PROGRAM MATERIALS
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Class Action Settlements: Getting Approval to Get the Deal Done

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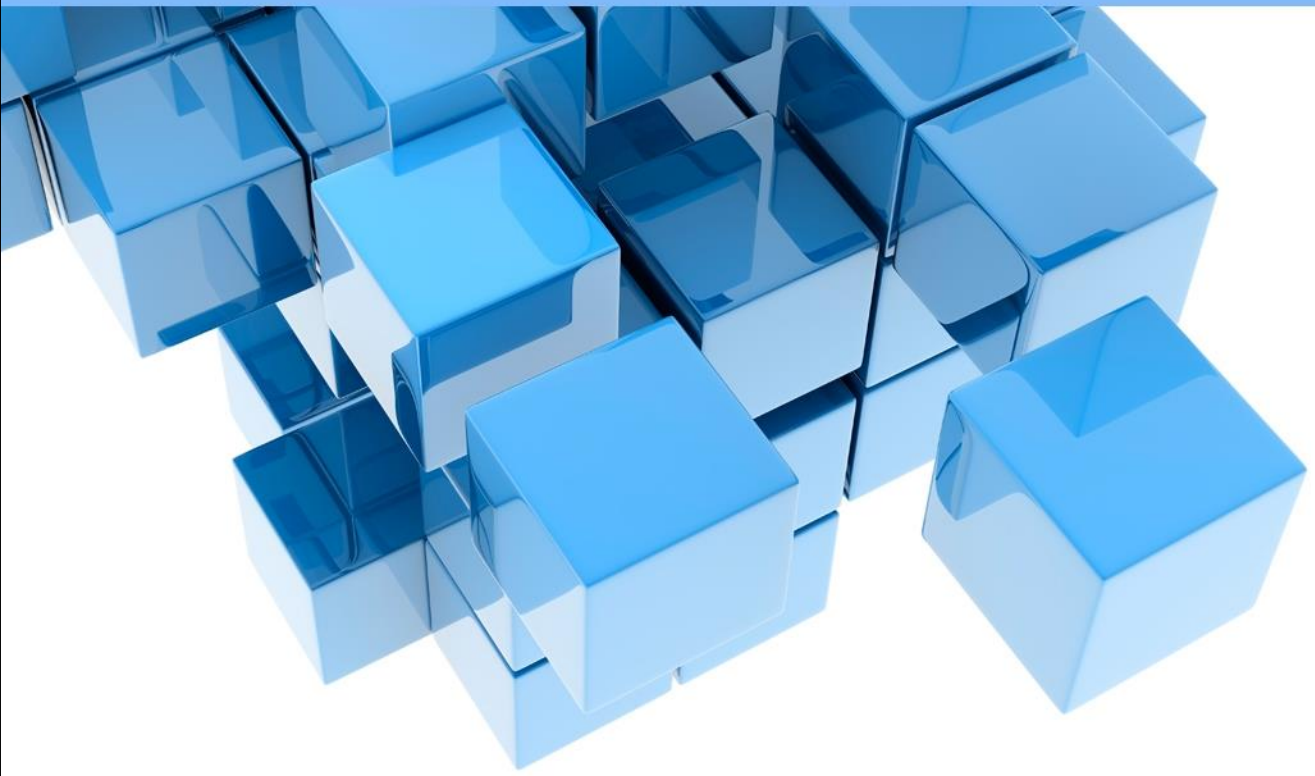
5301 North Federal Highway, Suite 180, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

Class Action Settlements: Getting Approval to Get the Deal Done



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Presenter

Michael Thompson

Senior Counsel

Foley & Lardner LLP

(617) 502-3262

mxthompson@foley.com

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Overview

- We will walk through the major milestones in settling class actions:
  - Class Action Basics
  - Reaching Settlement Terms
  - Memorializing the Settlement Terms
  - Drafting the Settlement Agreement
  - Obtaining Preliminary Approval
  - The Class Notice
  - The CAFA Notices
  - Objections and Opt Outs
  - Fairness Hearing and Final Approval
  - Appeals

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Class Action Refresher

- FRCP 23 authorizes "[o]ne or more members of a class" to "sue or be sued as representative parties on behalf of all members."
- All four of the following conditions must be satisfied.
  1. **Numerosity** – "the class is so numerous that joinder of all members is impractical" (FRCP 23(a)(1))
     - Low threshold
     - No set number
  2. **Commonality** – "there are question of law or fact common to the class" (Fed R. Civ. P. 23(a)(2))
     - Lists of common questions are insufficient.
     - "What matters … [is] the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

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Class Action Refresher (cont'd)

3. **Typicality** – "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (FRCP 23(a)(3))
   - Usually sufficient to show that the class representatives and class members' claims "arise from the same event or pattern or practice and are based on the same legal theory." *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012).
4. **Adequacy of Representation** – "the representative parties will fairly and adequately protect the interests of the class" (FRCP 23(a)(4))
   - The touchstone is whether there are conflicts of interest between the class representatives and the class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

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Class Action Refresher (cont'd)

- At least one of the following conditions must be satisfied:
  - Separate actions risk inconsistent rulings and/or, as a practical matter, would be dispositive of non-parties' interests (FRCP 23(b)(1))
  - Final declaratory or injunctive relief is appropriate for the entire class (FRCP 23(b)(2))
  - Predominance **and** superiority (FRCP 23(b)(3))
    - Predominance – common questions of law or fact predominate over individual questions. This is a "demanding" prerequisite. *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).
    - Superiority – class action is superior to other methods of adjudicating the matter. A class action "achieve economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Windsor*, 521 U.S. at 615.

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Agreeing to the Settlement Terms

- All the typical challenges of negotiating a settlement apply – along with a few additional considerations.
  - What will be the scope of the settlement class?
  - Are class counsel and the class representatives adequately considering the interests of the *class*?
  - Does the settlement consideration include attorneys' fees, administration costs, and class representative awards – or are any of those amounts paid in addition to the settlement consideration?
  - Will there be a "blow up" provision for the settlement?
  - Are there potentially any special challenges in administering the settlement?

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Memorializing the Settlement Terms

- Because the settlement agreement itself can take time to draft, it is prudent to memorialize the settlement terms in a memorandum of understanding (MOU) or term sheet.
- The MOU should set out the key terms of the settlement – including any important contingencies (e.g., the settlement is conditioned on court approval).
  - Settlement amount/consideration
  - Scope of the release
  - Who will serve as class administrator
  - Blow-up provision
  - Attorneys' fees and class representative awards
- The MOU can help the parties to flag terms that require further negotiation or issues that may develop in drafting the settlement agreement.
- The MOU can (and probably should) address some "nuts and bolts" issues like which party will draft which documents in connection with seeking preliminary approval and when the parties anticipate filing for preliminary approval.

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The Settlement Agreement

- A class settlement agreement is not the typical short settlement and release. This document that will form a key part of the court's fairness analysis, will be available to class members, and will form the basis of the class notice. Not only does it need to be comprehensive (as with any agreement), but there are class-action specific items that need to be addressed.

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The Settlement Agreement (cont'd)

- Typical sections include:
  - Definitions
  - Recitals
  - Settlement Class Definition
  - Settlement Consideration
  - Preliminary Approval Procedures
  - Class Notice Procedures
  - Objection and Opt Out Procedures
  - Class Action Fairness Act Notice Procedures
  - Attorneys' Fees and Class Representative Awards
  - Final Approval, Final Judgment, and Release
  - Cooperation
  - Administration Procedures
  - Other Provisions

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The Settlement Agreement (cont'd)

- The settlement agreement will also typically attach or be filed with:
  - A proposed form of class notice
  - A **detailed** proposed preliminary approval order (including a timeline for the remainder of the settlement process)
  - A motion for preliminary approval (and possibly a consent to such motion from the other party)
- We will examine each component in more detail.

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The Settlement Agreement (cont'd)

- Definitions
  - Will likely include items like "class notice," "class period," "conditional class member," and "settlement class."
  - Because class settlement agreements tend to be longer and more complex than other settlement agreements, use definitions to assist you.
- Recitals
  - Will largely be typical of other settlement agreements.
  - Class representatives and class counsel may wish to express that they have carefully weighed the relevant factors and believe the settlement to be **fair**, **reasonable**, **adequate**, and in the class's **best interests**.

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The Settlement Agreement (cont'd)

- Settlement Class Definition
  - Whether the class has already been certified or not, it is wise to include the specific class definition to which the settlement applies.
  - This section may also discuss revisions to a pre-existing class definition and subclasses, if applicable.
  - If a settlement class is being certified, the non-class party may wish to include non-waiver language clarifying that it agrees to certification for settlement purposes only.
  - This section may also address how the parties (and class administrator) anticipate identifying class members.

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The Settlement Agreement (cont'd)

- Settlement Consideration
  - Sets out the consideration to be provided to the class.
  - May also
    - discuss what happens to consideration that is not paid to or claimed by class members – e.g., cy près.
      - "Reversionary" settlements (where money that is not claimed is returned) are disadvantageous because they can create conflicts of interest between the defendants and the class.
    - specify how class members demonstrate that they are members of the class – e.g., whether they must file a claim and, if so, what the claims procedure is.
    - specify when the settlement consideration (and attorneys' fees, class representative award, and administration fees) is to be paid.

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The Settlement Agreement (cont'd)

- Preliminary Approval Procedures
  - Usually refers to a concurrently filed motion for preliminary approval.
  - May discuss what happens if the court does not preliminarily approve the settlement – e.g., do the parties renegotiate?
- Class Notice Procedures
  - Specifies the form of class notice (usually set out in an exhibit) and the time and method for providing notice of the settlement to the class.

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The Settlement Agreement (cont'd)

- Objections and Opt Outs
  - This is a "nuts and bolts" section that should explain how class members may object or opt out, including the form, filing procedure, and deadline for objections and opt outs.
  - The parties may also include a provision allowing them to respond to objections.
  - May also state the effect of objecting/opting out (or of not doing so) such as (1) only objectors may be heard at the fairness hearing and (2) those who neither object nor opt out waive challenges to the settlement.
  - May also contain a "blow-up" provision. This provision states that, if opt outs reach a certain threshold, then the agreement becomes void.

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The Settlement Agreement (cont'd)

- Class Action Fairness Act ("CAFA") Notices
  - Recites the requirement that CAFA notices be served and specify who bears the responsibility for doing so. *See* 28 USC § 1715.
  - The latter is important because the timeline for CAFA notices is **only 10 days.**
  - More on CAFA notices later.

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The Settlement Agreement (cont'd)

- Attorneys' Fees and Class Representative Awards
  - States the amount (or likely or maximum amount) of fees to be awarded to class counsel and the class representatives.
  - States whether the other party reserves or waives the right to object to the fee awards.
  - States whether the fees are paid from the settlement benefits or separately.
  - This is important information to provide to the class as part of the settlement notice.

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The Settlement Agreement (cont'd)

- Final Approval, Final Judgment, and Release
  - States the effect of final approval
  - States the scope and effect of the release
  - States the court's continuing jurisdiction over the settlement agreement
- Administration Procedures
  - States when the agreement is effective.
  - States who the class administrator is and what the duties are.
  - May state specific administration procedures.
- Other Provisions
  - No admission of wrongdoing
  - Cooperation between the parties in enforcing the release
  - How the parties will address publicity
  - Document retention/destruction
  - Integration, choice of law, choice of forum, and anything else

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Preliminary Approval

- Unlike in individual cases, after the foregoing is put together, it must be submitted to the court for review and preliminary approval. FRCP 23(e) ("The claims . . . of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised **only with the court's approval**. (emphasis added))
- The court is limited to approving the settlement, rejecting the settlement, or imposing conditions. The court cannot rewrite the settlement agreement! *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

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Preliminary Approval (cont'd)

- The standard for preliminary approval is the same as that for final approval: the court must determine whether the settlement is "fair, reasonable, and adequate." FRCP 23(e)(2).
- Rule 23 sets out a number of factors the court should consider in making that determination:
  - Adequacy of representation by the class representatives and class counsel (FRCP 23(e)(2)(A))
  - Whether the proposed settlement was negotiated at arm's length (FRCP 23(e)(2)B)
  - Adequacy of the relief provided to the class in light of litigation cost, the effectiveness of class notice, and proposed attorneys' fees and other agreements (FRCP 23(e)(2)(C))
  - Whether the proposed settlement treats class members equally (FRCP 23(e)(2)(D))

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Preliminary Approval (cont'd)

- Rule 23, however, does not contain an exhaustive list of the factors courts should or may consider. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 316–24 (3d Cir. 1998).
- It is also within the court's discretion to determine what weight to give the relevant factors. *See Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993).
- If a class has not been previously certified or if the settlement class is different from one previously certified, the court must also undertake a class certification analysis. The analysis is the same as for any other class. *See Windsor*, 521 U.S. at 620 (1997).
  - Previously certified classes should have a renewed opportunity to opt out. FRCP 23(e)(4).
  - Certification of settlement class may require closer judicial scrutiny. *Hanlon*, 150 F.3d at 1026 ("a higher standard of fairness"); *Windsor*, 521 U.S. at 620 ("undiluted, even heightened, attention").

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The Class Notice

- The proposed form and method of class notice should be included in the papers submitted to the court to support preliminary approval. Doing so allows the court to approve them.
- Once the court grants preliminary approval, then class members must be given notice of the settlement and fairness hearing (FRCP 23(e)) and, if applicable, of the certification of the class (FRCP 23(c)(2)).
- The notice should tell class members when and how to object or opt-out in addition to the particulars and consequences of the settlement. Use plain language!
- Notice must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FRCP 23(c)(2)(B).
  - There is no one size fits all notice for each case (i.e., U.S. mail, e-mail, or otherwise). The touchstone is whether due process considerations are satisfied.

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The CAFA Notice

- The Class Action Fairness Act of 2005 ("CAFA") imposes important class settlement procedures that require strict adherence. 28 USC § 1715.
- CAFA notices must be served within ten (10) days of filing the proposed class settlement. *Id.* § 1715(b).
- Why? The officials receiving CAFA notice may object to or oppose the settlement. Final approval cannot issue before 90 days after the last CAFA notice. *Id.* § 1715(d).
- CAFA notices must be served on "the appropriate State official of each State in which a class member resides and the appropriate Federal official." *Id.* § 1715(b).

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The CAFA Notice – To Whom?

- "Appropriate Federal Official" means the U.S. Attorney General or, for depository institutions, "the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person." *Id.* § 1715(a)(1).
- "Appropriate State Official" means "the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person" or "the State attorney general." *Id.* § 1715(a)(2).
- There are also specific requirements for federal and state depository institutions. *Id.* § 1715(c).

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The CAFA Notice – To Whom? (cont'd)

- Identifying whom should receive CAFA notices can be a challenge and the consequences for failure to provide the required notices is severe: "A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided." *Id.* § 1715(e)(1).
  - As a result, it is better to provide more notices than fewer.
  - There is a safe harbor: "A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant." *Id.* § 1715(e)(2).
  - Don't forget the District of Columbia, Puerto Rico, U.S. Virgin Island, American Samoa, Guam, and the Northern Mariana Islands!

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The CAFA Notice - Contents

- CAFA Notices must include the following (*Id.* § 1715(b)):
  - The complaint and any amended complaints
  - Notice of any hearings on the class settlement
  - The proposed or final form of class notice
  - The proposed settlement agreement
  - Any side agreements
  - Any final judgment or notice of dismissal
  - A class list with states of residence or an estimate of the number of class members in each state
  - Any court opinions or orders concerning the class settlement

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Objections and Opt Outs

- A class member may not both object and opt out: someone who opts out chooses not to be in the class and will not be subject to any of the settlement terms, so they lack standing to object.
- An objection must state "whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." FRCP 23(e)(5)(A).
- Typically, settlement arguments will provide that objections and opt outs be clear and unambiguous. They may also give counsel the opportunity to address an objection ahead of the fairness hearing.

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Objections and Opt Outs (cont'd)

- Objections are sometimes lodged for improper purposes. To address that concern, Rule 23 was recently amended to provide that, absent court approval after a hearing, no payment can be made to an objector for foregoing/withdrawing an objection or appeal. FRCP 23(e)(5)(B).
- Importantly, those who opt out may go on to prosecute individual claims.
  - This should be taken into account in agreeing to the settlement amount and may be the basis for negotiating a "blow up" provision.

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The Fairness Hearing and Final Approval

- Roles and Responsibilities
  - Counsel are the primary source of information for the court.
  - Class counsel, class representatives, and the class administrator are the primary source of information for class members.
  - Class counsel and class representatives are also responsible for protecting the interests of the class.
  - Objectors may provide important information to the court and may play an important role in defending the interests of the class. **BUT** individuals may object for improper purposes as well.

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The Fairness Hearing and Final Approval (cont'd)

- The fairness hearing is the opportunity for the parties and objectors to be heard and for the court to determine whether the settlement is **fair**, **reasonable**, and **adequate**.
- While the standard for preliminary approval is the same, the gravity of final approval cannot be overstated – a class settlement binds individuals to an agreement that they did not negotiate or sign. This raises important due process considerations.
- Even if there are no objections, the court has an obligation to ensure that there is a sufficient record to support that the settlement is **fair**, **reasonable**, and **adequate**.

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The Fairness Hearing and Final Approval (cont'd)

- Approval of the fees for class counsel and class representatives is also often part of the fairness hearing.
  - A motion for approval of such fees must be served on all parties and "directed to class members in a reasonable manner." FRCP 23(h)(1).
  - The "fundamental focus is the result actually achieved for class members." *Id.*, committee note.

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Appeals

- Because class action settlements are subject to court approval (FRCP 23(e)), the court's decision to approve or reject a settlement is subject to appeal.
- Because of the multifaceted nature of class action settlements, there are a number of potentially appealable decisions.

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Appeals (cont'd)

- The Named Parties
  - If the court **rejects** a settlement, there is no final judgment that can be appealed. 28 U.S.C. § 1291; FRCP 23(f). The parties' options are to renegotiate to address the court's concerns or continue to litigate.
  - If the court **approves** a settlement, then the named parties could *theoretically* appeal, but they typically would have no basis since the settlement is a product of their mutual agreement.
  - **BUT** the named parties may appeal specific issues decided by the court (e.g., notice requirements, fees and awards, or settlement administration).

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Appeals (cont'd)

- Objectors: Objectors are more likely to appeal class settlements because they had no role in negotiating the settlement.
  - If the court upholds an objection, there is no basis for appeal because there is no final order or judgment. 28 U.S.C. § 1291.
  - Non-objectors **do not** have the right to appeal. *In re UnitedHealth Group Inc. S'holder Derivative Litig.*, 631 F.3d 913, 917 (8th Cir. 2011); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1257-58 (10th Cir. 2004).
  - Objectors may only appeal issues on which they actually objected. *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002).

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Appeals (cont'd)

- Objectors
  - If the court denies an objection, the objector may appeal. *See, e.g.*, *Eubank v. Pella Corp.*, 753 F.3d 718, 721 (7th Cir. 2014); *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012).
    - An objector may appeal without intervening in the case. *Devlin*, 536 U.S. at 6-10.
    - The standard for review for such an appeal is abuse of discretion – i.e., the district court is overturned only on a clear showing that it abused its discretion in approving the settlement. *See, e.g.*, *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 557 (7th Cir. 2017); *Charron v. Wiener*, 731 F.3d 241, 246 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1941 (2014).
    - **BUT** subsidiary legal issues are reviewed *de novo* and subsidiary factual issues are reviewed for clear error. *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015); *Charron*, 731 F.3d at 246.

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Appeals (cont'd)

- Attorneys' Fees and Class Representative Awards
  - Fee awards may be appealable apart from the other issues in a class action. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 726 (3d Cir. 2001).
  - A party must have standing to appeal a fee or class representative award – typically by being "aggrieved" by the award. *Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084, 1088 (9th Cir. 2011); *PRIDES Litig.*, 243 F.3d at 727-30.
    - Objecting class members usually have standing unless the fees are paid by the defendant separately. *Glasser*, 645 F.3d at 1088-89
    - Conversely, defendants usually do not have standing unless the fees are paid by them separate from the settlement payment to class members. *Carlsen v. Glob. Client Sols., LLC*, 542 Fed. Appx. 594, 594 (9th Cir. 2013)
    - Class counsel usually has standing. *Cassese v. Williams*, 503 Fed. Appx. 55, 57 (2d Cir. 2012); *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. Appx. 496, 498 (6th Cir. 2011)

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Appeals (cont'd)

- Attorneys' Fees and Class Representative Awards (cont'd)
  - Fee and representative awards are reviewed for abuse of discretion. *Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016).
  - Courts are split on whether the method of calculating attorneys' fees is reviewed for abuse of discretion or *de novo*. *See, e.g., J.G. Goodman, et al. v. American Express Travel Related Services Co., Inc.*, 2017 WL 6044109, at *9 (7th Cir. Dec. 7, 2017) (reviewing *de novo*); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (reviewing for abuse of discretion).

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Appeals (cont'd)

- The district court may require an appeal bond in certain class action appeals. FRAP 7.
- Note that the time to appeal (in cases not involving the United States as a party) is short – only **14 days**. FRCP 23(f).
- In addition, "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."

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Administering the Class Settlement

- Often, parties will hire a professional outfit experienced in administering class settlements.
- The "nuts and bolts" of administration are typically set out in the settlement agreement.
- **BUT** questions may arise that (1) either both parties should weigh in and agree on and/or (2) require court input.
  - Remember that due process is the key. If decisions are made without court input, consider whether the decision you make can be defended at a fairness hearing.

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Have Additional Questions?

Michael Thompson, Senior Counsel

Foley & Lardner LLP

111 Huntington Ave., Suite 2500

Boston, MA 02199

(617) 502-3262

mxthompson@foley.com

https://www.linkedin.com/in/michael-thompson-6285b012/

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Materials Accompanying
Class Action Settlements: Getting Approval to Get the Deal Done

1. Fed. R. Civ. P. 23
2. Sample Class Action Settlement
3. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)
4. *Ault v. Walt Disney World Co.*, 692 F.3d 1212 (11th Cir. 2012)
5. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)
6. *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013)
7. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998)
8. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998)
9. *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993)
10. 28 USC § 1715
11. *In re UnitedHealth Group Inc. S'holder Derivative Litig.*, 631 F.3d 913 (8th Cir. 2011)
12. *In re Integra Realty Res., Inc.*, 354 F.3d 1246 (10th Cir. 2004)
13. *Devlin v. Scardelletti*, 536 U.S. 1 (2002)
14. *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014)
15. *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012)
16. *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017)
17. *Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1941 (2014)
18. *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78 (1st Cir. 2015)
19. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001)
20. *Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084 (9th Cir. 2011)
21. *Carlsen v. Glob. Client Sols., LLC*, 542 Fed. Appx. 594 (9th Cir. 2013)p
22. *Cassese v. Williams*, 503 Fed. Appx. 55 (2d Cir. 2012)

23. *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. Appx. 496 (6th Cir. 2011)

24. *Heien v. Archstone*, 837 F.3d 97 (1st Cir. 2016)

25. *J.G. Goodman, et al. v. American Express Travel Related Services Co., Inc.*, 2017 WL 6044109 (7th Cir. Dec. 7, 2017)

26. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015)

27. Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide

1

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 23 are displayed in two separate documents. Notes of Decisions for subdivisions I and II are contained in this document. For Notes of Decisions for subdivisions III to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 23.>

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

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(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)--or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)--the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

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(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

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(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class--or a class proposed to be certified for purposes of settlement--may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

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(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

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

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

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

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

(3) ***Identifying Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to be Excluded.*** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

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(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C)may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

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(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; April 26, 2018, effective December 1, 2018.)

Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A., FRCP Rule 23
Including Amendments Received Through 5-1-19

End of Document

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SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This Settlement Agreement and Release of Claims ("Agreement") is entered into as of the last date of any signature below by and among (a) AmeriTitle, Inc. ("Defendant" or "AmeriTitle"), and (b) Millicent Radonovich ("Plaintiff" or "Radonovich"), individually and as representative of the Plaintiff Settlement Class, as defined below.

RECITALS

A. Radonovich, a former AmeriTitle customer, filed a putative class action complaint ("Complaint") in the Superior Court of the State of Washington, County of Kittitas, Cause No 11-2-00495-6 on November 28, 2011, on behalf of herself and all others similarly situated (the "Action"), as amended by the first amended complaint dated March 14, 2012.

B. In the Action, Radonovich sought damages, on behalf of herself and all others similarly situated, for the recovery of a Release Services fee and a Recording Services fee AmeriTitle charged in connection with her escrow transaction and which she alleged were not authorized and/or were excessive, as well as attorneys' fees and costs, exemplary damages, and prejudgment interest. AmeriTitle denies the material allegations in the Action, denies all liability with respect to the facts and claims alleged in the Action, and has asserted certain Affirmative Defenses.

C. Radonovich and AmeriTitle (the "Parties") engaged in extensive settlement discussions through counsel and reached an agreement to resolve the Action. The Parties desire to fully, finally, and forever settle, compromise, and discharge all disputes and claims that have been alleged in the Action or that arise out of or could have been alleged on the basis of the circumstances alleged in the Action, including both federal and state claims.

In consideration of the mutual covenants, promises, and warranties set forth herein, and subject to approval of the Court, the Parties enter into this Settlement Agreement and Release of Claims ("Agreement") for themselves and through their undersigned counsel, and on behalf of the "Settlement Class Members" as defined below.

SETTLEMENT CLASS CERTIFICATION

1. **Preliminary Approval and Conditional Certification.** Within thirty (30) days of execution of this Agreement, Plaintiff will move the Court for an Order substantially in the form of Exhibit A, which provisionally certifies the Plaintiff Settlement Class for settlement purposes only; appoints Radonovich as the representative of the Plaintiff Settlement Class; appoints Rob Williamson of Williamson & Williams; Martin S. Garfinkel and Adam S. Berger of Schroeter, Goldmark & Bender; and Guy W. Beckett of Berry & Beckett, PLLP as "Class Counsel" for the Settlement Class; appoints Tilghman & Co. ("Tilghman") as settlement administrator; grants the Court's Preliminary Approval of this Agreement; approves notices substantially in the forms of Exhibits B and C to the Plaintiff Settlement Class of the class action status and proposed settlement of the Action; and sets a hearing date to consider objections, if any, to the settlement and to enter the Settlement Order and Final Judgment. AmeriTitle will not oppose the motion.

2. **Proposed Settlement Class.** The proposed Settlement Class will include all AmeriTitle customers who paid either (a) a Recording Services fee between November 28, 2005, and April 30, 2013, or (b) a Release Services fee between November 28, 2005, and August 7, 2008, and who do not timely opt out of the Settlement Class ("Settlement Class Members").

3. **Effect of Conditional Certification.** The certification of the Plaintiff Settlement Class as set forth in Exhibit A will have no bearing in deciding whether the claims asserted in the Action are or were appropriate for class treatment in the absence of settlement. If this Agreement terminates, the provisional class certification in Exhibit A shall be vacated by its terms, and the Action will revert to the status that existed before execution of this Agreement. In that event, Radonovich will be free to pursue any claims available to her, and AmeriTitle will be free to assert any defenses available to it, including (but not limited to) denying the suitability of this case for class treatment. Nothing in this Agreement will be argued or deemed to estop any party from asserting any claims and defenses.

SETTLEMENT TERMS

4. **Settlement Payments**. AmeriTitle will make settlement payments ("Awards") on a claims made basis, in the amounts and at the times set forth below to Settlement Class Members who satisfy the criteria set forth below and who have made a claim by submitting a claim form, which shall be substantially in the form contained in Exhibit D (the "Eligible Settlement Claimants").

(a) **Release Services Fee.** AmeriTitle will pay each Eligible Settlement Claimant 65% of the Release Services fee that Settlement Class Member paid to AmeriTitle. To qualify as an Eligible Settlement Claimant, a Settlement Class Member must have (i) been an AmeriTitle escrow customer; (ii) paid a Release Services fee to AmeriTitle between November 28, 2005, and August 7, 2008; and (iii) submit a timely claim form.

(b) **Recording Services Fee.** AmeriTitle will pay each Eligible Settlement Claimant who paid a Recording Services fee to AmeriTitle the amount of $10.00. To qualify as an Eligible Settlement Claimant, a Settlement Class Member must have (i) been an AmeriTitle escrow customer; (ii) paid a Recording Services fee to AmeriTitle between November 28, 2005, and April 30, 2013, in an amount exceeding AmeriTitle's out of pocket recording cost; and (iii) submit a timely claim form. AmeriTitle will have the right, but not the obligation, to verify that the claimant paid AmeriTitle more than its out of pocket recording cost.

5. **Attorneys' Fees and Costs.** AmeriTitle agrees to pay Class Counsel attorneys' fees and reasonable litigation costs in an amount approved by the Court, not to exceed the total sum of $52,500. No later than fifteen (15) business days after the Effective Date, AmeriTitle shall pay attorneys' fees directly to Williamson & Williams, which shall be responsible for distributing the fee to any co-counsel. The enforceability of this Settlement Agreement is not contingent on the amount of attorneys' fees or costs awarded, and any dispute regarding the amount of attorneys' fees or costs, and/or any appeal of the fee award, will not affect or delay the finality of this Settlement Agreement, and will not affect or delay the entry of dismissal of the Action with prejudice.

6. **Incentive Payment to Class Representative.** AmeriTitle agrees to pay Radonovich a payment (the "Incentive Payment") in an amount to be approved by the Court, not to exceed the total sum of $2,500, in recognition of her role and efforts as representative of the Class. No later than fifteen (15) business days after the Effective Date, AmeriTitle will pay the Incentive Payment directly to Class Counsel to hold in trust for Radonovich. Radonovich will also have the right to make a claim as a member of the Settlement Class. The enforceability of this Agreement is not contingent on the amount of the Incentive Payment (if any) that is granted.

7. **Future Conduct.** From the Effective Date of the Settlement Agreement, AmeriTitle will charge Release Services fees and Recording Services fees consistent with its filings with the Washington State Office of the Insurance Commissioner.

NOTICE TO SETTLEMENT CLASS MEMBERS

8. **Mailing of Class Notice.** Within thirty (30) days after the Court's entry of the order of preliminary settlement approval, Tilghman will mail a Summary Notice and Claim Form substantially in the forms of Exhibit C and D to all Settlement Class Members, as defined in Paragraph 2 above, using the addresses in AmeriTitle's computerized records for those Class Members. AmeriTitle will provide the class mailing list to Class Counsel, subject to the Protective Order entered in the Action and for use only in connection with administration of this Agreement. Tilghman will re-mail any notice returned by the USPS with updated address information. Neither Tilghman nor AmeriTitle will be obliged to take any further steps with respect to re-mailing returned notices.

9. **Website Notice.** Class Counsel will post on Schroeter Goldmark Bender's website a copy of the Long-Form Notice substantially in the form of Exhibit B along with the Claim Form, as described in Paragraph 26.

10. **Costs of Notice.** AmeriTitle shall bear the full cost of Notice and settlement administration.

OPT OUTS; OBJECTIONS; CLAIMS; BINDING EFFECT

11. **Date for Opt-outs.** Settlement Class Members will have forty-five (45) days from the mailing date on the Notice to opt out of the Class or object to the Settlement Agreement.

12. **Opt-out Procedure.** Any Settlement Class Member may elect to be excluded from the Class during the 45-day period after the date of the Notice. To be effective, any such election must be made in writing; must contain the information specified in the Notice; and must be mailed to Tilghman and emailed or postmarked on or before the 45th day after the date the Notice is mailed. The date of the email or postmark on the mailing envelope shall be the exclusive means to determine whether a request for exclusion is timely. Any putative Settlement Class Member who is eligible to opt out and who timely requests exclusion in compliance with these requirements shall not be considered to be a Settlement Class Member, shall not have any rights under this Settlement Agreement, shall not be entitled to receive any settlement payment, and shall not be bound by this Settlement Agreement.

13. **Binding Effect of Settlement.** Except for those Settlement Class Members who exclude themselves in compliance with the foregoing, all Settlement Class Members will be deemed to be members of the Settlement Class in the Action for all purposes under this Agreement, the final approval order, the judgment, and the releases set forth in this Agreement.

14. **Objections.** Any Settlement Class Member may object to this Settlement Agreement, provided that such objections are made in writing and filed with the Court and served on Class Counsel and counsel for AmeriTitle no later than forty-five (45) days after the mailing of the Notice. Any objection must include the information specified in the Notice.

15. **Claim Forms.** Any Settlement Class Member who wishes to receive an Award must mail a claim substantially in the form of Exhibit D to Tilghman within forty-five (45) days after the date the Notice is mailed. Neither Radonovich, Class Counsel, AmeriTitle, AmeriTitle's counsel, nor any person on their behalf, shall seek to solicit or otherwise encourage anyone to (a) exclude himself or herself from the Settlement Class; (b) object to the Settlement; (c) appeal from any order consistent with the terms of this Agreement; (d) discourage participation in the Settlement; or (e) file a claim in connection with this Agreement.

16. **Claim Determination**. Within fourteen (14) days after the claim period referenced in Paragraph 15 above has expired, Tilghman will provide to Class Counsel and AmeriTitle's counsel: (i) the names and addresses of all Eligible Settlement Claimants; (ii) the names and addresses of ineligible claimants with an explanation of the reason(s) for ineligibility; and (iii) copies of all claim forms received. Within twenty-one (21) days after receiving from Tilghman the forgoing information, AmeriTitle will report to Tilghman and Class Counsel: (i) the amount of Release Services fees charged to each Eligible Settlement Claimant who made a Release Services fee claim; (ii) which of the Eligible Settlement Claimants who made a Recording Services fee claim paid a Recording Services fee that did not exceed AmeriTitle's out of pocket costs, along with proof of the same, but only to the extent AmeriTitle elects to exercise its right to verify that the claimant paid AmeriTitle more than its out of pocket recording cost as set forth in Paragraph 4(b) above; and (iii) which claimants do not appear to have been AmeriTitle customers who paid the claimed fees during the requisite time period. The Parties will promptly work together in good faith to resolve any disagreements between them regarding claim eligibility. If they cannot reach agreement, they will submit their disagreement to the Court for resolution.

17. **Exchange of Information.** Upon receipt, counsel for the Parties shall promptly exchange with one another copies of all claims, objections, exclusions and/or challenges to the Settlement or any part thereof.

DUTIES OF THE PARTIES FOLLOWING NOTICE

18. **Motion for Final Approval. N**o later than seven (7) days before the hearing on final approval of this Agreement, Radonovich will move the Court for entry of an Order substantially in the form of Exhibit E granting final approval to this Settlement and dismissing the Action with prejudice.

19. **Effective Date of Agreement.** The settlement embodied in this Agreement will become effective on the "Effective Date," which is defined as the later of: (i) thirty-one (31) days after entry of the Court's final approval of this Settlement Agreement, including the final award of attorneys' fees and the Incentive Payment, if no appeal of that order is filed, or (ii) the date the Court's approval of this Settlement Agreement becomes final and binding after final resolution of any appeals.

20. **Timing and Form of Settlement Payments.** AmeriTitle will deliver to Tilghman, no later than fifteen (15) business days after the Effective Date, payment in an amount equal to the total amount of payments due to Eligible Settlement Claimants, as set forth in Paragraph 4. No later than ten (10) business days after receipt of the foregoing funds from AmeriTitle, Tilghman will mail payments to Eligible Settlement Claimants, as set forth in Paragraph 4. With respect to claims by Eligible Settlement Claimants whose AmeriTitle escrow transaction involved multiple parties on the same transaction who jointly paid Release Services and/or Recording Services fees to AmeriTitle, settlement payments will be made jointly payable to all parties who jointly paid the fee for which the Eligible Settlement Claimant has made a claim under this Settlement.

21. **Expiration of Settlement Checks.** If any Eligible Settlement Claimants do not cash their checks within one hundred twenty (120) days after issuance, their checks will be void. In that event and unless good cause exists, those Eligible Settlement Claimants will be deemed to have irrevocably waived any right in or claim to a settlement payment or share under this Agreement, but the Agreement and the Court's final approval order and dismissal of the Complaint with prejudice, shall nevertheless be binding upon them.

RELEASES BY SETTLEMENT CLASS MEMBERS AND PLAINTIFF

22. **Release by Settlement Class.** Upon the Court's final approval of this Agreement (and except as to such rights or claims as may be created by this Agreement), the Settlement Class Members and Radonovich release and discharge AmeriTitle, its present and former subsidiaries, parent companies, shareholders, officers, directors, employees, agents, servants, registered representatives, attorneys, insurers, affiliates, successors and assigns ("Released Parties") from any and all claims, penalties, and liabilities that were or could have been alleged based on the facts and circumstances alleged in the Action, including both federal and state claims and any associated claims for declaratory or injunctive relief, prejudgment interest, liquidated or exemplary damages, attorneys' fees or costs ("Released Claims"). Except to the extent a Settlement Class Member presents a timely objection to this Settlement pursuant to the procedures set forth above, Settlement Class Members waive their right to seek any form of appellate review over any order or judgment that is consistent with the terms of this Settlement Agreement.

VOIDING THE SETTLEMENT AGREEMENT

23. **Failure to Approve.** The Court's failure to approve any material term or aspect of this Agreement shall render the entire Settlement voidable and unenforceable as to all Parties at the option of the party adversely affected. Either party may exercise its option to void this Settlement as provided in this Paragraph by giving notice, in writing, to the other and to the Court at any time before the Court enters an order granting final approval of the Settlement.

24. **Effect of Avoidance of Agreement.** If the Settlement is voided under the prior Paragraph, this Settlement Agreement shall have no force or effect; all negotiations, statements and proceedings related thereto shall be without prejudice to the rights of any party, all of whom shall be restored to their respective positions in the Action prior to the Settlement; the Settlement Class created pursuant to this Settlement Agreement shall be decertified; and neither this Settlement Agreement nor any ancillary documents, actions or filings shall be admissible or offered into evidence in the Action or any other action for any purpose.

MISCELLANEOUS PROVISIONS

25. **No Admission.** AmeriTitle does not admit any liability or wrongdoing of any kind associated with the claims asserted in the Action. This Agreement and any documents executed or filed in connection with this Agreement are not admissions and may not be used as evidence in any proceeding of AmeriTitle's liability or wrongdoing.

26. **Public Statements**. Neither the Parties nor their counsel shall make any commentary about or seek publicity concerning this Agreement, except (i) in filed settlement approval papers and (ii) in a statement (in language subject to AmeriTitle's approval, which shall not be unreasonably withheld) posted on Schroeter Goldmark Bender's website, advising that the Action is subject to a proposed settlement that has received preliminary or final approval, along with a copy of the Long-Form Notice and Claim Form. The Parties and their counsel further agree to refrain from disparaging one another, the practices at issue in the Action, and/or this Agreement. Nothing in this Paragraph will prohibit anyone from discussing documents that are in the public record in this case with Settlement Class Members or objectors.

27. **Warranty of Authority.** The signatories warrant and represent that they are fully authorized to enter into this Settlement Agreement and to bind the Parties.

28. **Cooperation.** The Parties will reasonably cooperate with each other to implement the terms of this Settlement Agreement, including but not limited to, executing documents and taking other action reasonably be necessary to implement the terms of this Agreement. As soon as practicable after execution of this Agreement, Class Counsel will, with the assistance and cooperation of AmeriTitle and its counsel, take all necessary steps to secure the Court's preliminary and final approval of this Settlement Agreement.

29. **Dispute Resolution.** Any disputes over any term of this Agreement, calculations of settlement payments or checks, the form of the Notice, or alleged violations of any of the terms or deadlines set forth in this Agreement shall be brought on an expedited basis to the Court for resolution. Pursuant to CR 23, the Court shall have continuing jurisdiction to consider and resolve such post-settlement matters.

30. **Notices.** Unless otherwise specifically provided herein, all notices, demands or other communications contemplated or required by this Agreement will be in writing and delivered and addressed as follows:

To Class Counsel:

Rob Williamson
Williamson & Williams
2239 West Viewmont Way West
Seattle, WA 98199

To AmeriTitle's Counsel:

Stephen M. Rummage
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101

31. **Construction.** The terms and conditions of this Agreement result from lengthy, intensive, arm's-length negotiations between the Parties. As a result, the Agreement shall not be construed in favor of or against any party by reason of the extent to which any party or his or its counsel participated in the drafting of this Agreement.

32. **Captions and Interpretations.** Paragraph titles or captions are inserted as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this Agreement or any provision.

33. **Modification or Amendment.** This Agreement may not be changed, altered, or modified, except in writing and signed by the Parties, and, if changed after preliminary court approval, approved by the Court.

34. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties relating to the settlement and transaction contemplated hereby, and all prior or contemporaneous agreements, understandings, representations, and statements, whether oral or written and whether by a party or such party's legal counsel are merged into this Agreement. No waiver of rights under this Agreement will be effective unless made in writing. The Parties acknowledge they have not relied on any promise, representation or warranty, whether express or implied, not contained in this Agreement.

35. **Binding Effect; No Assignments.** This Agreement will be binding upon and inure to the benefit of the Parties and their respective heirs, trustees, executors, administrators and successors. The Parties represent, covenant, and warrant they have not directly or indirectly assigned, transferred, encumbered, or purported to assign, transfer, or encumber to any person or entity any portion of any liability, claim, demand, action, cause of action, or rights herein released and discharged in this Agreement.

36. **Counterparts.** This Agreement may be executed in counterparts, and when each party has signed and delivered at least one such counterpart, each counterpart shall be

deemed an original, and, when taken together with other signed counterparts, shall constitute one Agreement, which shall be binding upon and effective as to all Parties.

Executed as of the date indicated below:

Date: August ___, 2013

Plaintiff and Proposed Class Representative

_____

Millicent Radonovich, Individually and as Proposed Representative of Settlement Class

Dated: August ___, 2013

Class Counsel:

_____

Rob Williamson, WSBA #11387
WILLIAMSON & WILLIAMS

Date: August ___, 2013

AmeriTitle, Inc.

By_____
Linda Stelle, Its President

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITTITAS

MILLICENT RADONOVICH, on behalf of herself and all others similarly situated, Plaintiff, v. AMERITITLE, INC., a foreign corporation, Defendant.	Case No. 11-2-00495-6 [PROPOSED] ORDER (1) CERTIFYING SETTLEMENT CLASS, (2) PRELIMINARILY APPROVING PROPOSED CLASS ACTION SETTLEMENT, (3) AUTHORIZING NOTICE, AND (4) SETTING HEARING FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

This matter came before the Court on Plaintiff's Unopposed Motion for Settlement Class Certification and Preliminary Settlement Approval ("Plaintiff's Motion"). In conjunction with Plaintiff's Motion, Plaintiff has filed a copy of the Parties' signed Settlement Agreement, attached as Exhibit A to the Declaration of Rob Williamson in support of Plaintiff's Motion.

The Court has considered Plaintiff's Motion, the Parties' signed Settlement Agreement, and all of the other pleadings, papers and filings herein;

As used in this Order, all terms defined in the Parties' Settlement Agreement shall have the same meaning here; and

The Parties' Settlement Agreement is within the range of reasonableness and is presumptively valid,

NOW, THEREFORE, THE COURT ORDERS as follows:

1. ***Class Certification for Settlement Purposes Only.*** Pursuant to CR 23(a) and (b)(3) of the Washington Superior Court Civil Rules, and in conjunction with the Settlement Agreement, the Court certifies this case as a class action, solely for purposes of implementing the Parties' Settlement Agreement, on behalf of the following Settlement Class:

> All AmeriTitle customers who paid either (a) a Recording Services fee between November 28, 2005, and April 30, 2013, or (b) a Release Services fee between November 28, 2005, and August 7, 2008.

The Settlement Class shall exclude any persons who opt out of the Settlement Class in accordance with the terms of the Settlement Agreement and Paragraph 8 of this Order. The Court finds that the prerequisites of CR 23(a) and (b)(3) have been satisfied for the Settlement Class. Specifically, the Court finds as follows:

a. The Settlement Class appears to be so numerous that joinder of all members is impracticable.

b. There appear to be questions of law and fact common to the Settlement Class, including, but not limited to, whether AmeriTitle was legally authorized to charge the Recording Services and Release Services Fees.

c. Plaintiff's claims appear to be typical of the claims of the Settlement Class, and Plaintiff and Class Counsel appear capable of fairly and adequately protecting the interests of the Settlement Class.

d. Certification of a Settlement Class under CR 23(b)(3) is appropriate because, for purposes of Settlement Approval and administration, questions of law and fact common to all Settlement Class Members appear to predominate over any questions affecting only individual members, and settlement with the above-described Class appears to be superior to other available means for the fair and efficient resolution of this controversy.

2. ***Class Representative.*** Pursuant to CR 23, the Court appoints and designates Plaintiff Millicent Radonovich, for all purposes, as the representative of the Settlement Class.

3. ***Class Counsel.*** Pursuant to CR 23, the Court appoints and designates Martin S. Garfinkel and Adam J. Berger of the law firm of Schroeter, Goldmark & Bender; Rob

Williamson of Williamson & Williams; and Guy Beckett of Berry & Beckett PLLP as Class Counsel for the Settlement Class. Class Counsel are authorized to act on behalf of the Settlement Class with respect to all acts or consents required by or which may be given pursuant to the Settlement Agreement or such other acts which are reasonably necessary to consummate the proposed Settlement.

4. ***Settlement Administrator.*** The Court appoints and designates Tilghman & Co. as the settlement administrator.

5. ***Settlement Notice.*** The Court approves the Parties' proposed Notice of Settlement Class Certification and Proposed Class Action Settlement ("Settlement Notice"), which is attached as Exhibit B to the Settlement Agreement. Consistent with the terms of the Settlement Agreement, AmeriTitle is hereby directed to mail, or cause to be mailed, a copy of the Settlement Notice to each potential Settlement Class Member no later than _____ [30 days after entry of Preliminary Approval Order].

6. ***Findings Concerning Notice.*** Pursuant to CR 23, the Court hereby finds and concludes that the form and manner of giving notice by mailing a Settlement Notice to each individual Settlement Class Member, as required by the Settlement Agreement and by this Order, is the best notice practicable under the circumstances. The foregoing notice procedures fully satisfy the requirements of CR 23(c)(2) and CR 23(e) and the requirements of due process.

7. ***Final Settlement Approval Hearing.*** On _____ [at least 90 days after entry of Preliminary Approval Order] at ___ a.m./p.m. or as soon thereafter as may be scheduled by the Court, a Final Settlement Approval Hearing shall be held before this Court, as set forth in the Settlement Notice, to determine whether the Court should approve the fairness, adequacy, and reasonableness of the terms and conditions of the Settlement Agreement, and whether the Court should enter the Parties' proposed Final Order and Judgment.

8. ***Papers for Final Approval.*** Plaintiff shall file any final memoranda or other papers she may wish to submit in support of the proposed Settlement Agreement no later than seven (7) calendar days before the Final Settlement Approval Hearing Date set forth above.

These papers shall confirm that the mailing of the Settlement Notice was completed in accordance with the requirements of this Order, and provide information concerning any opt-outs or objections received as a result of such mailing. Plaintiff shall provide a draft copy of these pleadings to AmeriTitle at least one week before filing.

9. ***Exclusion from Class.*** Any person who is eligible to exclude himself or herself from the Settlement Class under the terms of the Settlement Agreement must do so by following the instructions for requesting exclusion from the Settlement Class as set forth in the Settlement Notice. All requests for exclusion from the Settlement Class must be mailed to Class Counsel and postmarked no later than forty-five (45) days after the date of the Settlement Notice, in accordance with the instructions in the Settlement Notice and the terms and requirements of the Settlement Agreement, or they shall be deemed void and ineffective.

10. ***Right to Appear through Other Counsel.*** Any Settlement Class Member may enter an appearance through counsel of such Settlement Class Member's own choosing and at such Settlement Class Member's own expense. Any Settlement Class Member who does not personally appear or otherwise enter an appearance at the Final Settlement Approval Hearing shall be deemed to be represented by Class Counsel as provided above.

11. ***Objections; Appearance at Final Settlement Approval Hearing.*** Any Settlement Class Member who has not validly requested exclusion may submit written objections to the Settlement Agreement by mailing to Class Counsel and counsel for AmeriTitle, at the addresses provided in the Settlement Notice, a written statement containing the Settlement Class Member's name, current address, and the substance of his or her objection (including any briefs and supporting papers) no later than forty-five (45) days after the date of the Settlement Notice, as set forth in the Settlement Agreement. Any Settlement Class Member who presents written objections in the manner prescribed above may also appear personally or through counsel at the Final Settlement Approval Hearing to express the Settlement Class Member's views regarding the Settlement Agreement. Only Settlement Class Members who object to the Settlement Agreement in writing, in person, or by appearance through counsel, in accordance with the

procedures set forth in this Order and the Settlement Agreement, shall be permitted to appeal or otherwise seek review of this Court's decision approving or rejecting the Settlement Agreement. Failure to follow the procedures for objecting set forth herein shall constitute a waiver of a Settlement Class Member's right to object to the Settlement Agreement.

12. ***Claim Procedures.*** In order to obtain an Award under the Settlement, a Settlement Class Member must submit a claim using the form attached as Exhibit D to the Settlement Agreement by mailing it to the settlement administrator postmarked no later than forty-five (45) days after the date of the Settlement Notice, as set forth in the Settlement Agreement. This form will accompany the Settlement Notice mailed to Settlement Class Members.

13. ***Reservation of Rights and Retention of Jurisdiction.*** The Court reserves the right to adjourn or continue the date of the Settlement Hearing or any other dates provided in this Order without further notice to Settlement Class Members, and retains jurisdiction to consider all further applications arising out of or connected with the settlement. The Court may approve or modify the settlement without further notice to Settlement Class Members.

14. ***No Admission of Liability.*** Consistent with the Settlement Agreement, neither this Order, nor the fact or substance of the Settlement Agreement, shall be considered a concession or admission, nor shall they be used as evidence in any proceeding for the purpose of establishing AmeriTitle's liability or wrongdoing.

15. ***Effect of Failure to Approve the Agreement.*** In the event the Settlement Agreement does not become effective in accordance with the terms of the Settlement Agreement, or the Settlement Agreement is not finally approved, or the Settlement Agreement is terminated, canceled or fails to become effective for any reason, this Order shall be vacated and rendered null and void, the Settlement Class shall be decertified, and all claims and defenses previously asserted by the Parties shall be reinstated and the Court shall enter further appropriate orders governing the proceedings.

16. ***Injunction against Asserting Released Claims Pending Settlement Approval.*** Pending final determination of whether the settlement should be approved, Plaintiff, all Settlement Class Members and any person or entity allegedly acting on behalf of Settlement Class Members, either directly, representatively, or in any other capacity, are preliminarily enjoined from commencing or prosecuting against the Released Parties any action or proceeding in any court or tribunal asserting any of the Released Claims, provided, however, that this injunction shall not apply to individual claims of any Class Members who timely exclude themselves in a manner that complies with this Order. This injunction is necessary to protect and effectuate the settlement, this Order, and the Court's flexibility and authority to effectuate this settlement and to enter judgment when appropriate, and is ordered in aid of the Court's jurisdiction and to protect its judgments.

IT IS SO ORDERED this _____ day of _____, 2013.

_____
THE HONORABLE FRANCES P. CHMELEWSKI
KITTITAS COUNTY SUPERIOR COURT JUDGE

Presented by:

SCHROETER GOLDMARK & BENDER
Counsel for Plaintiff and Settlement Class

By:_____
Martin S. Garfinkel, WSBA #20787
Adam J. Berger, WSBA #20714

BERRY & BECKETT, PLLP
Guy W. Beckett, WSBA #14939

WILLIAMSON & WILLIAMS
Rob Williamson, WSBA #11387

APPROVED AS TO FORM AND FOR ENTRY;
NOTICE OF PRESENTATION WAIVED:

DAVIS WRIGHT TREMAINE LLP
Counsel for Defendant AmeriTitle, Inc.

By:_____
Stephen M. Rummage, WSBA #11168

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITTITAS

MILLICENT RADONOVICH, on behalf of herself and all others similarly situated, Plaintiff, v. AMERITITLE, INC., a foreign corporation, Defendant.	)	Case No. 11-2-00495-6 NOTICE OF SETTLEMENT CLASS CERTIFICATION AND PROPOSED CLASS ACTION SETTLEMENT

THIS NOTICE AFFECTS YOUR RIGHTS. PLEASE READ IT CAREFULLY

You are receiving this notice because you were a customer of AmeriTitle, Inc. ("AmeriTitle"), which acted as your escrow agent in connection with your real estate transaction in Washington State, and AmeriTitle charged you either a Release Services Fee at some time between November 28, 2005, and August 7, 2008, and/or Recording Services Fee at some time between November 28, 2005, and April 30, 2013, (the "Settlement Class Period").

The purpose of this notice is to provide you with information about the Court's certification of this case as a class action for settlement purposes, the parties' proposed settlement of the case (the "Settlement"), your rights with respect to the settlement class certification and the Settlement, and the procedure for submitting a claim for payment under the Settlement.

WHAT IS THIS CASE ABOUT?

This class action case involves claims for reimbursement under Washington law based on allegations that you and other customers of AmeriTitle were overcharged for certain fees in connection with escrow transactions. AmeriTitle denies the allegations and contends all of its charges were lawful, authorized, and permissible under Washington law.

The Court has not ruled on the merits of Plaintiff's claims and has not decided whether Plaintiff or AmeriTitle would win the case. However, the parties have engaged in lengthy settlement negotiations, and have agreed on a proposed settlement of the lawsuit that they believe is fair, adequate, reasonable, and in the best interests of the members of the Settlement Class. The terms of the proposed Settlement are summarized below. If the Court approves the Settlement at the Final Settlement Approval Hearing on _____, settlement payments will be distributed to members of the Settlement Class who make claims as described below. In addition, the Court will enter an order permanently dismissing all claims that were or could have been asserted in the lawsuit.

WHAT IS A SETTLEMENT CLASS?

On _____, the Court certified this case as a class action for purposes of the proposed settlement. A "class action" is a type of lawsuit in which the named plaintiff brings a lawsuit on behalf of a larger group of similarly situated "class members." If a court certifies (approves) a lawsuit as a class action, the final outcome of the suit applies to all members of the Settlement Class unless they choose to be excluded from the lawsuit.

In this case, the Court has certified the case as a class action for settlement purposes only, and has approved Millicent Radonovich (the "Named Plaintiff") to serve as the class representative for the Settlement Class and attorneys Adam J. Berger and Martin S. Garfinkel of Schroeter Goldmark and Bender; Rob Williamson of Williamson & Williams; and Guy Beckett of Guy Beckett of Berry & Beckett PLLP to act as the attorneys for the Settlement Class ("Class Counsel"). If the Court decides not to grant final approval of the Settlement for any reason, the Settlement Class will be decertified (voided) and the Parties will proceed with litigation of the

case. If the Court grants final approval of the Settlement described below, and you choose to remain a member of the Settlement Class, you will be bound by the proposed Settlement Agreement.

WHAT ARE THE REASONS FOR THIS SETTLEMENT?

The Parties have reached this Settlement because they agree that it is in the interests of both Amerititle and the Class to avoid further delay and expense and that there are risks going forward that could produce a result that is less acceptable to one side or the other.

DESCRIPTION OF THE PROPOSED SETTLEMENT

The following is a summary of the basic provisions of the proposed Settlement. The specific and complete terms are contained in the proposed Settlement Agreement, a copy of which is on file with the Clerk of the Court, Kittitas County Superior Court, Ellensburg, Washington, is available upon request from Class Counsel.

• AmeriTitle will make settlement payments on a claims made basis, in the amounts and at the times set forth below. AmeriTitle will make Settlement payments ("Awards") to Settlement Class Members who satisfy the criteria set forth below and who have made a claim by submitting a claim form (the "Eligible Settlement Claimants").

A. **Release Services Fee.** AmeriTitle will pay each Eligible Settlement Claimant 65% of the Release Services fee that Settlement Class Member paid to AmeriTitle. To qualify as an Eligible Settlement Claimant, a Settlement Class Member must have (i) been an AmeriTitle escrow customer; (ii) paid a Release Services fee to AmeriTitle between November 28, 2005, and August 7, 2008; and (iii) submit a timely claim form

B. **Recording Services Fee.** AmeriTitle will pay each Eligible Settlement Claimant who paid a Recording Services fee to AmeriTitle the amount of $10.00. To qualify as an Eligible Settlement Claimant, a Settlement Class Member must have (i) been an AmeriTitle escrow customer; (ii) paid a Recording Services fee to AmeriTitle between November 28, 2005, and April 30, 2013, in an amount

exceeding AmeriTitle's out of pocket recording cost; and (iii) submit a timely claim form. AmeriTitle will have the right, but not the obligation, to verify that the claimant paid AmeriTitle more than its out of pocket recording cost.

- From the Effective Date of the Settlement, AmeriTitle will charge Release Services fees and Recording Services fees consistent with its filings with the Washington State Office of the Insurance Commissioner.
- In order to receive a settlement award payment under this Settlement, you must complete, sign, and submit a claim form, postmarked no later than [45 days after mailing of Notice]. With respect to claims by Eligible Settlement Claimants whose AmeriTitle escrow transaction involved multiple parties on the same transaction who jointly paid Release Services and/or Recording Services fees to AmeriTitle, settlement payments will be made jointly payable to all parties who jointly paid the fee for which the Eligible Settlement Claimant has made a claim under this Settlement. Settlement Class Members who do not submit a claim form, but who do not opt out of the Settlement Class, will not receive a payment but will still be bound by any Order approving this Settlement and releasing the claims in this case. Class members will have one hundred and twenty (120) days after the date of issue to cash the settlement award checks.
- Subject to approval by the Court, Class Counsel will request an award of attorneys' fees and reasonable litigation costs in an amount approved by the Court, not to exceed the total sum of $52,500.
- Subject to approval by the Court, the Named Plaintiff will receive a service payment, or Incentive Payment, not to exceed the total sum of $2,500. This sum is to compensate her for her time and effort expended as the representative of the Settlement Class and will be in addition to her own settlement award.

WHAT IS THE LEGAL EFFECT OF THE SETTLEMENT?

If the Court approves the Settlement, the Court will enter a Final Judgment dismissing the lawsuit "with prejudice." This means that any claims that were or could have been asserted in the lawsuit will be permanently dismissed – i.e., the effect of such a Final Judgment will be to

release and discharge AmeriTitle from all claims that were or could have been brought based on the facts and circumstances alleged in the lawsuit. When claims are "released," that means that a person covered by the release cannot later sue or recover from AmeriTitle or the other released parties (such as AmeriTitle's owners, officers, affiliates and employees) for any of the claims that are covered by the Release.

WHAT OPTIONS DO I HAVE WITH RESPECT TO THE CASE AND THE SETTLEMENT?

1. Option to Make a Claim for an Individual Settlement Award:

If you wish to receive a payment under the Settlement, you must complete, sign and submit the claim form accompanying this Notice to the address listed on the form, postmarked no later than [45 days after mailing of Notice]. If the Court grants final approval of the settlement, you will receive your individual settlement award approximately five weeks after the date that the Court's approval becomes final and not subject to any appeal.

If you do not specifically ask to be excluded from the Settlement Class, you will automatically be included as a member of the Settlement Class, even if you do not submit a claim form. As a member of the Settlement Class, you will be bound by all terms of the Settlement if it is approved by the Court, and any Final Judgment entered by the Court, even if you do not submit a claim form and do not receive a payment under the Settlement.

2. Option to Decline Participation in the Settlement:

If you do not want to remain a member of the Settlement Class, you must send a signed letter by mail stating that you "want to opt out of the *Radonovich v. AmeriTitle, Inc.* settlement." Please be sure to include your name, address, telephone number, and your signature. To be valid, you must mail your exclusion request postmarked no later than [45 days after mailing of Notice] to [insert address].

If you submit a valid and timely request for exclusion from the Settlement Class, you will not be entitled to receive any benefits under the proposed Settlement Agreement, nor will you be bound by its terms or any Final Judgment if the Settlement Agreement is approved by the Court.

In that event, you may pursue any claims you may have against AmeriTitle by filing your own lawsuit, which lawsuit will be subject to all applicable defenses.

3. To Object to the Settlement:

If you wish to remain in the Settlement Class but object to any aspect of the Settlement, you must file a written objection with the Court by [45 days after mailing of Notice]. You must also serve copies of your written objection upon Class Counsel and AmeriTitle's counsel at the addresses listed below and postmarked no later than [45 days after mailing of Notice]:

Class Counsel:
Rob Williamson
Williamson & Williams
2239 West Viewmont Way West
Seattle, WA 98199

AmeriTitle's Counsel:
Stephen M. Rummage
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101

Any written objection to the Settlement must contain your name, current address, telephone number, and email address, as well as the substance of your objection(s). If you file a written objection, you may also appear in person at the Final Settlement Approval Hearing to be held as stated below in order to explain your objection(s). You may hire an attorney at your own expense to represent you at this hearing and to make objections to the Settlement.

Only Settlement Class Members who object to the proposed Settlement in accordance with these procedures will be permitted to appeal or otherwise seek review of any decision by the Court approving the proposed Settlement. Settlement Class Members who fail to present objections to the proposed Settlement Agreement in the manner provided above shall be deemed to have waived any such objections and shall be forever foreclosed from making any objections (by appeal or otherwise) to the proposed Settlement.

FINAL SETTLEMENT APPROVAL HEARING

On _____, at 9:00 a.m., at the Kittitas County Superior Court in Ellensburg, Washington, the Honorable Judge Frances P. Chmelewski will conduct a hearing (the "Final Settlement Approval Hearing") to determine whether the proposed Settlement is fair, adequate and reasonable, and should be granted final approval. The date and time of the Final Settlement Approval Hearing is subject to change without further notice.

EXAMINATION OF COURT PAPERS AND INQUIRIES

The foregoing is only a summary of this lawsuit and the proposed Settlement and does not purport to be comprehensive. For more detailed information, interested persons should refer to the court records, including the Settlement Agreement, and other papers filed in this case, which may be inspected at the Office of the Clerk of the Kittitas County Superior Court in Ellensburg, Washington, during regular business hours of each court day. All questions concerning the case or the proposed Settlement should be directed to Class Counsel at [phone] or [email].

REMINDER ABOUT DEADLINES

- **In order to receive a payment under the Settlement, you must complete, sign, and return the accompanying Claim Form by no later than [45 days after mailing of Notice].**
- **If you wish to exclude yourself from the Settlement Class, you must submit a request for exclusion in the form described in this Notice by not later than [45 days after mailing of Notice].**
- **To object to all or any provision of the Settlement, you must submit your objection as described above by not later than [45 days after mailing of Notice].**

PLEASE DO NOT CONTACT THE CLERK OF THE COURT, THE JUDGE, AMERITITLE OR AMERITITLE'S ATTORNEYS WITH INQUIRIES.

EXHIBIT C

Radonovich v. AmeriTitle, Inc.

NOTICE OF SETTLEMENT OF CLASS ACTION

Dear Former Customer of AmeriTitle:

On November 28, 2011, a class action case was filed alleging that you and other escrow customers of AmeriTitle may have been overcharged for a Release Services Fee at some time between November 28, 2005, and August 7, 2008, and/or Recording Services Fee at some time between November 28, 2005, and April 30, 2013.

AmeriTitle denies the allegations and contends its charges were all lawful and permissible under Washington law. In agreeing to settle, as described below, AmeriTitle does not admit any wrongdoing.

Plaintiff Millicent Radonovich, on behalf of all Class Members, has reached a settlement of the class action, which has been given preliminary approval by Judge Frances P. Chmelewski of the Superior Court of Kittitas County in Ellensburg, Washington. Judge Chmelewski will conduct a final hearing on _____ to consider whether to approve the settlement and award attorneys' fees and expenses as requested, in an amount not to exceed $52,500. The Court has directed that you be sent this notice. You are a potential member of the class and may be entitled to receive an award under the settlement by completing and timely returning the enclosed Claim Form. You may be entitled to receive reimbursement of 65% of any Release Services fee you paid and $10.00 for any Recording Services Fee you paid, as determined by records maintained by AmeriTitle. If you are not certain if you paid either fee within the time periods stated above, you are permitted to make a claim and AmeriTitle will review its records to verify whether you are eligible for payment.

One of the law firms representing Ms. Radonovich and members of the settlement class is Schroeter Goldmark & Bender, at the location listed below. This firm is referred to herein as "Class Counsel." Please read the full Notice of the proposed settlement agreement at Class Counsel's web site, at http://www.sgb-law.com/case-updates/ameritite-escrow-fee-class-action/, or by requesting a copy of the settlement agreement from the settlement administrator by mail. The full Notice contains the release that you are giving by participating in this class action settlement and includes other details regarding the settlement. The release contained in the settlement agreement is also set forth on the back of this letter.

If you want to exclude yourself from the settlement and from the class, you must send a signed letter by mail stating that you "want to opt out of the *Radonovich v. AmeriTitle, Inc.* settlement." Please include your name, address, telephone number, and your signature. To be valid, you must mail your exclusion request postmarked no later than [45 days after mailing of Notice] to [insert address for Tilghman & Co.]. If you do not request to be excluded, you will be deemed to have released AmeriTitle Title of all claims involved in this lawsuit whether or not you submit a claim form**.**

If you wish to claim an award under this settlement, you must completely fill out and send in the attached claim form postmarked no later than [45 days after mailing of Notice] to [insert address for Tilghman & Co.].

Finally, you may object to the settlement by filing a written objection with the Court by [45 days after mailing of Notice]. You must also serve copies of your written objection upon Class Counsel at the address below and upon AmeriTitle's counsel at the address listed in the full Notice, postmarked no later than [45 days after mailing of Notice].

AmeriTitle Escrow Fee Class Action
SCHROETER GOLDMARK & BENDER
500 CENTRAL BUILDING
810 THIRD AVEUNE
SEATTLE, WA 98104
info@sgb-law.com

RELEASE OF CLAIMS

Upon the Court's final approval of this Agreement (and except as to such rights or claims as may be created by this Agreement), the Settlement Class Members and Radonovich release and discharge AmeriTitle, its present and former subsidiaries, parent companies, shareholders, officers, directors, employees, agents, servants, registered representatives, attorneys, insurers, affiliates, successors and assigns ("Released Parties") from any and all claims, penalties, and liabilities that were or could have been alleged based on the facts and circumstances alleged in the Action, including both federal and state claims and any associated claims for declaratory or injunctive relief, prejudgment interest, liquidated or exemplary damages, attorneys' fees or costs ("Released Claims"). Except to the extent a Settlement Class Member presents a timely objection to this Settlement pursuant to the procedures set forth above, Settlement Class Members waive their right to seek any form of appellate review over any order or judgment that is consistent with the terms of this Settlement Agreement.

EXHIBIT D

CLAIM FORM

RADONOVICH V. AMERITITLE, INC.

This form is to be used by Settlement Class Members in the above case who wish to submit a claim for reimbursement of Release Services Fees in connection with AmeriTitle, Inc. ("AmeriTitle") escrow transactions occurring between November 28, 2005, and August 7, 2008, and/or Recording Services Fees in connection with AmeriTitle escrow transactions occurring between November 28, 2005, and April 30, 2013. If you wish to file a claim, please completely fill out the information below.

This form must be postmarked no later than [45 days after mailing of Notice].

Claim Control Number (from envelope transmitting this claim form): _____

First/Last Name (print your name clearly): _____

Home Address (include city, state): _____

Current Telephone No.: _____

Current Email Address: _____

I wish to participate in the *Radonovich v. AmeriTitle, Inc.* class action settlement.

SIGN ON THE LINE BELOW:

_____

DATED: _____

EXHIBIT E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITTITAS

MILLICENT RADONOVICH, on behalf of herself and all others similarly situated, Plaintiff, v. AMERITITLE, INC., a foreign corporation, Defendant.	)	Case No. 11-2-00495-6 [PROPOSED] SETTLEMENT ORDER AND FINAL JUDGMENT

THIS MATTER came before the Court on Plaintiff Millicent Radonovich's ("Plaintiff") motion for final approval of the proposed class settlement (the "Settlement"). The Court has considered all papers filed and proceedings in this matter and is fully informed regarding the facts surrounding the proposed Settlement. Based upon this information, the Court has determined to approve the proposed Settlement as fair, reasonable and adequate. The Court hereby enters this Final Judgment, which constitutes a final adjudication on the merits of all claims of the Settlement Class.

On _____, 2013, this Court granted preliminary approval to the proposed Settlement between Plaintiff and Defendant AmeriTitle, Inc. ("AmeriTitle"). The proposed Settlement resolves all of the Settlement Class's claims against AmeriTitle in exchange for AmeriTitle's agreement to pay claims made by Eligible Settlement Class Members as set forth in the Agreement and to charge Release Services fees and Recording Services fees consistent with

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its filings with the Washington State Office of the Insurance Commissioner as of the Settlement Effective Date.

On _____, 2013, this Court held a Final Settlement Approval Hearing to consider whether to grant final approval to the Settlement and to consider Class Counsel's application for an award of attorneys' fees and costs. The Court heard argument from counsel and others who elected to appear to voice their support for, or objection to, the Settlement and/or the fee application.

Having read, reviewed and considered the papers filed in support of and in opposition to final approval of the Settlement, including supporting declarations; oral arguments of counsel and presentations by Settlement Class Members who appeared at the hearing; Class Counsel's fee application; the Agreement; and the pleadings, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. ***Definitions.*** The definitions and provisions of the Settlement Agreement and Release of Claims (the "Agreement") are incorporated in this Order as though fully set forth herein.

2. ***Jurisdiction.*** This Court has jurisdiction over the subject matter of the Agreement with respect to and over all parties to the Agreement, including Plaintiff and all members of the Settlement Class.

3. ***Final Settlement Approval.*** The Court hereby grants final approval to the Settlement and finds the Settlement is, in all respects, fair, reasonable, and adequate to the Settlement Class, within the authority of the parties, and the result of extensive arm's length negotiations between the parties.

4. ***Final Class Certification.*** This Court confirms the proposed Settlement Class satisfies the requirements of Civil Rule 23, as found in the Court's Order (1) Certifying Settlement Class, (2) Preliminarily Approving Proposed Class Action Settlement, (3) Authorizing Notice, and (4) Setting Hearing for Final Approval of Class Action Settlement ("Preliminary Approval

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Order"). Accordingly, this Court makes final the conditional certification set forth in Preliminary Approval Order.

5. ***Exclusion from Class.*** Certain members of the Settlement Class have timely requested to be excluded from the Class and the Settlement. Exhibit A, attached hereto, lists the Settlement Class Members who timely requested exclusion from the Settlement Class. Accordingly, this Order shall not bind or affect Settlement Class Members listed on Exhibit A.

6. ***Objections.*** The Court has considered and hereby overrules all objections brought to the Court's attention, whether properly filed or not.

7. ***No Admission of Liability.*** Neither this Final Judgment nor the Agreement is an admission or concession by AmeriTitle of the validity of any claims or of any liability or wrongdoing or of any violation of law. This Final Judgment and the Agreement do not constitute a concession and shall not be used as an admission or indication of any wrongdoing, fault or omission by AmeriTitle or any other person in connection with any transaction, event or occurrence, and neither this Final Judgment nor the Agreement nor any related documents in this proceeding, nor any reports or accounts thereof, shall be offered or received in evidence in any civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to consummate or enforce this Final Judgment, the Agreement, and all releases given thereunder, or to establish the affirmative defenses of *res judicata* or collateral estoppel barring the pursuit of claims released in the Agreement.

8. ***Dismissal with Prejudice.*** This Court hereby dismisses with prejudice all claims of Settlement Class Members against AmeriTitle arising from any and all claims, penalties, and liabilities that were or could have been alleged based on the facts and circumstances alleged in the Action, including both federal and state claims and any associated claims for declaratory or injunctive relief, prejudgment interest, liquidated or exemplary damages, attorneys' fees or costs.

9. ***Releases.*** Plaintiff, for herself and as the representative of the Settlement Class, and on behalf of each Settlement Class Member who has not timely opted out and each of their respective agents, successors, heirs, assigns, and any other person who can claim by or through

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them in any manner, fully, finally, and forever irrevocably release, relinquish, and forever discharge with prejudice all Released Claims against the Released Parties.

10. ***Notice; Binding Effect of Judgment.*** AmeriTitle completed the delivery of class notice according to the terms of the Agreement. AmeriTitle's Notice to the Settlement Class, which set forth the principal terms of the Agreement and other matters, was the best practicable notice under the circumstances. The notice program prescribed by the Agreement was reasonable and provided due and adequate notice of these proceedings and of the matters set forth therein, including the terms of the Agreement, to all parties entitled to such notice. The Notice given to Settlement Class Members satisfied the requirements of Civil Rule 23 and the requirements of constitutional due process. The Notice was reasonably calculated under the circumstances to apprise Settlement Class Members of the pendency of this Action, all material elements of the Settlement, and their opportunity to exclude themselves from, object to, or comment on the Settlement and appear at the Final Settlement Approval Hearing. The Court has afforded a full opportunity to all Settlement Class Members to be heard. Accordingly, the Court determines that all members of the Settlement Class, except those who timely excluded themselves from the Settlement Class, are bound by this Judgment and Final Order.

11. ***Retention of Jurisdiction.*** Without affecting the finality of this judgment, the Court retains continuing jurisdiction over (a) implementation of the Agreement, distribution of the settlement payments, incentive fees, and attorneys' fees and costs contemplated by the Agreement, and processing of the claims permitted by the Agreement, until each and every act agreed to be performed pursuant to the Agreement has been performed, and (b) all parties to this Action and members of the Settlement Class for the purpose of enforcing and administering the Agreement.

12. ***Incentive Payment.*** As an incentive payment in compensation for the time, effort, and risk she undertook as representative of the Settlement Class, the Court hereby awards $2,500 to Millicent Radonovich.

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Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

13. ***Fee Award.*** The Court hereby awards attorneys' fees and costs to compensate Class Counsel for their time incurred and expenses advanced. The Court has concluded that: (a) Class Counsel achieved a favorable result for the Settlement Class by obtaining AmeriTitle's agreement to certain claim payments and to modify future conduct; (b) Class Counsel devoted substantial effort to pre-and post-filing investigation, legal analysis, and litigation; (c) Class Counsel prosecuted the Settlement Class's claims on a contingent fee basis, investing significant time and accumulating costs with no guarantee that they would receive compensation for their services or recover their expenses; (d) Class Counsel employed their knowledge of and experience with class action litigation in achieving a valuable settlement for the Settlement Class, in spite of AmeriTitle's possible legal defenses and their experienced and capable counsel; (e) Class Counsel has a standard contingent fee agreements with Plaintiff, who reviewed the Agreement and has been informed of Class Counsel's attorneys' fee and cost application and has approved of that application; (f) the Notice informed Settlement Class Members of the amount and nature of Class Counsel's fee and cost request under the Agreement, and (g) Class Counsel filed and posted their fee application in time for Settlement Class Members to make a meaningful decision whether to object to the fee application. For these reasons, the Court hereby approves Class Counsel's fee and cost application and awards to Class Counsel fees and costs in the total aggregate amount of $52,500. All such fees are in lieu of statutory fees that Plaintiff and/or the Settlement Class might otherwise have been entitled to recover.

14. ***Payment of Claims, Fees and Costs, and Incentive Payment.*** AmeriTitle shall pay the fee and cost awards to Class Counsel and the Incentive Payment to Plaintiff, as well as amounts due to Eligible Settlement Claimants who timely filed a claim under the Agreement, in accordance with and at the times prescribed by the Agreement.

IT IS SO ORDERED this _____ day of _____, 2013.

_____

THE HONORABLE FRANCES P. CHMELEWSKI
KITTITAS COUNTY SUPERIOR COURT JUDGE

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

Presented by:

SCHROETER GOLDMARK & BENDER
Counsel for Plaintiff and Settlement Class

By:_____
Martin S. Garfinkel, WSBA #20787
Adam J. Berger, WSBA #20714

BERRY & BECKETT, PLLP
Guy W. Beckett, WSBA #14939

WILLIAMSON & WILLIAMS

Rob Williamson, WSBA #11387
Counsel for Plaintiff

APPROVED AS TO FORM AND FOR ENTRY;
NOTICE OF PRESENTATION WAIVED:

DAVIS WRIGHT TREMAINE LLP
Counsel for Defendant AmeriTitle, Inc.

By:_____
Stephen M. Rummage, WSBA #11168

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

3

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Not Followed as Dicta Chen-Oster v. Goldman, Sachs & Co., S.D.N.Y., April 12, 2017

131 S.Ct. 2541
Supreme Court of the United States

WAL–MART STORES, INC., Petitioner,
v.
DUKES et al.

No. 10–277.
|
Argued March 29, 2011.
|
Decided June 20, 2011.

Synopsis

Background: Female employees of retail store chain brought Title VII against employer alleging sex discrimination and seeking injunctive and declaratory relief, back pay, and punitive damages. The United States District Court for the Northern District of California, Martin J. Jenkins, J., 222 F.R.D. 137, granted in part and denied in part plaintiffs' motion for class certification, and the Ninth Circuit Court of Appeals, Pregerson, Circuit Judge, 509 F.3d 1168, affirmed. On rehearing en banc, the Court of Appeals, Michael Daly Hawkins, Circuit Judge, 603 F.3d 571,affirmed in part and remanded in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

evidence presented by members of putative class did not rise to level of significant proof that company operated under general policy of discrimination, as required to satisfy commonality requirement and to permit certification of plaintiff class;

certification of plaintiff class upon theory that defendant has acted, or refused to act, on grounds that apply generally to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole, is not appropriate with respect to claims for monetary relief, at least where monetary relief is not incidental to injunctive or declaratory relief; and

necessity of litigation to resolve employer's statutory defenses to claims for backpay asserted by individual members of putative employee class prevented court from treating these backpay claims as "incidental" to claims for declaratory or injunctive relief.

Reversed.

Justice Ginsburg concurred in part and dissented in part and filed opinion, in which Justices Breyer, Sotomayor, and Kagan joined.

****2544** *Syllabus* [*]

Respondents, current or former employees of petitioner Wal–Mart, sought judgment against the company for injunctive and declaratory relief, punitive damages, and backpay, on behalf of themselves and a nationwide class of some 1.5 million female employees, because of Wal–Mart's alleged discrimination against women in violation of Title VII of the Civil Rights Act of 1964. They claim that local managers exercise their discretion over pay and promotions disproportionately in favor of men, which has an unlawful disparate impact on female employees; and that Wal–Mart's refusal to cabin its managers' authority amounts to disparate treatment. The District Court certified the class, finding that respondents satisfied Federal Rule of Civil Procedure 23(a), and Rule 23(b)(2)'s requirement of showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Ninth Circuit substantially affirmed, concluding, *inter alia,* that respondents met Rule 23(a)(2)'s commonality requirement and that their backpay claims could be certified as part of a (b)(2) class because those claims did not predominate over the declaratory and injunctive relief requests. It also ruled that the class action could be manageably tried without depriving Wal–Mart of its right to present its statutory defenses if the District Court selected a random set of claims for valuation and then extrapolated the validity and value of the untested claims from the sample set.

Held :

1. The certification of the plaintiff class was not consistent with Rule 23(a). Pp. 2550 – 2557.

**2545 (a) Rule 23(a)(2) requires a party seeking class certification to prove that the class has common "questions of law or fact." Their claims must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Here, proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a pattern or practice of discrimination. The crux of a Title VII inquiry is "the reason for a particular employment decision," *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718, and respondents wish to sue for millions of employment decisions at once. Without some glue holding together the alleged reasons for those decisions, it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial discrimination question. Pp. 2550 – 2553.

(b) *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740, describes the proper approach to commonality. On the facts of this case, the conceptual gap between an individual's discrimination claim and "the existence of a class of persons who have suffered the same injury," *id.,* at 157–158, 102 S.Ct. 2364, must be bridged by "[s]ignificant proof that an employer operated under a general policy of discrimination," *id.,* at 159, n. 15, 102 S.Ct. 2364. Such proof is absent here. Wal–Mart's announced policy forbids sex discrimination, and the company has penalties for denials of equal opportunity. Respondents' only evidence of a general discrimination policy was a sociologist's analysis asserting that Wal–Mart's corporate culture made it vulnerable to gender bias. But because he could not estimate what percent of Wal–Mart employment decisions might be determined by stereotypical thinking, his testimony was worlds away from "significant proof" that Wal–Mart "operated under a general policy of discrimination." Pp. 2553 – 2554.

(c) The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's "policy" of giving local supervisors discretion over employment matters. While such a policy could be the basis of a Title VII disparate-impact claim, recognizing that a claim "can" exist does not mean that every employee in a company with that policy has a common claim. In a company of Wal–Mart's size and geographical scope, it is unlikely that all managers would exercise their discretion in a common way without some common direction. Respondents' attempt to show such direction by means of statistical and anecdotal evidence falls well short. Pp. 2554 – 2557.

2. Respondents' backpay claims were improperly certified under Rule 23(b)(2). Pp. 2557 – 2561.

(a) Claims for monetary relief may not be certified under Rule 23(b)(2), at least where the monetary relief is not incidental to the requested injunctive or declaratory relief. It is unnecessary to decide whether monetary claims can ever be certified under the Rule because, at a minimum, claims for individualized relief, like backpay, are excluded. Rule 23(b)(2) applies only when a single, indivisible remedy would provide relief to each class member. The Rule's history and structure indicate that individualized monetary claims belong instead in Rule 23(b)(3), with its procedural protections of predominance, superiority, mandatory notice, and the right to opt out. Pp. 2557 – 2559.

(b) Respondents nonetheless argue that their backpay claims were appropriately **2546 certified under Rule 23(b)(2) because those claims do not "predominate" over their injunctive and declaratory relief requests. That interpretation has no basis in the Rule's text and does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify eliminating Rule 23(b)(3)'s procedural protections, and creates incentives for class representatives to place at risk potentially valid monetary relief claims. Moreover, a district court would have to reevaluate the roster of class members continuously to excise those who leave their employment and become ineligible for classwide injunctive or declaratory relief. By contrast, in a properly certified (b)(3) class action for backpay, it would be irrelevant whether the plaintiffs are still employed at Wal–Mart. It follows that backpay claims should not be certified under Rule 23(b)(2). Pp. 2559 – 2561.

(c) It is unnecessary to decide whether there are any forms of "incidental" monetary relief that are consistent with the above interpretation of Rule 23(b)(2) and

the Due Process Clause because respondents' backpay claims are not incidental to their requested injunction. Wal–Mart is entitled to individualized determinations of each employee's eligibility for backpay. Once a plaintiff establishes a pattern or practice of discrimination, a district court must usually conduct "additional proceedings ... to determine the scope of individual relief." *Teamsters v. United States,* 431 U.S. 324, 361, 97 S.Ct. 1843, 52 L.Ed.2d 396. The company can then raise individual affirmative defenses and demonstrate that its action was lawful. *Id.,* at 362, 97 S.Ct. 1843. The Ninth Circuit erred in trying to replace such proceedings with Trial by Formula. Because Rule 23 cannot be interpreted to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims. Pp. 2561.

603 F.3d 571, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined as to Parts I and III. Ginsburg, J., filed an opinion concurring in part and dissenting in part, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

Attorneys and Law Firms

Theodore B. Olson, Mark A. Perry, Amir C. Tayrani, Gibson, Dunn & Crutcher LLP, Washington, DC, Theodore J. Boutrous, Jr., Counsel of Record, Rachel S. Brass, Theane Evangelis Kapur, Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for Petitioner.

Joseph M. Sellers, Christine E. Webber, Jenny R. Yang, Kalpana Kotagal, Cohen Milstein Sellers & Toll PLLC, Washington, D.C., Brad Seligman, Jocelyn D. Larkin, The Impact Fund, Berkeley, CA, Steven Stemerman, Elizabeth A. Lawrence, Davis, Cowell & Bowe, LLP, San Francisco, CA, Arcelia Hurtado, Noreen Farell, Equal Rights Advocates, San Francisco, CA, Sheila Y. Thomas, Law Office of Sheila Thomas, Oakland, CA, Stephen Tinkler, The Tinkler Law Firm, Santa Fe, NM, Merit Bennett, The Bennett Firm, Santa Fe, NM, Debra Gardner, Baltimore, MD, Shauna Marshall, Hastings College of the Law, San Francisco, CA, for Respondents.

Theodore B. Olson, Mark A. Perry, Amir C. Tayrani, Gibson, Dunn & Crutcher LLP, Washington, D.C., Theodore J. Boutrous, Jr., Counsel of Record, Rachel S. Brass, Theane Evangelis Kapur, Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for Petitioner.

Opinion

****2547** Justice SCALIA delivered the opinion of the Court.

***342** We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal–Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

I

A

Petitioner Wal–Mart is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal–Mart operates approximately 3,400 stores and employs more than one million people.

***343** Pay and promotion decisions at Wal–Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." 222 F.R.D. 137, 145 (N.D.Cal.2004). Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal–Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal–Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.,* assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal–Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e–1 *et seq.* [1]

***344** Betty Dukes began working at a Pittsburgh, California, Wal–Mart in 1994. She started as a cashier, but later sought and ****2548** received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburgh store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told her to 'doll up,' to wear some makeup, and to dress a little better." App. 1003a.

The final named plaintiff, Edith Arana, worked at a Wal–Mart store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with Wal–Mart's timekeeping policy.

These plaintiffs, respondents here, do not allege that Wal–Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees, see ***345** 42 U.S.C. § 2000e–2(k). And, respondents say, because Wal–Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment, see § 2000e–2(a). Their complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal–Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal–Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal–Mart's stores in a nationwide class action.

C

Class certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23(a), the party seeking certification must demonstrate, first, that:

> "(1) the class is so numerous that joinder of all members is impracticable,

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"(2) there are questions of law or fact common to the class,

"(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

"(4) the representative parties will fairly and adequately protect the interests of the class" (paragraph breaks added).

Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to **2549 act on grounds that apply generally to the class, so that final injunctive relief or corresponding *346 declaratory relief is appropriate respecting the class as a whole." [2]

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of " '[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and management track promotions policies and practices.' " 222 F.R.D., at 141–142 (quoting Plaintiff 's Motion for Class Certification in case No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 37). As evidence that there were indeed "questions of law or fact common to" all the women of Wal–Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal–Mart's female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a "social framework analysis" of Wal–Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination. 603 F.3d 571, 601 (C.A.9 2010) (en banc).

Wal–Mart unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat Rule 23(a)'s requirements *347 of commonality, typicality, and adequate representation. Wal–Mart further contended that respondents' monetary claims for backpay could not be certified under Rule 23(b)(2), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a class without depriving Wal–Mart of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents' motion and certified their proposed class. [3]

D

A divided en banc Court of Appeals substantially affirmed the District Court's certification order. 603 F.3d 571. The majority concluded that respondents' evidence of commonality was sufficient to "raise the common question whether Wal–Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII." *Id.,* at 612 (emphasis deleted). It also agreed with the District Court that the named plaintiffs' claims were sufficiently typical of the class **2550 as a whole to satisfy Rule 23(a)(3), and that they could serve as adequate class representatives, see Rule 23(a)(4). *Id.,* at 614–615. With respect to the Rule 23(b)(2) question, the Ninth Circuit held that respondents' backpay claims could be certified as part of a (b)(2) class because they did not "predominat[e]" over the requests for declaratory and injunctive relief, meaning they were not "superior in strength, influence, or authority" to *348 the nonmonetary claims. *Id.,* at 616 (internal quotation marks omitted). [4]

Finally, the Court of Appeals determined that the action could be manageably tried as a class action because the District Court could adopt the approach the Ninth Circuit approved in *Hilao v. Estate of Marcos,* 103 F.3d 767, 782–787 (1996). There compensatory damages for some 9,541 class members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set. See 603 F.3d, at 625–626. The Court of Appeals "s[aw] no reason why a similar procedure to that used in *Hilao* could not be employed in this case." *Id.,* at 627. It would allow Wal–Mart "to present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something other than gender discrimination." *Ibid.,* n. 56 (emphasis deleted).

We granted certiorari. 562 U.S. ——, 131 S.Ct. 795, 178 L.Ed.2d 530 (2010).

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II

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki,* 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the ***349** class members." *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.' " *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (quoting *General Telephone Co. of Northwest v. EEOC,* 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980)).

A

The crux of this case is commonality—the rule requiring a plaintiff to show that "there are questions of law or fact ****2551** common to the class." Rule 23(a)(2).[5] That language is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.' " Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality ***350** requires the plaintiff to demonstrate that the class members "have suffered the same injury," *Falcon, supra,* at 157, 102 S.Ct. 2364. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

> "What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." Nagareda, *supra,* at 132.

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," 457 U.S., at 160, 102 S.Ct. 2364, and that certification is proper only if "the trial court is satisfied, after a ***351** rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," *id.,* at 161, 102 S.Ct. 2364; see *id.,* at 160, 102 S.Ct. 2364 (" [A]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable"). Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. " ' [T]he ****2552** class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Falcon, supra,* at 160, 102 S.Ct. 2364 (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); some internal quotation marks omitted).[6] Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve ***352** preliminary matters, *e.g.,* jurisdiction and venue, is a familiar feature of litigation. See *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672, 676–677 (C.A.7 2001) (Easterbrook, J.).

In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a *pattern or practice* of discrimination. [7] That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is "the reason for a particular employment decision," *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*

B

This Court's opinion in *Falcon* describes how the commonality issue must be **2553 approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. 457 U.S., at 152, 102 S.Ct. 2364. We rejected that composite class for lack of commonality and typicality, explaining:

> "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or *353 higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims." *Id.,* at 157–158, 102 S.Ct. 2364.

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." *Id.,* at 159, n. 15, 102 S.Ct. 2364. Second, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Ibid.* We think that statement precisely describes respondents' burden in this case. The first manner of bridging the gap obviously has no application here; Wal–Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

The second manner of bridging the gap requires "significant proof" that Wal–Mart "operated under a general policy of discrimination." That is entirely absent here. Wal–Mart's announced policy forbids sex discrimination, see App. 1567a–1596a, and as the District Court recognized the company imposes penalties for denials of equal employment opportunity, 222 F.R.D., at 154. The only evidence of a "general policy of discrimination" respondents produced was the testimony of Dr. William Bielby, their sociological *354 expert. Relying on "social framework" analysis, Bielby testified that Wal–Mart has a " strong corporate culture," that makes it " 'vulnerable' " to "gender bias." *Id.,* at 152. He could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart. At his deposition ... Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking." 222 F.R.D. 189, 192 (N.D.Cal.2004). The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under Federal Rule of Evidence 702 and our *Daubert* case, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). [8] the District Court concluded **2554 that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. 222 F.R.D., at 191. We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case. " [W]hether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking" is the essential question on which respondents' theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard *355 what he has to say. It is worlds away from "significant proof" that Wal–Mart "operated under a general policy of discrimination."

C

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said "should itself raise no inference of discriminatory conduct," *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 990, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

To be sure, we have recognized that, "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." *Id.,* at 990–991, 108 S.Ct. 2777. But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements, see *Griggs v. Duke Power Co.,* 401 U.S. 424, 431–432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use ***356** of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that ****2555** pervades the entire company—aside from their reliance on Dr. Bielby's social frameworks analysis that we have rejected. In a company of Wal–Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. Drogin conducted his analysis region-by-region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. After considering regional and national data, Drogin concluded that "there are statistically significant disparities between men and women at Wal–Mart ... [and] these disparities ... can be explained only by gender discrimination." 603 F.3d, at 604 (internal quotation marks omitted). Bendick compared work-force data from Wal–Mart and competitive retailers and concluded that Wal–Mart "promotes a lower percentage of women than its competitors." *Ibid.*

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon,* we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." 457 U.S., at 158, 102 S.Ct. 2364. A similar failure of inference arises here. As Judge Ikuta observed in her dissent, "[i]nformation about disparities at the regional and national level does not establish the existence ***357** of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." 603 F.3d, at 637. A regional pay disparity, for example, may be attributable to only a small set of Wal–Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women,

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or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity *is not enough.* "[T]he plaintiff must begin by identifying the specific employment practice that is challenged." *Watson,* 487 U.S., at 994, 108 S.Ct. 2777; accord, *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 656, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (approving that statement), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k). That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no "specific employment practice"—much less one that ties all their 1.5 million claims ****2556** together. Merely showing that Wal–Mart's policy of discretion has produced an overall sex-based disparity does not suffice.

***358** Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. In *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), in addition to substantial statistical evidence of company-wide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. See *id.,* at 338, 97 S.Ct. 1843. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, *id.,* at 337, 97 S.Ct. 1843, and the class itself consisted of around 334 persons, *United States v. T.I.M.E.-D.C., Inc.,* 517 F.2d 299, 308 (C.A.5 1975), overruled on other grounds, *Teamsters, supra*. The 40 anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals noted that the anecdotes came from individuals "spread throughout" the company who "for the most part" worked at the company's operational centers that employed the largest numbers of the class members. 517 F.2d, at 315, and n. 30. Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal–Mart's 3,400 stores. 603 F.3d, at 634 (Ikuta, J., dissenting). More than half of these reports are concentrated in only six States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal–Mart's operations at all. *Id.,* at 634–635, and n. 10. Even if every single one of these accounts is true, that would not demonstrate that the entire company "operate [s] under a general policy of discrimination," *Falcon, supra,* at 159, n. 15, 102 S.Ct. 2364, which is what respondents must show to certify a companywide class. [9]

***359** The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative class members on the ground that we have "blend[ed]" Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s inquiry into whether common questions "predominate" over individual ones. See *post,* at 2550 – 2552 (GINSBURG, J., concurring in part and dissenting in part). That is not so. We quite agree that for purposes of Rule 23(a)(2) " '[e]ven a single [common] question' " will do, *post,* at 2566, n. 9 (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L.Rev. 149, 176, n. 110 (2003)). We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate,* but in order to determine (as Rule 23(a)(2) requires) whether there *is* "[e]ven a single [common] question." And there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have ****2557** not established the existence of any common question. [10]

In sum, we agree with Chief Judge Kozinski that the members of the class:

> "held a multitude of different jobs, at different levels of Wal–Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of ***360** regional policies that all differed .... Some thrived while others did poorly. They have little in common but their sex and this lawsuit." 603 F.3d, at 652 (dissenting opinion).

III

We also conclude that respondents' claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) *(per curiam)* expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

A

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." One possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Nagareda, 84 N.Y.U.L.Rev., at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not ***361** authorize class certification when each class member would be entitled to an individualized award of monetary damages.

That interpretation accords with the history of the Rule. Because Rule 23 "stems from equity practice" that predated its codification, *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), in determining its meaning we have previously looked to the historical models on which the Rule was based, *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 841–845, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). As we observed in *Amchem,* "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of what (b)(2) is meant to capture. ****2558** 521 U.S., at 614, 117 S.Ct. 2231. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction. See Advisory Committee's Note, 39 F.R.D. 69, 102 (1966) (citing cases); *e.g., Potts v. Flax,* 313 F.2d 284, 289, n. 5 (C.A.5 1963); *Brunson v. Board of Trustees of Univ. of School Dist. No. 1, Clarendon Cty.,* 311 F.2d 107, 109 (C.A.4 1962) *(per curiam)*; *Frasier v. Board of Trustees of N.C.,* 134 F.Supp. 589, 593 (NC 1955) (three-judge court), aff'd, 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956).

Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a(b)(1) class, [11] or that the relief sought must perforce ***362** affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an "adventuresome innovation" of the 1966 amendments, *Amchem,* 521 U.S., at 614, 117 S.Ct. 2231 (internal quotation marks omitted), framed for situations "in which 'class-action treatment is not as clearly called for'," *id.,* at 615, 117 S.Ct. 2231 (quoting Advisory Committee's Notes, 28 U.S.C.App., p. 697 (1994 ed.)). It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3). And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive "the best notice that is practicable under the circumstances" and to withdraw from the class at their option. See Rule 23(c)(2)(B).

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Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating ***363** the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which ****2559** is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. See *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.

B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not "predominate" over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee's statement that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." 39 F.R.D., at 102 (emphasis added). The negative implication, they argue, is that it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim ***364** does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a "predominating request"—for an injunction.

Respondents' predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not "predominate." But it also created the possibility (if the predominance test were correct) that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have.

The predominance test would also require the District Court to reevaluate the roster of class members continually. The Ninth Circuit recognized the necessity for this when it concluded that those plaintiffs ****2560** no longer employed by Wal–Mart lack standing to seek injunctive or declaratory relief against its employment practices. The Court of Appeals' response to that difficulty, however, was not to eliminate *all* former employees from the certified class, but to eliminate only those who had left the company's employ by the date ***365** the complaint was filed. That solution has no logical connection to the problem, since those who have left their Wal–Mart jobs *since* the complaint was filed have no more need for prospective relief than those who left

beforehand. As a consequence, even though the validity of a (b)(2) class depends on whether "final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole,*" Rule 23(b)(2) (emphasis added), about half the members of the class approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the class as they leave their employment may have struck the Court of Appeals as wasteful of the District Court's time. Which indeed it is, since if a backpay action were properly certified for class treatment under *(b)(3),* the ability to litigate a plaintiff's backpay claim as part of the class would not turn on the irrelevant question whether she is still employed at Wal–Mart. What follows from this, however, is not that some arbitrary limitation on class membership should be imposed but that the backpay claims should not be certified under Rule 23(b)(2) at all.

Finally, respondents argue that their backpay claims are appropriate for a (b)(2) class action because a backpay award is equitable in nature. The latter may be true, but it is irrelevant. The Rule does not speak of "equitable" remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither. See 42 U.S.C. § 2000e–5(g)(2)(B)(i) and (ii) (distinguishing between declaratory and injunctive relief and the payment of "backpay," see § 2000e–5(g)(2)(A)).

C

In *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 415 (C.A.5 1998), the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it defined ***366** as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." In that court's view, such "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations." *Ibid.* We need not decide in this case whether there are any forms of "incidental" monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot.

Contrary to the Ninth Circuit's view, Wal–Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay ... or any other equitable relief as the court deems appropriate." § 2000e–5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any ****2561** reason other than discrimination, the court cannot order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay." § 2000e–5(g)(2)(A).

We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings ... to determine the scope of individual relief." *Teamsters,* 431 U.S., at 361, 97 S.Ct. 1843. At this phase, the burden of proof will shift to the company, but it ***367** will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.,* at 362, 97 S.Ct. 1843.

The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. 603 F.3d, at 625–627. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U.S.C. §

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2072(b); see *Ortiz,* 527 U.S., at 845, 119 S.Ct. 2295, a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, respondents' class could not be certified even assuming, *arguendo,* that "incidental" monetary relief can be awarded to a 23(b)(2) class.

* * *

The judgment of the Court of Appeals is

Reversed.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, concurring in part and dissenting in part.

The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2). The plaintiffs, alleging discrimination in violation ***368** of Title VII, 42 U.S.C. § 2000e *et seq.,* seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available. See *ante,* at 2557 – 2561. A putative class of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common class questions "predominate" over issues affecting individuals—*e.g.,* qualification for, and the amount of, backpay or compensatory damages—and that a class action is "superior" to other modes of adjudication.

Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand. [1] The Court, ****2562** however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the "commonality" line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.

I

A

Rule 23(a)(2) establishes a preliminary requirement for maintaining a class action: "[T]here are questions of law or fact common to the class." [2] The Rule "does not require that all questions of law or fact raised in the litigation be common," ***369** 1 H. Newberg & A. Conte, Newberg on Class Actions § 3.10, pp. 3–48 to 3–49 (3d ed.1992); indeed, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement," Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L.Rev. 149, 176, n. 110 (2003). See Advisory Committee's 1937 Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 138 (citing with approval cases in which "there was only a question of law or fact common to" the class members).

A "question" is ordinarily understood to be "[a] subject or point open to controversy." American Heritage Dictionary 1483 (3d ed.1992). See also Black's Law Dictionary 1366 (9th ed.2009) (defining "question of fact" as "[a] disputed issue to be resolved ... [at] trial" and "question of law" as "[a]n issue to be decided by the judge"). Thus, a "question" "common to the class" must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims. [3]

B

The District Court, recognizing that "one significant issue common to the class may be sufficient to warrant certification," 222 F.R.D. 137, 145 (N.D.Cal.2004), found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality. See *Califano v. Yamasaki,* 442 U.S. 682, 703, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) ("[M]ost issues arising under Rule 23 ... [are] committed in the first instance to the discretion of the district court.").

***370** The District Court certified a class of "[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998." 222 F.R.D., at 141–143 (internal quotation marks omitted). The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of

the class, allegations that Wal–Mart discriminates on the basis of gender in pay and promotions. **2563 They allege that the company "[r]eli[es] on gender stereotypes in making employment decisions such as ... promotion[s] [and] pay." App. 55a. Wal–Mart permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of "a nearly all male managerial workforce" using "arbitrary and subjective criteria." *Ibid.* Further alleged barriers to the advancement of female employees include the company's requirement, "as a condition of promotion to management jobs, that employees be willing to relocate." *Id.*, at 56a. Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men. See Dept. of Labor, Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital 151 (1995).

Women fill 70 percent of the hourly jobs in the retailer's stores but make up only "33 percent of management employees." 222 F.R.D., at 146. "[T]he higher one looks in the organization the lower the percentage of women." *Id.*, at 155. The plaintiffs' "largely uncontested descriptive statistics" also show that women working in the company's stores "are paid less than men in every region" and "that the salary gap widens over time even for men and women hired into the same jobs at the same time." *Ibid.*; cf. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007) (GINSBURG, J., dissenting).

The District Court identified "systems for ... promoting in-store employees" that were "sufficiently similar across regions and stores" to conclude that "the manner in which *371 these systems affect the class raises issues that are common to all class members." 222 F.R.D., at 149. The selection of employees for promotion to in-store management "is fairly characterized as a 'tap on the shoulder' process," in which managers have discretion about whose shoulders to tap. *Id.*, at 148. Vacancies are not regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions. *Ibid.*

Wal–Mart's compensation policies also operate uniformly across stores, the District Court found. The retailer leaves open a $2 band for every position's hourly pay rate. Wal–Mart provides no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors. See *id.*, at 146–147.

Wal–Mart's supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal–Mart used to maintain a "carefully constructed ... corporate culture," such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores "on a close and constant basis," and "Wal–Mart TV," "broadcas[t] ... into all stores." *Id.*, at 151–153 (internal quotation marks omitted).

The plaintiffs' evidence, including class members' tales of their own experiences, [4] suggests that gender bias suffused Wal–Mart's company culture. Among illustrations, **2564 senior management often refer to female associates as "little Janie *372 Qs." Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 13 (internal quotation marks omitted). One manager told an employee that "[m]en are here to make a career and women aren't." 222 F.R.D., at 166 (internal quotation marks omitted). A committee of female Wal–Mart executives concluded that " [s]tereotypes limit the opportunities offered to women." Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, at 16 (internal quotation marks omitted).

Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal–Mart "can be explained only by gender discrimination and not by ... neutral variables." 222 F.R.D., at 155. Using regression analyses, their expert, Richard Drogin, controlled for factors including, *inter alia,* job performance, length of time with the company, and the store where an employee worked. *Id.*, at 159. [5] The results, the District Court found, were sufficient to raise an "inference of discrimination." *Id.*, at 155–160.

C

The District Court's identification of a common question, whether Wal–Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The

practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases ***373** of which they are unaware. [6] The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

The plaintiffs' allegations resemble those in one of the prototypical cases in this area, *Leisner v. New York Tel. Co.,* 358 F.Supp. 359, 364–365 (S.D.N.Y.1973). In deciding on promotions, supervisors in that case were to start with objective measures; but ultimately, they were to "look at the individual as a total individual." *Id.*, at 365 (internal quotation marks omitted). The final question they were to ask and answer: "Is this person going to be successful in our business?" *Ibid.* (internal quotation marks omitted). It is hardly surprising that for many managers, the ideal candidate was someone with characteristics similar to their own.

We have held that "discretionary employment practices" can give rise to Title ****2565** VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. See *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 988, 991, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). But see *ante,* at 2555 ("[P]roving that [a] discretionary system has produced a ... disparity *is not enough*."). In *Watson,* as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the "discretionary promotion system" ***374** caused a discriminatory effect based on race. 487 U.S., at 984, 108 S.Ct. 2777 (internal quotation marks omitted). Four different supervisors had declined, on separate occasions, to promote the employee. *Id.,* at 982, 108 S.Ct. 2777. Their reasons were subjective and unknown. The employer, we noted "had not developed precise and formal criteria for evaluating candidates"; "[i]t relied instead on the subjective judgment of supervisors." *Ibid.*

Aware of "the problem of subconscious stereotypes and prejudices," we held that the employer's "undisciplined system of subjective decisionmaking" was an "employment practic[e]" that "may be analyzed under the disparate impact approach." *Id.*, at 990–991, 108 S.Ct. 2777. See also *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 657, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (recognizing "the use of 'subjective decision making' " as an "employment practic[e]" subject to disparate-impact attack).

The plaintiffs' allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal–Mart's stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further.

II

A

The Court gives no credence to the key dispute common to the class: whether Wal–Mart's discretionary pay and promotion policies are discriminatory. See *ante,* at 2551 ("Reciting" questions like "Is [giving managers discretion over pay] an unlawful employment practice?" "is not sufficient to obtain class certification."). "What matters," the Court asserts, "is not the raising of common 'questions,' " but whether there are "[d]issimilarities within the proposed ***375** class" that "have the potential to impede the generation of common answers." *Ante,* at 2551 (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 132 (2009); some internal quotation marks omitted).

The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer "easily satisfied," 5 J. Moore et al., Moore's Federal Practice § 23.23[2], p. 23–72 (3d ed.2011). [7] Rule 23(b)(3) certification ****2566** requires, in addition to the four 23(a) findings, determinations that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for ... adjudicating the controversy." [8]

***376** The Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether

common questions "predominate" over individual issues. And by asking whether the individual differences "impede" common adjudication, *ante,* at 2551 – 2552 (internal quotation marks omitted), the Court duplicates 23(b)(3)'s question whether "a class action is superior" to other modes of adjudication. Indeed, Professor Nagareda, whose "dissimilarities" inquiry the Court endorses, developed his position in the context of Rule 23(b)(3). See 84 N.Y.U.L.Rev., at 131 (Rule 23(b)(3) requires "some decisive degree of similarity across the proposed class" because it "speaks of common 'questions' that 'predominate' over individual ones"). [9] "The Rule 23(b)(3) predominance inquiry" is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). If courts must conduct a "dissimilarities" analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3).

Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's "dissimilarities" position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met. See *Amchem Products,* 521 U.S., at 623, n. 19, 117 S.Ct. 2231 (Rule 23(b)(1)(B) "does not have a predominance requirement"); *Yamasaki,* 442 U.S., at 701, 99 S.Ct. 2545 (Rule 23(b)(2) action in which the Court noted that "[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal ***377** issue"). For example, in *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a Rule 23(b)(2) class of African–American truckdrivers complained that the defendant had ****2567** discriminatorily refused to hire black applicants. We recognized that the "qualification[s] and performance" of individual class members might vary. *Id.*, at 772, 96 S.Ct. 1251 (internal quotation marks omitted). "Generalizations concerning such individually applicable evidence," we cautioned, "cannot serve as a justification for the denial of [injunctive] relief to the entire class." *Ibid.*

B

The "dissimilarities" approach leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them. Given the lack of standards for pay and promotions, the majority says, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Ante,* at 2554.

Wal–Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes. 487 U.S., at 990–991, 108 S.Ct. 2777; see *supra,* at 2564 – 2565. A finding that Wal–Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination. *Teamsters v. United States,* 431 U.S. 324, 359, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); see *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 415–423, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e–5(g)(2)(A) (barring backpay if a plaintiff "was refused ... advancement ... for any reason other than discrimination"), should not factor into the Rule 23(a)(2) determination.

* * *

***378** The Court errs in importing a "dissimilarities" notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join Part II of the Court's opinion.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The complaint included seven named plaintiffs, but only three remain part of the certified class as narrowed by the Court of Appeals.

2 Rule 23(b)(1) allows a class to be maintained where "prosecuting separate actions by or against individual class members would create a risk of" either "(A) inconsistent or varying adjudications," or "(B) adjudications ... that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impeded their ability to protect their interests." Rule 23(b)(3) states that a class may be maintained where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." The applicability of these provisions to the plaintiff class is not before us.

3 The District Court excluded backpay claims based on promotion opportunities that had not been publicly posted, for the reason that no applicant data could exist for such positions. 222 F.R.D. 137, 182 (N.D.Cal.2004). It also decided to afford class members notice of the action and the right to opt-out of the class with respect to respondents' punitive-damages claim. *Id.,* at 173.

4 To enable that result, the Court of Appeals trimmed the (b)(2) class in two ways: First, it remanded that part of the certification order which included respondents' punitive-damages claim in the (b)(2) class, so that the District Court might consider whether that might cause the monetary relief to predominate. 603 F.3d, at 621. Second, it accepted in part Wal–Mart's argument that since class members whom it no longer employed had no standing to seek injunctive or declaratory relief, as to them monetary claims must predominate. It excluded from the certified class "those putative class members who were no longer Wal–Mart employees *at the time Plaintiffs' complaint was filed,*" *id.,* at 623 (emphasis added).

5 We have previously stated in this context that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157–158, n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

6 A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), is sometimes mistakenly cited to the contrary: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." But in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rules 23(a) and (b) (he had already done that, see *id.,* at 165, 94 S.Ct. 2140), but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.

Perhaps the most common example of considering a merits question at the Rule 23 stage arises in class-action suits for securities fraud. Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members" would often be an insuperable barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation. But the problem dissipates if the plaintiffs can establish the applicability of the so-called "fraud on the market" presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements. To invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, *Erica P. John Fund, Inc. v. Halliburton Co.,* 563 U.S. ——, ——, 131 S.Ct. 2179, 2185, 180 L.Ed.2d 24, 2011 WL 2175208 (2011) (slip op., at 5), an issue they will surely have to prove *again* at trial in order to make out their case on the merits.

7 In a pattern-or-practice case, the plaintiff tries to "establish by a preponderance of the evidence that ... discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice." *Teamsters v. United States,* 431 U.S. 324, 358, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); see also *Franks v. Bowman Transp. Co.,* 424 U.S.

747, 772, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). If he succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify "an award of prospective relief," such as "an injunctive order against the continuation of the discriminatory practice." *Teamsters,supra,* at 361, 97 S.Ct. 1843.

8 Bielby's conclusions in this case have elicited criticism from the very scholars on whose conclusions he relies for his social-framework analysis. See Monahan, Walker, & Mitchell, Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks," 94 Va. L.Rev. 1715, 1747 (2008) ("[Bielby's] research into conditions and behavior at Wal–Mart did not meet the standards expected of social scientific research into stereotyping and discrimination"); *id.,* at 1745, 1747 ("[A] social framework necessarily contains only general statements about reliable patterns of relations among variables ... and goes no further .... Dr. Bielby claimed to present a social framework, but he testified about social facts specific to Wal–Mart"); *id.,* at 1747–1748 ("Dr. Bielby's report provides no verifiable method for measuring and testing any of the variables that were crucial to his conclusions and reflects nothing more than Dr. Bielby's 'expert judgment' about how general stereotyping research applied to all managers across all of Wal–Mart's stores nationwide for the multi-year class period").

9 The dissent says that we have adopted "a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class." *Post,* at 2563, n. 4 (GINSBURG, J., concurring in part and dissenting in part). That is not quite accurate. A discrimination claimant is free to supply as few anecdotes as he wishes. But when the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all.

10 For this reason, there is no force to the dissent's attempt to distinguish *Falcon* on the ground that in that case there were " '*no* common questions of law or fact' between the claims of the lead plaintiff and the applicant class" *post,* at 2565 – 2566, n. 7 (quoting *Falcon,* 457 U.S., at 162, 102 S.Ct. 2364 (BURGER, C.J., concurring in part and dissenting in part)). Here also there is nothing to unite all of the plaintiffs' claims, since (contrary to the dissent's contention, *post,* at 2565 – 2566, n. 7), the same employment practices do not "touch and concern all members of the class."

11 Rule 23(b)(1) applies where separate actions by or against individual class members would create a risk of "establish[ing] incompatible standards of conduct for the party opposing the class," Rule 23(b)(1)(A), such as "where the party is obliged by law to treat the members of the class alike," *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), or where individual adjudications "as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B), such as in " 'limited fund' cases, ... in which numerous persons make claims against a fund insufficient to satisfy all claims," *Amchem, supra,* at 614, 117 S.Ct. 2231.

1 The plaintiffs requested Rule 23(b)(3) certification as an alternative, should their request for (b)(2) certification fail. Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 47.

2 Rule 23(a) lists three other threshold requirements for class-action certification: "(1) the class is so numerous that joinder of all members is impracticable"; "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." The numerosity requirement is clearly met and Wal–Mart does not contend otherwise. As the Court does not reach the typicality and adequacy requirements, *ante,* at 2551, n. 5, I will not discuss them either, but will simply record my agreement with the District Court's resolution of those issues.

3 The Court suggests Rule 23(a)(2) must mean more than it says. See *ante,* at 2550 – 2552. If the word "questions" were taken literally, the majority asserts, plaintiffs could pass the Rule 23(a)(2) bar by "[r]eciting ... questions" like "Do all of us plaintiffs indeed work for Wal–Mart?" *Ante,* at 2551. Sensibly read, however, the word "questions" means disputed issues, not any utterance crafted in the grammatical form of a question.

4 The majority purports to derive from *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class. *Ante,* at 17–18. *Teamsters,* the Court acknowledges, see *ante,* at 2556, n. 9, instructs that statistical evidence alone may suffice, 431 U.S., at 339, 97 S.Ct. 1843; that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account.

5 The Court asserts that Drogin showed only average differences at the "regional and national level" between male and female employees. *Ante,* at 2555 (internal quotation marks omitted). In fact, his regression analyses showed there were disparities *within* stores. The majority's contention to the contrary reflects only an arcane disagreement about statistical method—which the District Court resolved in the plaintiffs' favor. 222 F.R.D. 137, 157 (N.D.Cal.2004). Appellate review is no occasion to disturb a trial court's handling of factual disputes of this order.

6 An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. Goldin and Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on

Female Musicians, 90 Am. Econ. Rev. 715, 715–716 (2000). In the 1970's orchestras began hiring musicians through auditions open to all comers. *Id*., at 716. Reviewers were to judge applicants solely on their musical abilities, yet subconscious bias led some reviewers to disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens. *Id*., at 738.

7 The Court places considerable weight on *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). *Ante,* at 2553. That case has little relevance to the question before the Court today. The lead plaintiff in *Falcon* alleged discrimination evidenced by the company's failure to promote him and other Mexican–American employees and failure to hire Mexican–American applicants. There were "*no* common questions of law or fact" between the claims of the lead plaintiff and the applicant class. 457 U.S., at 162, 102 S.Ct. 2364 (Burger, C. J., concurring in part and dissenting in part) (emphasis added). The plaintiff-employee alleged that the defendant-employer had discriminated against him intentionally. The applicant class claims, by contrast, were "advanced under the 'adverse impact' theory," *ibid*., appropriate for facially neutral practices. "[T]he only commonality [wa]s that respondent is a Mexican–American and he seeks to represent a class of Mexican–Americans." *Ibid*. Here the same practices touch and concern all members of the class.

8 "A class action may be maintained if Rule 23(a) is satisfied and if:

"(1) prosecuting separate actions by or against individual class members would create a risk of ... inconsistent or varying adjudications ... [or] adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members ...;

"(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief ... is appropriate respecting the class as a whole; or

"(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. Rule Civ. Proc. 23(b) (paragraph breaks added).

9 Cf. *supra,* at 2545 (Rule 23(a) commonality prerequisite satisfied by "[e]ven a single question ... common to the members of the class" (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L.Rev. 149, 176, n. 110 (2003).

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692 F.3d 1212
United States Court of Appeals,
Eleventh Circuit.

Mahala AULT, on her own behalf and on behalf of all others similarly situated, Stacie Rhea, on her own behalf and on behalf of all others similarly situated, Dan Wallace, on his own behalf and on behalf of all others similarly situated, Plaintiffs–Appellees, Jerry Miller, Disability Rights Advocates for Technology, Daniel M. Gade, Alan A. Maccini, James F. Overby, Intervenor Plaintiffs–Appellants, Jerry Kerr, Interested Party–Appellant,
v.
WALT DISNEY WORLD CO., Defendant–Appellee.

No. 11–12013.
|
Aug. 30, 2012.

Synopsis
Background: Plaintiffs with mobility disabilities brought class action against resort operator, alleging that resorts' ban on use of two-wheeled vehicles violated the Americans with Disabilities Act. The United States District Court for the Middle District of Florida, No. 6:07–cv–01785–GAP–KRS, Gregory A. Presnell, J., 2011 WL 1460181, certified a settlement-only class and approved class action settlement, and intervenor plaintiffs appealed.

Holdings: The Court of Appeals, Dubina, Chief Judge, held that:

district court did not abuse its discretion in determining that typicality requirement for class certification was satisfied, and

district court did not abuse its discretion in approving class settlement.

Affirmed.

Attorneys and Law Firms

***1214** John A. Baker, J. Phillip Krajewski, Baker, Baker & Krajewski, LLC, Springfield, IL, Bernard H. Dempsey, Jr., Dempsey & Associates, PA, Winter Park, FL, Jason M. Medley, O'Donnell, Ferebee, Medley & Keiser, PC, Houston, TX, for Plaintiffs–Appellees.

Aaron Carter Bates, The Maher Law Firm, PA, Winter Park, FL, David Ferleger, Law Office of David Ferleger, Jenkintown, PA, for Intervenors–Appellants.

David G. Geffen, David Geffen Law Firm, Santa Monica, CA, for Interested Party–Appellant.

Kerry Alan Scanlon, Jeremy White, Kaye Scholer, LLP, Washington, DC, Manuel Kushner, Kaye Scholer, LLP, West Palm Beach, FL, for Defendant–Appellee.

Jennifer Levin Eichhorn, Gregory B. Friel, U.S. Atty., Mark L. Gross, U.S. Dept. of Justice, Civ. Rights Div., App. Sec., Washington, DC, for United States of America, Amicus Curiae.

Appeal from the United States District Court for the Middle District of Florida.

Before DUBINA, Chief Judge, and JORDAN and ALARCON, * Circuit Judges.

Opinion

DUBINA, Chief Judge:

This appeal is brought by objectors to the district court's approval of a class action settlement. The underlying case involves allegations that Appellee Walt Disney World Company ("Disney") is violating Title III of the Americans with Disabilities Act, 42 U.S.C. § 12182, *et seq.* ("Title III"), by implementing a policy that bans the use of two-wheeled vehicles, including Segways®, by customers within its parks and hotels, without exception. The district court certified a settlement-only class and found that the settlement reached between the class representatives and Disney was fair. Objectors appeal both of these orders, arguing that (1) class certification is inappropriate under Federal Rule of Civil Procedure 23; and (2) the district court abused its discretion by approving the settlement agreement after an extensive fairness hearing. We conclude that there was no abuse of discretion and affirm the district court's orders.

I.

Disney has a policy that bans the use of all two-wheeled vehicles in all of the parks and hotels within its Walt Disney World Resort and Disneyland Resort (collectively "Disney Resorts"). The ban effectively prohibits the use of Segways® [1] and has no exceptions, even for those with disabilities. On November 9, 2007, Mahala Ault, Stacie Rhea, and Dan Wallace (collectively "class representatives") brought a class action suit against Disney on behalf of past and future Disney customers who have a mobility disability and rely upon a Segway® for mobility assistance. The class action suit alleges that Disney's policy violates Title III and seeks an injunction directing ***1215** Disney to permit the use of Segways® within Disney Resorts.

A year later, the parties entered into a class-wide settlement agreement. According to the terms of the settlement, Disney will maintain its ban on Segways® and, in return, will develop a four-wheeled, electric stand-up vehicle ("the ESV") for those for whom a stand-up mobility device is a necessity and who are unable to utilize a mobility device that requires sitting, such as an electronic wheelchair or motorized scooter. The settlement agreement also includes a nationwide waiver of declaratory or injunctive claims relating to Disney's policy. Upon review of the settlement, the district court granted conditional class certification and preliminarily approved the settlement.

Following the district court's approval of the settlement and dispersal of the required class notice to individual class members and to members of organizations that support people with mobility disabilities, several parties filed objections to the settlement. The objectors include Appellant Disability Rights Advocates for Technology ("DRAFT"), the United States Department of Justice ("DOJ"), which filed an amicus curiae brief in this appeal, 23 State Attorneys General, and others (collectively "objectors").

After receipt of the objections, the district court conducted a fairness hearing to hear the objectors' challenges. At the hearing, Disney's Chief Safety Officer, Greg Hale, presented evidence that allowing customers to bring Segways® into the Disney Resorts would pose a significant safety risk to other guests. Disney also presented evidence that the ESV was a beneficial substitute. In rebuttal, the objectors presented testimony of people with severe mobility disabilities—from amputations to neurological disorders—for whom, objectors insist, using a Segway® is necessary and operating the ESV is impossible.

After conducting the fairness hearing, the district court vacated its prior order conditionally certifying the class and dismissed the case for lack of prudential standing, finding that because all of the named plaintiffs and objectors were able to use wheelchairs or motorized scooters, none had been denied access to Disney's parks. Class representatives appealed to a panel of this court, which held that the class representatives' interests "are arguably within the zone of interest protected by [Title III]" and remanded the case to the district court for "a determination as to whether the claims of the named plaintiffs are typical of the claims of the class and whether they are adequate representatives of the class." *Ault v. Walt Disney World Co.*, 405 Fed.Appx. 401, 401 (11th Cir.2010) (per curiam).

Between the district court's dismissal for lack of prudential standing and this court's decision, the DOJ issued a new Title III regulation, 28 C.F.R. § 36.311. This regulation requires a public accommodation, such as Disney Resorts, to "make reasonable modifications in its policies ... to permit the use of other power-driven mobility devices" unless Disney can demonstrate that the device "cannot be operated in accordance with legitimate safety requirements." *Id.* § 36.311(b)(1).

After this court's remand, the district court granted final class certification based upon its prior findings, approved the settlement as fair and reasonable based upon the factors set forth in *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir.1984), and overruled all objections. In determining that the class representatives were unlikely to prevail at trial, one of the *Bennett* factors, the district court made two findings. First, the district court afforded the new DOJ regulation no deference under ***1216** *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984), because the court found that "the revised regulations conflict with the plain language of Title III." [R. 252 at 7.] Second, the district court found that even if the new DOJ regulation is afforded deference, class representatives

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are still likely to fail in their claim because of Disney's legitimate safety concerns. The objectors then perfected this appeal.

II.

The district court's certification of a class pursuant to Rule 23 is reviewed for abuse of discretion. *Heffner v. Blue Cross & Blue Shield of Ala., Inc.,* 443 F.3d 1330, 1337 (11th Cir.2006). We also review the district court's approval of a class action settlement agreement for abuse of discretion. *Faught v. Am. Home Shield Corp.,* 668 F.3d 1233, 1239 (11th Cir.2011). "The proponents of class actions settlements bear the burden of ... demonstrating that the settlement distribution is fair, reasonable, and adequate." *Id.* (internal quotation marks omitted).

III.

Objectors first argue that the class does not satisfy the prerequisites to class certification set forth in Rule 23(a), insisting that "the claims or defenses of the representative parties are [not] typical of the claims or defenses of the class[.]" FED.R.CIV.P. 23(a)(3).[2] Objectors argue that the class representatives' claims lack the required typicality because the class representatives do not rely upon their Segways® for mobility to the same extent as other class members. For example, Wallace only uses his Segway® once or twice a week, while Ault uses a cane or scooter for help with mobility and infrequently uses her Segway®. In contrast, according to the objectors, a Segway® for several class members is an absolute necessity for mobility, which makes the claims of these class members sufficiently different from those of the class representatives to defeat class certification.

In the first order granting preliminary class certification, the district court found that the claims of the class representatives are typical because all class members assert that Disney's Segway® ban violates Title III and precludes them from using and enjoying Disney's parks to the fullest. Following this court's remand, the district court found no reason to disturb this previous finding, and we agree. Class members' claims all stem from the same policy prohibiting the use of Segways® within Disney Resorts, and all claims require analysis of Title III to determine the outcome. While each class member may have a stronger or weaker claim depending upon his or her degree of reliance, we conclude that this alone does not make class representatives' claims atypical of the class as a whole. Class members' claims need not be identical to satisfy the typicality requirement; rather, there need only exist "a sufficient nexus ... between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Prado–Steiman v. Bush,* 221 F.3d 1266, 1278–79 (11th Cir.2000). This nexus exists "if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1337 (11th Cir.1984). All claims in this class action arise from the same policy—Disney's ban on Segways®—and are ***1217** all based upon liability pursuant to Title III. Thus, we conclude that the district court clearly did not abuse its discretion by finding that the claims of the class representatives and class members are typical and warrant class certification.

IV.

Class actions can only be settled with the approval of the court. FED.R.CIV.P. 23(e). In approving the settlement, the district court must conduct "a hearing and ... [find] that it is fair, reasonable, and adequate." *Id.* 23(e)(2). The district court must also find that the settlement "is not the product of collusion between the parties." *Bennett,* 737 F.2d at 986 (internal quotation marks omitted). When the district court initially approved the settlement in the present case, the district court considered the six factors espoused by this court in *Bennett* and found that the class was unlikely to succeed at trial. *See id.* Based upon this finding, the district court looked at the other *Bennett* factors and determined that the settlement agreement afforded at least some relief that was fair and reasonable. *See id.* The district court's initial determination regarding the class's likelihood of success at trial occurred before the DOJ issued the new regulation that requires a public accommodation to modify its policies to permit mobility assistance devices such as Segways® unless the public accommodation determines that such devices cannot be operated safely. 28 C.F.R. §§ 36.104, 36.311(b)(1). Before the district court and this court, in its amicus brief, the DOJ argues that the regulation alters the landscape of Title III jurisprudence in such a way as to make it likely the class would succeed at trial if allowed to

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proceed. However, after this court's remand, the district court disagreed with the DOJ and found that even if the new DOJ regulation is afforded deference,[3] Disney's legitimate safety concerns present a significant hurdle to the class's ability to succeed at trial.

The first *Bennett* factor is "the likelihood of success at trial[.]" 737 F.2d at 986. During an extensive fairness hearing before the district court, Hale testified regarding the safety risks posed by the operation of Segways® in Disney Resorts. The very factors Hale considered before deciding that Segways® are too dangerous for operation in Disney Resorts are the very factors facilities are required to consider under the new regulation. *See* 28 C.F.R. § 36.311(b)(2)(i)-(v) (requiring a public accommodation to consider the attributes of the device, the volume of foot traffic in the facility, the design and operational characteristics of the facility, whether safety restrictions on the use of the device can mitigate its danger, and whether operation of the device will harm the environment in determining if a specific device is allowable in the facility). The district court found that based upon this testimony Disney is likely to succeed at trial in showing that it has fulfilled its obligations under Title III.[4] Objectors ***1218** and the DOJ would like us to hold that this finding constitutes an abuse of discretion. We decline to do so. The issue before us is not who prevails over whom, but rather, the question is whether the district court abused its discretion in its finding regarding who was *most likely* to prevail at trial. We conclude from the record that there is no abuse of discretion.

The second *Bennett* factor that must be considered is "the range of possible recovery[.]" 737 F.2d at 986. Class representatives in this class only seek injunctive or declaratory relief; therefore, the class receives either nothing or an injunction requiring Disney to permit Segways® at Disney Resorts. Because the district court found that class representatives were unlikely to prevail at trial, the district court found that Disney's agreement to produce and make available the ESVs is a beneficial remedy for the class. This finding does not constitute an abuse of discretion. If Disney prevails at trial, the class will be left with no remedy at all. This settlement precludes such a Draconian result and ensures that a stand-up mobility device is available at Disney Resorts if it conforms to Disney's unique safety requirements. Therefore, we conclude that the district court's finding that the settlement results in a "fair, adequate, and reasonable" remedy within the range of possible recoveries is also not an abuse of discretion. *See Bennett,* 737 F.2d at 986.[5]

V.

After a careful review of the record and with the benefit of oral argument, we conclude that the district court did not abuse its discretion in certifying the class and in approving the settlement. Accordingly, we affirm its orders.

AFFIRMED.

All Citations

692 F.3d 1212, 83 Fed.R.Serv.3d 373, 26 A.D. Cases 1435, 45 NDLR P 238, 23 Fla. L. Weekly Fed. C 1489

Footnotes

* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

1 Because the only two-wheeled vehicle mentioned in this case is the Segway®, we refer to Disney's policy as a ban on Segways®.

2 Objectors also argue that class representatives are not adequate representatives of the class, FED.R.CIV.P. 23(a)(4), and that the district court improperly certified the class pursuant to Rule 23(b)(2). We have considered these arguments and find them unpersuasive. Therefore, we summarily reject them.

3 We acknowledge that the district court also found that the DOJ regulation should be given no deference, finding it to be contrary to Title III. *See Chevron,* 467 U.S. at 843–44, 104 S.Ct. at 2782. However, because we affirm the case on other grounds, we defer answering this question and leave it for another day.

4 Following oral argument, this court was made aware of the recent decision of *Baughman v. Walt Disney World Co.,* 685 F.3d 1131 (9th Cir.2012), where the Ninth Circuit ruled that Disney was not entitled to summary judgment in a case filed by an individual challenging its Segway® ban because genuine issues of material fact existed. The Ninth Circuit did *not* hold that Title III requires Disney to permit Segways® in Disney Resorts and, in fact, explicitly stated that Segways® can

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be excluded if Disney determines that the safety factors listed in 28 C.F.R. § 36.311(b)(2) warrant exclusion. *Baughman,* 685 F.3d at 1137. In the present case, the district court found that if this action went to trial, Disney was likely to prevail because of its reliance upon those exact safety factors. Therefore, *Baughman* is factually and procedurally different from the case at bar and does not transform the district court's well-reasoned analysis into an abuse of discretion.

5 We also summarily reject objectors' arguments regarding the nationwide waiver of claims included in the settlement agreement.

End of Document

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5

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta In re Placid Oil Co., 5th Cir.(Tex.), May 27, 2014

117 S.Ct. 2231
Supreme Court of the United States

AMCHEM PRODUCTS, INC., et al., Petitioners,
v.
George WINDSOR et al.

No. 96–270.
|
Argued Feb. 18, 1997.
|
Decided June 25, 1997.

Synopsis

Asbestos products manufacturers who were members of Center for Claims Resolution (CCR), and whose stipulation of proposed global settlement of claims by persons exposed to asbestos had been court-approved, moved to enjoin actions against them by individuals who failed to timely opt out of class. The United States District Court for the Eastern District of Pennsylvania, Lowell A. Reed, Jr., J., 878 F.Supp. 716, granted injunction under All-Writs Act and Anti-Injunction Act. Parties objecting to class certification appealed, and the Court of Appeals for the Third Circuit, 83 F.3d 610, vacated and remanded with directions to decertify class. Certiorari was granted, and the Supreme Court, Justice Ginsburg, held that: (1) district court faced with request for settlement-only class certification need not inquire whether case would present intractable problems of trial management, but other requirements for certification must still be satisfied, abrogating *In re Asbestos Litigation*, 90 F.3d 963, *White v. National Football League*, 41 F.3d 402, *In re A.H. Robins Co.*, 880 F.2d 709, and *Malchman v. Davis*, 761 F.2d 893, and (2) requirements for class certification of commonality of issues of fact and law and adequacy of representation were not met.

Affirmed.

Justice Breyer filed an opinion concurring in part and dissenting in part in which Justice Stevens joined.

Justice O'Connor took no part in the consideration or decision of the case.

****2234** *Syllabus* [*]

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. Never intending to litigate, the settling parties—petitioners and the representatives of the plaintiff class described below—presented to the District Court a class-action complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification. The complaint identifies nine lead plaintiffs, designating them and members of their families as representatives of a class comprised of all persons who had not previously sued any of the asbestos-manufacturing companies that are petitioners in this suit, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos attributable to a petitioner, or (2) whose spouse or family member had been so exposed. Potentially hundreds of thousands, perhaps millions, of individuals may fit this description. All named plaintiffs alleged exposure; more than half of them alleged already manifested physical injuries; the others, so-called "exposure-only" claimants, alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the entire class.

The exhaustive agreement, *inter alia,* (1) proposed to settle, and to preclude nearly all class members from litigating, claims not previously filed against petitioners; (2) detailed an administrative mechanism and a schedule of payments to compensate class members who meet defined exposure and medical criteria; (3) described four categories of compensable cancers and nonmalignant conditions, and specified the range of damages to be paid qualifying claimants for each; (4) did not adjust payments for inflation; (5) capped the number of claims payable annually for each disease; and (6) denied compensation for family members' loss-of-consortium claims, for exposure-only plaintiffs' claims for emotional distress, enhanced risk of disease, and medical monitoring, and for "pleural" claims involving lung plaques but no physical impairment, even if otherwise applicable state law recognized such claims.

***592** The District Court approved the settling parties' plan for giving notice to the class and certified the proposed class for settlement only. The court found, over numerous challenges raised by the objectors, that the settlement was fair, the court's jurisdiction properly invoked, and representation and notice adequate. Pending the issuance of a final order, the District Court enjoined class members from separately pursuing asbestos suits in any federal or state court. The Third Circuit ultimately vacated the District Court's orders. Although the objectors maintained that the case was not justiciable and that the exposure-only claimants lacked standing to sue, the Court of Appeals declined to reach these issues, reasoning that they would not exist but for the class certification. The court acknowledged that a class action may be certified for settlement only, but held that the certification requirements of Rule 23 must be met as if the case were going to be litigated, without taking the settlement into account. The court nevertheless homed in on the settlement's terms in examining aspects of the case under Rule 23 criteria. The Court of Appeals explained that certification was inappropriate because the class failed to satisfy, among other provisions, Rule 23(b)(3)'s requirement that questions common to the class "predominate over" other questions, and Rule 23(a)(4)'s adequacy of representation requirement. The court therefore ordered the class decertified.

Held:

1. The class certification issues are dispositive here in that their resolution is logically antecedent to the existence of any Article III issues. This Court therefore declines to resolve objectors' assertions that no justiciable case or controversy is presented and that the exposure-only claimants lack standing ****2235** to sue. Cf. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 66–67, 117 S.Ct. 1055, 1068, 137 L.Ed.2d 170. The Court follows this path mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act's instruction that procedural rules not abridge, enlarge, or modify any substantive right. P. 2244.

2. The sprawling class the District Court certified does not satisfy Rule 23's requirements. Pp. 2245–2252.

(a) Rule 23 gained its current shape in a 1966 revision. Its subdivisions (a) and (b) enumerate criteria that must be met for a class to be certified. Rule 23(b)(3) was the most adventuresome innovation of the 1966 Amendments, permitting judgments for money that would bind all class members save those who opt out. To gain certification under Rule 23(b)(3), a class must satisfy the requirements of Rule 23(a), among them, that named class representatives will fairly and adequately protect class interests; the class must also meet the Rule 23(b)(3) criteria ***593** that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other available methods for the fair and efficient adjudication of the controversy." To alert Rule 23(b)(3) class members to their right to "opt out," Rule 23 requires "the best notice practicable under the circumstances." Rule 23(c)(2). Finally, Rule 23(e) specifies that a class action cannot be settled without the court's approval, and that notice of the proposed compromise must be given to all class members in such manner as the court directs. Pp. 2245–2247.

(b) Because settlement is relevant to the propriety of class certification, the Third Circuit's statement that Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement" bears modification. But the Third Circuit did not, in fact, ignore the settlement. The court homed in on settlement terms in explaining why it found absentees' interests inadequately represented. The Third Circuit's inspection of the settlement agreement in that regard was altogether proper. Whether trial would present intractable management problems, see Rule 23(b)(3)(D), is not a consideration when settlement-only certification is requested, for the proposal is that there be no trial. But other specifications of the Rule designed to protect absentee class members by blocking unwarranted or overbroad class definitions are of vital importance in the settlement context, for the court in such a case will lack the opportunity to adjust the class as litigation unfolds. See Rule 23(c) and (d). And, of overriding importance, courts must be mindful that they are bound to enforce the Rule as now composed, for Federal Rules may be amended only through the extensive deliberative process Congress prescribed. Rule 23(e)'s settlement prescription was designed to function as an additional requirement, not a superseding direction, to the class-qualifying criteria of Rule 23(a) and (b). Cf. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 176–177, 94 S.Ct. 2140, 2151–2152, 40 L.Ed.2d 732. The dominant concern of Rule 23(a) and (b)—that a proposed class have sufficient unity so that absentees can fairly

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be bound by class representatives' decisions—persists when settlement, rather than trial, is proposed. Those subdivisions' safeguards provide practical checks in the settlement context. First, their standards serve to inhibit class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness. Second, if a Rule 23(e) fairness inquiry controlled certification, eclipsing Rule 23(a) and (b), and permitting certification despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation. Federal courts, in any case, lack authority to substitute ***594** for Rule 23's certification criteria a standard never adopted by the rulemakers—that if a settlement is "fair," then certification is proper. Pp. 2247–2249.

(c) Rule 23(b)(3)'s predominance requirement is not met by the factors relied on by the District Court and the settling parties: class members' shared experience of asbestos exposure; their common interest in ****2236** receiving prompt and fair compensation, while minimizing the risks and transaction costs inherent in the tort system's asbestos litigation process; and the settlement's fairness. The benefits asbestos-exposed persons might gain from a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement, and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. In contrast, the Rule 23(e) inquiry protects unnamed class members from unjust or unfair settlements agreed to by fainthearted or self-interested class representatives; the Rule 23(e) prescription was not designed to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy Rule 23(b)(3)'s predominance requirement, that vital prescription would be stripped of any meaning in the settlement context. The predominance criterion is not satisfied by class members' shared experience of asbestos exposure, given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions. No settlement class called to the Court's attention is as sprawling as the one certified here. Although mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement, the Advisory Committee for the 1966 Rule 23 revision advised that such cases are ordinarily not appropriate for class treatment, and warned district courts to exercise caution when individual stakes are high and disparities among class members great. The certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design. Pp. 2249–2250.

(d) Nor can the class approved by the District Court satisfy Rule 23(a)(4)' s adequate representation inquiry. That inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. See *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157–158, n. 13, 102 S.Ct. 2364, 2370–2371, n. 13, 72 L.Ed.2d 740. Representatives must be part of the class and possess the same interest and suffer the same injury as the class ***595** members. *E.g., East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 1896–1897, 52 L.Ed.2d 453. In this case, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. *General Telephone Co. of Northwest v. EEOC,* 446 U.S. 318, 331, 100 S.Ct. 1698, 1706–1707, 64 L.Ed.2d 319. The disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category, are not made insignificant by the District Court's finding that petitioners' assets suffice to pay settled claims. Although this is not a Rule 23(b)(1)(B) "limited fund" case, the settlement's terms —*e.g.,* no inflation adjustments, only a few claimants per year permitted to opt out at the back end, and loss-of-consortium claims extinguished—reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. Thus, the settling parties achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. The Third Circuit found no assurance here that the named parties operated

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under a proper understanding of their representational responsibilities. That assessment is on the mark. Pp. 2250–2251.

(e) In light of the conclusions that the class does not satisfy the requirements of common issue predominance and adequacy of representation, this Court need not rule, definitively, on the adequacy of the notice given here. The Court recognizes, however, the gravity of the question whether class-action ****2237** notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous as the class certified by the District Court. P. 2252.

(f) The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load the settling parties and the District Court heaped upon it. P. 2252.

83 F.3d 610, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which ***596** STEVENS, J., joined, *post*, p. 2252. O'CONNOR, J., took no part in the consideration or decision of the case.

Attorneys and Law Firms

Stephen M. Shapiro, for petitioners.

Laurence H. Tribe, Cambridge, MA, for respondents.

Opinion

***597** Justice GINSBURG delivered the opinion of the Court.

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies. Those companies, defendants in the lower courts, are petitioners here.

The United States District Court for the Eastern District of Pennsylvania certified the class for settlement only, finding that the proposed settlement was fair and that representation and notice had been adequate. That court enjoined class members from separately pursuing asbestos-related personal-injury suits in any court, federal or state, pending the issuance of a final order. The Court of Appeals for the Third Circuit vacated the District Court's orders, holding that the class certification failed to satisfy Rule 23's requirements in several critical respects. We affirm the Court of Appeals' judgment.

I

A

The settlement-class certification we confront evolved in response to an asbestos-litigation crisis. See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 618, and n. 2 (C.A.3 1996) (citing commentary). A United States Judicial Conference ***598** Ad Hoc Committee on Asbestos Litigation, appointed by THE CHIEF JUSTICE in September 1990, described facets of the problem in a 1991 report:

> "[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
>
> "The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated

over and over; transaction **2238 costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar.1991).

Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. See *id.,* at 3, 27–35; see also *id.,* at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. See Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991). To this date, no congressional response has emerged.

*599 In the face of legislative inaction, the federal courts —lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district, the United States District Court for the Eastern District of Pennsylvania; pursuant to the transfer order, the collected cases were consolidated for pretrial proceedings before Judge Weiner. See *In re Asbestos Products Liability Litigation (No. VI),* 771 F.Supp. 415, 422–424 (Jud.Pan.Mult.Lit. 1991).[1] The order aggregated pending cases only; no authority resides in the MDL Panel to license for consolidated proceedings claims not yet filed.

B

After the consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations. Ronald L. Motley and Gene Locks—later appointed, along with Motley's law partner Joseph F. Rice, to represent the plaintiff class in this action—cochaired the Plaintiffs' Steering Committee. Counsel for the Center for Claims Resolution (CCR), the consortium of *600 20 former asbestos manufacturers now before us as petitioners, participated in the Defendants' Steering Committee.[2] Although the MDL Panel order collected, transferred, and consolidated only cases already commenced in federal courts, settlement negotiations included efforts to find a "means of resolving ... future cases." Record, Doc. 3, p. 2 (Memorandum in Support of Joint Motion for Conditional Class Certification); see also *Georgine v. Amchem Products, Inc.,* 157 F.R.D. 246, 266 (E.D.Pa.1994) ("primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims," including claims that might be filed in the future).

In November 1991, the Defendants' Steering Committee made an offer designed to settle all pending and future asbestos cases by providing a fund for distribution by plaintiffs' **2239 counsel among asbestos-exposed individuals. The Plaintiffs' Steering Committee rejected this offer, and negotiations fell apart. CCR, however, continued to pursue "a workable administrative system for the handling of future claims." *Id.,* at 270.

To that end, CCR counsel approached the lawyers who had headed the Plaintiffs' Steering Committee in the unsuccessful negotiations, and a new round of negotiations began; that round yielded the mass settlement agreement now in controversy. At the time, the former heads of the Plaintiffs' Steering Committee represented thousands of plaintiffs with then-pending asbestos-related claims—claimants the parties *601 to this suit call "inventory" plaintiffs. CCR indicated in these discussions that it would resist settlement of inventory cases absent "some kind of protection for the future." *Id.,* at 294; see also *id.,* at 295 (CCR communicated to the inventory plaintiffs' attorneys that once the CCR defendants saw a rational way to deal with claims expected to be filed in the future, those defendants would be prepared to address the settlement of pending cases).

Settlement talks thus concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although

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those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. In one such agreement, CCR defendants promised to pay more than $200 million to gain release of the claims of numerous inventory plaintiffs. After settling the inventory claims, CCR, together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province—plaintiffs without already pending lawsuits. [3]

C

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling parties—CCR defendants and the representatives of the plaintiff class described below—presented to the District Court a complaint, an answer, a proposedsettlement ***602** agreement, and a joint motion for conditional class certification. [4]

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed. [5] Untold numbers of individuals ****2240** may fall within this description. All named plaintiffs alleged that they or a member of their family had been exposed to asbestos-containing products of ***603** CCR defendants. More than half of the named plaintiffs alleged that they or their family members had already suffered various physical injuries as a result of the exposure. The others alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.

The complaint invoked the District Court's diversity jurisdiction and asserted various state-law claims for relief, including (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. Each plaintiff requested unspecified damages in excess of $100,000. CCR defendants' answer denied the principal allegations of the complaint and asserted 11 affirmative defenses.

A stipulation of settlement accompanied the pleadings; it proposed to settle, and to preclude nearly all class members from litigating against CCR companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death. An exhaustive document exceeding 100 pages, the stipulation presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements. The stipulation describes four categories of compensable disease: mesothelioma; lung cancer; certain "other cancers" (colon-rectal, laryngeal, esophageal, and stomach cancer); and "non-malignant conditions" (asbestosis and bilateral pleural thickening). Persons with "exceptional" medical claims—claims that do not fall within the four described diagnostic categories—may in some instances qualify for compensation, but the settlement caps the number of "exceptional" claims CCR must cover.

For each qualifying disease category, the stipulation specifies the range of damages CCR will pay to qualifying claimants. ***604** Payments under the settlement are not adjustable for inflation. Mesothelioma claimants—the most highly compensated category—are scheduled to receive between $20,000 and $200,000. The stipulation provides that CCR is to propose the level of compensation within the prescribed ranges; it also establishes procedures to resolve disputes over medical diagnoses and levels of compensation.

Compensation above the fixed ranges may be obtained for "extraordinary" claims. But the settlement places both numerical caps and dollar limits on such claims. [6] The settlement also imposes "case flow maximums," which cap the number of claims payable for each disease in a given year.

Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims. Claims that garner no compensation under the settlement include claims by family members of asbestos-exposed individuals for loss of consortium, and claims by so-called "exposure-only" plaintiffs for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring. "Pleural" claims, which might be asserted by persons with asbestos-related plaques on their lungs but no accompanying physical impairment, are also excluded. Although not entitled to present compensation, exposure-only claimants and pleural claimants may qualify for benefits when and if they develop a compensable disease and meet the relevant exposure and medical criteria. Defendants forgo defenses **2241 to liability, including statute of limitations pleas.

Class members, in the main, are bound by the settlement in perpetuity, while CCR defendants may choose to withdraw *605 from the settlement after ten years. A small number of class members—only a few per year—may reject the settlement and pursue their claims in court. Those permitted to exercise this option, however, may not assert any punitive damages claim or any claim for increased risk of cancer. Aspects of the administration of the settlement are to be monitored by the AFL–CIO and class counsel. Class counsel are to receive attorneys' fees in an amount to be approved by the District Court.

D

On January 29, 1993, as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. The certified class included persons occupationally exposed to defendants' asbestos products, and members of their families, who had not filed suit as of January 15. Judge Weiner appointed Locks, Motley, and Rice as class counsel, noting that "[t]he Court may in the future appoint additional counsel if it is deemed necessary and advisable." Record, Doc. 11, p. 3 (Class Certification Order). At no stage of the proceedings, however, were additional counsel in fact appointed. Nor was the class ever divided into subclasses. In a separate order, Judge Weiner assigned to Judge Reed, also of the Eastern District of Pennsylvania, "the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class." See 157 F.R.D., at 258. Various class members raised objections to the settlement stipulation, and Judge Weiner granted the objectors full rights to participate in the subsequent proceedings. *Ibid.* [7]

*606 In preliminary rulings, Judge Reed held that the District Court had subject-matter jurisdiction, see *Carlough v. Amchem Products, Inc.*, 834 F.Supp. 1437, 1467–1468 (E.D.Pa.1993), and he approved the settling parties' elaborate plan for giving notice to the class, see *Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314, 336 (E.D.Pa.1993). The court-approved notice informed recipients that they could exclude themselves from the class, if they so chose, within a three-month opt-out period.

Objectors raised numerous challenges to the settlement. They urged that the settlement unfairly disadvantaged those without currently compensable conditions in that it failed to adjust for inflation or to account for changes, over time, in medical understanding. They maintained that compensation levels were intolerably low in comparison to awards available in tort litigation or payments received by the inventory plaintiffs. And they objected to the absence of any compensation for certain claims, for example, medical monitoring, compensable under the tort law of several States. Rejecting these and all other objections, Judge Reed concluded that the settlement terms were fair and had been negotiated without collusion. See 157 F.R.D., at 325, 331–332. He also found that adequate notice had been given to class members, see *id.*, at 332–334, and that final class certification under Rule 23(b)(3) was appropriate, see *id.*, at 315.

As to the specific prerequisites to certification, the District Court observed that the class satisfied Rule 23(a)(1)'s numerosity requirement, [8] see *ibid.*, a matter no one debates. The *607 Rule 23(a)(2) and (b)(3) requirements **2242 of commonality [9] and preponderance [10] were also satisfied, the District Court held, in that

> "[t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos

litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3)." *Id.,* at 316.

The District Court held next that the claims of the class representatives were "typical" of the class as a whole, a requirement of Rule 23(a)(3), [11] and that, as Rule 23(b)(3) demands, [12] the class settlement was "superior" to other methods of adjudication. See *ibid.*

Strenuous objections had been asserted regarding the adequacy of representation, a Rule 23(a)(4) requirement. [13] Objectors maintained that class counsel and class representatives had disqualifying conflicts of interests. In particular, objectors urged, claimants whose injuries had become manifest and claimants without manifest injuries should not have common counsel and should not be aggregated in a single ***608** class. Furthermore, objectors argued, lawyers representing inventory plaintiffs should not represent the newly formed class.

Satisfied that class counsel had ably negotiated the settlement in the best interests of all concerned, and that the named parties served as adequate representatives, the District Court rejected these objections. See *id.,* at 317–319, 326–332. Subclasses were unnecessary, the District Court held, bearing in mind the added cost and confusion they would entail and the ability of class members to exclude themselves from the class during the three-month opt-out period. See *id.,* at 318–319. Reasoning that the representative plaintiffs "have a strong interest that recovery for *all* of the medical categories be maximized because they may have claims in *any,* or several categories," the District Court found "no antagonism of interest between class members with various medical conditions, or between persons with and without currently manifest asbestos impairment." *Id.,* at 318. Declaring class certification appropriate and the settlement fair, the District Court preliminarily enjoined all class members from commencing any asbestos-related suit against the CCR defendants in any state or federal court. See *Georgine v. Amchem Products, Inc.,* 878 F.Supp. 716, 726–727 (E.D.Pa.1994).

The objectors appealed. The United States Court of Appeals for the Third Circuit vacated the certification, holding that the requirements of Rule 23 had not been satisfied. See 83 F.3d 610 (1996).

E

The Court of Appeals, in a long, heavily detailed opinion by Judge Becker, first noted several challenges by objectors to justiciability, subject-matter jurisdiction, and adequacy of notice. These challenges, the court said, raised "serious concerns." *Id.,* at 623. However, the court observed, "the jurisdictional issues in this case would not exist but for the [class-action] certification." *Ibid.* Turning to the class-certification ***609** issues and finding them dispositive, the Third Circuit declined to decide other questions.

****2243** On class-action prerequisites, the Court of Appeals referred to an earlier Third Circuit decision, *In re General Motors Corp. Pick–Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, cert. denied, 516 U.S. 824, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995) (hereinafter *GM Trucks*), which held that although a class action may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated. 55 F.3d, at 799–800. The same rule should apply, the Third Circuit said, to class certification under Rule 23(b)(3). See 83 F.3d, at 625. But cf. *In re Asbestos Litigation,* 90 F.3d 963, 975–976, and n. 8 (C.A.5 1996), cert. pending, Nos. 96–1379, 96–1394. While stating that the requirements of Rule 23(a) and (b)(3) must be met "without taking into account the settlement," 83 F.3d, at 626, the Court of Appeals in fact closely considered the terms of the settlement as it examined aspects of the case under Rule 23 criteria. See *id.,* at 630–634.

The Third Circuit recognized that Rule 23(a)(2)'s "commonality" requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions. The court therefore trained its attention on the "predominance" inquiry. See *id.,* at 627. The harmfulness of asbestos exposure was indeed a prime factor common to the class, the Third Circuit observed. See *id.,* at 626, 630. But uncommon questions abounded.

In contrast to mass torts involving a single accident, class members in this case were exposed to different

asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases. See *id.,* at 626, 628. "These factual differences," the Third Circuit explained, "translate [d] into significant legal differences." *Id.,* at 627. State law governed and varied widely ***610** on such critical issues as "viability of [exposure-only] claims [and] availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury." *Ibid.* [14] "[T]he number of uncommon issues in this humongous class action," the Third Circuit concluded, *ibid.,* barred a determination, under existing tort law, that common questions predominated, see *id.,* at 630.

The Court of Appeals next found that "serious intra-class conflicts preclude[d] th[e] class from meeting the adequacy of representation requirement" of Rule 23(a)(4). *Ibid.* Adverting to, but not resolving charges of attorney conflict of interests, the Third Circuit addressed the question whether the named plaintiffs could adequately advance the interests of all class members. The Court of Appeals acknowledged that the District Court was certainly correct to this extent: " '[T]he members of the class are united in seeking the maximum possible recovery for their asbestos-related claims.' " *Ibid.* (quoting 157 F.R.D., at 317). "But the settlement does more than simply provide a general recovery fund," the Court of Appeals immediately added; "[r]ather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." 83 F.3d, at 630.

In the Third Circuit's view, the "most salient" divergence of interests separated plaintiffs already afflicted with an asbestos-related disease from plaintiffs without manifest injury (exposure-only plaintiffs). The latter would rationally want protection against inflation for distant recoveries. See *ibid.* They would also seek sturdy back-end opt-out rights and "causation provisions that can keep pace with changing ***611** science and medicine, rather than freezing in place the science of 1993." *Id.,* at 630–631. Already injured parties, in contrast, would care little about such provisions and would rationally trade them for higher current payouts. See *id.,* at 631. These and other adverse interests, the Court of Appeals carefully explained, strongly suggested that an undivided set of representatives ****2244** could not adequately protect the discrete interests of both currently afflicted and exposure-only claimants.

The Third Circuit next rejected the District Court's determination that the named plaintiffs were "typical" of the class, noting that this Rule 23(a)(3) inquiry overlaps the adequacy of representation question: "both look to the potential for conflicts in the class." *Id.,* at 632. Evident conflict problems, the court said, led it to hold that "no set of representatives can be 'typical' of this class." *Ibid.*

The Court of Appeals similarly rejected the District Court's assessment of the superiority of the class action. The Third Circuit initially noted that a class action so large and complex "could not be tried." *Ibid.* The court elaborated most particularly, however, on the unfairness of binding exposure-only plaintiffs who might be unaware of the class action or lack sufficient information about their exposure to make a reasoned decision whether to stay in or opt out. See *id.,* at 633. "A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23, would seem preferable," the Court of Appeals said. *Id.,* at 634.

The Third Circuit, after intensive review, ultimately ordered decertification of the class and vacation of the District Court's antisuit injunction. *Id.,* at 635. Judge Wellford concurred, "fully subscrib[ing] to the decision of Judge Becker that the plaintiffs in this case ha[d] not met the requirements of Rule 23." *Ibid.* He added that in his view, named exposure-only plaintiffs had no standing to pursue the ***612** suit in federal court, for their depositions showed that "[t]hey claimed no damages and no present injury." *Id.,* at 638.

We granted certiorari, 519 U.S. 957, 117 S.Ct. 379, 136 L.Ed.2d 297 (1996), and now affirm.

II

Objectors assert in this Court, as they did in the District Court and Court of Appeals, an array of jurisdictional barriers. Most fundamentally, they maintain that the settlement proceeding instituted by class counsel and CCR is not a justiciable case or controversy within the confines of Article III of the Federal Constitution. In the main, they say, the proceeding is a nonadversarial endeavor to

impose on countless individuals without currently ripe claims an administrative compensation regime binding on those individuals if and when they manifest injuries.

Furthermore, objectors urge that exposure-only claimants lack standing to sue: Either they have not yet sustained any cognizable injury or, to the extent the complaint states claims and demands relief for emotional distress, enhanced risk of disease, and medical monitoring, the settlement provides no redress. Objectors also argue that exposure-only claimants did not meet the then-current amount-in-controversy requirement (in excess of $50,000) specified for federal-court jurisdiction based upon diversity of citizenship. See 28 U.S.C. § 1332(a).

As earlier recounted, see *supra,* at 2242, the Third Circuit declined to reach these issues because they "would not exist but for the [class-action] certification." 83 F.3d, at 623. We agree that "[t]he class certification issues are dispositive," *ibid.;* because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first, cf. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 66–67, 117 S.Ct. 1055, 1068–1069, 137 L.Ed.2d 170 (1997) (declining to resolve definitively question whether petitioners had standing because mootness issue was dispositive of the case). We therefore follow the path taken by the Court of Appeals, mindful that ***613** Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). See also Fed. Rule Civ. Proc. 82 ("rules shall not be construed to extend ... the [subject-matter] jurisdiction of the United States district courts"). [15]

****2245** III

To place this controversy in context, we briefly describe the characteristics of class actions for which the Federal Rules provide. Rule 23, governing federal-court class actions, stems from equity practice and gained its current shape in an innovative 1966 revision. See generally Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L.Rev. 356, 375–400 (1967) (hereinafter Kaplan, Continuing Work). Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical ... of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

***614** In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Fed. Rule Civ. Proc. 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B). Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Kaplan, Continuing Work 388 (footnotes omitted). Rule 23(b)(1)(B) includes, for example, "limited fund" cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims. See Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., pp. 696–697 (hereinafter Adv. Comm. Notes).

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples. Adv. Comm. Notes, 28 U.S.C.App., p. 697; see Kaplan, Continuing Work 389 (subdivision (b)(2) "build[s] on experience mainly, but not exclusively, in the civil rights field").

In the 1966 class-action amendments, Rule 23(b)(3), the category at issue here, was "the most adventuresome" innovation. See Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497, 497 (1969) (hereinafter Kaplan, Prefatory Note). Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be ***615** excluded. See 7A Charles Alan Wright, Arthur R. Miller, & Mary

Kay Kane, Federal Practice and Procedure § 1777, p. 517 (2d ed.1986) (hereinafter Wright, Miller, & Kane); see generally Kaplan, Continuing Work 379–400. Rule 23(b)(3) "opt-out" class actions superseded the former "spurious" class action, so characterized because it generally functioned as a permissive joinder ("opt-in") device. See 7A Wright, Miller, & Kane § 1753, at 28–31, 42–44; see also Adv. Comm. Notes, 28 U.S.C.App., p. 695.

Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, 28 U.S.C.App., p. 697. To qualify for certification under Rule 23(b)(3), a class must meet ****2246** two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." In adding "predominance" and "superiority" to the qualification-for-certification list, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Ibid.* Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action...." Kaplan, Continuing Work 390.

Rule 23(b)(3) includes a nonexhaustive list of factors pertinent to a court's "close look" at the predominance and superiority criteria:

> ***616** "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

In setting out these factors, the Advisory Committee for the 1966 reform anticipated that in each case, courts would "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." Adv. Comm. Notes, 28 U.S.C.App., p. 698. They elaborated:

> "The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable." *Ibid.*

See also Kaplan, Continuing Work 391 ("Th[e] interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable." (footnote omitted)). As the Third Circuit observed in the instant case: "Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]"; each "ha[s] a substantial stake in making individual decisions on whether and when to settle." 83 F.3d, at 633.

***617** While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Kaplan, Prefatory Note 497. As concisely recalled in a recent Seventh Circuit opinion:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (1997).

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To alert class members to their right to "opt out" of a (b)(3) class, Rule 23 instructs the court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. Rule Civ. Proc. 23(c)(2); see ****2247** *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173–177, 94 S.Ct. 2140, 2150–2152, 40 L.Ed.2d 732 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in (b)(3) actions; requirement may not be relaxed based on high cost).

No class action may be "dismissed or compromised without [court] approval," preceded by notice to class members. Fed. Rule Civ. Proc. 23(e). The Advisory Committee's sole comment on this terse final provision of Rule 23 restates the Rule's instruction without elaboration: "Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action." Adv. Comm. Notes, 28 U.S.C.App., p. 699.

In the decades since the 1966 revision of Rule 23, class-action practice has become ever more "adventuresome" as a means of coping with claims too numerous to secure their ***618** "just, speedy, and inexpensive determination" one by one. See Fed. Rule Civ. Proc. 1. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue. See generally J. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices (1995); Schwarzer, Settlement of Mass Tort Class Actions: Order out of Chaos, 80 Cornell L.Rev. 837 (1995).

Among current applications of Rule 23(b)(3), the "settlement only" class has become a stock device. See, *e.g.,* T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 61–62 (1996) (noting large number of such cases in districts studied). Although all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes, courts have divided on the extent to which a proffered settlement affects court surveillance under Rule 23's certification criteria.

In *GM Trucks,* 55 F.3d, at 799–800, and in the instant case, 83 F.3d, at 624–626, the Third Circuit held that a class cannot be certified for settlement when certification for trial would be unwarranted. Other courts have held that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements. See, *e.g., In re Asbestos Litigation,* 90 F.3d, at 975(C.A.5) ("in settlement class context, common issues arise from the settlement itself") (citing H. Newberg & A. Conte, 2 Newberg on Class Actions § 11.28, p. 11–58 (3d ed.1992)); *White v. National Football League,* 41 F.3d 402, 408 (C.A.8 1994) ("adequacy of class representation ... is ultimately determined by the settlement itself"), cert. denied, 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); *In re A.H. Robins Co.,* 880 F.2d 709, 740(C.A.4) ("[i]f not a ground for certification *per se,* certainly settlement should be a factor, and an important factor, to be considered when determining certification"), cert. denied *sub nom. Anderson* ***619** *v. Aetna Casualty & Surety Co.,* 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); *Malchman v. Davis,* 761 F.2d 893, 900 (C.A.2 1985) (certification appropriate, in part, because "the interests of the members of the broadened class in the settlement agreement were commonly held"), cert. denied, 475 U.S. 1143, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986).

A proposed amendment to Rule 23 would expressly authorize settlement class certification, in conjunction with a motion by the settling parties for Rule 23(b)(3) certification, "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." Proposed Amendment to Fed. Rule Civ. Proc. 23(b), 117 S.Ct. No. 1 CXIX, CLIV to CLV (Aug.1996) (Request for Comment). In response to the publication of this proposal, voluminous public comments—many of them opposed to, or skeptical of, the amendment—were received by the Judicial Conference Standing Committee on Rules of Practice and Procedure. See, *e.g.,* Letter from Steering Committee to Oppose Proposed Rule 23, signed by 129 law professors (May 28, 1996); Letter from Paul D. Carrington (May 21, 1996). The Committee has not yet acted on the matter. We consider the certification at issue under the Rule as it is currently framed.

IV

We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification. ****2248** The Third Circuit's opinion stated that each of the requirements of Rule 23(a) and

(b)(3) "must be satisfied without taking into account the settlement." 83 F.3d, at 626 (quoting *GM Trucks,* 55 F.3d, at 799). That statement, petitioners urge, is incorrect.

We agree with petitioners to this limited extent: Settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect. But, as we earlier observed, see *supra,* at 2243, the Court of Appeals in fact did not ignore the settlement; instead, that court homed in on settlement terms in explaining why it found the absentees' ***620** interests inadequately represented. See 83 F.3d, at 630–631. The Third Circuit's close inspection of the settlement in that regard was altogether proper.

Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. See Rule 23(c), (d). [16]

And, of overriding importance, courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge ... any substantive right." § 2072(b).

Rule 23(e), on settlement of class actions, reads in its entirety: "A class action shall not be dismissed or compromised ***621** without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This prescription was designed to function as an additional requirement, not a superseding direction, for the "class action" to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b). Cf. *Eisen,* 417 U.S., at 176–177, 94 S.Ct., at 2151–2152 (adequate representation does not eliminate additional requirement to provide notice). Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.

The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement-class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.

Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation ****2249** to press for a better offer, see Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L.Rev. 1343, 1379–1380 (1995), and the court would face a bargain proffered for its approval without benefit of adversarial investigation, see, *e.g., Kamilewicz v. Bank of Boston Corp.,* 100 F.3d 1348, 1352 (C.A.7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (parties "may even put one over on the court, in a staged performance"), cert. denied, 520 U.S. 1204, 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997).

***622** Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is "fair," then certification is proper. Applying to this case criteria the rulemakers set, we conclude that the Third Circuit's appraisal is essentially correct. Although that court should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account. The Court of Appeals' opinion amply demonstrates why—with or without a settlement on the table—the sprawling class the District Court certified does not satisfy Rule 23's requirements. [17]

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A

We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact ... predominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D., at 316. The settling parties also contend that the settlement's fairness is a common question, predominating over disparate legal issues that might be pivotal in litigation but become irrelevant under the settlement.

The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, see ***623** *supra,* at 2237–2238, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement. [18]

The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. See 7A Wright, Miller, & Kane 518–519. [19] The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members "from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." See 7B Wright, Miller, & Kane § 1797, at 340–341. But it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that ****2250** vital prescription would be stripped of any meaning in the settlement context.

The District Court also relied upon this commonality: "The members of the class have all been exposed to asbestos products supplied by the defendants...." 157 F.R.D., at 316. Even if Rule 23(a)'s commonality requirement may be satisfied ***624** by that shared experience, the predominance criterion is far more demanding. See 83 F.3d, at 626–627. Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.

The Third Circuit highlighted the disparate questions undermining class cohesion in this case:

> "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma.... Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> "The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." *Id.,* at 626.

Differences in state law, the Court of Appeals observed, compound these disparities. See *id.,* at 627 (citing *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 823, 105 S.Ct. 2965, 2980, 86 L.Ed.2d 628 (1985)).

No settlement class called to our attention is as sprawling as this one. Cf. *In re Asbestos Litigation,* 90 F.3d, at 976, n. 8 ("We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy [Rule 23] requirements due to the huge number of individuals and ***625** their varying medical expenses, smoking histories, and family situations."). Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. See Adv. Comm. Notes, 28 U.S.C.App., p. 697; see also *supra,* at 2245–2246. Even mass tort cases arising from

a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, ... affecting the individuals in different ways." Adv. Comm. Notes, 28 U.S.C.App., p. 697. And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. *Ibid.* But the text of the Rule does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970's, have been certifying such cases in increasing number. See Resnik, From "Cases" to "Litigation," 54 Law & Contemp.Prob. 5, 17–19 (Summer 1991) (describing trend). The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great. As the Third Circuit's opinion makes plain, the certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design.

B

Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. See *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157–158, n. 13, 102 S.Ct. 2364, 2370–2371, n. 13, 72 L.Ed.2d 740 (1982). "[A] class representative ****2251** must be part of the class and 'possess ***626** the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974)). [20]

As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. *General Telephone Co. of Northwest v. EEOC,* 446 U.S. 318, 331, 100 S.Ct. 1698, 1707, 64 L.Ed.2d 319 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.").

The disparity between the currently injured and expossure-only categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement. See 157 F.R.D., at 291. Although ***627** this is not a "limited fund" case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. For example, as earlier described, see *supra,* at 2240–2241, the settlement includes no adjustment for inflation; only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no compensation.

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. In another asbestos class action, the Second Circuit spoke precisely to this point:

> "[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *In re Joint Eastern and Southern Dist. Asbestos Litigation,* 982 F.2d

721, 742–743 (1992), modified on reh'g *sub nom. In re Findley,* 993 F.2d 7 (1993).

The Third Circuit found no assurance here—either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their representational responsibilities. See ***628** 83 F.3d, at 630–631. That assessment, we conclude, is on the mark.

****2252** C

Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. *Id.,* at 633; cf. *In re Asbestos Litigation,* 90 F.3d, at 999–1000 (Smith, J., dissenting). Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Family members of asbestos-exposed individuals may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet large numbers of people in this category—future spouses and children of asbestos victims—could not be alerted to their class membership. And current spouses and children of the occupationally exposed may know nothing of that exposure.

Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, see 83 F.3d, at 633–634, we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

V

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos ***629** exposure.[21] Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste." C. Wright, Law of Federal Courts 508 (5th ed.1994); cf. 83 F.3d, at 634 (suggesting resort to less bold aggregation techniques, including more narrowly defined class certifications).

* * *

For the reasons stated, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

Justice O'CONNOR took no part in the consideration or decision of this case.

Justice BREYER, with whom Justice STEVENS joins, concurring in part and dissenting in part.

Although I agree with the Court's basic holding that "[s]ettlement is relevant to a class certification," *ante,* at 2248, I find several problems in its approach that lead me to a different conclusion. First, I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests. Second, I would give more weight than would the majority to settlement-related issues for purposes of determining whether common issues predominate. Third, I am uncertain about the Court's determination of adequacy of representation, ***630** and do not believe it appropriate for this Court to second-guess the District Court on the matter without first having the Court of Appeals consider it. Fourth, I am uncertain about the tenor of an opinion that seems to suggest the settlement is unfair. And fifth, in the absence of further review

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by the Court of Appeals, I cannot accept the majority's suggestions that "notice" is inadequate.

These difficulties flow from the majority's review of what are highly fact-based, complex, and difficult matters, matters that are inappropriate for initial review before this Court. The law gives broad leeway to district courts in making class certification decisions, **2253 and their judgments are to be reviewed by the court of appeals only for abuse of discretion. See *Califano v. Yamasaki,* 442 U.S. 682, 703, 99 S.Ct. 2545, 2558–2559, 61 L.Ed.2d 176 (1979). Indeed, the District Court's certification decision rests upon more than 300 findings of fact reached after five weeks of comprehensive hearings. Accordingly, I do not believe that we should in effect set aside the findings of the District Court. That court is far more familiar with the issues and litigants than is a court of appeals or are we, and therefore has "broad power and discretion ... with respect to matters involving the certification" of class actions. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 345, 99 S.Ct. 2326, 2334, 60 L.Ed.2d 931 (1979); cf. *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 402, 110 S.Ct. 2447, 2459, 110 L.Ed.2d 359 (1990) (district court better situated to make fact-dependent legal determinations in Rule 11 context).

I do not believe that we can rely upon the Court of Appeals' review of the District Court record, for that review, and its ultimate conclusions, are infected by a legal error. *E.g., Georgine v. Amchem Products, Inc.,* 83 F.3d 610, 626 (C.A.3 1996) (holding that "*considered as a litigation class,*" the class cannot meet Federal Rule of Civil Procedure 23's requirements (emphasis added)). There is no evidence that the Court of Appeals at any point considered the settlement as something that would help the class meet Rule 23. I find, moreover, the fact-related issues presented here sufficiently *631 close to warrant further detailed appellate court review under the correct legal standard. Cf. *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 486, 117 S.Ct. 1491, 1501, 137 L.Ed.2d 730 (1997). And I shall briefly explain why this is so.

I

First, I believe the majority understates the importance of settlement in this case. Between 13 and 21 million workers have been exposed to asbestos in the workplace —over the past 40 or 50 years—but the most severe instances of such exposure probably occurred three or four decades ago. See Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation, pp. 6–7 (Mar.1991) (Judicial Conference Report); App. 781–782, 801; B. Castleman, Asbestos: Medical and Legal Aspects 787–788 (4th ed.1996). This exposure has led to several hundred thousand lawsuits, about 15% of which involved claims for cancer and about 30% for asbestosis. See *In re Joint Eastern and Southern Dist. Asbestos Litigation,* 129 B.R. 710, 936–937 (E. and S.D.N.Y.1991). About half of the suits have involved claims for pleural thickening and plaques—the harmfulness of which is apparently controversial. (One expert below testified that they "don't transform into cancer" and are not "predictor[s] of future disease," App. 781.) Some of those who suffer from the most serious injuries, however, have received little or no compensation. *In re School Asbestos Litigation,* 789 F.2d 996, 1000 (C.A.3 1986); see also Edley & Weiler, Asbestos: A Multi–Billion–Dollar Crisis, 30 Harv. J. Legis. 383, 384, 393 (1993) ("[U]p to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never become impaired"). These lawsuits have taken up more than 6% of all federal civil filings in one recent year, and are subject to a delay that is twice that of other civil suits. Judicial Conference Report 7, 10–11.

*632 Delays, high costs, and a random pattern of noncompensation led the Judicial Conference Ad Hoc Committee on Asbestos Litigation to transfer all federal asbestos personal-injury cases to the Eastern District of Pennsylvania in an effort to bring about a fair and comprehensive settlement. It is worth considering a few of the Committee's comments. See Judicial Conference Report 2 (" 'Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses.' The ensuing five years have seen the picture worsen: increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects that judgments—if ever obtained—can be collected" (quoting Rand Corporation Institute for Civil Justice)); *id.,* at 13 ("The transaction **2254 costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease." "[O]f each asbestos litigation dollar, 61 cents is consumed in transaction costs.... Only 39 cents were paid to the

asbestos victims" (citing Rand finding)); *id.,* at 12 ("Delays also can increase transaction costs, especially the attorneys' fees paid by defendants at hourly rates. These costs reduce either the insurance fund or the company's assets, thereby reducing the funds available to pay pending and future claimants. By the end of the trial phase in [one case], at least seven defendants had declared bankruptcy (as a result of asbestos claims generally")); see also J. Weinstein, Individual Justice in Mass Tort Litigation 155 (1995); Edley & Weiler, *supra,* at 389–395.

Although the transfer of the federal asbestos cases did not produce a general settlement, it was intertwined with and led to a lengthy year-long negotiation between the cochairs of the Plaintiff's Multi–District Litigation Steering Committee (elected by the Plaintiff's Committee Members and approved by the District Court) and the 20 asbestos defendants who are before us here. *Georgine v. Amchem Products, Inc.,* 157 F.R.D. 246, 266–267 (E.D.Pa.1994); App. 660–662. ***633** These "protracted and vigorous" negotiations led to the present partial settlement, which will pay an estimated $1.3 billion and compensate perhaps 100,000 class members in the first 10 years. 157 F.R.D., at 268, 287. "The negotiations included a substantial exchange of information" between class counsel and the 20 defendant companies, including "confidential data" showing the defendants' historical settlement averages, numbers of claims filed and settled, and insurance resources. *Id.,* at 267. "Virtually no provision" of the settlement "was not the subject of significant negotiation," and the settlement terms "changed substantially" during the negotiations. *Ibid.* In the end, the negotiations produced a settlement that, the District Court determined based on its detailed review of the process, was "the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys." *Id.,* at 335.

The District Court, when approving the settlement, concluded that it improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount. Under the previous system, according to the court, "[t]he sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." *Ibid.* The court believed the settlement would create a compensation system that would make more money available for plaintiffs who later develop serious illnesses.

I mention this matter because it suggests that the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects. All of which leads me to be reluctant to set aside the District Court's findings without more assurance than I have that they are wrong. I cannot obtain that assurance through comprehensive review of the record because that is properly the job of the Court of Appeals and that court, understandably, but as we now hold, mistakenly, believed that settlement ***634** was not a relevant (and, as I would say, important) consideration.

Second, the majority, in reviewing the District Court's determination that common "issues of fact and law predominate," says that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Ante,* at 2249 (footnote omitted). I find it difficult to interpret this sentence in a way that could lead me to the majority's conclusion. If the majority means that these pre-settlement questions are what matters, then how does it reconcile its statement with its basic conclusion that "settlement is relevant" to class certification, or with the numerous lower court authority that says that settlement is not only relevant, but important? See, *e. g., In re A.H. Robins Co.,* 880 F.2d 709, 740(C.A.4), cert. denied *sub nom. Anderson v. Aetna Casualty & Surety Co.,* 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); *In re Beef Industry Antitrust Litigation,* 607 F.2d 167, 177–178 (C.A.5 1979), ****2255** cert. denied *sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Assn.,* 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981); 2 H. Newberg & A. Conte, Newberg on Class Actions § 11.27, pp. 11–54 to 11–55 (3d ed.1992).

Nor do I understand how one could decide whether common questions "predominate" in the abstract—without looking at what is likely to be at issue in the proceedings that will ensue, namely, the settlement. Every group of human beings, after all, has some features in common, and some that differ. How can a court make a contextual judgment of the sort that Rule 23 requires without looking to what proceedings will follow? Such guideposts help it decide whether, in light of common concerns and differences, certification will achieve Rule 23's basic objective—"economies of time, effort, and expense." Advisory Committee's Notes on Fed. Rule Civ.

Proc. 23(b)(3), 28 U.S.C.App., p. 697. As this Court has previously observed, "sometimes it may be necessary for the court to probe behind the pleadings before coming to ***635** rest on the certification question." *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982); see also 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1785, p. 107, and n. 34 (1986). I am not saying that the "settlement counts only one way." *Ante,* at 2248, n. 16. Rather, the settlement may simply "add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint" and courts "can and should" look to it to enhance the "ability ... to make informed certification decisions." *In re Asbestos Litigation,* 90 F.3d 963, 975 (C.A.5 1996).

The majority may mean that the District Court gave too much weight to the settlement. But I am not certain how it can reach that conclusion. It cannot rely upon the Court of Appeals, for that court gave no positive weight at all to the settlement. Nor can it say that the District Court relied solely on "a common interest in a fair compromise," *ante,* at 2249, for the District Court did not do so. Rather, it found the settlement relevant because it explained the importance of the class plaintiffs' common features and common interests. The court found predominance in part because:

> "The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D., at 316.

The settlement is relevant because it means that these common features and interests are likely to be important in the proceeding that would ensue—a proceeding that would focus primarily upon whether or not the proposed settlement fairly and properly satisfied the interests class members had in common. That is to say, the settlement underscored the importance ***636** of (a) the common fact of exposure, (b) the common interest in receiving *some* compensation for certain rather than running a strong risk of *no* compensation, and (c) the common interest in avoiding large legal fees, other transaction costs, and delays. *Ibid.*

Of course, as the majority points out, there are also important differences among class members. Different plaintiffs were exposed to different products for different times; each has a distinct medical history and a different history of smoking; and many cases arise under the laws of different States. The relevant question, however, is *how much* these differences matter in respect to the legal proceedings that lie ahead. Many, if not all, toxic tort class actions involve plaintiffs with such differences. And the differences in state law are of diminished importance in respect to a proposed settlement in which the defendants have waived all defenses and agreed to compensate all those who were injured. *Id.,* at 292.

These differences might warrant subclasses, though subclasses can have problems of their own. "There can be a cost in creating more distinct subgroups, each with its own representation.... [T]he more subclasses created, the more severe conflicts bubble to ****2256** the surface and inhibit settlement.... The resources of defendants and, ultimately, the community must not be exhausted by protracted litigation." Weinstein, Individual Justice in Mass Tort Litigation, at 66. Or these differences may be too serious to permit an effort at group settlement. This kind of determination, as I have said, is one that the law commits to the discretion of the district court—reviewable for abuse of discretion by a court of appeals. I believe that we are far too distant from the litigation itself to reweigh the fact-specific Rule 23 determinations and to find them erroneous without the benefit of the Court of Appeals first having restudied the matter with today's legal standard in mind.

***637** Third, the majority concludes that the "representative parties" will not "fairly and adequately protect the interests of the class." Rule 23(a)(4). It finds a serious conflict between plaintiffs who are now injured and those who may be injured in the future because "for the currently injured, the critical goal is generous immediate payments," a goal that "tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Ante,* at 2251.

I agree that there is a serious problem, but it is a problem that often exists in toxic tort cases. See Weinstein, *supra,* at 64 (noting that conflict "between present and future claimants" "is almost always present in some form in mass tort cases because long latency periods are needed to discover injuries"); see also Judicial Conference

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Report 34–35 ("Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled' " (citation omitted)). And it is a problem that potentially exists whenever a single defendant injures several plaintiffs, for a settling plaintiff leaves fewer assets available for the others. With class actions, at least, plaintiffs have the consolation that a district court, thoroughly familiar with the facts, is charged with the responsibility of ensuring that the interests of no class members are sacrificed.

But this Court cannot easily safeguard such interests through review of a cold record. "What constitutes adequate representation is a question of fact that depends on the circumstances of each case." 7A Wright, Miller, & Kane, Federal Practice and Procedure § 1765, at 271. That is particularly so when, as here, there is an unusual baseline, namely, the " 'real and present danger' " described by the Judicial Conference Report above. The majority's use of the ***638** lack of an inflation adjustment as evidence of inadequacy of representation for future plaintiffs, *ante,* at 2251, is one example of this difficulty. An inflation adjustment might not be as valuable as the majority assumes if most plaintiffs are old and not worried about receiving compensation decades from now. There are, of course, strong arguments as to its value. But that disagreement is one that this Court is poorly situated to resolve.

Further, certain details of the settlement that are not discussed in the majority opinion suggest that the settlement may be of greater benefit to future plaintiffs than the majority suggests. The District Court concluded that future plaintiffs receive a "significant value" from the settlement due to a variety of its items that benefit future plaintiffs, such as: (1) tolling the statute of limitations so that class members "will no longer be forced to file premature lawsuits or risk their claims being time-barred"; (2) waiver of defenses to liability; (3) payment of claims, if and when members become sick, pursuant to the settlement's compensation standards, which avoids "the uncertainties, long delays and high transaction costs [including attorney's fees] of the tort system"; (4) "some assurance that there will be funds available if and when they get sick," based on the finding that each defendant "has shown an ability to fund the payment of all qualifying claims" under the settlement; and (5) the right to additional compensation if cancer develops (many settlements for plaintiffs with noncancerous conditions bar such additional claims). 157 F.R.D., at 292. For these reasons, and others, the District Court found that the distinction ****2257** between present and future plaintiffs was "illusory." *Id.,* at 317–318.

I do not know whether or not the benefits are more or less valuable than an inflation adjustment. But I can certainly recognize an argument that they are. (To choose one more brief illustration, the majority chastises the settlement for extinguishing loss-of-consortium claims, *ante,* at 2251, 2252, but ***639** does not note that, as the District Court found, the "defendants' historical [settlement] averages, upon which the compensation values are based, include payments for loss of consortium claims, and, accordingly, the Compensation Schedule is not unfair for this ascribed reason," 157 F.R.D., at 278.) The difficulties inherent in both knowing and understanding the vast number of relevant individual fact-based determinations here counsel heavily in favor of deference to district court decisionmaking in Rule 23 decisions. Or, at the least, making certain that appellate court review has taken place with the correct standard in mind.

Fourth, I am more agnostic than is the majority about the basic fairness of the settlement. *Ante,* at 2250–2252. The District Court's conclusions rested upon complicated factual findings that are not easily cast aside. It is helpful to consider some of them, such as its determination that the settlement provided "fair compensation ... while reducing the delays and transaction costs endemic to the asbestos litigation process" and that "the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members." 157 F.R.D., at 316 (citation omitted); see also *id.,* at 335 ("The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, these unimpaired victims have, in many states, been forced to assert

their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the ... defendants" ***640**); *id.,* at 279, 280 (settlement "will result in less delay for asbestos claimants than that experienced in the present tort system" and will "result in the CCR defendants paying more claims at a faster rate, than they have ever paid before"); *id.,* at 292; Edley & Weiler, 30 Harv. J. Legis., at 405, 407 (finding that "[t]here are several reasons to believe that this settlement secures important gains for both sides" and that they "firmly endorse the fairness and adequacy of this settlement"). Indeed, the settlement has been endorsed as fair and reasonable by the AFL–CIO (and its Building and Construction Trades Department), which represents a " 'substantial percentage' " of class members, 157 F.R.D., at 325, and which has a role in monitoring implementation of the settlement, *id.,* at 285. I do not intend to pass judgment upon the settlement's fairness, but I do believe that these matters would have to be explored in far greater depth before I could reach a conclusion about fairness. And that task, as I have said, is one for the Court of Appeals.

Finally, I believe it is up to the District Court, rather than this Court, to review the legal sufficiency of notice to members of the class. The District Court found that the plan to provide notice was implemented at a cost of millions of dollars and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. *Id.,* at 312–313, 336. Every notice emphasized that an individual did not currently have to be sick to be a class member. And in the end, the District Court was "confident" that Rule 23 and due process requirements were satisfied because, as a result of this "extensive and expensive notice procedure," "over six million" individuals "received actual notice materials," and "millions more" were reached by the media campaign. *Id.,* at 312, 333, 336. Although the majority, in principle, is reviewing a Court of Appeals' ****2258** conclusion, it seems to me that its opinion might call into question the fact-related determinations of the District ***641** Court. *Ante,* at 2252. To the extent that it does so, I disagree, for such findings cannot be so quickly disregarded. And I do not think that our precedents permit this Court to do so. See *Reiter,* 442 U.S., at 345, 99 S.Ct., at 2334; *Yamasaki,* 442 U.S., at 703, 99 S.Ct., at 2558–2559.

II

The issues in this case are complicated and difficult. The District Court might have been correct. Or not. Subclasses might be appropriate. Or not. I cannot tell. And I do not believe that this Court should be in the business of trying to make these fact-based determinations. That is a job suited to the district courts in the first instance, and the courts of appeals on review. But there is no reason in this case to believe that the Court of Appeals conducted its prior review with an understanding that the settlement could have constituted a reasonably strong factor in favor of class certification. For this reason, I would provide the courts below with an opportunity to analyze the factual questions involved in certification by vacating the judgment, and remanding the case for further proceedings.

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521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689, 65 USLW 4635, 37 Fed.R.Serv.3d 1017, 28 Envtl. L. Rep. 20,173, 97 Cal. Daily Op. Serv. 4894, 97 Daily Journal D.A.R. 8025, 97 CJ C.A.R. 1314, 11 Fla. L. Weekly Fed. S 128

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 In a series of orders, the MDL Panel had previously denied other asbestos-case transfer requests. See *In re Asbestos and Asbestos Insulation Material Products Liability Litigation,* 431 F.Supp. 906, 910 (JPML 1977); *In re Asbestos Products Liability Litigation (No. II),* MDL–416 (JPML Mar. 13, 1980) (unpublished order); *In re Asbestos School Products Liability Litigation,* 606 F.Supp. 713, 714 (JPML 1985); *In re Ship Asbestos Products Liability Litigation,* MDL–676 (JPML Feb. 4, 1986) (unpublished order); *In re Leon Blair Asbestos Products Liability Litigation,* MDL–702 (JPML Feb. 6, 1987) (unpublished order).

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2 The CCR Companies are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I.U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co. All of the CCR petitioners stopped manufacturing asbestos products around 1975.

3 It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer.

4 Also on the same day, the CCR defendants filed a third-party action against their insurers, seeking a declaratory judgment holding the insurers liable for the costs of the settlement. The insurance litigation, upon which implementation of the settlement is conditioned, is still pending in the District Court. See, *e.g., Georgine v. Amchem Prods., Inc.,* No. 93–0215, 1994 WL 502475 (E.D.Pa., Sept.2, 1994) (denying motion of insurers to compel discovery).

5 The complaint defines the class as follows:

> "(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).
>
> "(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability)." 1 App. 13–14.

6 Only three percent of the qualified mesothelioma, lung cancer, and "other cancer" claims, and only one percent of the total number of qualified "non-malignant condition" claims can be designated "extraordinary." Average expenditures are specified for claims found "extraordinary"; mesothelioma victims with compensable extraordinary claims, for example, receive, on average, $300,000.

7 These objectors, now respondents before this Court, include three groups of individuals with overlapping interests, designated as the "Windsor Group," the New Jersey "White Lung Group," and the "Cargile Group." Margaret Balonis, an individual objector, is also a respondent before this Court. Balonis states that her husband, Casimir, was exposed to asbestos in the late 1940's and was diagnosed with mesothelioma in May 1994, after expiration of the opt-out period, see *infra,* at 2241, 2242. The Balonises sued CCR members in Maryland state court, but were charged with civil contempt for violating the Federal District Court's antisuit injunction. Casimir Balonis died in October 1996. See Brief for Balonis Respondents 9–11.

8 Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."

9 Rule 23(a)(2) requires that there be "questions of law or fact common to the class."

10 Rule 23(b)(3) requires that "the [common] questions of law or fact ... predominate over any questions affecting only individual members."

11 Rule 23(a)(3) states that "the claims ... of the representative parties [must be] typical of the claims ... of the class."

12 Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy."

13 Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."

14 Recoveries under the laws of different States spanned a wide range. Objectors assert, for example, that 15 percent of current mesothelioma claims arise in California, where the statewide average recovery is $419,674—or more than 209 percent above the $200,000 maximum specified in the settlement for mesothelioma claims not typed "extraordinary." See Brief for Respondents George Windsor et al. 5–6, n. 5 (citing 2 App. 461).

15 The opinion dissenting in part does not find the class-certification issues dispositive—at least not yet, and would return the case to the Third Circuit for a second look. See *post,* at 2253, 2258. If certification issues were genuinely in doubt, however, the jurisdictional issues would loom larger. Concerning objectors' assertions that exposure-only claimants do not satisfy the $50,000 amount-in-controversy and may have no currently ripe claim, see *Metro–North Commuter R. Co. v. Buckley,* 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560 (Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. § 51 *et seq.,* interpreted in light of common-law principles, does not permit "exposure-only" railworker to recover for negligent infliction of emotional distress or lump-sum damages for costs of medical monitoring).

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16 Portions of the opinion dissenting in part appear to assume that settlement counts only one way—in favor of certification. See *post,* at 2252–2253, 2258. But see *post,* at 2255. To the extent that is the dissent's meaning, we disagree. Settlement, though a relevant factor, does not inevitably signal that class-action certification should be granted more readily than it would be were the case to be litigated. For reasons the Third Circuit aired, see 83 F.3d 610, 626–635 (1996), proposed settlement classes sometimes warrant more, not less, caution on the question of certification.

17 We do not inspect and set aside for insufficient evidence District Court findings of fact. Cf. *post,* at 2254, 2256–2257. Rather, we focus on the requirements of Rule 23, and endeavor to explain why those requirements cannot be met for a class so enormously diverse and problematic as the one the District Court certified.

18 In this respect, the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context—just as in the context of Rule 24(b)(2) governing permissive intervention—"manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond v. Charles,* 476 U.S. 54, 76–77, 106 S.Ct. 1697, 1711, 90 L.Ed.2d 48 (1986) (O'CONNOR, J ., concurring in part and concurring in judgment).

19 This case, we note, involves no "limited fund" capable of supporting class treatment under Rule 23(b)(1)(B), which does not have a predominance requirement. See *Georgine v. Amchem Products, Inc.,* 157 F.R.D. 246, 318 (E.D.Pa.1994); see also *id.,* at 291, and n. 40. The settling parties sought to proceed exclusively under Rule 23(b)(3).

20 The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether ... maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157, n. 13, 102 S.Ct. 2364, 2370, n. 13, 72 L.Ed.2d 740 (1982). The adequacy heading also factors in competency and conflicts of class counsel. See *id.,* at 157–158, n. 13, 102 S.Ct., at 2370–2371, n. 13. Like the Third Circuit, we decline to address adequacy-of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.

21 The opinion dissenting in part is a forceful statement of that argument.

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6

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Harris v. comScore, Inc., N.D.Ill., April 2, 2013

133 S.Ct. 1426
Supreme Court of the United States

COMCAST CORPORATION, et al., Petitioners
v.
Caroline BEHREND et al.

No. 11–864.
|
Argued Nov. 5, 2012.
|
Decided March 27, 2013.

Synopsis

Background: Customers brought antitrust class action against cable television company, alleging that company obtained monopoly via transactions with competitors for allocation of regional cable markets and that company engaged in conduct excluding and preventing competition. The United States District Court for the Eastern District of Pennsylvania, John R. Padova, J., 264 F.R.D. 150, certified class, and company appealed. The United States Court of Appeals for the Third Circuit, Aldisert, Circuit Judge, 655 F.3d 182, affirmed. Certiorari was granted.

The Supreme Court, Justice Scalia, held that regression model developed by plaintiffs' expert could not be accepted as evidence that damages were susceptible of measurement across entire class, as required for certification of class on theory that questions of law or fact common to class members predominated over any questions affecting only individual members.

Reversed.

Justices Ginsburg and Breyer dissented and filed opinion, in which Justices Sotomayor and Kagan joined.

****1428** *Syllabus* [*]

***27** Petitioners, Comcast Corporation and its subsidiaries, allegedly "cluster" their cable television operations within a particular region by swapping their systems outside the region for competitor systems inside the region. Respondents, named plaintiffs in this class-action antitrust suit, claim that they and other Comcast subscribers in the Philadelphia "cluster" are harmed because Comcast's strategy lessens competition and leads to supra-competitive prices. They sought class certification under Federal Rule of Civil Procedure 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." The District Court required them to show (1) that the "antitrust impact" of the violation could be proved at trial through evidence common to the class and (2) that the damages were measurable on a classwide basis through a "common methodology." The court accepted only one of respondents' four proposed theories of antitrust impact: that Comcast's actions lessened competition from "overbuilders," *i.e.,* companies that build competing networks in areas where an incumbent cable company already operates. It then certified the class, finding that the damages from overbuilder deterrence could be calculated on a classwide basis, even though respondents' expert acknowledged that his regression model did not isolate damages resulting from any one of respondents' theories. In affirming, the Third Circuit refused to consider petitioners' argument that the model failed to attribute damages to overbuilder deterrence because doing so would require reaching the merits of respondents' claims at the class certification stage.

Held : Respondents' class action was improperly certified under Rule 23(b)(3). Pp. 1432 – 1435.

(a) A party seeking to maintain a class action must be prepared to show that Rule 23(a)'s numerosity, commonality, typicality, and adequacy-of-representation requirements have been met, *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. ——, ——, 131 S.Ct. 2541, 180 L.Ed.2d 374, and must satisfy through evidentiary proof at least one of Rule 23(b)'s provisions. The same analytical principles govern certification ****1429** under both Rule 23(a) and Rule 23(b). Courts may have to " 'probe behind the pleadings before coming to rest on the certification question,' and [a] certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that [Rule 23's] prerequisites ***28** ... have been satisfied.' " *Ibid.* The analysis will frequently "overlap with the merits of the plaintiff's underlying claim" because a " 'class

determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Ibid.* P. 1432.

(b) The Third Circuit ran afoul of this Court's precedents when it refused to entertain arguments against respondents' damages model that bore on the propriety of class certification simply because they would also be pertinent to the merits determination. If they prevail, respondents would be entitled only to damages resulting from reduced overbuilder competition. A model that does not attempt to measure only those damages attributable to that theory cannot establish that damages are susceptible of measurement across the entire class for Rule 23(b)(3) purposes. The lower courts' contrary reasoning flatly contradicts this Court's cases, which require a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. *Wal–Mart, supra,* at ——, and n. 6, 131 S.Ct. 2541. Pp. 1434 – 1435.

(c) Under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages can be measured classwide. The figure respondents' expert used was calculated assuming the validity of all four theories of antitrust impact initially advanced by respondents. Because the model cannot bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to overbuilder deterrence, Rule 23(b)(3) cannot authorize treating subscribers in the Philadelphia cluster as members of a single class. Pp. 1433 – 1435.

655 F.3d 182, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined. GINSBURG and BREYER, JJ., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined.

Attorneys and Law Firms

Miguel Estrada, Washington, DC, for Petitioners.

Barry Barnett, Dallas, TX, for Respondents.

Sheron Korpus, Kasowitz, Benson, Torres & Friedman LLP, New York, NY, Miguel A. Estrada, Counsel of Record, Darryl J. May, Ballard Spahr LLP, Philadelphia, PA, Mark A. Perry, Scott P. Martin, Gibson, Dunn & Crutcher LLP, Washington, DC, for Petitioners.

Barry Barnett, Counsel of Record, Daniel H. Charest, Susman Godfrey L.L.P., Dallas, TX, Anthony J. Bolognese, Joshua H. Grabar, Bolognese & Assocs., LLC, Philadelphia, PA, Samuel D. Heins, Vincent J. Esades, David Woodward, Heins Mills & Olson, P.L.C., Minneapolis, MN, Joseph Goldberg, Freedman, Boyd, Hollander, Goldberg, Urias & Ward, P.A., Albuquerque, NM, for Respondents.

Opinion

Justice SCALIA delivered the opinion of the Court.

***29** The District Court and the Court of Appeals approved certification of a class of more than 2 million current and former Comcast subscribers who seek damages ****1430** for alleged violations of the federal antitrust laws. We consider whether certification was appropriate under Federal Rule of Civil Procedure 23(b)(3).

I

Comcast Corporation and its subsidiaries, petitioners here, provide cable-television services to residential and commercial customers. From 1998 to 2007, petitioners engaged in a series of transactions that the parties have described as "clustering," a strategy of concentrating operations within a particular region. The region at issue here, which the parties have referred to as the Philadelphia "cluster" or the Philadelphia "Designated Market Area" (DMA), includes 16 counties located in Pennsylvania, Delaware, and New Jersey. [1] Petitioners pursued their clustering strategy by acquiring competitor cable providers in the region and swapping their own systems outside the region for competitor systems located in the region. For instance, in 2001, petitioners ***30** obtained Adelphia Communications' cable systems in the Philadelphia DMA, along with its 464,000 subscribers; in exchange, petitioners sold to Adelphia their systems in Palm Beach, Florida, and Los Angeles, California. As a result of nine clustering transactions, petitioners' share of subscribers in the region allegedly increased from 23.9 percent in 1998 to 69.5 percent in 2007. See 264 F.R.D. 150, 156, n. 8, 160 (E.D.Pa.2010).

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The named plaintiffs, respondents here, are subscribers to Comcast's cable-television services. They filed a class-action antitrust suit against petitioners, claiming that petitioners entered into unlawful swap agreements, in violation of § 1 of the Sherman Act, and monopolized or attempted to monopolize services in the cluster, in violation of § 2. Ch. 647, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2. Petitioners' clustering scheme, respondents contended, harmed subscribers in the Philadelphia cluster by eliminating competition and holding prices for cable services above competitive levels.

Respondents sought to certify a class under Federal Rule of Civil Procedure 23(b)(3). That provision permits certification only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." The District Court held, and it is uncontested here, that to meet the predominance requirement respondents had to show (1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as "antitrust impact") was "capable of proof at trial through evidence that [was] common to the class rather than individual to its members"; and (2) that the damages resulting from that injury were measurable "on a class-wide basis" through use of a "common methodology." 264 F.R.D., at 154. [2]

***31** Respondents proposed four theories of antitrust impact: First, Comcast's clustering made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers. Second, Comcast's activities reduced the level of competition from "overbuilders," ****1431** companies that build competing cable networks in areas where an incumbent cable company already operates. Third, Comcast reduced the level of "benchmark" competition on which cable customers rely to compare prices. Fourth, clustering increased Comcast's bargaining power relative to content providers. Each of these forms of impact, respondents alleged, increased cable subscription rates throughout the Philadelphia DMA.

The District Court accepted the overbuilder theory of antitrust impact as capable of classwide proof and rejected the rest. *Id.,* at 165, 174, 178, 181. Accordingly, in its certification order, the District Court limited respondents' "proof of antitrust impact" to "the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." App. to Pet. for Cert. 192a–193a. [3]

The District Court further found that the damages resulting from overbuilder-deterrence impact could be calculated on a classwide basis. To establish such damages, respondents had relied solely on the testimony of Dr. James McClave. ***32** Dr. McClave designed a regression model comparing actual cable prices in the Philadelphia DMA with hypothetical prices that would have prevailed but for petitioners' allegedly anticompetitive activities. The model calculated damages of $875,576,662 for the entire class. App. 1388a (sealed). As Dr. McClave acknowledged, however, the model did not isolate damages resulting from any one theory of antitrust impact. *Id.,* at 189a–190a. The District Court nevertheless certified the class.

A divided panel of the Court of Appeals affirmed. On appeal, petitioners contended the class was improperly certified because the model, among other shortcomings, failed to attribute damages resulting from overbuilder deterrence, the only theory of injury remaining in the case. The court refused to consider the argument because, in its view, such an "attac[k] on the merits of the methodology [had] no place in the class certification inquiry." 655 F.3d 182, 207 (C.A.3 2011). The court emphasized that, "[a]t the class certification stage," respondents were not required to "tie each theory of antitrust impact to an exact calculation of damages." *Id.,* at 206. According to the court, it had "not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." *Ibid.* Rather, the court said, respondents must "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Ibid.* In the court's view, that burden was met because respondents' model calculated "supra-competitive prices regardless of the type of anticompetitive conduct." *Id.,* at 205.

We granted certiorari. 567 U.S. ——, 133 S.Ct. 24, 183 L.Ed.2d 673 (2012). [4]

***33** ****1432** II

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the

individual named parties only." *Califano v. Yamasaki,* 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). To come within the exception, a party seeking to maintain a class action "must affirmatively demonstrate his compliance" with Rule 23. *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. ——, ——, 131 S.Ct. 2541, 2551–2552, 180 L.Ed.2d 374 (2011). The Rule "does not set forth a mere pleading standard." *Ibid.* Rather, a party must not only "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact," typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a). *Ibid.* The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b). The provision at issue here is Rule 23(b)(3), which requires a court to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members."

Repeatedly, we have emphasized that it " 'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.' " *Ibid.* (quoting *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 160–161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). Such an analysis will frequently entail "overlap with the ***34** merits of the plaintiff's underlying claim." 564 U.S., at ——, 131 S.Ct., at 2551. That is so because the " 'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Ibid.* (quoting *Falcon, supra,* at 160, 102 S.Ct. 2364).

The same analytical principles govern Rule 23(b). If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a). *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623–624, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Rule 23(b)(3), as an " 'adventuresome innovation,' " is designed for situations " 'in which "class-action treatment is not as clearly called for." ' " *Wal–Mart, supra,* at ——, 131 S.Ct., at 2558 (quoting *Amchem,* 521 U.S., at 614–615, 117 S.Ct. 2231). That explains Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.,* an opportunity to opt out), and the court's duty to take a " 'close look' " at whether common questions predominate over individual ones. *Id.,* at 615, 117 S.Ct. 2231.

III

Respondents' class action was improperly certified under Rule 23(b)(3). By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, ****1433** simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class. This case thus turns on the straightforward application of class-certification principles; it provides no occasion for the dissent's extended discussion, *post,* at 1437 – 1441 (GINSBURG and BREYER, JJ., dissenting), of substantive antitrust law.

***35** A

We start with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3). Calculations need not be exact, see *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931), but at the class-certification stage (as at trial), any model supporting a "plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010); see, *e.g., Image Tech. Servs. v. Eastman Kodak*

Co., 125 F.3d 1195, 1224 (C.A.9 1997). And for purposes of Rule 23, courts must conduct a " 'rigorous analysis' " to determine whether that is so. *Wal–Mart, supra,* at ——, 131 S.Ct., at 2551–2552.

The District Court and the Court of Appeals saw no need for respondents to "tie each theory of antitrust impact" to a calculation of damages. 655 F.3d, at 206. That, they said, would involve consideration of the "merits" having "no place in the class certification inquiry." *Id.,* at 206–207. That reasoning flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. *Wal–Mart, supra,* at ——, and n. 6, 131 S.Ct., at 2551–2552, and n. 6. The Court of Appeals simply concluded that respondents "provided a method to measure and quantify damages on a classwide basis," finding it unnecessary to decide "whether the methodology [was] a just and reasonable inference or speculative." 655 F.3d, at 206. Under that ***36** logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.

B

There is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised. [5] The scheme devised by respondents' ****1434** expert, Dr. McClave, sought to establish a "but for" baseline—a figure that would show what the competitive prices would have been if there had been no antitrust violations. Damages would then be determined by comparing to that baseline what the actual prices were during the charged period. The "but for" figure was calculated, however, by assuming a market that contained none of the four distortions that respondents attributed to petitioners' actions. In other words, the model assumed the validity of all four theories of antitrust impact initially advanced by respondents: decreased penetration by satellite providers, overbuilder deterrence, lack of benchmark competition, and increased bargaining power. At the evidentiary hearing, Dr. McClave expressly admitted that the model calculated damages resulting from "the alleged anticompetitive conduct ***37** as a whole" and did not attribute damages to any one particular theory of anticompetitive impact. App. 189a–190a, 208a.

This methodology might have been sound, and might have produced commonality of damages, if all four of those alleged distortions remained in the case. But as Judge Jordan's partial dissent pointed out:

> "[B]ecause the only surviving theory of antitrust impact is that clustering reduced overbuilding, for Dr. McClave's comparison to be relevant, his benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding. In all respects unrelated to reduced overbuilding, the benchmark counties should reflect the actual conditions in the Philadelphia DMA, or else the model will identify 'damages' that are not the result of reduced overbuilding, or, in other words, that are not the certain result of the wrong." 655 F.3d, at 216 (internal quotation marks omitted).

The majority's only response to this was that "[a]t the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Id.,* at 206. But such assurance is not provided by a methodology that identifies damages that are not the result of the wrong. For all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners' alleged elimination of satellite competition (a theory of liability that is not capable of classwide proof); while subscribers in Camden County may have paid elevated prices because of petitioners' increased bargaining power vis-à-vis content providers (another theory that is not capable of classwide proof); while yet other subscribers in Montgomery County may have paid rates produced by the combined effects ***38** of multiple forms of alleged antitrust harm; and so on. The permutations involving four theories of liability ****1435** and 2 million subscribers located in 16 counties are nearly endless.

In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members

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of a single class.[6] Prices whose level above what an expert deems "competitive" has been caused by factors unrelated to an accepted theory of antitrust harm are not "anticompetitive" in any sense relevant here. "The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011) (emphasis added). The District Court and the Court of Appeals ignored that first step entirely.

The judgment of the Court of Appeals for the Third Circuit is reversed.

It is so ordered.

Justice GINSBURG and Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

Today the Court reaches out to decide a case hardly fit for our consideration. On both procedural and substantive grounds, we dissent.

I

This case comes to the Court infected by our misguided reformulation of the question presented. For that reason ***39** alone, we would dismiss the writ of certiorari as improvidently granted.

Comcast sought review of the following question: "[W]hether a district court may certify a class action without resolving 'merits arguments' that bear on [Federal Rule of Civil Procedure] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)." Pet. for Cert. i. We granted review of a different question: "Whether a district court may certify a class action without resolving *whether the plaintiff class has introduced admissible evidence,* including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." 567 U.S. ——, 133 S.Ct. 24, 183 L.Ed.2d 673 (2012) (emphasis added).

Our rephrasing shifted the focus of the dispute from the District Court's Rule 23(b)(3) analysis to its attention (or lack thereof) to the admissibility of expert testimony. The parties, responsively, devoted much of their briefing to the question whether the standards for admissibility of expert evidence set out in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), apply in class certification proceedings. See Brief for Petitioners 35–49; Brief for Respondents 24–37. Indeed, respondents confirmed at oral argument that they understood our rewritten question to center on admissibility, not Rule 23(b)(3). See, *e.g.,* Tr. of Oral Arg. 25.

As it turns out, our reformulated question was inapt. To preserve a claim of error in the admission of evidence, a party must timely object to or move to strike the evidence. Fed. Rule Evid. 103(a)(1). In ****1436** the months preceding the District Court's class certification order, Comcast did not object to the admission of Dr. McClave's damages model under Rule 702 or *Daubert*. Nor did Comcast move to strike his testimony and expert report. Consequently, Comcast forfeited any objection to the admission of Dr. McClave's model at the certification stage. At this late date, Comcast may ***40** no longer argue that respondents' damages evidence was inadmissible.

Comcast's forfeiture of the question on which we granted review is reason enough to dismiss the writ as improvidently granted. See *Rogers v. United States,* 522 U.S. 252, 259, 118 S.Ct. 673, 139 L.Ed.2d 686 (1998) (O'Connor, J., concurring in result) ("[W]e ought not to decide the question if it has not been cleanly presented."); *The Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180, 183, 79 S.Ct. 710, 3 L.Ed.2d 723 (1959) (dismissal appropriate in light of "circumstances ... not fully apprehended at the time certiorari was granted" (internal quotation marks omitted)). The Court, however, elects to evaluate whether respondents "failed to show that the case is susceptible to awarding damages on a class-wide basis." *Ante,* at 1431, n. 4 (internal quotation marks omitted). To justify this second revision of the question presented, the Court observes that Comcast "argued below, and continue[s] to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis." *Ibid.* And so *Comcast* did, in addition to endeavoring to address the question on which we granted review. By treating the first part of our reformulated question as though it did not exist, the Court is hardly fair to respondents.

Abandoning the question we instructed the parties to brief does "not reflect well on the processes of the Court." *Redrup v. New York,* 386 U.S. 767, 772, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) (Harlan, J., dissenting). Taking their cue from our order, respondents did not train their energies on defending the District Court's finding of predominance in their briefing or at oral argument. The Court's newly revised question, focused on predominance, phrased only after briefing was done, left respondents without an unclouded opportunity to air the issue the Court today decides against them. And by resolving a complex and fact-intensive question without the benefit of full briefing, the Court invites the error into which it has fallen. See *infra,* at 1437 – 1441.

***41** II

While the Court's decision to review the merits of the District Court's certification order is both unwise and unfair to respondents, the opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3). In particular, the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable " 'on a class-wide basis.' " See *ante,* at 1431 – 1432 (acknowledging Court's dependence on the absence of contest on the matter in this case); Tr. of Oral Arg. 41.

To gain class-action certification under Rule 23(b)(3), the named plaintiff must demonstrate, and the District Court must find, "that the questions of law or fact common to class members predominate over any questions affecting only individual members." This predominance requirement is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), but it scarcely demands commonality as to all questions. See ****1437** 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, p. 121 (3d ed. 2005) (hereinafter Wright, Miller, & Kane). In particular, when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate. See Advisory Committee's 1966 Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 141 ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class."); 7AA Wright, Miller, & Kane § 1781, at 235–237. [*]

***42** Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal. See 2 W. Rubenstein, Newberg on Class Actions § 4:54, p. 205 (5th ed. 2012) (ordinarily, "individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)"). Legions of appellate decisions across a range of substantive claims are illustrative. See, *e.g., Tardiff v. Knox County,* 365 F.3d 1, 6 (C.A.1 2004) (Fourth Amendment); *Chiang v. Veneman,* 385 F.3d 256, 273 (C.A.3 2004) (Equal Credit Opportunity Act); *Bertulli v. Independent Assn. of Continental Pilots,* 242 F.3d 290, 298 (C.A.5 2001) (Labor–Management Reporting and Disclosure Act and Railway Labor Act); *Beattie v. CenturyTel, Inc.,* 511 F.3d 554, 564–566 (C.A.6 2007) (Federal Communications Act); *Arreola v. Godinez,* 546 F.3d 788, 801 (C.A.7 2008) (Eighth Amendment). Antitrust cases, which typically involve common allegations of antitrust violation, antitrust impact, and the fact of damages, are classic examples. See *In re Visa Check/MasterMoney Antitrust Litigation,* 280 F.3d 124, 139–140 (C.A.2 2001). See also 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, Antitrust Law ¶ 331, p. 56 (3d ed. 2007) (hereinafter Areeda & Hovenkamp); 6 A. Conte & H. Newberg, Newberg on Class Actions § 18:27, p. 91 (4th ed. 2002). As this Court has rightly observed, "[p]redominance is a test readily met" in actions alleging "violations of the antitrust laws." *Amchem,* 521 U.S., at 625, 117 S.Ct. 2231.

The oddity of this case, in which the need to prove damages on a classwide basis through a common methodology was never challenged by respondents, see Brief for Plaintiffs–Appellees in No. 10–2865(CA3), pp. 39–40, is a further reason to dismiss the writ as improvidently granted. The Court's ruling is good for this day and case only. In the mine run of cases, it remains the "black letter rule" that a ***43** class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members. 2 Rubenstein, *supra,* § 4:54, at 208.

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III

Incautiously entering the fray at this interlocutory stage, the Court sets forth a profoundly mistaken view of antitrust law. And in doing so, it relies on its own version of the facts, a version inconsistent with factual findings made by the District Court and affirmed by the Court of Appeals.

A

To understand the antitrust problem, some (simplified) background discussion is ****1438** necessary. Plaintiffs below, respondents here, alleged that Comcast violated §§ 1 and 2 of the Sherman Act. See 15 U.S.C. §§ 1, 2. For present purposes, the § 2 claim provides the better illustration. A firm is guilty of monopolization under § 2 if the plaintiff proves (1) "the possession of monopoly power in the relevant market" and (2) "the willful acquisition or maintenance of that power[,] as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). A private plaintiff seeking damages must also show that (3) the monopolization caused "injur[y]." 15 U.S.C. § 15. We have said that antitrust injuries must be "of the type the antitrust laws were intended to prevent and that flo[w] from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)). See 2A Areeda & Hovenkamp ¶ 391a, at 320 (To prove antitrust injury, "[a] private plaintiff must identify the economic rationale for a business practice's illegality under the antitrust laws and show that its harm flows from whatever it is that makes the practice unlawful.").

***44** As plaintiffs below, respondents attempted to meet these requirements by showing that (1) Comcast obtained a 60% or greater share of the Philadelphia market, and that its share provides it with monopoly power; (2) Comcast acquired its share through exclusionary conduct consisting of a series of mergers with competitors and "swaps" of customers and locations; and (3) Comcast consequently injured respondents by charging them supra-competitive prices.

If, as respondents contend, Philadelphia is a separate well-defined market, and the alleged exclusionary conduct permitted Comcast to obtain a market share of at least 60%, then proving the § 2 violation may not be arduous. As a point of comparison, the government considers a market shared by four firms, each of which has 25% market share, to be "highly concentrated." Dept. of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 5.3, p. 19 (2010). A market, such as the one alleged by respondents, where *one* firm controls 60% is far worse. See *id.*, § 5.3, at 18–19, and n. 9 (using a concentration index that determines a market's concentration level by summing the squares of each firm's market share, one firm with 100% yielding 10,000, five firms with 20% each yielding 2000, while a market where one firm accounts for 60% yields an index number of *at least* 3,600). The Guidelines, and any standard antitrust treatise, explain why firms in highly concentrated markets normally have the power to raise prices significantly above competitive levels. See, *e.g.*, 2B Areeda & Hovenkamp ¶ 503, at 115.

B

So far there is agreement. But consider the last matter respondents must prove: Can they show that Comcast injured them by charging higher prices? After all, a firm with monopoly power will not necessarily exercise that power by charging higher prices. It could instead act less competitively in other ways, such as by leading the quiet life. See J. Hicks, Annual Survey of Economic Theory: The ***45** Theory of Monopoly, 3 Econometrica 1, 8 (1935) ("The best of all monopoly profits is a quiet life.").

It is at this point that Dr. McClave's model enters the scene. His model first selects a group of comparable *outside*-Philadelphia ****1439** "benchmark" counties, where Comcast enjoyed a lower market share (and where satellite broadcasting accounted for more of the local business). Using multiple regression analysis, McClave's model measures the effect of the anticompetitive conduct by comparing the class counties to the benchmark counties. The model concludes that the prices Philadelphia area consumers would have paid had the Philadelphia counties shared the properties of the benchmark counties (including a diminished Comcast market share), would

have been 13.1% lower than those they actually paid. Thus, the model provides evidence that Comcast's anticompetitive conduct, which led to a 60% market share, caused the class to suffer injuriously higher prices.

C

1

The special antitrust-related difficulty present here stems from the manner in which respondents attempted to prove their antitrust injuries. They proffered four "non-exclusive mechanisms" that allegedly "cause[d] the high prices" in the Philadelphia area. App. 403a. Those four theories posit that (1) due to Comcast's acquisitions of competitors, customers found it more difficult to compare prices; (2) one set of potential competitors, namely Direct Broadcast Satellite companies, found it more difficult to obtain access to local sports broadcasts and consequently decided not to enter the Philadelphia market; (3) Comcast's ability to obtain programming material at lower prices permitted it to raise prices; and (4) a number of potential competitors (called "overbuilders"), whose presence in the market would have limited Comcast's power to raise prices, were ready to enter some parts of the market but decided not to do so in light of Comcast's ***46** anticompetitive conduct. 264 F.R.D. 150, 161–162 (E.D.Pa.2010).

For reasons not here relevant, the District Court found the first three theories inapplicable and limited the liability-phase proof to the "overbuilder" theory. See App. to Pet. for Cert. 192a–193a. It then asked the parties to brief whether doing so had any impact on the viability of McClave's model as a measure of classwide damages. See 264 F.R.D., at 190. After considering the parties' arguments, the District Court found that striking the three theories "does not impeach Dr. McClave's damages model" because "[a]ny anticompetitive conduct is reflected in the [higher Philadelphia] price [which Dr. McClave's model determines], not in the [the model's] selection of the comparison counties, [*i.e.,* the lower-price 'benchmark counties' with which the Philadelphia area prices were compared]." *Id.,* at 190–191. The court explained that "whether or not we accepted all [four] ... theories ... is inapposite to Dr. McClave's methods of choosing benchmarks." *Ibid.* On appeal, the Third Circuit held that this finding was not an abuse of discretion. 655 F.3d 182, 207 (2011).

2

The Court, however, concludes that "the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." *Ante,* at 1433. To reach this conclusion the Court must consider fact-based matters, namely what this econometric multiple-regression model is about, what it proves, and how it does so. And it must overturn two lower courts' related factual findings to the contrary.

We are normally "reluctant to disturb findings of fact in which two courts below have concurred." ****1440** *United States v. Doe,* 465 U.S. 605, 614, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984). See also *United States v. Virginia,* 518 U.S. 515, 589, n. 5, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (SCALIA, J., dissenting) (noting "our well-settled rule that we will not 'undertake to review concurrent findings of fact by two courts below in the ***47** absence of a very obvious and exceptional showing of error' " (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672 (1949))). Here, the District Court found McClave's econometric model capable of measuring damages on a classwide basis, even after striking three of the injury theories. 264 F.R.D., at 190–191. Contrary to the Court's characterization, see *ante,* at 1433 – 1434, n. 5, this was not a legal conclusion about what the model proved; it was a factual finding about *how* the model worked. Under our typical practice, we should leave that finding alone.

In any event, as far as we can tell, the lower courts were right. On the basis of the record as we understand it, the District Court did not abuse its discretion in finding that McClave's model could measure damages suffered by the class—even if the damages were limited to those caused by deterred overbuilding. That is because respondents alleged that Comcast's anticompetitive conduct increased Comcast's market share (and market power) by deterring potential entrants, in particular, overbuilders, from entering the Philadelphia area market. See App. 43a–66a. By showing that this was so, respondents' proof tends to show the same in respect to other entrants. The overbuilders' failure to enter deprives the market of the price discipline that their entry would have provided in

other parts via threat of the overbuilders' expansion or that of others potentially led on by their example. Indeed, in the District Court, Comcast argued that the three other theories, *i.e.,* the three rejected theories, had no impact on prices. See 264 F.R.D., at 166, 176, 180–181. If Comcast was right, then the damages McClave's model found must have stemmed exclusively from conduct that deterred new entry, say from "overbuilders." Not surprisingly, the Court offers no support at all for its contrary conclusion, namely, that the District Court's finding was " 'obvious [ly] and exceptional[ly]' erroneous." *Ante,* at 1433 – 1434, n. 5 (quoting *Virginia,* 518 U.S., at 589, n. 5, 116 S.Ct. 2264 (SCALIA, J., dissenting)).

***48** We are particularly concerned about the matter because the Court, in reaching its contrary conclusion, makes broad statements about antitrust law that it could not mean to apply in other cases. The Court begins with what it calls an "unremarkable premise" that respondents could be "entitled only to damages resulting from reduced overbuilder competition." *Ante,* at 1433. in most § 2 CASES, HOWEVER, THE COURT'S STARTING PLACE WOULD SEEM *remarkable,* not "unremarkable."

Suppose in a different case a plaintiff were to prove that Widget, Inc. has obtained, through anticompetitive means, a 90% share of the California widget market. Suppose the plaintiff also proves that the two small remaining firms—one in Ukiah, the other in San Diego —lack the capacity to expand their widget output to the point where that possibility could deter Widget, Inc. from raising its prices. Suppose further that the plaintiff introduces a model that shows California widget prices are now twice those in every other State, which, the model concludes is (after accounting for other possible reasons) the result of lack of competition in the California widget market. Why would a court hearing that case restrict damages solely to customers in the vicinity of Ukiah and San Diego?

****1441** Like the model in this example, Dr. McClave's model does not purport to show precisely *how* Comcast's conduct led to higher prices in the Philadelphia area. It simply shows *that* Comcast's conduct brought about higher prices. And it measures the amount of subsequent harm.

* * *

Because the parties did not fully argue the question the Court now answers, all Members of the Court may lack a complete understanding of the model or the meaning of related statements in the record. The need for focused argument is particularly strong here where, as we have said, the underlying considerations are detailed, technical, and fact-based. ***49** The Court departs from our ordinary practice, risks inaccurate judicial decisionmaking, and is unfair to respondents and the courts below. For these reasons, we would not disturb the Court of Appeals' judgment and, instead, would dismiss the writ as improvidently granted.

All Citations

569 U.S. 27, 133 S.Ct. 1426, 185 L.Ed.2d 515, 81 USLW 4217, 2013-1 Trade Cases P 78,316, 85 Fed.R.Serv.3d 118, 13 Cal. Daily Op. Serv. 3396, 2013 Daily Journal D.A.R. 4027, 57 Communications Reg. (P&F) 1487, 24 Fla. L. Weekly Fed. S 125

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 A "Designated Market Area" is a term used by Nielsen Media Research to define a broadcast-television market. Strictly speaking, the Philadelphia DMA comprises 18 counties, not 16.

2 Respondents sought certification for the following class: "All cable television customers who subscribe or subscribed at any times since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster." App. 35a.

3 The District Court did not hold that the three alternative theories of liability failed to establish antitrust impact, but merely that those theories could not be determined in a manner common to all the class plaintiffs. The other theories of liability may well be available for the plaintiffs to pursue as individual actions. Any contention that the plaintiffs should be allowed to recover damages attributable to all four theories in this class action would erroneously suggest one of two things—

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either that the plaintiffs may *also* recover such damages in individual actions or that they are precluded from asserting those theories in individual actions.

4 The question presented reads: "Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." 567 U.S., at ——, 133 S.Ct. 24. Respondents contend that petitioners forfeited their ability to answer this question in the negative because they did not make an objection to the admission of Dr. McClave's testimony under the Federal Rules of Evidence. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Such a forfeit would make it impossible for petitioners to argue that Dr. McClave's testimony was not "admissible evidence" under the Rules; but it does not make it impossible for them to argue that the evidence failed "to show that the case is susceptible to awarding damages on a class-wide basis." Petitioners argued below, and continue to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis. That is the question we address here.

5 The dissent is of the view that what an econometric model proves is a "question of fact" on which we will not "undertake to review concurrent findings ... by two courts below in the absence of a very obvious and exceptional showing of error." *Post,* at 1440 (quoting *United States v. Virginia,* 518 U.S. 515, 589, n. 5, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (SCALIA, J., dissenting) (internal quotation marks omitted)). To begin with, neither of the courts below found that the model established damages attributable to overbuilding alone. Second, while the data contained within an econometric model may well be "questions of fact" in the relevant sense, what those data prove is no more a question of fact than what our opinions hold. And finally, even if it were a question of fact, concluding that the model here established damages attributable to overbuilding alone would be "obvious[ly] and exceptional[ly]" erroneous.

6 We might add that even if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been the same in all counties, or that the extent is irrelevant to effect upon ability to charge supra-competitive prices.

* A class may be divided into subclasses for adjudication of damages. Fed. Rule Civ. Proc. 23(c)(4)–(5). Or, at the outset, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings. See 2 W. Rubenstein, Newberg on Class Actions § 4:54, pp. 206–208 (5th ed. 2012). Further, a certification order may be altered or amended as the case unfolds. Rule 23(c)(1)(C).

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KeyCite Yellow Flag - Negative Treatment
Overruling Recognized by Kearney v. Hyundai Motor America, C.D.Cal., December 17, 2012

150 F.3d 1011
United States Court of Appeals,
Ninth Circuit.

Stuart HANLON, Plaintiff,
and
Kenneth Edwards; Nancy Edwards; Kathy Hancock; Michael Hancock; Lori Tuttle; Paul Alan Levy; Nancy Huvendick; Center For Auto Safety, Intervenors–Appellants,
v.
CHRYSLER CORPORATION, a Delaware corporation, Defendant–Appellee.
Stuart HANLON, Plaintiff,
and
Robert Kempton, Plaintiff–Appellant,
and
George Van Buskirk, Objector; Diane Cheatham, Objector, Appellants,
v.
CHRYSLER CORPORATION, a Delaware corporation, Defendant–Appellee.
Stuart HANLON; Billy Macables; Lewis Amonette; June Amrhein; Richard Bales; Ray Baranowski; Lynette Barrera; Larry Beasley; Steven Bell; Sue & Stanley Bell; Angie Blain; Robert Bowman; Gail Broadway; Elizabeth Callais; Ann Caples; Steve Cathey; Allison Clay; George Clifford; Max Colvin; Karen & Ryan Courtade; George Cowsar; William Dalrymple; Greg Davis; Linda De Muro; Dennis Dean; Cheryl Deegan; James Deming; Bill Dippel; Chris Dixon; Jerry Donelson; Allen Douglass; Mary Douglass; Sandra Edwards; E.W. Ellison, Jr.; Al Fairley; Jerry Ferguson; Noah Ferrell; Benjamin Ferrydene; Jeanette Fisher; Steve Fontenot; Steven Franks; Thomas Gonda; Joseph & Jeanne Graham; Tammy Grantham; James Haffey; Della Hamilton; Michelle & Jay Hare; Cheryl Hensley; Sherman Hyatt; Carl Jackson; Diann James; Isaac Jarrett; Kamal Kabshura; James Kaigler; Paul L. Kennedy; Sandra King; Judith Koinm; John Langford; Laura Leathers; Walter Legers; Linda Lewandowski; Joseph Lewandowski; Thomas Look; Margaret Maddox; Roosevelt March; Debra Mason; Zandra Mcbride; Nancy Mcmanus; Adrian Millwood; Wendy & John Minerowicz; D. Mitchell; Starkey Morgan; Ana Nadim; Tim Nolan; Katie Nutall; Carey O'neal; Harry & Becky Pepper; David Ramsey; Teresa Ruiz; J.R. Sanders; Wilton Sanders; George Shackleford; A.J. Sims; Elaine Sims; Eileen Siss; William Spell; Dewey Stancil; Robert Stengl; Kevin Stevens; Denise Storey; Donna Strichter; Melanie Tichenor; Ed Turnage; Ralph Ulery; Sally Ulery; Robert Ware; Christine White; Darrell Whitten; Terrell Williams; Ramona Williams; Sidney Wilson; Stacy Wilson, Plaintiffs–Appellees,
and
C. Stuart McPherson, Objector; Robert Mendoza, Objector; Gloria Mendoza, Objector; Michael Rubin, Objector; Roderick Thornton, Objector; Peter Von Savoye, Objector, Appellants,
v.
CHRYSLER CORPORATION, a Delaware corporation, Defendant–Appellee.
Stuart HANLON, Plaintiff–Appellee,
and
George Van Buskirk, Objector; Diane Cheatham, Objector; Robert Kempton, Appellants,
v.
CHRYSLER CORPORATION, a Delaware corporation, Defendant.

Nos. 96–15043, 96–15044, 96–16027, 96–16076.
|
Submitted Aug. 13, 1997.
|
Decided June 9, 1998.
|
Amended July 24, 1998.

Synopsis

Minivan owners brought class action against minivan manufacturer, alleging defectively designed rear liftgate latch. The United States District Court for the Northern District of California, Charles A. Legge, J., approved settlement. Objectors appealed. The Court of Appeals, Thomas, Circuit Judge, held that: (1) settlement class satisfied class action prerequisites; (2) class could be certified as common question class; (3) class representative

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in Georgia class action could not opt out of national class action on behalf of all Georgia members; (4) settlement requiring manufacturer to make minivans safe was fair; (5) rejection of settlement was not warranted by inclusion of paragraph regarding government action affecting settlement; and (6) award of $5 million in attorney fees for class counsel was not abuse of discretion.

Affirmed.

Attorneys and Law Firms

***1017** Colette G. Matzzie, Washington, DC, for objectors-intervenors-appellants.

James E. Carter, Madison, GA, for objectors-appellants.

Charles A. Newman, Bryan Cave, St. Louis, MO, for defendant-appellee.

Elizabeth J. Cabraser, Michael F. Ram, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA, for plaintiffs-appellees.

William M. Rubenstein, Asst. Atty. Gen. of Connecticut, Hartford, CT, for Amicus Curiae States of Connecticut, Arizona, Iowa, Kansas, New York, Nevada, Oklahoma, Pennsylvania, Rhode Island and Vermont.

Appeals from the United States District Court for the Northern District of California; Charles A. Legge, District Judge, Presiding. D.C. No. CV–95–02010–CAL.

Before: GOODWIN and THOMAS, Circuit Judges, SEDWICK, [1] U.S. District Judge.

Opinion

THOMAS, Circuit Judge:

We are presented in this appeal with procedural and substantive objections to the settlement of a nationwide class action against Chrysler Corporation. After examining the settlement in accordance with the guidelines established in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), we affirm the district court.

I.

In September 1993, the National Highway Traffic Safety Administration ("NHTSA") Office of Defect Investigation learned of a rear liftgate latch problem in 1992 Chrysler minivans. NHTSA opened a preliminary investigation, which was expanded to an "engineering analysis" of all 1984–1994 Chrysler minivans. The Engineering Analysis included a technical evaluation of the rear latches, testing of the latches in different scenarios, and analyzing accidents, fatalities, injuries and consumer complaints. Despite NHTSA's investigation, Chrysler publicly denied any problem with its rear liftgate latches.

The NHTSA investigation proceeded throughout 1994. On November 17, 1994, Chrysler and NHTSA representatives met to discuss the engineering analysis and the ***1018** growing evidence that the latches presented a serious safety threat. Following that meeting, NHTSA and Chrysler negotiated a voluntary resolution to the investigation wherein Chrysler announced a "Service Action" to replace the rear liftgate latches on all 1984–1994 minivans. The Service Action was extended one month later to include 1995 minivans.

The details of the Service Action are found in the correspondence exchanged between Chrysler and NHTSA; Chrysler understood its campaign to include:

- a redesigned improved replacement latch to be installed free of charge;
- a series of letters to minivan owners advising them the new latches were available;
- an advertising campaign;
- monitoring the response rate of owners and taking all necessary steps to ensure an appropriate response rate; and
- quarterly reports to NHTSA.

NHTSA kept its investigation open after Chrysler initiated the Service Action to ensure the company's compliance. The investigation was finally closed on October 25, 1995. At that time, NHTSA was satisfied that the voluntary action taken by Chrysler had been as effective as a formal recall. However, NHTSA reserved the right to reopen the proceedings and initiate a recall if Chrysler's Service Action proved inadequate or if Chrysler abandoned the plan.

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Prior to the agreement between NHTSA and Chrysler, plaintiffs lawyers in several states filed class actions in various state courts seeking latch replacement, as well as damages under various state-law warranties and theories of recovery.[2] The plaintiffs' counsel in the state actions met with engineering experts, conducted and defended depositions, and were proceeding through the normal course of document-intensive discovery. Class counsel in the two California cases and the Texas case moved for class certification; however, the hearings were continued at Chrysler's request.

Approximately two weeks before it announced the NHTSA-approved Service Action, Chrysler and counsel from the various state actions began serious settlement discussions, which continued throughout April, May and June 1995. As a result of the settlement discussions, all of the state class actions were consolidated in one large national class action (the *Hanlon* class) in federal court in the Northern District of California under Judge Legge on June 16, 1995. In their complaint the *Hanlon* plaintiffs asserted various claims against Chrysler with regard to an alleged defect in the rear liftgate latches of the minivans. Three days after filing the case, the parties submitted a settlement agreement to the court for approval. The district court held a preliminary hearing on the settlement agreement on August 18, 1994, and issued an Order granting preliminary approval of the settlement and certifying the nationwide class of Minivan owners for settlement purposes only. All personal injury and death cases are excluded from this settlement.

The Order also provided at Paragraph 19:

> Pending final determination of whether the settlement embodied in the Settlement Agreement is to be approved, no member of the Settlement Class, either directly, representatively, derivatively, or in any other capacity, shall commence or prosecute any action or proceeding in any court or tribunal asserting any of the claims described in paragraph 17 of the Settlement Agreement.

Pursuant to the August 18 Order, the Court-approved notice of the proposed settlement was mailed directly to over 3.3 million Minivan owners. The order granting preliminary approval of the settlement set an objection and opt-out date of October 20, 1995, and all activity on the state actions ceased.

A few weeks after the *Hanlon* action was filed, Robert Kempton, a resident of Georgia and Chrysler minivan owner, filed a similar class action in a Georgia state court. Kempton sought to represent himself and all Georgia ***1019** residents and entities who purchased or leased a Chrysler minivan in the relevant product years. In direct contravention of the federal district court's August 18 order, Kempton filed a motion to certify the Georgia class on October 17, 1995. Kempton specifically stated that his goal was either to opt out all Georgia residents from the *Hanlon* action or object on their behalf. The *Hanlon* plaintiffs and Chrysler filed a motion to enjoin Kempton from proceeding, and the California district court issued such an order on October 19, 1995.

Kempton expressly ignored the injunction and proceeded with the Georgia class certification, arguing that he had opted out of the *Hanlon* class and therefore was not subject to that court's jurisdiction or bound by its orders. The Georgia state judge entered an order conditionally granting Kempton's motion and certifying the class.

Following notification of the proposed settlement, the district court in California conducted two fairness hearings on the adequacy of the settlement in November 1995. The court made several findings at the second hearing on November 30, 1995, indicating its approval of the settlement. Prior to entering the order, the court gave objectors an opportunity to present arguments on the pending settlement. The objections centered around one primary issue: the adequacy and fairness of the settlement in light of Chrysler's prior agreement with NHTSA to replace all of the defective latches. At the conclusion of the hearing, the court entered a final order of settlement and award of attorneys fees.

In early 1996, Chrysler acknowledged that approximately one million class members never received the notice of settlement and opportunity to opt-out of the settlement class because it had inadvertently failed to include them in the initial mailing. As a result, Chrysler moved to set aside

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the final order of settlement and reopen the proceedings to allow additional notice to these class members. The court agreed and granted Chrysler's Rule 60(b) Motion to Partially Reopen the Judgment on February 23, 1996.

A third and final fairness hearing was held on April 29, 1996. At the close of that hearing, the court issued a new order that was substantially similar to the November 30 order. The objectors timely appealed to this court.

II.

In recent years, the difficulties attendant to consummating settlement of mass tort and consumer lawsuits have caused litigants to instigate lawsuits for the limited purpose of obtaining court approval of a certified class settlement. Although there is nothing inherently wrong with this practice, we must pay "undiluted, even heightened, attention" to class certification requirements in a settlement context. *Amchem Products, Inc. v. Windsor,* 521U.S. 591, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689 (1997) ("*Amchem* ").

A.

Our threshold task is to ascertain whether the proposed settlement class satisfies the requirements of Rule 23(a) of the Federal Rules of Civil Procedure applicable to all class actions, namely: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Id.* 117 S.Ct. at 2245. The prerequisite of numerosity is discharged if "the class is so large that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). None of the objectors contest certification for failure to meet this condition, and as a nationwide class with millions of class members residing in fifty states, this requirement is clearly satisfied.

A class has sufficient commonality "if there are questions of fact and law which are common to the class." Fed.R.Civ.P. 23(a)(2). The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3). Indeed, Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class. Although members of the proposed class in this instance may possess different avenues of redress, their claims stem from the same ***1020** source: the allegedly defective designed rear liftgate latch installed in minivans manufactured by Chrysler between 1984 and 1995. Thus, the proposed class shares sufficient factual commonality to satisfy the minimal requirements of Rule 23(a)(2).

The typicality prerequisite of Rule 23(a) is fulfilled if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). Under the rule's permissive standards, representative claims are "typical" if they are reasonably co-extensive with those of absent class members; they need not be substantially identical. In this instance, the broad composition of the representative parties vitiates any challenge founded on atypicality. The representative parties comprise persons from every state, representing all models of Chrysler minivans and include minivan owners whose latches remain operable. The narrow focus of the proposed class was to obtain a defect-free rear liftgate latch in Chrysler minivans owned by class members, or receive adequate non-personal injury compensatory damages. Given these limited objectives and the broad composition of the representative parties, the representative claims were sufficiently typical to pass muster under Rule 23(a)(3).

The final hurdle interposed by Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them. *See Hansberry v. Lee,* 311 U.S. 32, 42–43, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? *See Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512 (9th Cir.1978).

Examination of potential conflicts of interest has long been an important prerequisite to class certification. That inquiry is especially critical when the a class settlement is tendered along with a motion for class certification. *Amchem* instructs us to give heightened scrutiny to cases

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in which class members may have claims of different strength.

Amchem was a settlement class action which attempted to settle all pending and future asbestos litigation. The asbestos manufacturers wished to resolve all claims, including those not yet filed or even in existence at the time of the settlement. The class was never divided into sub-classes and additional counsel was never appointed to represent the interests of plaintiffs with as yet undeveloped or undiagnosed injuries. Despite these problems, the class was conditionally certified and the settlement approved.

The Third Circuit vacated the certification because the requirements of Rule 23 were not met independent of the settlement agreement. *Georgine v. Amchem Products, Inc.,* 83 F.3d 610, 617–618 (3d Cir.1996). The Supreme Court affirmed. *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The Court found that the clashing interests of present and future claimants presented insurmountable conflicts for class counsel who could not possibly provide adequate representation to both groups as required by Rule 23(a)(4). *Id.* 117 S.Ct. at 2251. The Court also held that all of the Rule 23 standards for class actions must be met without regard to the presence or terms of a pending settlement agreement. *Id.* at 2249.

At the heart of *Amchem* was concern over settlement allocation decisions; asbestos manufacturers had a designated amount of money that was not fairly distributed between present and future claimants. The *Amchem* settlement eliminated all present and future claims against asbestos manufacturers, with class counsel attempting to represent both groups of plaintiffs. The Supreme Court found this dual representation to be particularly troubling, given that present plaintiffs had a clear interest in a settlement that maximized current funds, while future plaintiffs had a strong interest in preserving ***1021** funds for their future needs and protecting the total fund against inflation.

Unlike the class in *Amchem,* this class of minivan owners does not present an allocation dilemma. Potential plaintiffs are not divided into conflicting discrete categories, such as those with present health problems and those who may develop symptoms in the future. Rather, each potential plaintiff has the same problem: an allegedly defective rear latchgate which requires repair or commensurate compensation. The differences in severity of personal injury present in *Amchem* are avoided here by excluding personal injury and wrongful death claims. Similarly, there is no structural conflict of interest based on variations in state law, for the named representatives include individuals from each state, and the differences in state remedies are not sufficiently substantial so as to warrant the creation of subclasses. Representatives of other potential subclasses are included among the named representatives, including owners of every minivan model. However, even if the named representatives did not include a broad cross-section of claimants, the prospects for irreparable conflict of interest are minimal in this case because of the relatively small differences in damages and potential remedies.

To further forfend problems caused by potential subclass differences, the actions and tendered settlement were narrowly circumscribed. No personal injury or wrongful death claims were included, and any class member who wished to do so could opt out of the settlement class. To fulfill this limited purpose, the proposed settlement does not propose different terms for different class members; on the contrary, treatment of each class member is identical. Given these careful precautions and safeguards, no improper conflict of interest existed which would deny absent class members adequate representation.

Our second adequacy inquiry is directed to the vigor with which the named representatives and their counsel will pursue the common claims. Although there are no fixed standards by which "vigor" can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation.

The objectors do not seriously challenge the competence of class counsel, and the record dispels any cause for concern. Affidavits submitted to the district court show experience prosecuting dozens of high profile class action cases and products liability litigation. If these attorneys are not equal to the task of prosecuting this case, it is not clear to us who would be. The objectors presented no evidence, and we could find none in the record, to indicate any deficiencies or conflicts of interest on the part of class counsel.

The *Amchem* Court also noted the problem of counsel "not prepared to try a case." Such counsel is,

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almost by definition, inadequate because an inability or unwillingness to try a case means the class loses all of the benefits of adversarial litigation. "Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer." *Amchem,* 117 S.Ct. at 2248–2249. District courts must be skeptical of some settlement agreements put before them because they are presented with a "bargain proffered for ... approval without benefit of an adversarial investigation." *Id.* at 2249.

These concerns warrant special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded. *See, e.g., In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768 (3d Cir.), *cert. denied,* 516 U.S. 824, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995).

These circumstances are not present in this case. Class counsel prosecuted several state class actions in strategic states prior to the filing of the federal consolidated action. They conducted the initial factual investigation, even prior to learning of the NHTSA investigation. They consulted and retained automotive and engineering experts to assess the design specifications, blueprints, ***1022** and other Chrysler documentation relating to the minivans. They assessed the failure mode commonly experienced and corroborated that the reported failures were due to defective latch design. They reviewed Chrysler's history of advertising the minivan as a "safe family vehicle" in order to assess any implied or express warranties and possible misrepresentation claims. They engaged in the traditional discovery of products liability litigation, including document request and production, interrogatories, and the taking and defending of depositions. They fought Chrysler's requests for protective orders, successfully resisted Chrysler's attempts to remove the various actions to federal court, and its attempt to transfer all of the cases to an MDL proceeding. Plaintiffs' counsel spoke and conferred regularly to coordinate their litigation strategy and to apply as much pressure as possible to Chrysler. We find counsel's prosecution of the case sufficiently vigorous to satisfy any Rule 23(a)(4) concerns.

In sum, the named representatives have fulfilled the threshold requirements of Fed.R.Civ.P. 23(a) by satisfying the preconditions of numerosity, commonality, typicality, and adequacy of representation. The named plaintiffs have also satisfied the heightened scrutiny we must give to Rule 23(a) requirements when considering certification of a settlement-only class.

B.

In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class certification must also show that the action is maintainable under Fed.R.Civ.P. 23(b)(1), (2) or (3). *Amchem,* 117 S.Ct. at 2245. In the instant case, the parties propose certification pursuant to Rule 23(b)(3), which is appropriate "whenever the actual interests of the parties can be served best by settling their differences in a single action." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1777 (2d ed.1986). To qualify for certification under this subsection, a class must satisfy two conditions in addition to the Rule 23(a) prerequisites: common questions must "predominate over any questions affecting only individual members," and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem,* 117 S.Ct. at 2249. This analysis presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2); thus, the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3). In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between the common and individual issues. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." Wright, Miller & Kane, *supra,* § 1778. Settlement benefits cannot form part of a Rule 23(b)(3) analysis; rather the examination must rest on "legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem,* 117 S.Ct. at 2249.

A common nucleus of facts and potential legal remedies dominates this litigation. Variations in state law do not necessarily preclude a 23(b)(3) action, but class counsel

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should be prepared to demonstrate the commonality of substantive law applicable to all class members. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 821–23, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In this case, although some class members may possess slightly differing remedies based on state statute or common law, the actions asserted by the class representatives are not sufficiently anomalous to deny class certification. On the contrary, to the extent distinct remedies exist, they are local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, and "lemon laws." Individual claims based on personal injury or wrongful death were excluded from the class. Thus, the idiosyncratic differences between ***1023** state consumer protection laws are not sufficiently substantive to predominate over the shared claims. Indeed, at the November 30, 1995 fairness hearing, the objectors acknowledged that independent of any variations in state law, there were still sufficient common issues to warrant a class action, particularly questions of Chrysler's prior knowledge of the latch deficiency, the design defect, and a damages remedy.

Rule 23(b)(3) also requires that class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case. Wright, Miller & Kane, *supra* § 1779. This determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution. In this instance, the alternative methods of resolution are individual claims for a small amount of consequential damages or latch replacement. Further, the statute of limitations has run for owners of older vehicles under many state laws, and state lemon laws almost universally require that the vehicle be defective beyond repair—a condition which is impossible for many owners to demonstrate. Thus, many claims could not be successfully asserted individually. Even if efficacious, these claims would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs. In most cases, litigation costs would dwarf potential recovery. In this sense, the proposed class action is paradigmatic. A fair examination of alternatives can only result in the apodictic conclusion that a class action is the clearly preferred procedure in this case.

Assessment of the non-exclusive factors listed in Rule 23(b)(3) which potentially apply to both the predominance and superiority inquiries yields the same result. From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery. With a few exceptions, the pre-existing lawsuits were cooperatively managed and can be effectively merged into the instant action. No particular forum stands out as a logical venue for concentration of claims. Thus, consideration of the factors enumerated in Rule 23(b)(3) does not alter the conclusion.

Thus, given the limited focus of the action, the shared factual predicate and the reasonably inconsequential differences in state law remedies, the proposed class was sufficiently cohesive to survive Rule 23(b)(3) scrutiny. A comparative examination of alternatives underscores the wisdom of a class action in this instance. Consideration of the specific, non-exclusive factors identified in Rule 23(b)(3) produces the same result. Thus, the requisite predominance and superiority tests are satisfied, and the conditions of Rule 23(b)(3) have been met.

C.

The objectors claim error in the brevity of the district court findings, and the district court was, to say the least, restrained and succinct in explaining its reasoning. However, as the Supreme Court has stated, "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim...." *General Telephone Co. of the Southwest v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). This is just such a case. The record is fully developed, the issues are plain and the analytical framework clear. All the parties, including the objectors, have been represented on appeal by skilled advocates who have exhaustively briefed and argued the salient questions. Although the district court's findings are almost conclusory, the record provides more than adequate foundation upon which to reach our conclusions. There is no value to be served in remanding this case for the entry of further self-evident findings. The parties seeking certification have quite clearly satisfied the requirements of Rule 23(a) and Rule 23(b)(3), and the district court did not abuse its discretion

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in certifying the class. *Hilao v. Estate of Marcos,* 103 F.3d 767, 774 (9th Cir.1996). *Amchem* cautioned against conflating the class certification requirements ***1024** of Fed.R.Civ.P. 23(a) and (b) into the "fair, adequate and reasonable" preconditions for class settlement pursuant to Fed.R.Civ.P. 23(e), and mandated heightened scrutiny of proposed settlement-only class certifications. We have independently analyzed the proposed class with these admonitions in mind, and find no fault with district court's class certification even under these rigorous standards.

III.

After the federal consolidated class action was filed, but before the settlement agreement was presented to the district court for preliminary approval, Robert Kempton filed a state class action in Georgia. Kempton's theory of recovery was very similar to that of the federal action, but he claimed relief under Georgia state law. He sought to represent himself and all other Georgia consumers who owned or leased a minivan from the relevant model years, and asserted the right to opt-out all Georgia customers from the federal class action.

The district court expressly held that Kempton's actions in proceeding with his state class action, in direct contravention of the district court's injunction against such a proceeding, operated to exclude him from the nationwide class, but his opt-out had no effect on the remaining Georgia class members. Kempton argues on appeal that the district court erred, that his actions were taken on behalf of all Georgia class members, and that the state court's certification of the Georgia action operates to opt-out all Georgia class members from the plaintiff class.

The district court was entirely correct. All class members in a Rule 23(b)(3) action are entitled to due process, including notice. *Phillips Petroleum v. Shutts,* 472 U.S. 797, 810–813, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). The procedural due process rights of these members include an opportunity to be excluded from the action. The right to participate, or to opt-out, is an individual one and should not be made by the class representative or the class counsel. *See* Newberg and Conte, *Newberg on Class Actions,* § 16.16 at 90 (3d ed. 1992) ("The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an individual decision of each class member and may not be usurped by the class representative or class counsel.") There is no class action rule, statute, or case that allows a putative class plaintiff or counsel to exercise class rights en masse, either by making a class-wide objection or by attempting to effect a group-wide exclusion from an existing class. Indeed, to do so would infringe on the due process rights of the individual class members, who have the right to intelligently and individually choose whether to continue in a suit as class members. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173–77, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Additionally, to allow representatives in variously asserted class actions to opt a class out without the permission of individual class members "would lead to chaos in the management of class actions." *Berry Petroleum Co. v. Adams & Peck,* 518 F.2d 402, 412 (2d Cir.1975). In this case, all members of the purported Georgia class were notified of this class action and the proposed settlement, and all but twenty-eight elected to remain in the class. By contrast, there is no evidence in the record that any Georgia class member received notice of the Kempton suit and made an intelligent election to join or decline to participate in it.

Kempton relies on *In re Joint Eastern & Southern Dist. Asbestos Litig.,* 14 F.3d 151 (2d Cir.1994), to support his notion of a state-wide opt-out on behalf of all Georgia class members, regardless of their individual preferences or actions. His reliance on this case is misplaced, however, as it provides no support for his contention that his power as a named state class representative allows him to act on behalf of all other state class members in a nationwide suit and exercise their opt-out rights for them. Rather, in that case the three groups of victims all possessed liquidated judgments or settlements which were in existence and final *prior to* the filing of the class action. The Second Circuit held that it was in the discretion of the trial court to deem subclasses which had obtained prior settlements or judgments to have opted out of the new class because their rights had been determined previously. *Id.* at 156. That theory is inapplicable to cases such as ***1025** this in which the separate action is filed subsequently and the rights of the putative subclass have not been determined.

In addition, the temporary approval of the nationwide settlement stayed the state class actions. The federal court had the power to issue an injunction against continued state proceedings under the All Writs Act, 28 U.S.C. § 1651 ("[t]he All Writs Act ... empowers the federal courts to enjoin state proceedings that interfere, derogate, or conflict with federal judgments, orders, or settlements."

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Keith v. Volpe, 118 F.3d 1386, 1390 (9th Cir.1997)) and the Anti–Injunction Act, 28 U.S.C. § 2283 (a federal court may intervene and enjoin state court proceedings in three narrow circumstances, one of which includes when it is necessary to protect the court's jurisdiction). Although comity requires federal courts to exercise extreme caution in interfering with state litigation, federal courts have the power to do so when their jurisdiction is threatened.

Further, Fed.R.Civ.P. Rule 23(d) vests a district court with the authority and discretion to protect the interests and rights of class members and to ensure its control over the integrity of the settlement approval process. "[A] district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 100, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981).

Because a class representative in a state class action, acting at the same time as a federal class action, lacks the power to opt-out an entire class without the permission of individual class members, the district court properly ruled that Kempton's actions served as an individual opt-out for Kempton alone.

IV.

Having concluded independent of settlement considerations that the proposed class passes certification muster, our analysis must turn to the proposed settlement itself. In that determination, we are guided by Rule 23(e) which provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in a manner as the court directs.

A.

Adequate notice is critical to court approval of a class settlement under Rule 23(e). In this case, the notice provided to the absent class members provided each member with the opportunity to opt-out and individually pursue any state law remedies that might provide a better opportunity for recovery. The objectors contended at oral argument that even if the notice provided to the class met the requirements of Rule 23(c)—which it clearly did—the absent class members still did not understand what they were giving up. There is no evidence of such wide-scale confusion or ignorance in the record.

On the contrary, the text of the notice plainly stated:

> If the proposed settlement is approved, it will be binding and will release Chrysler from any and all claims, including any claims for consumer damages or equitable relief, arising out of or related to the Minivan rear liftgate latches, that were or could have been asserted by Settlement Class members in the Hanlon lawsuit. In addition, if the proposed settlement is approved, it will release any and all claims, arising out of or related to the Minivan rear liftgate latches, that were or could have been asserted for Settlement Class members in certain class action lawsuits pending in various state courts around the United States. The proposed settlement does not, however, release, dismiss, or affect any claims for personal injury or wrongful death as an alleged result of the rear-door latch on the Minivans.

The notice resulted in approximately 971 members of the class exercising their opt-out right. This number reveals two things: (1) at least some portion of the class understood the notice and chose not to participate in the settlement for whatever reason; and (2) the vast majority of the class—over 99.9%— ***1026** agreed to be

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bound. This is how Rule 23 works, and we decline any opportunity to rewrite it by implication.

The individual notice sent to each minivan owner, coupled with the pre-trial publicity, NHTSA actions, and nationwide dealer participation was sufficient to bring the urgency of the action to each class member's attention. There is no evidence that the settlement proposed and accepted by the district court did anything to advance the rights of one group of claimants over another and plaintiffs who were at risk of losing what they deemed valuable claims had an opportunity to protect their interests.

B.

Fed.R.Civ.P. 23(e) requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable. *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir.1992). Our review of the district court's decision to approve a class action settlement is extremely limited. *Id.* It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness. *Officers for Justice v. Civil Serv. Comm'n of San Francisco,* 688 F.2d 615, 628 (9th Cir.1982). Neither the district court nor this court have the ability to "delete, modify or substitute certain provisions." *Id.* at 630. The settlement must stand or fall in its entirety. *Id.*

Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1375 (9th Cir.1993), *quoting Officers for Justice,* 688 F.2d 615, 625 (9th Cir.1982). To survive appellate review, the district court must show it has explored comprehensively all factors. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 434, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968).

Several circuits have held that settlement approval that takes place prior to formal class certification requires a higher standard of fairness. The dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a courtdesignated class representative, weigh in favor of a more probing inquiry than may normally be required under Rule 23(e). This is the position adopted by the Third Circuit in *GM Pick–Up Litig.,* 55 F.3d at 805 ("We affirm the need for courts to be even more scrupulous than usual in approving settlements where no class has yet been formally certified."); the Second Circuit in *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982) ("district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care"); and the Seventh Circuit in *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust,* 834 F.2d 677, 681 (7th Cir.1987) ("*Simer* and *Weinberger* emphasize ... that when class certification is deferred, a more careful scrutiny of the fairness of the settlement is required. We agree...."). *See also Manual for Complex Litigation* § 30.45 (3rd. ed. 1995) ("Approval under Rule 23(e) of settlements involving settlement classes ... requires closer judicial scrutiny than approval of settlements where class certification has been litigated.") No circuit has held to the contrary. Because settlement class actions present unique due process concerns for absent class members, we agree with our sister circuits and adopt this standard as our own.

We have repeatedly stated that the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is "exposed to the litigants, and their strategies, positions and proof." *Officers for Justice,* 688 F.2d at 626 (internal quotation omitted). The district court held a hearing in August 1995 in which it granted ***1027** preliminary approval of the settlement agreement and approved a class-wide notice. Two fairness hearings followed in November 1995, and a third was held in April 1996. The transcripts of the hearings reveal an exhaustive presentation by the objectors raising virtually all of the issues noted in the briefs and in oral argument before this court.

In approving the settlement under Rule 23(e), the district court noted that the class was not giving up any right to challenge the adequacy of the replacement latch and was relieved from any duty to prove that the original latch was defective. The monitoring by class counsel and the

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additional outreach provided by Chrysler also worked in favor of the class in terms of extended notification and the fulfillment of all terms. The district court also retains jurisdiction over the implementation of the settlement. Class counsel may return to court if Chrysler is not using its "best efforts" to obtain the latch replacement goals or if the outreach and notification funds are allocated or spent in an inappropriate manner. The court also recognized that the alternatives to settlement were not promising; the parties could return to the bargaining table but that was no guarantee that the class would receive a better deal. Allowing the state court actions to proceed put the entire class at risk of "balkanized decisions" and high expenses —the only benefit being that "a few people would get a little more money."

The judge's decision to approve the settlement was correct on the merits, and reflected the proper deference to the private consensual decision of the parties. As we noted in *Officers for Justice,* "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.* at 625. The fairness hearings support such a finding.

There is no evidence to suggest that the settlement was negotiated in haste or in the absence of information illuminating the value of plaintiffs' claims. In fact, settlement negotiations began several months prior to the filing of the consolidated federal action and included numerous meetings. No evidence of collusion was presented to the district court or otherwise evident in the record.

The settlement presented to the district court obligates Chrysler to make the minivans safe. This fact alone sets this case apart from *GM Pick–Up Litig.* and *In re Ford Motor Co. Bronco II Prod. Liab. Litig.,* 981 F.Supp. 969 (E.D.La.1997)—cases in which a settlement agreement was rejected in large measure because it did nothing to remedy the safety problem with the vehicles. Again and again, the objectors reiterated that their primary concern was the safety of the vehicles and the prevention of injury. Of course it is possible, as many of the objectors' affidavits imply, that the settlement could have been better. But this possibility does not mean the settlement presented was not fair, reasonable or adequate. Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion. In this regard, the fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness. There was no disparate treatment between class members; all stood to benefit equally, a fact which lessens the likelihood that the named plaintiffs and their attorneys colluded with Chrysler to increase their own recovery at the expense of the unnamed plaintiffs who class counsel had a duty to represent. No objector stepped forward and suggested that his or her personal claim was being sacrificed for the greater good—and if any thought that was the case, they had the right to opt-out of the class.

The district court's final determination to approve the settlement should be reversed "only upon a strong showing that the district court's decision was a clear abuse of discretion." *In re Pacific Enterprises Sec. Litig.,* 47 F.3d 373, 377 (9th Cir.1995) (internal quotation omitted). There was no such showing here.

***1028** C.

Several state Attorneys General,[3] acting as amicus curiae, contest one paragraph of the settlement agreement.

Paragraph 24 of the agreement provides:

> **¶ 24. Government Actions Affecting Settlement.** If any administrative proceeding or action is commenced by any federal (except NHTSA), state or local governmental authority in a *parens patriae* function (and not in its capacity as an owner of any Minivan that has opted-out of the Settlement Class) asserting claims within the scope of the Action, the Class Plaintiffs and Settlement Class Counsel shall intervene in that action at the request of Chrysler. They shall intervene to fully support Chrysler by asserting that the governmental action is within the scope of this agreement, the Class Action Complaint, and the judgment entered herein. Any time and expense incurred by the Class Plaintiffs and Settlement Class Counsel shall be deemed to be within the application(s) referenced in paragraph 14. Additionally, in the event any action is commenced by

> a governmental authority as stated in this paragraph, Chrysler shall have the option, in its sole discretion, to immediately suspend relief to citizens of that jurisdiction pending the outcome of the suit brought by the governmental authority.

The Attorneys General claim this provision is unfair and unreasonable because it will have a "chilling effect" on state enforcement. "For example," they claim, "if a governmental agency were to initiate an enforcement action relating to the defective latch or the latch replacement program, such as for deceptive advertising of the program, Chrysler would have the discretion to suspend relief in the applicable jurisdiction." The effect is to place relief "outside the control of the class" and dependent upon the actions of nonparties to the action.

Paragraph 24 survives for several reasons. First, paragraph 24 does not prohibit any government action. The attorneys general remain free to act as they see necessary to enforce the consumer laws of their state. Chrysler and Class counsel cannot not prohibit state enforcement and never argued they could. Any "chilling effect" on state enforcement that flows from the settlement agreement comes from the danger that Chrysler will decide to contest the state action, invoke paragraph 24 of the settlement, and impose a delay on minivan owners. The chilling effect then comes from the potential anger of class members—who knowingly agreed to the settlement provisions, including paragraph 24, did not opt out, and readily accepted the benefits of the agreement—at the attorney general of their state for interfering with their receipt of the benefits of the settlement. The only impact of paragraph 24 falls on the plaintiff class members and they have agreed—by their inclusion in the class—to assume the risk.

Second, paragraph 24 has been included in the Settlement Agreement from the beginning. Class members had notice that they were exchanging their state rights for the contractual promises of the Agreement and the vast majority of the class agreed. Class Counsel is required by the agreement to come forward and explain this fact in any state enforcement proceeding, an appearance that would most likely be helpful to a court, rather than a hindrance.

Third, paragraph 24 is limited to local, state or federal enforcement actions that are within the *scope of the settlement agreement.* If, for example, there was evidence of fraud in the advertising of the replacement latch program, this would not fall under the original complaint. As a result, the state attorneys general would be free to bring an action and Chrysler could not suspend relief.

Again, we reiterate that the district court was not free to redraft the agreement, or strike out certain parts it found to be problematic. We do not think the inclusion of paragraph 24 warrants rejection of the agreement.

***1029** V.

We review a district court's award of attorneys fees for an abuse of discretion. *In re Washington Public Power Supply System Sec. Litig.,* 19 F.3d 1291, 1296 (9th Cir.1994) ("*WPPSS* ").

At Chrysler's insistence, class counsel and Chrysler did not negotiate or discuss attorneys fees until after the final settlement agreement was presented to the court. The parties then met with retired California Superior Court Judge Coleman Fannin in a fee mediation session. They eventually agreed to a fee of $5 million coupled with $200,000 in costs; Judge Fannin's affidavit indicated that he initially recommended this amount. The mediator's role did not include evaluating the benefits of the settlement so Judge Fannin had no way to ascertain whether $5 million was an appropriate percentage recovery. His affidavit was submitted only to certify that the figure was the result of legitimate arms-length negotiations.

Contrary to the objectors' contention, we do not believe the weight the district court gave to the mediation proceeding was an abrogation of its duty to determine independently whether the fee award was proper. Rather, the court relied on the mediator as independent confirmation that the fee was not the result of collusion or a sacrifice of the interests of the class, an inquiry the court was required to make. More importantly, Judge Legge appears to have reviewed the award using a lodestar methodology by requiring class counsel to submit detailed evidence of their work on behalf of the class. The choice of method for determining attorney fees is also reviewed for an abuse of discretion. *WPPSS,* 19 F.3d at 1296.

This court has affirmed the use of two separate methods for determining attorneys fees, depending on the case. In "common-fund" cases where the settlement or award

creates a large fund for distribution to the class, the district court has discretion to use either a percentage or lodestar method. *Id.* at 1295. The percentage method means that the court simply awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee. *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir.1989). This circuit has established 25% of the common fund as a benchmark award for attorney fees. *Six (6) Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir.1990).

Although no class member is entitled to a cash recovery —making valuation of the settlement agreement more difficult—Chrysler and class counsel valued the settlement at $115 million. This is the amount Chrysler charged against its earnings in order to account for its voluntary service action and the production and installation of the replacement latches. The fee award of $5.2 million represents roughly 4.5% of this "common fund", significantly less than the 25% commonly used under *Six Mexican Workers.* We note, however, that the court rejected the idea of a straight percentage recovery because of its uncertainty as to the valuation of the settlement.

In employment, civil rights and other injunctive relief class actions, courts often use a lodestar calculation because there is no way to gauge the net value of the settlement or any percentage thereof. The lodestar calculation begins with the multiplication of the number of hours reasonably expended by a reasonable hourly rate. *Blum v. Stenson,* 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The hours expended and the rate should be supported by adequate documentation and other evidence; thus, attorneys working on cases where a lodestar may be employed should keep records and time sheets documenting their work and time spent. The resulting figure may be adjusted upward or downward to account for several factors including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment. *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir.1975).

Class counsel presented affidavits to the district court justifying their fees on the basis of their work on the individual state class actions. The fee award also includes all future services that class counsel must provide through the life of the latch replacement program. They must remain available to enforce the contractual elements of the settlement agreement and represent any class members who encounter difficulties. The ***1030** factual record provides a sufficient evidentiary basis for the district court's approval of the fee request. The lodestar calculation received further support from the mediator's recommendation, although we note that such a recommendation is never the starting point for calculation of a fee award. We find no abuse of discretion.

VI.

The certification of the settlement class, the approval of the class settlement and the fee award were well within the guidelines provided by *Amchem* and Fed.R.Civ.P. 23. Accordingly, we affirm the judgment of the district court.

All Citations

150 F.3d 1011, 98 Daily Journal D.A.R. 8001

Footnotes

1 The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

2 The Louisiana action, the first state action to commence, was filed in April 1994. It was followed by actions in Alabama (filed April 1994), Texas (filed in June 1994), California (two actions filed in December 1994), and New York (filed in March 1995).

3 The Attorneys General of Connecticut, Arizona, Iowa, Kansas, New York, Nevada, Oklahoma, Pennsylvania, Rhode Island, and Vermont joined in the amicus brief.

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Declined to Follow by Jordan v. California Dept. of Motor Vehicles, Cal.App. 3 Dist., July 22, 2002

148 F.3d 283
United States Court of Appeals,
Third Circuit.

In re: PRUDENTIAL INSURANCE COMPANY AMERICA SALES PRACTICE LITIGATION AGENT ACTIONS.
Richard P. KRELL, MDL transfer, N.D. Ohio, DNJ Civil Action No. 95–6062
v.
PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Richard P. Krell, as well as Objectors Elizabeth Bajek, Amanda Bajek, Helen Bartsch, Mark Ciconte, Raymond Dolce, Margaret Dolice, Louise Duggan, Peter Duggan, Charles Duncan, Mary Howe, Mary Krell, William Morris, Diana Racer, Thomas Racer, Gweneth Reidel, The Estate of Carl J. Scalzo, Marie Scalzo, Terry Sligar, Alice Smith, Jerry Smith, and William Walton,
Appellants at Nos. 97–5155/5156/5312.
In re PRUDENTIAL INSURANCE COMPANY AMERICA SALES PRACTICE LITIGATION AGENT ACTIONS.
Richard Johnson, Intervenor–Plaintiff in District Court,
Richard E. Johnson, Appellant at No. 97–5217.

Nos. 97–5155, 97–5156, 97–5217 and 97–5312.
|
Argued Jan. 26, 1998.
|
Decided July 23, 1998.

Synopsis

Class action was brought against a life insurer on behalf of over 8 million policyholders, alleging a variety of deceptive sales practices. The United States District Court for the District of New Jersey, Wolin, J., certified a settlement class and approved a settlement, 962 F.Supp. 450, awarded attorney fees, 962 F.Supp. 572, and denied a recusal motion. Objecting class members appealed. The Court of Appeals, Scirica, Circuit Judge, held that: (1) supplemental jurisdiction existed over all non-federal claims; (2) personal jurisdiction existed over all class members; (3) the action met the constitutional "case or controversy" requirement; (4) the class was properly certified for settlement; (5) the settlement was properly found fair, reasonable, and adequate; (6) the settlement did not violate the Rules Enabling Act or the McCarran–Ferguson Act; (7) the objectors were not entitled to additional discovery; (8) a catch-all category of "other claims" was not improperly included in the settlement; (9) the class members were adequately notified of the settlement; (10) it was appropriate to use the percentage-of-recovery method to calculate a fees award, though the award itself had to be remanded for further examination; and (11) the refusal to recuse was not improper.

Affirmed in part; vacated and remanded in part.

Roth, Circuit Judge, filed concurring opinion.

Attorneys and Law Firms

***287** Michael P. Malakoff (Argued), Malakoff, Doyle & Finberg, Pittsburgh, Pennsylvania, for Appellants Richard P. Krell, et al.

Lynde Selden, II, Lynde Selden Chartered, San Diego, California, for Appellant Richard E. Johnson.

Melvyn I. Weiss (Argued), Milberg, Weiss, Bershad, Hynes & Lerach, New York City, Allyn Z. Lite, Goldstein, Lite & DePalma, Newark, New Jersey, for Appellee George A. Zoller, Class Action Plaintiff Representative.

Reid L. Ashinoff (Argued), Michael H. Barr, Sonnenschein, Nath & Rosenthal, New ***288** York City, for Appellees Prudential Insurance Company of America and Ron D. Barbaro.

Brian S. Wolfman (Argued), Alan B. Morrison, Public Citizen Litigation Group, Washington, DC, for Amicus Curiae–Appellant Public Citizen, Inc.

John J. Gibbons, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, New Jersey, for Appellee Robert C. Winters.

Frederick B. Lacey, LeBoeuf, Lamb, Greene & MacRae, Newark, New Jersey, for Appellee Frances K. Beck, as Executrix of the Estate of Robert A. Beck.

Before: SCIRICA, ROTH and RENDELL, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

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This is an appeal from the approval of the settlement of a nationwide class action lawsuit against Prudential Life Insurance Company alleging deceptive sales practices affecting over 8 million claimants throughout the fifty states and the District of Columbia.

The class is comprised of Prudential policyholders who allegedly were the victims of fraudulent and misleading sales practices employed by Prudential's sales force. The challenged sales practices consisted primarily of churning, vanishing premiums and fraudulent investment plans, and each cause of action is based on fraud or deceptive conduct. There are no allegations of personal injury; there are no futures classes. The settlement creates an alternative dispute resolution mechanism and establishes protocols to determine the kind and amount of relief to be granted. The relief awarded includes full compensatory damages consisting of what plaintiffs thought they were purchasing from the insurance agent. There is no cap on the amount of compensatory damages for those who qualify, and although punitive damages are not included in the settlement, Prudential has agreed to pay a remediation amount in addition to the payments made through dispute resolution process.

The case involves five consolidated appeals from the judgments of the District Court for the District of New Jersey approving the settlement and awarding attorneys' fees to class counsel. Appellants, members of the certified class who object to the settlement, challenge the district court's jurisdiction, the certification of the settlement class, the fairness of the settlement itself, the award of attorneys' fees, and the district court's refusal to disqualify itself.

We hold the district court properly exercised jurisdiction. Federal subject matter jurisdiction is properly grounded on the alleged violations of the federal securities laws. Although most of the claims implicate state law, supplemental jurisdiction is proper because all of the claims arise out of a common nucleus of operative fact. The district court had personal jurisdiction over the class because ***290** actual notice was given to each of the 8 million policyholders by direct mail, and disseminated through television, radio and print advertising throughout the fifty states and the District of Columbia. We also hold there was no reason for the district court to recuse itself from these proceedings.

The district court properly certified a national class under Fed.R.Civ.P. 23(b)(3). The court assessed the numerosity and commonality of the asserted claims, the typicality of those claims, and the adequacy of representation provided by the named plaintiffs and class counsel, and found they satisfied the certification standards. The court also concluded the proposed class action was the superior means of addressing plaintiffs' claims of widespread sales abuse, and the issues common to all members of the class predominated over individual issues related to the members of the class.

We hold the district court properly evaluated the settlement, finding it fair, reasonable and adequate. Prudential's deceptive practices occurred nationwide. It may be argued that problems national in scope deserve the attention of national courts when there is appropriate federal jurisdiction. Because of the extraordinary number of claims, fairness counsels that plaintiffs similarly injured by the same course of deceptive conduct should receive similar results with respect to liability and damages. The proposed class settlement offers plaintiffs several advantages, including full compensation for their injuries, no obligation to pay attorneys' fees, and a relatively speedy resolution of their claims. The alternative dispute resolution process is sensible and provides adequate safeguards for individual treatment of claims, including appeals. We will affirm the district court's approval of the class certification and the settlement.

The district court awarded $90 million in attorneys' fees as a percentage of a common fund created under the settlement. We will vacate and remand the fee award and ask the district court to recalculate the fee to account for work done by the multi-state task force whose efforts served as a basis for the final settlement in this case. Furthermore, we question the multiplier employed in the lodestar analysis used by the court to cross check the size of the fee award. Although granting discovery on fee applications is within the sound discretion of the district court, we will ask the district court to reconsider whether it should grant limited discovery to the objectors on the fee application.

I. BACKGROUND AND PROCEDURAL HISTORY

This case began in early 1994, when the first of many individual and class action lawsuits alleging improper sales and marketing practices was filed against Prudential, the nation's largest life insurer. As lawsuits began to

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accumulate, the New Jersey Insurance Commissioner sought to organize a group to investigate the allegations against Prudential.[1] The resulting investigation into market conduct sought to determine the scope of any improper sales practices, and to develop a remedial plan designed to compensate injured policyholders, to prevent future violations, and to restore public confidence in the insurance industry. *Report of The Multi–State Life Insurance Task Force and Multi–State Market Conduct Examination of The Prudential Insurance Company of America* at 2 ("Task Force Report"). While the Task Force proceeded with its investigation, federal and state court actions alleging sales practice abuses by Prudential continued to accumulate. Although our primary concern is the outcome of the federal litigation, the history of both the Multi–State Life Insurance Task Force's investigation and the various lawsuits filed against Prudential overlap to a certain degree, and thus warrant discussion.

A. *The Multi–State Life Insurance Task Force*

At the instigation of the New Jersey Insurance Commissioner, the Multi–State Life Insurance Task Force was formed on April 25, 1995, with the stated goal of conducting a thorough and extensive examination of Prudential's sales practices during the period ***291** from 1985 until 1995. In all, thirty states and jurisdictions elected to participate.[2] The Task Force interviewed 283 agents and 27 sales management executives, and reviewed voluminous materials provided by Prudential. Among those materials were internal computer data bases reflecting complaints, policy transactions, and agent discipline. The Task Force also reviewed market conduct reports prepared by other states which had examined Prudential's business practices, and examined the historical developments which affected sales practices in the insurance industry.[3]

In July 1996, the Task Force issued its final report, citing widespread evidence of fraudulent sales practices and inadequate supervision by Prudential's management. It explained that Prudential's records revealed the company "knew of cases of alleged misrepresentation and other improper sales practices by its agents, and in many instances failed to adequately investigate and impose effective discipline." Task Force Report at 15. According to the report, interviews with Prudential agents revealed "little if any consistency in agent training and agent awareness of company and regulatory guidelines." *Id.* at 16. While the Task Force concluded that not all of the sales during the time period investigated were fraudulent or improper, it recognized the difficulty in ascertaining precisely which policyholders had been harmed,[4] and therefore recommended the implementation of a remediation plan which would "reach out to all potentially affected policyholders." *Id.* at 17–18. Under the plan, which was developed with Prudential's input and cooperation, policyholders were given the option of pursuing claims in an Alternative Dispute Resolution process ("ADR") or through a "no-fault" remedy known as Basic Claim Relief.[5]

As part of the Task Force Plan, Prudential agreed to conduct an extensive outreach program, including individual notice to all persons who purchased a policy between 1982 and December 31, 1995. Those electing the ADR process could submit their claim for evaluation. The remediation plan addressed four categories of claims: financed or replacement sales; sales involving abbreviated payment plans; life insurance sold as an investment; and other claims "falling outside of the first three categories." *Id.* at 19. Those electing Basic Claim Relief would be eligible for preferred-rate loans or the opportunity to purchase discounted policies.

Forty-three states and the District of Columbia signed a Consent Order adopting the ***292** Task Force Plan, with the understanding that if the pending class action achieved a better result, the Task Force and the states could join in the improved plan. The Task Force also recommended a separate $35 million fine to be divided among the states and the District of Columbia.

B. *The Federal Class Action*

While the Task Force was conducting its investigation, parties continued to file individual claims and class actions against Prudential in both state and federal court. On February 6, 1995, named plaintiff Nicholson filed a class action in Illinois state court which was removed one month later to the United States District Court for the Southern District of Illinois. The Kuchas plaintiffs filed their federal class action on February 28, 1995 in the District of Connecticut. Four other federal class actions were filed in the District of New Jersey in early 1995. Appellant Krell filed his class complaint in Ohio state court in June 1995.

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On April 26, 1995, Prudential moved to consolidate the various federal actions in the District of New Jersey. On August 3, 1995, the Judicial Panel on Multidistrict Litigation granted Prudential's motion and transferred several actions to the District of New Jersey. [6] Prudential then removed the various state actions to federal court, including the Krell action, and requested these additional cases be consolidated in New Jersey. The MDL Panel granted that request as well. [7]

In October 1995, the district court appointed Melvin Weiss of Milberg, Weiss, Bershad, Hynes & Lerach and Michael B. Hyman of Much, Shelist, Freed, Deneberg, Ament, Bell & Rubenstein as Co–Lead Counsel for plaintiffs, and ordered plaintiffs to file a consolidated complaint. On October 24, 1995, plaintiffs filed the First Consolidated Amended Class Action Complaint.

The named plaintiffs filed suit on behalf of all persons who purchased new or additional life insurance policies between January 1, 1980 and the time of the complaint as a result of Prudential's alleged fraudulent scheme. [8] They alleged that Prudential management developed and implemented a fraudulent scheme to sell life insurance policies through a variety of deceptive sales practices, including "churning," "vanishing premium," and "investment plan" sales tactics. Plaintiffs also challenged Prudential's dividend practices, among them the so-called "investment generation approach," and "Prudential's deceptive administration of class members' policies to conceal fraudulent sales and effectuate the scheme, including Prudential's use of unauthorized policy loans and similar contrivances to deplete policyholders' cash values." Lead Counsel Brief at 5. The Complaint alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, common law fraud, breach of contract, bad faith, negligent misrepresentation, negligence, unjust enrichment, and breach of state consumer fraud statutes.

On December 26, 1995, Prudential moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(6). At the same time, Prudential approached Lead Counsel to discuss a possible settlement. Those discussions ended, however, when Lead Counsel indicated they would not settle the case without significant discovery. The parties renewed their settlement discussions in early 1996, after Prudential agreed to provide discovery, but once again failed to reach an agreement. When the talks ceased, Prudential stopped its production of documents. Lead Counsel nevertheless pursued its own investigation, interviewing approximately thirty former Prudential agents and customers, and reviewing the limited array of documents provided by Prudential.

***293** The district court granted Prudential's motion in part on May 10, 1996, dismissing without prejudice all claims of three of the five named plaintiffs, and several claims of the remaining two. It also noted that plaintiffs would not likely prevail on many of their claims at trial. The district court then ordered Prudential to provide plaintiffs with copies of the substantial discovery materials already provided to the Task Force.

Following the issuance of the Task Force Report in July 1996, Lead Counsel and Prudential once again entered settlement negotiations, and again Prudential agreed to Lead Counsel's demands for discovery. [9] By August 8, 1996, Prudential had provided plaintiffs with over 70 boxes of documents in response to Lead Counsel's requests.

On September 19, 1996, plaintiffs filed their Second Amended Consolidated Complaint. The Second Amended Consolidated Complaint contained essentially the same claims as the first, alleging Prudential implemented a systematic fraudulent marketing scheme which made use of false and misleading sales presentations, policy illustrations, and marketing materials. Once again, the Complaint specifically referred to Prudential's "churning," "vanishing premium," and "investment plan" sales tactics. [10] Each of the named plaintiffs claimed to have been injured by this common scheme, and alleged one or more of the specified sales practices. [11] Plaintiffs also sued several persons in their individual capacities: Robert A. Beck, Prudential President from 1972 until 1979 and Chairman from 1978 until 1987; Ronald D. Barbaro, Prudential's President from 1990 until 1992; and Robert C. Winters, Chairman and CEO from 1987 until 1994, and President from 1993 until 1994.

***294** According to the Second Amended Consolidated Complaint, Prudential was aware of these fraudulent sales practices as early as 1982, when internal investigations discovered patterns of abuse involving financed insurance.

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Plaintiffs alleged that Prudential failed to take serious steps to combat the abuses, focusing instead on "damage control" and warning internal auditors not to "rock the boat." For example, when Prudential's auditing department tested a new computer system to detect churning in its Minneapolis office, sales dropped off sharply. Instead of addressing the concerns raised by the audit department, Prudential merely referred the matters to the "marketing" group, which took no steps to stop the fraudulent activities. Second Am. Cons.Compl. ¶ 86.

Three days after the filing of the Second Amended Consolidated Complaint, Prudential and class counsel entered into a settlement agreement. There were three preconditions to the agreement. First, those states which had adopted the Task Force Remediation Plan through the execution of the Consent Order had to agree to modify the Consent Order to conform to the Settlement Agreement. Second, the final Stipulation of Settlement had to be executed by October 28, 1996. Lastly, the parties reserved the right to modify the Stipulation of Settlement to reflect any new information revealed by class counsel's ongoing discovery. [12] The Settlement Agreement did not address attorneys' fees. [13]

On October 28, 1996, the parties filed a final Stipulation of Settlement. At that time, the district court issued an order conditionally certifying a national settlement class, directing issuance of class notice, issuing an injunction, [14] and scheduling a fairness hearing for January 21, 1997. The notice was sent to each of the more than 8 million class members by first class mail on or before November 4, 1996, and gave them until December 19, 1996 to file objections or opt out of the class. [15]

1. The Proposed Settlement

The proposed settlement was largely based on the Task Force Report and its proposed remediation plan. Like the Task Force plan, the settlement proposed a remediation scheme by which class members had the option of either pursuing their claims through an Alternate Dispute Resolution procedure or electing Basic Claim Relief. The proposed settlement class included all persons who owned one or more Prudential insurance policies between January 1, 1982 and December 31, 1995, with certain exceptions. [16] The class included approximately ***295** eight million Prudential policyholders who own or owned approximately 10.7 million policies.

a. The Alternative Dispute Resolution Process

Under the ADR process contained in the proposed settlement, class members who believed they had been misled could submit a claim to Prudential. The claim form provided to all potential class members contained both narrowly drawn questions designed to elicit information relating to specific evidentiary scoring criteria established under the settlement, as well as more open-ended questions allowing claimants to explain the exact nature of their claims. Claimants were also asked to submit any supporting documents in their possession. Prudential established a toll-free hotline to allow claimants to speak to a Claimant Support team, whose members are specially trained to answer policyholder inquiries, assist with filling out claim forms, and advise them with respect to the collection of supporting documents. Once the claim form was submitted, Prudential was obligated to locate all of its records pertaining to the claim and submit them for consideration.

Once a claim has been filed and all the relevant materials gathered, the claim is subject to a four tier review process. At the first level, the claim would be examined by a member of the Claim Evaluation Staff, who will apply a set of specific criteria for each of four general categories of sales complaints: (1) financed insurance (taking a loan against an existing policy in order to pay the premiums on a new policy); (2) abbreviated payment plans (using dividends from a policy to pay the premiums on that policy); (3) life insurance sold as an investment; and (4) other improper sales practices. [17] Based on the application of the established criteria, the reviewers then assign a score from zero to 3 to each claim. [18] The Claim Evaluation Staff is comprised of specially trained Prudential employees who are not associated with Prudential's individual life insurance sales force.

Any claim not receiving a score of "3" will automatically be reviewed by a team of independent claim evaluators who are selected by class counsel and representatives of the state regulators. This team will apply the same criteria as the Claim Evaluation Staff, and make a written recommendation if it believes the claimant's score should be adjusted.

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That recommendation is then examined by a member of the Claim Review Staff, which is comprised of Prudential employees who have not worked as or had supervisory authority over Prudential sales agents. The determination of the Claim Review Staff may not be appealed by Prudential. The claimant, however, may appeal the decision to the fourth level of review, the Appeals Committee. The Appeals Committee is selected by class counsel and representatives of the state regulators from a list agreed upon by class counsel, the state regulators, and Prudential. ***296** While the Appeals Committee must apply the same criteria, its review of the claim is *de novo.* [19]

The relief afforded a claimant varies depending on the final score he or she is awarded. Those obtaining a score of zero are afforded no relief. Those with a score of "1" may obtain relief only through Basic Claim Relief. Those with scores of "2" or "3" are entitled to compensatory relief. [20]

b. Basic Claim Relief

Basic Claim Relief allows the class member to obtain one or more forms of relief without having to demonstrate liability on Prudential's part. The available forms of Basic Claim Relief include: (1) low interest loans to help policy holders make premium payments on existing policies; (2) enhanced value policies which allow members to purchase new policies with additional coverage paid for by Prudential; (3) deferred annuities enhanced by contributions from Prudential; and (4) the opportunity to purchase shares in designated mutual funds enhanced by a contribution from Prudential.

c. Enhancements To the Task Force Plan

The district court found the settlement improved upon the Task Force's remediation plan in several ways. Fairness Opinion, 962 F.Supp. at 492–95. First, the court found that the settlement improved the structure of the ADR process by including class counsel and their representatives in the monitoring process, and improving the claim scoring criteria [21] and evidentiary factors used to analyze ADR claims. [22] It also enhanced the remedies ***297** available through both the ADR process and Basic Claim Relief, [23] and provided for a blanket waiver of statute of limitations and other defenses which Prudential might otherwise have.

Second, it provided minimum financial guarantees which were not contained in the Task Force plan. In addition to the uncapped relief provided under both the Task Force plan and the proposed settlement, Prudential guaranteed to pay at least $260 million for each 110,000 claims remedied (up to 330,000), with a minimum payment of $410 million regardless of the number of claims remedied. Prudential also agreed to pay an additional remediation amount based on a sliding scale from $50 to $300 million, depending on the number of claims remedied. This amount was to be allocated by the district court.

Finally, the district court noted the "Proposed Settlement establishe[d] an unparalleled outreach program to ensure that class members are adequately informed." Fairness Opinion, 962 F.Supp. at 492. This included mailing individual notice to over 8 million current and former policyholders, and publishing summary notices in the national editions of *The New York Times, The Wall Street Journal, USA Today,* and *The Newark Star Ledger.* The summary notice was also published in the largest newspaper in each of the fifty states and the District of Columbia. In addition, the Stipulation of Settlement provided that, following final approval of the settlement, post-settlement notice would be (a) mailed to each class member, (b) published in the national editions of *The New York Times, The Wall Street Journal, USA Today, The Newark Star Ledger,* and other regional newspapers, and (c) disseminated through television and radio advertising "on stations having representative regional coverage." Stipulation of Settlement at 27–29. Finally, the outreach program established a six-day-a-week toll-free "800" number, staffed by specially trained personnel, to answer class member questions. [24] The Task Force plan did not describe ***298** how its outreach program would be implemented. Fairness Opinion, 962 F.Supp. at 494.

2. The Fairness Hearing

The district court held the fairness hearing on February 24, 1997. [25] At that time the court heard oral argument from all parties who requested the opportunity to speak, including objectors. The district court also permitted appearances by several states and allowed the California Insurance Commissioner and the Florida Insurance

Commissioner to appear as amicus curiae. The court allowed the Massachusetts Insurance Commissioner, the Massachusetts Attorney General and the Texas Insurance Commissioner to intervene under Rule 24(b). The New Jersey Department of Insurance appeared informally as amicus curiae, on its own behalf and on behalf of the Multi–State Life Insurance Task Force.

Before the fairness hearing, Prudential reached agreements with the remaining state objectors—California, Florida, Texas and Massachusetts—whereby several enhancements were made to the Proposed Settlement. Among those were an automatic score of "3" where a claimant had a life insurance application containing an unauthorized signature, and consideration as one of the scoring criteria the fact that a claimant was over the age of sixty at the time of sale.[26] These enhancements were subsequently incorporated into the settlement and made available to all claimants. Fairness Opinion, 962 F.Supp. at 473.[27] The district court also took notice that these four states received, in addition to the negotiated enhancements, additional fines and penalties from Prudential which were paid to the states, and not to aggrieved policyholders.

On March 7, 1997 the able district court issued a summary Memorandum Opinion and ***299** Order certifying the class and approving the settlement as fair and reasonable, and ten days later filed a lengthy (almost 250 pages) and thorough opinion explaining its decision.

II. ISSUES RAISED ON APPEAL AND STANDARDS OF REVIEW

Appellants principally challenge five distinct elements of the settlement. First, they raise the threshold issue whether the district court had jurisdiction over this class action. Second, they challenge the court's certification of the settlement class. Third, they contest the district court's order approving the proposed settlement as fair and reasonable. Fourth, appellants take issue with the district court's $90 million award of attorneys' fees. Finally, they once more take aim at the district court's handling of this case, appealing the denial of their motion to disqualify under 28 U.S.C. §§ 455(a), 455(b)(1) and 455(b)(5)(iv).

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson,* 521 F.2d 153, 156 (3d Cir.1975). Consequently, we will reverse the district court "for a clear abuse of discretion." *Id.* at 156 n. 7. In addition, the certification of a class and the award of reasonable attorneys' fees are also subject to an abuse of discretion standard. *In re General Motors Corp. Pick–Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 782 (3d Cir.1995) ("*G.M. Trucks* "). "An appellate court may find an abuse of discretion where the 'district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.' " *Id.* at 783 (quoting *International Union, UAW v. Mack Trucks, Inc.,* 820 F.2d 91, 95 (3d Cir.1987)). Our review of jurisdictional issues, however, is plenary. *Anthuis v. Colt Industries Operating Corp.,* 971 F.2d 999, 1002 (3d Cir.1992).

III. JURISDICTION

The Krell and Johnson appellants contend the district court lacked subject matter jurisdiction over most of the class, including objectors. Additionally, they contend that there is no Article III "case or controversy" with respect to the class claims, and that the court's exercise of supplemental jurisdiction was improper.

A. *Subject Matter Jurisdiction*

As an initial matter, the district court found it had subject matter jurisdiction over the named plaintiffs in this class action. In particular, the court found it had both federal question jurisdiction and diversity jurisdiction over the class, as well as supplemental jurisdiction under 28 U.S.C. § 1367. Fairness Opinion, 962 F.Supp. at 500.

The district court found exclusive federal question jurisdiction under 28 U.S.C. § 1331 based on the claims of named plaintiff Dorfner. Dorfner alleged violations of the federal securities laws, in particular Sections 10(b) and 20(a) of the Securities and Exchange Act, and Rule 10b–5 promulgated thereunder. In addition, approximately 30% of the policies at issue were registered securities, and thus fell within the court's federal question jurisdiction. The district court also found it had diversity jurisdiction over each of the named plaintiffs under 28 U.S.C. § 1332. All named plaintiffs were residents of different states from the defendants named in the complaint. Additionally, the named plaintiffs have each alleged more than $50,000 in losses as a result of Prudential's fraudulent scheme, and thus meet the "amount-in-controversy" requirement in effect at the time the complaint was filed.[28]

The primary jurisdictional objection raised on appeal relates to the district court's assertion of supplemental jurisdiction over the absentee class members on the basis of 28 U.S.C. § 1367. The court found that all of the class claims are "inextricably factually intertwined" because they are all "premised upon a common course of conduct by Prudential ... relat[ing] to the same alleged company wide development and implementation of the patently fraudulent sales techniques." ***300** Fairness Opinion, 962 F.Supp. at 501. Noting that § 1367 applies to both pendent parties and pendent claims, the district court concluded it had the discretion to exercise supplemental jurisdiction over the entire dispute and the proposed settlement on the basis of its initial federal question jurisdiction. The court also found it could exercise supplemental jurisdiction over the state claims on the basis of its diversity jurisdiction. *Id.* at 505.

Appellants dispute both of these asserted grounds for supplemental jurisdiction. They contend the federal claims of plaintiff Dorfner, the claims of persons with purely state law claims, and the panoply of "other" sales claims do not derive from a common nucleus of operative fact, and thus the district court cannot exercise supplemental jurisdiction based on its jurisdiction over plaintiffs' federal securities claims.[29] Johnson Brief at 4. Appellants also contest the district court's assertion of supplemental jurisdiction based on its initial diversity jurisdiction. They contend that, in order for the district court to exercise supplemental jurisdiction, each putative class member must meet the amount-in-controversy requirement of § 1332. Johnson Brief at 7–8 (citing *Zahn v. International Paper Co.,* 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973)). Finally, appellants argue the district court's application of 28 U.S.C. § 1367 to assert jurisdiction over the proposed class violates Article III.

The settling parties respond with two arguments. First, they claim the district court correctly exercised supplemental jurisdiction based on its original federal question jurisdiction because all class members' claims arise from the same case or controversy. Thus there is no need to address the question of the district court's diversity jurisdiction. In the alternative, they argue that appellants' reliance on *Zahn* is misplaced, and that § 1367 overruled *Zahn* 's requirement that all class members meet the amount-in-controversy requirement of § 1332. Consequently, the court could properly exercise supplemental jurisdiction based on its original diversity jurisdiction.

1. Federal Question Jurisdiction as a Basis for Supplemental Jurisdiction

None of the parties contest the district court's assertion of federal question jurisdiction "over [plaintiff] Dorfner's federal securities claims, and the federal securities claims of other similarly situated plaintiffs." Fairness Opinion, 962 F.Supp. at 500. Instead they focus their arguments on the court's exercise of supplemental jurisdiction.

Before enactment of § 1367, a district court could only exercise jurisdiction over claims which did not satisfy the requirements of §§ 1331 and 1332 by applying the principles of ancillary or pendent jurisdiction. The concept of pendent jurisdiction, as explained by the Supreme Court in *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), allowed a court to hear non-federal claims over which it did not have diversity jurisdiction provided those claims shared a "common nucleus of operative fact" with the claims that supported the court's original jurisdiction. But this extension of jurisdiction was permitted only when it would promote "judicial economy, convenience and fairness to litigants." 383 U.S. at 726, 86 S.Ct. 1130.

While pendent jurisdiction allowed district courts to hear additional, non-federal claims which were part of the same "case" as those claims within the court's original jurisdiction, the doctrine of ancillary jurisdiction allowed courts to hear claims brought against additional parties. Ancillary jurisdiction, however, was more limited than its counterpart. In *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), the Court held ancillary jurisdiction could not be asserted when to do so was contrary to the rule of complete diversity. Further, the Court found the doctrine of ancillary jurisdiction did not allow the addition of parties who were not within the court's original jurisdiction, even in cases in which the district court had exclusive federal ***301** jurisdiction. *Finley v. United States,* 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989). But the *Finley* Court noted the cases addressing the scope of ancillary and pendent jurisdiction were not entirely consistent, and offered the possibility that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute

can of course be changed by Congress." *Id.* at 556, 109 S.Ct. 2003.

Congress responded by passing the Judicial Improvements Act of 1990, which added § 1367 to the jurisdictional arsenal of the federal courts and essentially overruled *Finley*. Section 1367 combined the two concepts of pendent and ancillary jurisdiction under the rubric of "supplemental" jurisdiction, providing for jurisdiction "in any civil action of which the district courts have original jurisdiction" over "all other claims that are so related ... that they form part of the same case or controversy under Article III." 28 U.S.C. 1367(a). The statute explicitly included "claims that involve the joinder or intervention of additional parties." *Id.*

The enactment of § 1367 has elicited a strong reaction from legal scholars. Some have argued that Congress intended § 1367 to be interpreted broadly, and hoped to encourage the federal courts to hear claims which might otherwise have fallen outside of their reach. *See* John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990,* 24 U.C. Davis L.Rev. 735, 766 (Spring 1991) ("By the juxtaposition of sections 1367(a) and 1367(c) Congress appears to have created a strong presumption in favor of the exercise of supplemental jurisdiction."); 2 Herbert B. Newberg and Alba Conte, *Newberg on Class Actions,* § 6.11, at 6–45 (3d ed. 1992) ("[T]here are multiple reasons to expect that the rulings of *Zahn v. International Paper Co.,* requiring allegations that each class member satisfied jurisdictional amount requirements in diversity actions, have been legislatively bypassed."). Others have felt that § 1367 is constrained by prior Supreme Court decisions, and does not expand the courts' jurisdictional grant. Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer,* 40 Emory L.J. 943, 960 n. 90 (Fall 1991) (acknowledging that while a facial construction of § 1367 would appear to overrule *Zahn,* "the legislative history was an attempt to correct the oversight"); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional And Statutory Analysis,* 24 Ariz. St. L.J. 849, 973 (Fall 1992)("[Section] 1367 should be interpreted as effecting no change in the prior practice and continuing undisturbed the rule of *Zahn.* "). Regardless of Congress's intent with respect to *Zahn,* it is clear that § 1367 does not abrogate the rule of law established in *Gibbs,* and thus any exercise of supplemental jurisdiction must meet the requirements of Article III's "case or controversy" standard. *See* H.R.Rep. No. 101–734 at n. 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 n. 15 (stating that § 1367(a) "codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs* "); *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.,* 101 F.3d 1492, 1505 (3d Cir.1996) ("The Supreme Court delineated the modern constitutional bounds of pendent [now referred to as supplemental] jurisdiction in *United Mine Workers v. Gibbs.*"); Oakley, 24 U.C. Davis L.Rev. at 764 (noting that under § 1367, the district court's exercise of supplemental jurisdiction "extends to the limits of Article III, thus ratifying and incorporating the constitutional analysis of *United Mine Workers v. Gibbs* ").

There is no dispute the district court had jurisdiction over the federal securities claims alleged in the Second Amended Consolidated Complaint. *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citing *Gully v. First National Bank,* 299 U.S. 109, 112–113, 57 S.Ct. 96, 81 L.Ed. 70 (1936)) ("The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."). It is equally clear that, under § 1367, the district court could exercise supplemental jurisdiction over any claims which ***302** were part of the same Article III "case or controversy" as the federal securities claims. Consequently, our analysis turns on whether the claims asserted in the Second Amended Consolidated Complaint meet the standard established in *Gibbs.*

Under *Gibbs,* three requirements must be met for a court to exercise supplemental jurisdiction:

> The federal claims must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if considered without regard to their state or federal character, a plaintiff's claims

> are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in the federal courts to hear the whole.

383 U.S. at 725, 86 S.Ct. 1130 (emphasis omitted) (footnote and internal citation omitted).

A district court may not assert supplemental jurisdiction over state claims that are totally unrelated to the federal claims that form the basis of the court's jurisdiction. *Lyon v. Whisman,* 45 F.3d 758, 761 (3d Cir.1995). In *Lyon,* the district court had original jurisdiction to hear claims under the Fair Labor Standards Act, and elected to exercise supplemental jurisdiction over state contract and tort claims. The federal claim involved the employer's failure to pay overtime wages, while the state claims related to a failure to pay certain bonuses. This Court ruled that the exercise of supplemental jurisdiction was inappropriate, because the only nexus between the state and federal claims was the employer/employee relationship, rather than the conduct underlying the claims. [30] *Id.* at 764.

The Second Amended Consolidated Complaint alleges that Prudential engaged in a widespread scheme to defraud customers. As part of that scheme, Prudential allegedly used "false and misleading sales presentations, policy illustrations, marketing materials," and other information approved, prepared and disseminated by Prudential to its nationwide sales force. Second Amended Consolidated Complaint at 3. According to plaintiffs, certain actions taken by Prudential in furtherance of that scheme violated § 10(b) [31] and § 20(a) [32] of the Securities and Exchange Act. As noted, the district court agreed with the settling parties, finding that all of the class claims were "inextricably intertwined" ***303** because there was a common scheme to defraud. [33]

We agree. The Second Amended Consolidated Complaint clearly alleges that Prudential engaged in a common scheme to defraud. Each category of claims raised in the Complaint relied on the implementation of that scheme, the training of Prudential's agents in conformity with it, and the use of pre-approved materials to support it. While only one category of claims alleged in the Complaint involved violations of the federal securities laws, all of the claims derive from the same common scheme, and thus from the same "nucleus of operative fact." That implementation of Prudential's scheme resulted in a variety of unlawful transactions does not negate the common basis they all shared. We recognize the need to scrutinize assertions of federal subject matter jurisdiction in these kinds of class actions where there are significant state law claims. But we believe the nexus between the federal and state claims is so close here that federal jurisdiction is appropriate. Consequently, we hold the district court properly exercised supplemental jurisdiction over the class members' state claims based on its federal question jurisdiction.

Of course, § 1367 does not permit courts to take jurisdiction over tangentially related claims. The issue is whether there is a "common nucleus of operative fact" and whether the claims are part of the "same case or controversy under Article III." Here the facts underlying the investment deception are so intertwined with the other misrepresentations and frauds that, given the allegations of the overall scheme, they have the same factual predicate, making extension of federal jurisdiction appropriate.

2. Diversity Jurisdiction as a Basis for Supplemental Jurisdiction

The district court also found that it had supplemental jurisdiction under § 1367 based on its original diversity jurisdiction over named plaintiffs' claims under § 1332. As noted, the named plaintiffs satisfy the prerequisites for diversity jurisdiction. None of the named plaintiffs is a citizen of the same state as any defendant, satisfying the complete diversity requirement, and each of the named plaintiffs has alleged damages in excess of $50,000, satisfying the amount in-controversy requirement. The more perplexing question is whether the remaining class members must also satisfy the requirements of diversity jurisdiction in order for the court to exercise supplemental jurisdiction over their claims.

Before enactment of § 1367, absentee class members seeking to establish the court's subject matter jurisdiction based on diversity of citizenship were not subject to the same requirements as the class representatives. According to the Supreme Court, the complete diversity requirement

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did not apply to absentee class members, but was satisfied so long as the named plaintiffs were completely diverse from defendants. *Supreme Tribe of Ben Hur v. Cauble,* 255 U.S. 356, 365–67, 41 S.Ct. 338, 65 L.Ed. 673 (1921). But the absentee class members were each subject to the same amount-in-controversy requirement as the named plaintiffs, and could not aggregate their claims in order to satisfy § 1332. *Zahn,* 414 U.S. at 301, 94 S.Ct. 505.

Although the complete diversity rule of *Supreme Tribe of Ben–Hur* remains intact, the passage of § 1367 has raised serious questions about the continuing viability of *Zahn.* On the one hand, it is generally conceded that the plain language of § 1367 states a different amount-in-controversy rule from that set forth in *Zahn.* [34] *See, e.g., Russ* ***304** *v. State Farm Mut. Auto. Ins. Co.,* 961 F.Supp. 808, 817–20 (E.D.Pa.1997). Section 1367(a) gives courts discretion to exercise supplemental jurisdiction in all cases where the original claim supporting federal jurisdiction and the additional claim are part of the same Article III case or controversy, including those additional claims involving the joinder of parties. At the same time, § 1367(b) establishes certain exceptions to this permissive rule in cases where the court's original jurisdiction is based solely on diversity. In particular, § 1367(b) prohibits federal courts from exercising supplemental jurisdiction over persons made parties under Rules 14, 19, 20, and 24, unless those additional claims independently satisfy § 1332. Under the principle of *expressio unius est exclusio alterius,* Congress's failure to include Rule 23 among the restrictions in subsection (b) would seem to indicate Congress did not intend to restrict the district court's exercise of supplemental jurisdiction in class actions. In addition, *Zahn* 's critics contend that, from a policy standpoint, the decision runs counter to *Supreme Tribe of Ben–Hur.* They argue that while the complete diversity requirement upholds the very essence of diversity jurisdiction, the amount-in-controversy requirement is merely an administrative concept designed to limit the caseload of the federal judiciary. Consequently, they contend it would make little sense to create an exception to complete diversity in the context of class actions but to continue requiring all class members to meet the amount-in-controversy requirement. *See Zahn,* 414 U.S. at 309, 94 S.Ct. 505 (Brennan, J. dissenting) ("Particularly in view of the constitutional background on which the statutory diversity requirements are written, it is difficult to understand why the practical approach the Court took in *Supreme Tribe of Ben–Hur* must be abandoned where the purely statutory 'matter in controversy' requirement is concerned."). [35]

By contrast, others contend § 1367 was never intended to eliminate the amount-in-controversy requirement for absentee class members established in *Zahn.* This argument relies heavily on the legislative history of the statute, in particular the House Judiciary Committee Report that explicitly states § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley.*" H.R.Rep. No. 101–734 at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 (footnote omitted). The footnote to this section of the Report specifically refers to *Supreme Tribe of Ben–Hur* and *Zahn,* and supports the argument that the complete diversity and amount-in-jurisdiction rules of those cases survive the enactment of § 1367. Additionally, the Report of the Federal Courts Study Committee urges Congress to "expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely, defendants against whom ***305** that plaintiff has a closely related state claim." Report of the Federal Courts Study Committee 47 (1990) (*quoted in Russ,* 961 F.Supp. at 815). The limited scope of the Committee's suggestion can be read as support for upholding the restrictions of *Zahn.* [36]

The cases addressing this issue reflect this difference of opinion. The only two appellate courts to examine this question have both found the language of the statute controlling, and concluded that § 1367 overrules *Zahn. See In re Abbott Laboratories,* 51 F.3d 524, 528 (5th Cir.1995); *Stromberg Metal Works v. Press Mechanical, Inc.,* 77 F.3d 928, 930 (7th Cir.1996). The *Abbott Laboratories* court reasoned that it could not "search legislative history for congressional intent unless [it found] the statute unclear or ambiguous," and that in the absence of such ambiguity "the statute is the sole repository of congressional intent." 51 F.3d at 528–29 (citing *United States v. X–Citement Video, Inc.,* 513 U.S. 64, 68–71, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); *West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 99–100, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991)). Because it found the plain language of the statute unambiguous, the court concluded that "under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet

the amount-in-controversy requirement, as did the class representatives." *Id.* at 529.

Unlike the class action facing the court in *Abbott Laboratories,* the Court of Appeals for the Seventh Circuit addressed this question in the context of two plaintiffs seeking to join an additional claim that did not meet the amount-in-controversy requirement. *Stromberg,* 77 F.3d at 930. The *Stromberg* court also reasoned that "[w]hen text and legislative history disagree, the text controls," and allowed the exercise of supplemental jurisdiction in that instance. 77 F.3d at 931 (citing *In re Sinclair,* 870 F.2d 1340 (7th Cir.1989)).

Most of the district courts that have addressed this issue have concluded otherwise. These courts have relied primarily on the legislative history to find that *Zahn* is still good law. *See, e.g., Russ,* 961 F.Supp. at 817–20; *Crosby v. America Online, Inc.,* 967 F.Supp. 257, 263–64 (N.D.Ohio 1997); *Griffin v. Dana Point Condominium Ass'n,* 768 F.Supp. 1299, 1301–02 (N.D.Ill.1991). Judge Louis Pollak's opinion in *Russ,* while conceding that the plain language of the statute would appear to overrule *Zahn,* presents a persuasive analysis of the legislative history and the policy reasons supporting his conclusion that *Zahn* is unaffected by the enactment of the supplemental jurisdiction statute.

The district court here followed the reasoning of *Abbott Laboratories* and concluded the plain language of § 1367 overruled *Zahn.* Consequently, the district court found it also had supplemental jurisdiction over the non-federal claims of absentee class members based on its diversity jurisdiction over the claims of the named plaintiffs.

The question is by no means an easy one. From a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises. Yet there are strong countervailing arguments that, at least under the current jurisdictional statutes, such class actions may be beyond the reach of the federal courts.

Regardless of the relative strength of the competing arguments over *Zahn* 's continued viability, we need not enter the fray. Because we have found that the district court properly exercised supplemental jurisdiction over class members' non-federal claims based on its original federal question jurisdiction, ***306** we need not decide whether the district court properly found it had supplemental jurisdiction based on its exercise of diversity jurisdiction over the claims of the named plaintiffs. The continued viability of *Zahn* and its effect on class actions will undoubtedly be addressed in the near future, either by the Supreme Court or by Congress, and at present we need not resolve the issue.

B. *Personal Jurisdiction*

The district court also found it had personal jurisdiction over all members of the proposed class. We agree. In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811–12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). The combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class satisfy the due process requirements of the Fifth Amendment. Consequently, silence on the part of those receiving notice is construed as tacit consent to the court's jurisdiction. *Id.; see also Carlough v. Amchem Prods., Inc.,* 10 F.3d 189, 199 (3d Cir.1993).

The district court here directed that notice of the class action be sent to all persons who owned one or more Prudential insurance policies between 1982 and the present. Initially, we note the provision of individual notice to each class member is by no means typical of the notice provided in most class actions, and certainly qualifies as unprecedented. The notice provided here met the requirements for personal jurisdiction. It explained that each individual receiving notice was a member of the proposed class, and clearly set forth the procedure for opting out of the class. The notice also contained the proposed release, which explained that all claims would be waived if the individual did not elect to opt out of the class. Consequently, we find the members of the proposed class were adequately informed of their potential claims against Prudential, and the district court had personal jurisdiction over those members of the putative class who did not timely opt out. [37]

C. *Article III*

Appellants also dispute the district court's finding that this case qualified as a "case or controversy" under Article III. Fairness Opinion, 962 F.Supp. at 505–06. Appellants contend that, "whether analyzed under the feigned case doctrine or as a failure of Article III standing," the inclusion of both injured and uninjured policyholders in the certified class violates the case or controversy requirement of Article III because the parties have not suffered an "injury in fact." Public Citizen Brief at 16. Appellants also contend the inclusion and release of claims arising out of not only the three primary activities complained of, but also based on "other improper sales practices," disqualifies the action as a case or controversy under Article III. *Id.* at 16–17. Amicus curiae Public Citizen further argues that the record is devoid of information concerning these other improper sales practices, that no plaintiff has claimed an injury as a result of them, and that there was never an intent to litigate them. Consequently, "there never has been any live controversy between Prudential and the 'other improper sales practices' class." *Id.* at 17. The district court addressed appellants' contentions and found them to be without merit. Fairness Opinion, 962 F.Supp. at 506.

We agree with the district court. Article III requires that federal courts may only adjudicate an actual "case or controversy." As the district court noted, whether an action presents a "case or controversy" under Article III is determined vis-a-vis the named parties. *Id.* at 506 (citing *Allee v. Medrano,* 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974)). "Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains ***307** no further separate class standing requirement in the constitutional sense."1 *Newberg on Class Actions* § 2.05 at 2–29 (3d Ed.1992). The record in this case is replete with examples of the adversarial nature of these proceedings, and it is clear that all of the named representatives have a valid "case or controversy" with respect to Prudential's alleged fraudulent sales scheme. There is also ample evidence that each named party has suffered an "injury in fact" as a result of Prudential's sales practices and therefore has standing to bring suit. Thus, the named plaintiffs satisfy Article III. The absentee class members are not required to make a similar showing, because once the named parties have demonstrated they are properly before the court, "the issue [becomes] one of compliance with the provisions of Rule 23, not one of Article III standing." *Goodman v. Lukens Steel Co.,* 777 F.2d 113, 122 (3d Cir.1985), *aff'd,* 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987).

We also note that, with respect to appellants' "feigned case" argument, the notice and the ADR process here were designed to determine which members of the class could demonstrate a compensable injury as a result of Prudential's allegedly deceptive practices. To require the named plaintiffs to determine beforehand which of the 8 million policyholders were deceived and provide notice to only those persons would eliminate the viability of the class action device.

We also disagree that the parties never intended to litigate the "other sales practices" claims. As discussed, those claims, along with the three categories of specific violations, were all intertwined as part of the common scheme allegedly employed by Prudential. If the parties litigated the churning, vanishing premium and investment plan claims, they would have litigated their "other sales practice" claims as well.

Based on the foregoing, we will affirm the district court's exercise of jurisdiction.

IV. CLASS CERTIFICATION

A. *Settlement–Only Class Certification*

Under the Federal Rules of Civil Procedure, a district court generally makes a determination whether to certify a class "as soon as practicable after the commencement of an action brought as a class action." Fed.R.Civ.P. 23(c)(1). This certification may be conditional, and may be modified as needed. *Id.* Although the initial complaint in this case was filed on October 24, 1995, the district court delayed consideration of the certification issue pending the outcome of the Task Force investigation. [38]

On October 28, 1996, the district court conditionally certified the proposed class for settlement purposes only. Reviewing the class action device historically, the Supreme Court noted that "[a]mong current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device .... all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes." *Amchem Products Inc. v. Windsor,* 521 U.S. 591, ——, 117 S.Ct. 2231, 2247, 138 L.Ed.2d 689 (1997) (citations omitted); *see also G.M. Trucks,* 55 F.3d at 786–800 (examining the arguments for

and against the use of settlement classes). But drawing on Judge Edward Becker's comprehensive opinion in *Georgine v. Amchem Products, Inc.,* 83 F.3d 610 (3d Cir.1996),[39] the *Amchem* Court noted the special ***308** problems encountered with settlement classes. Although as a general matter it approved the certification of classes for settlement purposes only, the Supreme Court cautioned that the certification inquiry is still governed by Rule 23(a) and (b), and that "[f]ederal courts ... lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper." *Amchem,* 521 U.S. at ——–——, 117 S.Ct. at 2248–49.

Consequently, a district court must first find a class satisfies the requirements of Rule 23, regardless whether it certifies the class for trial or for settlement. *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2248 ("The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—shorn of utility—in the settlement class context."); *G.M. Trucks,* 55 F.3d at 799–800 ("In sum, 'a class is a class is a class,' and a settlement class, if it is to qualify under Rule 23, must meet all of its requirements.").

The district court may take the proposed settlement into consideration when examining the question of certification. *Amchem,* at ——, 117 S.Ct. at 2248.[40] In *Amchem,* the Supreme Court held "a district court [determining whether to certify a class for settlement purposes only] need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial." *Id.* at ——, 117 S.Ct. at 2248. But at the same time the Court noted that "other specifications of the rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." *Id.* In particular, the Court emphasized the importance of applying the class certification requirements of Rules 23(a) and (b) separately from its fairness determination under Rule 23(e). The Court noted that "[i]f a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context." *Id.* at ——–——, 117 S.Ct. at 2249–50.[41] At the same time, the Court stressed the requirements found under Rule 23(a), in particular the stricture that "the representative parties will fairly and adequately protect the interests of the class." Indeed, the key to *Amchem* appears to be the careful inquiry into adequacy of representation. *Id.* at ——, 117 S.Ct. at 2248 ("Subdivisions (a) and (b) [of Rule 23] focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.")

With this standard in mind, we will review the district court's analysis of the Rule 23 certification criteria.

B. *Class Certification under Rule 23*

"Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiff's and counsel's ability to fairly and adequately protect class interests." *G.M. Trucks,* 55 F.3d at 799. In order to be certified, a class must satisfy the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy ***309** of representation.[42] If the Rule 23(a) criteria are satisfied, the court must also find that the class fits within one of the three categories of class actions defined in Rule 23(b).[43] In this instance the parties sought to certify the class under Rule 23(b)(3).[44] In order to pass muster under Rule 23(b)(3), the district court must determine that common questions of law or fact predominate and that the class action mechanism is the superior method for adjudicating the case. The requirements of subsections (a) and (b) are designed to insure that a proposed class has "sufficient unity so that absent class members can fairly be bound by decisions of class representatives." *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2248; *see also Hassine v. Jeffes,* 846 F.2d 169, 177 n. 4 (3d Cir.1988) (" '[C]ommonality' like 'numerosity' evaluates the sufficiency of the class itself, and 'typicality' like 'adequacy of representation' evaluates the sufficiency of the named plaintiff...."). As noted, these class certification requirements are to be determined independently from the court's determination of the "fairness" of the proposed settlement under Rule 23(e).[45] *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2248 (Rule 23(e) "was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b).").

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1. The Rule 23(a) Criteria

a. Numerosity

The court must find that the class is "so numerous that joinder of all members is impracticable." Fed.R.Civ.P.23(a)(1). No one has challenged the district court's finding that the proposed class satisfies the numerosity requirement. Indeed, the proposed class consists of more than 8 million present and former policyholders.

b. Commonality

The commonality prong of Rule 23(a) asks whether "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2).[46] The district court found the proposed ***310** class easily satisfied the commonality requirement, citing several common factual and legal issues which the class members would need to establish in order to prove Prudential's liability.[47] Fairness Opinion, 962 F.Supp. at 512. The district court also noted that the MDL Transfer Order recognized that the transferred actions "involve common questions of fact ... involv[ing] allegations that deceptive life insurance sales practices occurred or were encouraged as a[sic] result of some larger scheme or schemes organized by Prudential." *Id.* (quoting August 3, 1995 Transfer Order at 1–2). Finally, the court found Prudential had asserted affirmative defenses which were common to all class members, and independently would satisfy the predominance requirement. *Id.* at 512–13.[48]

We believe the court's finding that the proposed class satisfied the commonality requirement was within its sound discretion. A finding of commonality does not require that all class members share identical claims, and indeed "factual differences among the claims of the putative class members do not defeat certification." *Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir.1994) (citing *Eisenberg v. Gagnon,* 766 F.2d 770 (3d Cir.1985)).[49] "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Id.* As the district court found, the allegations in the Second Amended Consolidated Complaint raise numerous issues which all members of the class would need to demonstrate in order to succeed at trial. Consequently, the proposed class satisfies Rule 23(a)(2).

c. Typicality

The district court found the claims of the class representatives were typical of the class as a whole. First, the court noted all of the named plaintiffs have alleged either churning, vanishing premium, or investment plan claims, or some combination of the three. Second, it relied on the "prominent guiding thread through all plaintiffs' claims—Prudential's scheme to defraud" to support its conclusion that the claims of the named plaintiffs are typical of the class as a whole. Fairness Opinion, 962 F.Supp. at 518. The court rejected the argument that "the class fails for ***311** lack of typicality because no class representative claims to have been injured by 'other improper sales practices.' " *Id.* The court reasoned that the "class members injured by 'other fraudulent sales practices' have suffered the same injury—they are victims of Prudential's deception—and have suffered the same generic type of harm—they have economic damages—as the named plaintiffs," thereby satisfying the typicality requirement. *Id.* at 519 (citing *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 159, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

On appeal, Krell reasserts his argument that the inclusion of the "other claims" defeats a finding of typicality. In particular, Krell contends the named plaintiffs' claims cannot be representative of the class because the "other claims" are not identified. Krell Brief at 29; *see also* Public Citizen Brief at 13–16. Additionally, Krell contends the court failed to consider the variations among the laws of the 50 states, making its typicality analysis inadequate.[50] Amicus Public Citizen, relying on *Falcon,* argues plaintiffs must "show that the plaintiff class ha[s] been injured in the same manner as ha[ve] the named representative[s]." Public Citizen Brief at 15 (emphasis omitted).

"The concepts of commonality and typicality are broadly defined and tend to merge." *Baby Neal,* 43 F.3d at 56 (citing 7A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 1764, at 247 (1986)). The typicality requirement is designed to align the interests of the class and the class representatives so

that the latter will work to benefit the entire class through the pursuit of their own goals. *Id.* at 57 ("The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented."); 1 *Newberg on Class Actions,* § 3.13. In this respect the commonality and typicality requirements both seek to ensure that the interests of the absentees will be adequately represented. *Falcon,* 457 U.S. at 157 n. 13, 102 S.Ct. 2364 n. 13. However, "neither of these requirements mandates that all putative class members share identical claims." *Baby Neal,* 43 F.3d at 56; *Hassine v. Jeffes,* 846 F.2d at 176–77; *Weiss v. York Hosp.,* 745 F.2d 786, 809 (3d Cir.1984), *cert. denied,* 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). In addition, "factual differences among the claims of the putative class members do not defeat certification." *Baby Neal,* 43 F.3d at 56.

We believe the district court's typicality analysis is correct. The named plaintiffs, as well as the members of the proposed class, all have claims arising from the fraudulent scheme perpetrated by Prudential. That overarching scheme is the linchpin of the Second Amended Consolidated Complaint, regardless whether each class member alleges a churning claim, a vanishing premium claim, an investment plan claim, or some other injury falling within the category of "other sales" claims. "Commentators have noted that cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Baby Neal,* 43 F.3d at 58. Consequently, the factual distinctions among and between the named plaintiffs and the 8 million putative class members do not defeat a finding of typicality. "[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories" or where the claim arises from the same practice or course of conduct. *Id.*

This conclusion is further buttressed by the Supreme Court's holding in *Falcon.* The Supreme Court reversed certification of a class of Mexican–Americans who were challenging their employers hiring and promotion decisions on typicality grounds. [51] ***312** *Falcon,* 457 U.S. at 157–59, 102 S.Ct. 2364. Krell relies on *Falcon* for the proposition that "across-the-board" classes do not satisfy Rule 23. Krell Brief at 27–28. We disagree. *Falcon* did not strike down "across-the-board" classes *per se,* and, in fact, it agreed "with the proposition underlying the across-the-board rule—that racial discrimination is by definition class discrimination." *Falcon,* 457 U.S. at 157, 102 S.Ct. 2364. The Court nonetheless reversed the class certification because the district court had improperly presumed that Falcon's claims were typical of the class claims. In particular, the Court emphasized that Falcon's claim was based on the theory of disparate treatment, while the class claims relied on the theory of disparate impact. Consequently, Falcon would need to "prove much more than the validity of his own claim" in order to prove the claims of the absentee class members, and thus his claims were not typical of the class. *Id.* at 158, 102 S.Ct. 2364.

The present case is readily distinguishable. Unlike the plaintiff in *Falcon,* the named plaintiffs here have not relied on allegations that they were singled out and defrauded by Prudential. They have instead alleged that they suffered harm as the result of the same company-wide conduct that injured the absentee class members. The various forms which their injuries may take do not negate a finding of typicality, provided the cause of those injuries is some common wrong. *Baby Neal,* 43 F.3d at 58 (citing *Falcon,* 457 U.S. at 157–59, 102 S.Ct. 2364) ("Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice."). In this instance, the alleged common scheme provides an appropriate basis for a finding of typicality. Since all members of the class wouldneed to demonstrate the existence of this scheme, their interests are sufficiently aligned that the class representatives can be expected to adequately pursue the interests of the absentee class members. *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2248 (Rule 23 asks "whether a proposed class has sufficient unity so that absent class members can fairly be bound by decisions of class representatives").

d. Adequacy of Representation

The final Rule 23(a) prerequisite encompasses two distinct inquiries designed to protect the interests of absentee class members. First, the adequacy of representation inquiry

"tests the qualifications of the counsel to represent the class." *G.M. Trucks,* 55 F.3d at 800. Second, it "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2250. The district court found that both class counsel and the named plaintiffs satisfied these tests.

With respect to class counsel, the court found that plaintiffs' counsel were highly competent and experienced class action attorneys, and had pursued the interests of the class vigorously. Fairness Opinion, 962 F.Supp. at 519–20. With respect to the class representatives, the court found named plaintiffs' interest in proving Prudential's "knowledge and orchestration of the scheme to defraud" and their "interest in obtaining relief commensurate with individual injury," as well as punitive damages, demonstrates that "there are no disparate interests to impair plaintiffs' incentive to prosecute fully all aspects of their claims against Prudential." *Id.* at 521.

Krell contests the district court's analysis on several grounds. First, Krell disputes the district court's finding that class counsel adequately served the interests of the class. In particular, Krell argues that class counsel failed to take adequate discovery, and that an improper "clear sailing" fee agreement between class counsel and Prudential created an impermissible conflict of interest. [52] Krell Brief at 19–21, 51–53.

***313** Second, Krell contends the inclusion of the category of "other claims" defeats a finding of adequate representation. Krell argues because policyholders have an equity interest in any "surplus" of Prudential, the expansion of the class to include policyholders with unidentified "other claims," whose interests were "adverse to those with asserted claims," created a detriment on behalf of the "other" policyholders for the benefit of those with asserted claims. According to Krell, this conflict destroys the adequacy of named plaintiffs' representation.

Third, Krell repeats his argument that the court's failure to consider the variations among the laws of the 50 states demonstrates that there was no adequate protection of the claims of absentees. In particular, Krell claims there was a conflict between class members with replacement claims and those without, so that the district court should have created a subclass of replacement claimants. [53] Finally, both Krell and Public Citizen argue the proposed class improperly includes a subset of "futures" claimants, thereby running afoul of *Amchem.*

We believe the district court exercised its sound discretion when it found class counsel and the named plaintiffs adequately represent the class. First, we believe class counsel vigorously pursued this class action. Both the uncapped nature of the proposed settlement and the "unprecedented" outreach program indicate that class counsel and the named plaintiffs have attempted to serve the best interests of the class as a whole. Further, we agree with the district court's finding that the attorneys' fee arrangement between class counsel and Prudential did not affect the adequacy of representation. *See infra* § VI.C.1.

Second, we also agree with the district court that the named plaintiffs adequately represent the interests of the absentee class members. As discussed, the crux of this class action is the allegation that Prudential engaged in a scheme to defraud policyholders by means of company-wide deceptive sales practices. The named parties, like the members of the class, would need to establish this scheme in order to succeed on any of the claims in the Second Amended Consolidated Complaint. Even those class members with "other" claims share the common task of demonstrating the existence and implementation of this scheme. Consequently, we believe the proposed class satisfies the adequacy of representation requirement of Rule 23(a).

We also reject the argument that the class as constituted included persons who are currently unaware of their injury, and that this "futures" class is barred under *Amchem. Amchem,* of course, found the proposed class did not meet the adequacy of representation standard because the interests of those with present injuries differed from those with "futures" claims. *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2251 (finding that the economic interest of the currently injured claimants "tugs against the interest of the exposure-only plaintiffs"). But *Amchem* is easily distinguished on its facts. Unlike the "exposure-only" plaintiffs in *Amchem,* the class members here need not wait to determine if they have been harmed by Prudential's fraudulent sales practices. There is no "future" manifestation of injury, because any injury suffered by a member of the class has already occurred. Having received notice of the pending class action and the availability of relief, members of the class can determine whether they have been victims of Prudential's

fraud, either through a review of their records or by calling the toll-free number established by the settling parties. Consequently, the district court exercised its sound discretion in finding the proposed class meets the adequacy of representation requirement of Rule 23(a)(4).

2. The Rule 23(b) Criteria

In order to certify an opt-out class under Rule 23(b)(3) the district court must make two additional findings: predominance and superiority. Issues common to the class ***314** must predominate over individual issues, and the class action device must be superior to other means of handling the litigation. The district court found both requirements were satisfied.

a. Predominance

The Supreme Court's recent decision in *Amchem* addressed the application of the predominance prong to "settlement only" classes. Although the Court made clear that consideration of the proposed settlement was proper when making a decision on class certification, it also placed limits on the weight to be accorded to the settlement. In particular, *Amchem* rejected the idea that the potential benefits of settlement are relevant to the predominance inquiry. According to the Court, the predominance "inquiry trains on the legal or factual questions that qualify each member's case as a genuine controversy, questions that preexist any settlement." *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2249. The court noted the "claims and defenses" relevant to both the predominance test and the Rule 23(a)(4) adequacy of representation inquiry "refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." 521 U.S. at —— n. 18, 117 S.Ct. at 2249 n. 18 (quoting *Diamond v. Charles,* 476 U.S. 54, 76–77, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) (O'Connor, J. concurring in part and concurring in judgment)).

In its predominance determination, the court focused primarily on plaintiffs' allegation that Prudential engaged in a common course of conduct by which it defrauded class members, and concluded that "[w]here many purchasers have been defrauded over time by similar misrepresentations, or by a common scheme to which alleged non-disclosures related, courts have found that the purchasers have a common interest in determining whether the defendant's course of conduct is actionable." Fairness Opinion, 962 F.Supp. at 511 (citations omitted).

The district court also rejected the argument that claimants' need to demonstrate reliance destroyed predominance, reasoning that "reliance is an issue secondary to establishing the fact of defendant's liability." *Id.* at 516 (citing 1 *Newberg* § 4.26 at 4–104) ("Challenges based on ... reliance have usually been rejected and will not bar predominance satisfaction because [reliance pertains] to the right of a class member to recover in contrast to underlying common issues of the defendant's liability."). Additionally, the court noted that "most of the plaintiffs' claims do not even involve a reliance element," including their claims for breach of contract, breach of implied obligation of good faith and fair dealing, negligence, negligent training and supervision, and unjust enrichment. *Id.* Finally, the court found that, because "plaintiffs' fraud-based claims stem largely from misleading omissions," reliance can be presumed. *Id.*

The district court also distinguished this case from *Georgine.* First, the court reasoned that "Prudential's alleged intentional use of the fraudulent sales tactics provides the 'single central issue' lacking" in *Georgine. Id.* at 511 n. 45. Whereas *Georgine* involved a variety of claims encompassing scores of individual issues, a trial in this instance would be focused on Prudential management's conduct. *Id.* Second, the court noted the class here is comprised of persons who purchased one type of product (life insurance policies) from one company, in contrast to the *Georgine* class members who were exposed to different asbestos-containing products manufactured by different companies. Finally, the district court noted the class here lacked "futures" plaintiffs, because "class members are readily identifiable and have already suffered injury by the purchase of a product that was misrepresented." *Id.*

As the Supreme Court noted in *Amchem,* "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws .... [e]ven mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement." *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2250 (citing Adv. Comm. Notes, 28 U.S.C.App., p. 697). This case, involving a common scheme to defraud millions of life insurance policy holders,

falls within that category. The district court's opinion sets forth a litany of common issues which the class ***315** must demonstrate in order to prevail. *See supra* § IV.B.1 and n. 47–48. While individual questions may arise during the course of this litigation, we agree with the district court that the presence of individual questions does not *per se* rule out a finding of predominance. In particular, the "presence of individual questions as to the reliance of each investor does not mean that the common questions of law and fact do not predominate." *Eisenberg v. Gagnon,* 766 F.2d 770, 786 (3d Cir.1985).

Krell contends the district court did not conduct a proper analysis under Rule 23(b)(3), and instead "presumed" predominance by finding the central issue in this case was nationwide deceptive conduct by Prudential's management. We disagree. A review of the district court's fairness opinion belies the contention that it merely presumed predominance. *See* Fairness Opinion, 962 F.Supp. at 510–17. The district court's finding that common issues predominated in this case was within its sound discretion, was supported by the record, and was amply demonstrated in its opinion.

Krell also reasserts his argument that the class here suffers the same defects as the class of asbestos plaintiffs in *Amchem.* We find the district court's analysis of this comparison convincing. The two cases are markedly different, and easily distinguished. The *Amchem* class failed the predominance inquiry because of the disparate questions facing class members, based in part on their differing levels of exposure, their differing medical histories, and the presence of exacerbating conditions such as smoking. Of course, the complexity of a case alleging physical injury as a result of asbestos exposure differs greatly from a case alleging economic injury as a result of deceptive sales practices. The elements of proof are less difficult when the vagaries of medical testimony and scientific expertise are removed from consideration. Furthermore, the *Amchem* class was further undermined by the schism between the differing medical needs of currently injured class members and exposure-only or "futures" claimants. As noted, there is no "futures" class in this case.

We also reject Krell's contention that predominance is defeated because the class claims are subject to the laws of the fifty states. Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit. This Court has affirmed a class certification based on a "creditable showing, which apparently satisfied the district court, that class certification [did] not present insuperable obstacles" relating to variances in state law. *See In re School Asbestos Litigation,* 789 F.2d 996, 1010 (3d Cir.1986).[54] In this instance Krell has failed to demonstrate that the differences in applicable state law were sufficient to foreclose a similar approach.[55] In support of class certification, plaintiffs compiled "a series of charts setting forth comprehensive analyses of the various states' laws potentially applicable to their common law claims." Fairness Opinion, 962 F.Supp. at 525. The court concluded that the "elements of these common law claims are substantially similar and any differences fall into a limited number of predictable patterns." *Id.* The district court "considered the choice of law issues that confront[ed] the Court and conclude[d] that these choice of law issues [did] not render this class action unmanageable." *Id.* We agree.

b. Superiority

Rule 23(b)(3) sets out several factors relevant to the superiority inquiry.[56] The district ***316** court addressed these factors and found the class action mechanism was superior to other possible means of adjudicating this case. First, the court examined the relatively modest size of individual claims and the sheer volume of those claims in the aggregate, and concluded a class action presented the "only rational avenue of redress for many class members." *Id.* at 523. Second, the court reasoned the relatively small number of individual suits pending against Prudential indicated that individual policyholders lacked a compelling interest to control the prosecution of their own claims, and at the same time represented a potentially great strain on judicial resources. Third, the court found it was appropriate to litigate the case in New Jersey, Prudential's principal place of business. Finally, the district court determined that the case, while challenging, would not present insurmountable case management problems if it were tried.[57] *Id.* at 525.

Krell objects to the finding of superiority, claiming the district court erred by only comparing the nationwide class with the prospect of individual proceedings, without

considering the possibility of subclasses and without allowing Krell to develop the subclass issue.

The superiority requirement asks the court "to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." *Georgine,* 83 F.3d at 632 (citing *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 757 (3d Cir.) (en banc), *cert. denied,* 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974)). We believe the court's superiority determination was within its sound discretion. With respect to Krell's subclass argument, the district court found no conflict between replacement and nonreplacement claimants. Fairness Opinion, 962 F.Supp. at 522. We agree. As discussed *infra* at § V.A.4., Krell has not demonstrated that replacement claimants differ from other class members so as to require the creation of a subclass. Because the replacement claimants did not require specialized or distinct treatment, the court's failure to create a separate subclass for those claimants, as well as its superiority determination, was not an abuse of discretion. [58]

C. *Conclusion*

Based on our review of the prerequisites of Rule 23(a) and 23(b)(3), we believe the "proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2248. Consequently, we will affirm the district court's certification of the class.

V. THE FAIRNESS OF THE PROPOSED SETTLEMENT

Even if it has satisfied the requirements for certification under Rule 23, a class action cannot be settled without the approval of the court and a determination that the proposed settlement is "fair, reasonable and adequate." [59] *G.M. Trucks,* 55 F.3d at 785. "Rule 23(e) imposes on the trial judge the duty of protecting absentees, which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims." *Id.* at 805 (citations omitted).

In deciding the fairness of a proposed settlement, we have said that "[t]he evaluating ***317** court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.* at 806 (citations omitted). At the same time, we have noted that cases such as this, where the parties simultaneously seek certification and settlement approval, require "courts to be even more scrupulous than usual" when they examine the fairness of the proposed settlement. *Id.* at 805. This heightened standard is designed to ensure that class counsel has demonstrated "sustained advocacy" throughout the course of the proceedings and has protected the interests of all class members. *Id.* at 806.

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson,* 521 F.2d 153, 156 (3d Cir.1975). Because of the district court's proximity to the parties and to the nuances of the litigation, we accord great weight to the court's factual findings. *Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304, 1305–6 (3d Cir.1993) (citing *Ace Heating & Plumbing Co. v. Crane Co.,* 453 F.2d 30, 34 (3d Cir.1971)).

As the district court recognized, our decision in *Girsh* sets out appropriate factors to be considered when determining the fairness of a proposed settlement. Those factors are:

> (1) the complexity, expense and likely duration of the litigation ...; (2) the reaction of the class to the settlement ...; (3) the stage of the proceedings and the amount of discovery completed ...; (4) the risks of establishing liability ...; (5) the risks of establishing damages ...; (6) the risks of maintaining the class action through trial ...; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery ...; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation....

Girsh, 521 F.2d at 157 (quoting *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974)) (the "*Girsh* factors"). The court examined each of these factors and found "the Proposed Settlement is indeed fair, reasonable, and adequate and should be approved." Fairness Opinion, 962 F.Supp. at 534.

In addition to the *Girsh* analysis, the district court offered other reasons for its conclusion that the settlement was fair and reasonable. Describing the proposed settlement as "exceptional," the court noted the settlement's structure was based on the class action settlements approved in *Willson v. New York Life Ins. Co.,* No. 94–127804, 1995 N.Y. Misc. LEXIS 652 (N.Y.Sup.Ct. Feb. 1, 1996), *aff'd,* 228 A.D.2d 368, 644 N.Y.S.2d 617 (1st Dept.), and *Michaels v. Pheonix Home Life Ins. Co.,* No. 95–5318, 1997 N.Y. Misc. LEXIS 171 (N.Y.Sup.Ct. Jan. 3, 1997), both of which received the praise of "[c]ourts, academic and industry experts, and various independent organizations." Fairness Opinion, 962 F.Supp. at 535. The court also relied on the expertise of the insurance regulators from the fifty states and the District of Columbia, all of whom endorsed the settlement.

The court found the terms of the settlement "benefit[ ] the class enormously," emphasizing the uncapped nature of the relief, the fairness of the ADR process, and the availability of Basic Claim Relief to those class members who either elect not to participate in the ADR process or who cannot demonstrate they have a compensable claim. The court found this relief was enhanced by the inclusion of "Additional Remediation Amounts," which it described as the "punitive damage counterpart to the Proposed Settlement," and by Prudential's agreement to pay all attorneys' fees and costs associated with the settlement. *Id.* at 535–36. Finally, the court emphasized the settlement provided class members the opportunity to file claims immediately after court approval of the settlement, rather than waiting through what no doubt would be protracted litigation. *Id.* at 536.

Krell raises several challenges to the district court's fairness determination.[60] First, ***318** Krell claims the district court applied several of the *Girsh* factors improperly, and in some cases not at all, and that it erred by not creating a separate subclass to address replacement claims. Krell Brief at 43–50. Second, he contends the district court's fairness determination violated the McCarran–Ferguson Act and the Rules Enabling Act by altering the substantive contractual and statutory insurance rights of the class. *Id.* at 36–40. Finally, Krell alleges the certification and fairness proceedings lacked due process. *Id.* at 40–42.

A. *The Girsh Factors*

Although Krell has not directly challenged the court's analysis with respect to each of the nine *Girsh* factors, we will examine each of them in turn.

1. The complexity and duration of the litigation

Citing the myriad complex legal and factual issues which would arise at trial, the district court found the "anticipated complexity, costs, and time necessary to try this case greatly substantiate the fairness of the settlement." Fairness Opinion, 962 F.Supp. at 536. The court found that litigation would require expensive and time consuming discovery, would necessitate the use of several expert witnesses, and would not be completed for years. Consequently, the court concluded this factor weighed in favor of settlement.

We agree. Examining the sheer magnitude of the proposed settlement class as well as the complexity of the issues raised, we conclude the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court. The prospect of such a massive undertaking clearly counsels in favor of settlement.[61]

2. The reaction of the class to the settlement

This factor attempts to gauge whether members of the class support the settlement. Although the response rate in a 23(b)(3) class action is relevant to the fairness determination, *see, e.g., Bell Atlantic,* 2 F.3d at 1313 n. 15 (3d Cir., 1993); *Shlensky v. Dorsey,* 574 F.2d 131, 148 (3d Cir.1978), "a combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *G.M. Trucks,* 55 F.3d at 812 (citation omitted).

The district court found that, of the 8 million policyholders to whom Prudential sent the class notice, approximately 19,000 policyholders or 0.2 per cent of the class opted out.[62] The court also noted that approximately 300 policyholders filed objections to the settlement. The court found the small percentage of opt outs and objectors was "truly insignificant," and noted that the "most vociferous objectors to the Proposed Settlement are a handful of litigants represented by counsel in cases that compete with or overlap the claims asserted in the Second Amended Complaint." Fairness Opinion, 962 F.Supp. at 537. Consequently, the court concluded the limited number of objections filed also weighed in favor of approving the settlement. *Id.* at 537–38.

We see no abuse of discretion. While we do not read too much into the low rate of response, we believe the district court properly analyzed this factor.[63]

***319** 3. The stage of the proceedings and amount of discovery completed

The parties must have an "adequate appreciation of the merits of the case before negotiating." *G.M. Trucks,* 55 F.3d at 813. To ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken. Krell contends that class counsel's discovery was insufficient to support the proposed settlement, claiming that Lead Counsel's pre-settlement discovery consisted only of 70 boxes of documents received in August 1996 pursuant to informal letter requests, and a number of meetings with Prudential's chairman, Arthur Ryan. Krell questions how Lead Counsel could have been in "second stage settlement negotiations" before receiving Prudential's production of over 1 million documents, videotapes, audio tapes and computer tapes in mid-August. Finally, Krell contends there was no vigorous, adversarial discovery because "virtually all of Prudential's discovery obligations" were stayed between October 1995 and September 10, 1996, and the parties didn't agree on a free exchange of information until August 20, 1996, only a few weeks before the proposed settlement was announced.

The district court found that "counsel for plaintiffs and Prudential did not commence serious settlement discussions until 18 months of vigorous litigation had transpired," noting the parties had filed and argued a multitude of motions, including consolidation motions, jurisdictional motions, motions to stay competing class actions, case management motions, and Prudential's motion to dismiss under F.R.C.P. 12(b)(6). Fairness Opinion, 962 F.Supp. at 538 n. 62. In addition to its in-court efforts, the district court concluded that class counsel's pursuit of discovery also supported the settlement. The court found class counsel reviewed a multitude of documents provided by Prudential,[64] conducted its own interviews with hundreds of current and former Prudential employees, took twenty depositions, and had access to all of the materials collected by the Task Force. *Id.* at 541. The district court also found class counsel took sufficient time to review the discovery materials it collected, noting that class counsel refused to discuss settlement on two separate occasions because it believed it needed further discovery. *Id.* (citing Weiss Aff. ¶¶ 49, 101–02.) Finally, the court found class counsels' "use of informal discovery was especially appropriate in this case because the Court stayed plaintiffs' right to formal discovery for many months, and because informal discovery could provide the information that plaintiffs needed." *Id.* at 542. Based on the foregoing, the district court concluded "the volume and substance of Class Counsel's knowledge of this case are unquestionably adequate to support this settlement." *Id.* at 541. We see no error here.

4. The risks of establishing liability and damages

The fourth and fifth *Girsh* factors survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement. Examining plaintiffs' ability to establish liability and damages at trial, the court concluded "the risks of establishing liability weigh in favor of approving the settlement." *Id.* at 540.

We believe the district court properly examined the risks faced by the putative class. The court found plaintiffs would face a difficult burden at trial demonstrating, *inter alia,* (1) class members were deceived by Prudential's written disclosures and illustrations; (2) their contract claims were not barred by the parol evidence rule because they conflict with the unambiguous language

in the insurance contracts; (3) the necessary reliance to support their federal securities claims; and (4) their federal securities claims were not barred by the one year statute of limitations and the three year statute of repose. *Id.* at 539. As further evidence of the barriers facing plaintiffs, the district court took notice ***320** of a similar life insurance sales practice case in Alabama state court in which the judge overturned a substantial jury verdict against Prudential. *Id.* (citing *Key v. Prudential Ins. Co. of America,* Civ. No. 93–479 (Al.Cir.Ct. Dec. 28, 1995)). We believe the district court offered substantial reasons for its findings.

a. Replacement Claims

Krell argues the district court failed to consider separately the likelihood of success at trial for those class members who alleged "replacement claims," contending those claims require a lesser degree of proof and may be established by an objective review of the documents in Prudential's files. Both Prudential and Lead Counsel contend that "replacement policyholders faced similar burdens to those of other Class Members in establishing liability and damages against Prudential." [65] Prudential Brief at 35.

The district court did not believe that "replacement claims" are easier to prove and therefore required separate consideration. Fairness Opinion, 962 F.Supp. at 522. We agree. Krell offers no authority or analysis to support this blanket assertion. In addition, the findings of the Multi-State Task Force undermine Krell's argument.

The primary focus of the Multi–State Task Force was the practice known as "churning" or "twisting," which it defined as "the sale of any policy based upon incomplete or misleading comparisons." Task Force Report at 35. According to the Multi–State Task Force Report, the transactions most frequently the subject of churning or twisting complaints were financed sales and abbreviated payment plans. Replacement transactions are a subcategory of financed sales in which at least 25% of an existing policy's value is used to fund the purchase of a new policy. *Id.* (citing the current NAIC Replacement Life Insurance and Annuities Model regulation, adopted in 1984).

The Task Force Report makes clear that "none of these types of sales, financed, replacement or abbreviated pay, is in violation of the replacement regulation if properly done." *Id.* at 36 (emphasis omitted). It also notes that, during the late 1970s and early 1980's, the previous industry-wide disinclination for replacement sales began to give way. In 1978, for example, the National Association of Insurance Commissioners modified its model replacement regulations to reflect the growing acceptance of replacement sales, provided those sales were accompanied by necessary information and disclosure to allow consumers to "make an informed choice." [66] *Id.* at 39–40.

Turning to its examination of Prudential, the Task Force acknowledged its goal was "to determine whether during the sale of new policies, those involving financing or replacement, consumers were adequately advised of the potential failings of the new policies or the funding basis on which they were sold." *Id.* at 45. The Report notes that although all of the required disclosure forms may have been completed and filed by Prudential, "[o]ne must look beyond the required forms to determine whether or not presentations were accurate and not misleading." *Id.* In its discussion of the remediation protocol, the Task Force explained "the documentation received from Prudential did not always support the consumer's assertion," and consequently "[w]hat was or was not agreed upon at the time of sale became a question of fact." *Id.* at 189; *see also id.* at 191 (noting that while "some replacements may have been appropriate ... misrepresentation is never appropriate," and thus "the challenge is to distinguish appropriate replacement activity.")

***321** Consequently, it appears that misrepresentation, rather than compliance with bookkeeping requirements, was the primary concern of the Task Force examination of Prudential's replacement sales. As the Task Force Report states, it is incorrect "to assume that in any and every case where a replacement was not identified or the regulatory requirements were not met, the policyholder did not understand the transaction or that it was not properly explained." *Id.* at 17. We also find it significant that the state insurance regulators who crafted the initial Task Force Report did not incorporate a lesser burden of proof or otherwise distinguish "replacement claims" from other types of claims. [67] Consequently, we believe the district

court properly considered the role of replacement claims when analyzing the fourth and fifth *Girsh* factors. [68]

5. The risks of maintaining the class action through trial

Under Rule 23, a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable. *In re School Asbestos Litigation,* 789 F.2d at 1011 (3d Cir.1986); *G.M. Trucks,* 55 F.3d at 815. In this instance, the district court concluded that although "this case is manageable as a class action and [ ] the class action device is the most appropriate means to adjudicate this controversy, as the case evolves, maintaining the class action may become unworkable" and require decertification. Fairness Opinion, 962 F.Supp. at 540. The court also noted Prudential had sought to preserve its objections to class certification, and would likely contest certification if the case proceeded to trial. Consequently, the court concluded that there was a risk the case might eventually be decertified, all of which weighed in favor of settlement.

Although we agree with the district court's analysis and find there was some risk of decertification which supports settlement, we pause to comment on the application of this factor in "settlement-only" class actions following the Supreme Court's decision in *Amchem.* Because the district court always possesses the authority to decertify or modify a class that proves unmanageable, examination of this factor in the standard class action would appear to be perfunctory. There will always be a "risk" or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement. The test becomes even more "toothless" after *Amchem.* The Supreme Court in *Amchem* held a district court could take settlement into consideration when deciding whether to certify a class, and that, "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial." 521 U.S. at ——, 117 S.Ct. at 2248. It would seem, therefore, that after *Amchem* the manageability inquiry in settlement-only class actions may not be significant.

6. The ability of the defendants to withstand a greater judgment

The district court found "Prudential's ability to withstand a greater judgment is a matter of concern." [69] Fairness Opinion, ***322** 962 F.Supp. at 540. Noting that the settlement was valued between $1 billion and $2 billion, the court found a larger judgment could negatively impact Prudential's declining credit rating. [70] *Id.* The court also expressed concern that, because Prudential is a mutual insurer, non-class member policyholders could conceivably be adversely affected by an excessive settlement in the form of lower dividends. *Id.*

Krell claims the district court erred by finding that Prudential could not withstand a greater judgment because "neither Lead Counsel nor Prudential submitted any reliable evidence of the true value of the ADR relief." Krell Brief at 50. Krell speculates that even the $410 million minimum is inaccurate because it does not account for "profits, if any" generated by Basic Claim Relief.

We see no error here. As the district court noted, the value of the proposed settlement is difficult to determine because both the compensatory relief available under the ADR and the additional relief available through Basic Claim Relief are uncapped. The parties' experts offered valuations between $1 and $2 billion, with an absolute minimum of $410 million. While these numbers are imprecise, they are a sufficient basis for the district court to decide whether Prudential could withstand a greater judgment. In addition, Prudential's credit rating during the course of the litigation may be an appropriate indicator, among others, for the court's consideration, and its decline would support the court's analysis.

7. The range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation

The last two *Girsh* factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. In order to assess the reasonableness of a proposed settlement seeking monetary relief, "the present value of the damages plaintiffs would likely recover if successful,

appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *G.M. Trucks,* 55 F.3d at 806 (quoting Manual for Complex Litigation 2d § 30.44, at 252). On appeal, Krell argues the district court declined to address this issue, instead finding the analysis unnecessary because all injured policyholders would receive full compensatory relief.

Krell has mischaracterized the district court's opinion. The district court applied the final two *Girsh* factors, although it did not attempt to reduce its analysis to a concrete formula. The district court found that calculating the best possible recovery for the class in the aggregate would be "exceedingly speculative," and in this instance such a calculation was unnecessary because the reasonableness of the settlement could be fairly judged. The court instead examined the nature of the settlement and the range of possible outcomes for those participating in either the ADR process or Basic Claim Relief, and concluded that "an individual's recovery exceeds the value of the best possible recovery discounted by the risks of litigation." Fairness Opinion, 962 F.Supp. at 540.

For example, the court found class members who have clear claims against Prudential will receive scores of "3" and will "receive a choice between full rescissionary or compensatory relief plus interest." Thus they will receive full compensation without paying attorneys fees and without undue delay. [71] The court concluded this relief "is not only fair, it is exceptional." *Id.* at 540–41. Those ***323** class members who received a score of "2"—where the evidence on balance supports the claim—would receive 50% of their damages without having to pay litigation costs or fees, an award the court concluded was equivalent to what the claimant would have received at trial. *Id.* at 541 ("The 50% award plus 100% interest is equivalent to a full award minus litigation costs, attorneys' fees, and the price of delay."). The court also found the settlement was fair for those receiving a score of "1" in the ADR process and for those electing Basic Claim Relief—those who would not have had a claim or not elected to bring one—because the Basic Claim Relief recovery is greater than what they would have gotten at trial. [72] *Id.*

We believe the district court adequately addressed these factors and agree its examination "accounts appropriately for the nuances of this Proposed Settlement." *Id.* at 535 n. 58. As the court noted, both the structure of the settlement and the uncapped nature of the relief provided make it difficult to determine accurately the actual value of the settlement. Consequently, the traditional calculus suggested by the Manual for Complex Litigation 2d and adopted by this Court in *G.M. Trucks* cannot be applied to this case. But we cannot find the district court abused its discretion when it found that the remedies available under the proposed settlement provided extraordinary relief. When balanced against the best possible recovery and the risks of taking this case to trial, these remedies weighed in favor of the proposed settlement.

It is worth noting that since *Girsh* was decided in 1975, there has been a sea-change in the nature of class actions, especially with respect to mass torts. In this regard, it may be useful to expand the traditional *Girsh* factors to include, when appropriate, these factors among others: the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable. [73] Of these factors, the ***324** only one relevant here is the fairness and reasonableness of the ADR procedure. *See also* discussion *supra* § V.D.

B. *Other Objections*

1. The Rules Enabling Act and the McCarran–Ferguso n Act

Krell argues the proposed settlement violates the Rules Enabling Act [74] and the McCarran–Ferguson Act [75] because it "would alter policyholders' past and future substantive contractual and statutory insurance rights." Krell Brief at 36. The district court rejected both arguments. First, the court found the McCarran–Ferguson Act does not apply to an agreement between

private parties. Fairness Opinion, 962 F.Supp. at 561. Second, the court found approval of a settlement under Rule 23 "merely recognizes the parties' voluntary compromise of their rights" and does not itself affect their substantive state law rights.[76] *Id.* at 561–62. For the reasons outlined by the district court, we agree the proposed settlement in this case does not violate either the McCarran–Ferguson Act or the Rules Enabling Act.[77]

2. Failure to Allow Discovery

Krell alleges the district court deprived him of fundamental due process by denying him the opportunity to take necessary discovery. Krell Brief at 40–42. Krell ***325** contends additional discovery was essential because class counsel's own discovery was inadequate, and the district court's denial of Krell's requests for settlement and fee related discovery[78] resulted in an erroneous assessment of the fairness of the settlement.

Krell complains his discovery attempts were hampered by the court order requiring all discovery requests be served on Prudential through Lead Counsel. According to Krell, Lead Counsel refused Krell's requests both prior and subsequent to signing the settlement agreement in September 1996, and excluded him from the "free exchange" of documents. Krell also requested cross-examination of affiants supporting the settlement, depositions from the named plaintiffs with respect to jurisdiction and adequacy of representation, and other document discovery.[79]

Objectors are "entitled to an opportunity to develop a record in support of [their] contentions by means of cross-examination and argument to the court." *Greenfield v. Villager Indus., Inc.,* 483 F.2d 824, 833 (3d Cir.1973). There is no dispute Krell was given the opportunity to present his arguments to the court during the fairness hearing. In addition, the district court found Krell had ample opportunity to avail himself of the substantial discovery provided to Lead Counsel but failed to do so, and that additional discovery was unnecessary because Krell focused primarily on legal issues. Fairness Opinion, 962 F.Supp. at 563.

We believe the district court acted well within its discretion here. Faced with the prospect of immense discovery requests, the district court attempted to exert some control over the discovery process. Krell cannot impute to the court his own failure to avail himself of the opportunity to review the discovery in this case.

C. *"Other Sales Claims"*

The final issue we address with respect to fairness relates to the category of "other sales claims." Krell raises two arguments in opposition to this broad category of claims. First, Krell contends that the "other claims" were improperly added at the last minute to secure an all-encompassing release for Prudential. Second, Krell contends the notice provided under the settlement did not adequately explain the category to absentee members, and consequently millions of policyholders would inadvertently waive their right to recover for Prudential's fraudulent acts.

1. The Alleged Expansion of the Class

According to Krell, the "class definition was at the last minute expanded to release nearly 8 million additional policyholders not included in the class pled only 3 days earlier." Krell Brief at 4.[80] In addition to the previously-noted ramifications of this "expansion" with respect to the Rule 23 certification prerequisites, Krell also contends the release of these claims is improper because it exceeds the scope of the class complaint.

Prudential and Lead Counsel counter that the certified class is actually smaller than the "putative class defined in plaintiffs' initial pleadings" and that the Task Force remediation plan also included an "other claims" category. As Lead Counsel explains, plaintiffs have contended "from the outset that Prudential's common course of deceptive conduct extended beyond the churning, vanishing premium, and investment sales tactics and permeated its product design, agent training and oversight, sales activities, and dividend, expense and investment practices." Lead Counsel Brief at 20. The settling parties maintain that, even if such claims were not included in the Second Amended Consolidated ***326** Complaint, those claims could still be released because they arose from the conduct alleged in the Complaint.

The district court held the release was not unfairly broad, finding it generally corresponded with the allegations in

the Second Amended Consolidated Complaint. The court also found that "releases may include all claims, including unpleaded claims that arise out of the same conduct alleged in the case." [81] Fairness Opinion, 962 F.Supp. at 558 (citing *Grimes v. Vitalink Communications Corp.,* 17 F.3d 1553, 1563 (3d Cir.), *cert. denied,* 513 U.S. 986, 115 S.Ct. 480, 130 L.Ed.2d 393 (1994); *Sandler Assocs., L.P. v. Bellsouth Corp.,* 818 F.Supp. 695, 704–05 (D.Del.1993), *aff'd,* 26 F.3d 123 (3d Cir.1994)).

The crux of the plaintiffs' complaint was that Prudential engaged in a common scheme of deceptive sales practices. Although the Second Amended Consolidated Complaint specifically lists three types of deceptive sales claims—the churning, vanishing premium and investment plan claims—other allegations address conduct which supports the common scheme theory and which does not fall neatly within the three enumerated categories. *See supra* note 11. Therefore, we agree with the district court the "other claims" were properly released. [82] While it is essential to protect the interests of absentee class members, we believe the claims of the absentees here are adequately incorporated in the terms of the settlement. The category of "other claims" are part and parcel of the "common scheme" which underlies plaintiffs' entire case, and are separately addressed in the procedural guidelines which forms the basis for the ADR process. Finally, the settling parties have represented that the settlement "does not release unknown claims relating to the servicing or administration of class members' policies," but is limited to claims relating to the actual sale of insurance policies. [83] Lead Counsel Brief at 62–63. Consequently, we believe the "other claims" were appropriately included in the release.

2. Adequacy of Class Notice

Rule 23 of the Federal Rules of Civil Procedure contains two distinct notice provisions. Rule 23(c)(2) requires notice be given to all potential members of a Rule 23(b)(3) class informing them of the existence of the class action, the requirements for opting out of the class and/or entering an appearance with the court, and the applicability of any final judgment to all members who do not opt out of the class. [84] Rule 23(e) requires all members of the class be notified of the terms ***327** of any proposed settlement. [85] The Rule 23(e) notice is designed to summarize the litigation and the settlement and "to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." 2 *Newberg on Class Actions* § 8.32 at 8–109.

In this instance, the parties prepared a joint notice, combining the information required by Rules 23(c)(2) and 23(e). The district court's October 28, 1996 order required the settling parties to mail individual notice [86] to the last known address of the over 8 million present and former policyholders who comprised the putative class. [87] In addition, the Order required the parties to publish notice in the national editions of *The New York Times, The Wall Street Journal, USA Today* and *The Newark Star Ledger.* [88] Prudential went even further, publishing notice in the largest circulating newspaper in each of the fifty states and the District of Columbia. Fairness Opinion, 962 F.Supp. at 495. The notices were published over a three day period, from November 20, 1996 until November 22, 1996. [89]

The district court described the notice and outreach program as unparalleled and found "the comprehensive notice program in this case far exceeded the requirements of Rule 23 and due process." *Id.* at 526. The district court also examined and rejected various objections to the form and content of the notice. *Id.* at 528–34.

We agree with the district court's assessment of the scope of the outreach program. [90] Providing individual notice to over 8 million class members is a daunting task, and no doubt an expensive one. In addition, the combination of individual and publication notice, combined with the unsolicited news coverage the settlement received, greatly increased the possibility that Prudential will ultimately compensate a greater number of injured policyholders than would otherwise have been possible. [91] The parties also provided additional notices to the class, each designed to update the parties as to their rights and obligations under the settlement. [92]

***328** We agree with the district court that the notice provided all of the required information concerning the class members' right and obligations under the settlement. It detailed the procedures for opting out, entering an appearance, and filing objections, and notified the policyholders that if they did not opt out of the class

they would be bound by the settlement if approved. It explained the ADR process and Basic Claim Relief available to the class, provided the text of the release, and provided notification that all related documents were available for public inspection. Finally, it explained the nature of the claims covered under the settlement, and provided an 800 number through which class members could obtain information and make further inquiries. The fact that approximately 1.8 million inquiries have already been processed through the 800 number supports the conclusion that the class notice was effective.

The only legitimate concern raised with respect to the notice provided relates to the category of "other claims." After a careful review of the record, we hold the notice provided with respect to the category of "other claims" provided sufficient information to apprise the class of the scope of the allegations against Prudential. While this catch-all category is by its nature difficult to describe, we believe the class notice makes clear that additional claims which do not fit neatly into one of the other three categories may nonetheless be remedied through the ADR process.

The third page of the cover letter to the class notice specifically sets forth the four categories of sales claims —financed insurance, abbreviated payment, investment plan, and "other improper sales practices." The types of relief available for each of the four categories of claims are clearly listed on pages 10–11 of the Notice of Class Action, Proposed Settlement, Settlement Hearing And Right To Appear.[93] The four categories of claims are also listed in the question-and-answer pamphlet included with the Class Notice. Compared to the first three categories of claims, which require some understanding of insurance policies, the catch-all category of "other improper sales practices" is arguably easier for the uninformed layman to comprehend, and may in fact encourage class members to respond to the Class Notice.

Consequently, we believe the notice provided to the absentee class members in this case supports the district court's finding that the settlement is fair and reasonable.

D. *Conclusion*

As we have noted, a review of the *Girsh* factors strongly supports the district court's conclusion that the proposed settlement is fair and reasonable. In addition, the parties have fully satisfied the notice requirements of Rule 23, and provided the class with both individual and publication notice regarding the terms of the settlement. There are also other facets of the settlement which counsel in favor of its approval.

First, we are impressed with the nature and extent of the relief provided under the settlement. The ADR process provides an efficient and individually tailored approach to the remediation of claims. Rather than offering 8 million class members a small refund or a coupon towards the purchase of other policies (which we believe would have failed the fairness evaluation), the ADR process responds to the individual claims of the class and provides compensation based on the harm they have suffered. As a result, the potential class recovery is uncapped, a fact which weighs strongly in favor of the settlement.

Second, we are also impressed with the procedural safeguards created by the settlement. ***329** The four tier review process, in which the first and third levels of review are conducted by Prudential employees and the second and fourth levels are conducted by independent reviewers selected by class counsel, provide assurance that the ADR process will accurately assess and compensate the claims of injured class members.

Third, we are mindful of the external indicia of fairness which attach to this settlement. In particular, we are cognizant that the original framework of this settlement resulted from the efforts of the Multi–State Task Force. The involvement of the various state insurance regulators, with their vast experience and expertise, provides great support in favor of the fairness of the settlement. In addition, we are impressed by the seal of approval this settlement has received from the insurance regulators of each of the 50 states and the District of Columbia.

Fourth, that Prudential will bear all administrative costs associated with the remediation process and will pay class counsel's fees and costs weighs in favor of the settlement. By agreeing to cover these expenses, Prudential has ensured that the administrative and legal costs of the settlement will not diminish the class recovery.

Based on the foregoing, we conclude that the district court's finding that the proposed settlement was fair, reasonable and adequate was well within its sound discretion.

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VI. ATTORNEYS' FEES

A. *The Fee Agreement*

The settling parties addressed attorneys' fees in § K of the Stipulation of Settlement filed October 28, 1996. Under the settlement, Lead Counsel would request $90 million in attorneys' fees from the district court, a request Prudential agreed not to oppose.[94] The full amount, as well as certain administrative costs associated with the settlement plan, would be paid entirely by Prudential.[95] Stipulation of Settlement § K.4. The fee arrangement was designed so that payment of class counsel's fees and expenses would not "directly or indirectly reduce, limit or modify the remedies provided in the ADR process or Basic Claim Relief." *Id.* The Stipulation of Settlement also created a timetable for payment. Prudential would pay $45 million of the attorneys' fees plus expenses within five days of the district court's approval of the settlement, the remaining fees payable after the final disposition of any appeals.[96] *Id.* at § K.2.

On November 22, 1996, Lead Counsel submitted an application for attorneys' fees in conformity with § K. Several class members, among them Krell, filed objections to the award. As the district court noted, no state insurance commissioner opposed the fee petition. *In re Prudential Ins. Co. of America Sales Practices Litigation,* 962 F.Supp. 572, 575 (D.N.J.1997) ("Fee Opinion"). Advocating the propriety of the proposed fee, Lead Counsel contended the remedies established under the Proposed Settlement were analogous to a "common fund" and, consequently, the size of the fee award should be determined as a percentage of the class members' total recovery. In order to establish the ***330** value of the settlement, Lead Counsel submitted the affidavit of its expert Robert Hoyer, a Participating Principal with Arthur Andersen LLP, and managing partner of the firm's Life & Health Actuarial Service group. Hoyer estimated the total value of the settlement at $1.987 billion, $1.187 billion attributable to the ADR process, and $799.6 million to Basic Claim Relief.[97] Hoyer Aff. ¶¶ 6, 11, 15. According to Hoyer's calculations, $863.7 million of the settlement's total value was created under the Task Force plan, while the remaining $1.123 billion was the result of the enhancements created by class counsel. *See* Fee Opinion, 962 F.Supp. at 575.

To assist with its fee determination, the district court appointed an independent fee examiner, Stephen Greenberg, on November 6, 1996.[98] Greenberg was charged with analyzing the fairness of Lead Counsel's fee request. The fee examiner submitted his Report and Recommendation on February 13, 1997, concluding the $90 million fee award was fair and reasonable. Krell was the only objector to the Fee Examiner's Report. Fee Opinion, 962 F.Supp. at 576. On March 10, 1997, the district court held a hearing dedicated to attorneys' fees, and provided an opportunity for all interested parties to address the fairness of the Fee Petition.

B. *Fee Opinion*

On March 20, 1997 the court issued its opinion and order with respect to attorneys' fees. As urged by Lead Counsel in its fee petition, the district court found this case analogous to the common fund paradigm, and elected to apply the percentage-of-recovery method to calculate the attorneys' fee award.[99] Fee Opinion, 962 F.Supp. at 579. Despite accepting the percentage-of-recovery method, the district court rejected both the fee petition and the fee examiner's Recommendation and Report, and in its place constructed a bifurcated fee award designed to provide no less than $45 million and no more than $90 million to class counsel.[100]

The district court found that "any fee awarded to class counsel in this case should be based upon the entire value of the settlement, including any portion which would have been provided to the class under the Task Force Plan." Fee Opinion, 962 F.Supp. at 581 (emphasis omitted). The court reasoned the Task Force Plan "resulted in substantial measure from the efforts of class counsel in this litigation," noting that Prudential began to urge the formation of the Task Force only after the consolidated lawsuits were filed. Fee Opinion, 962 F.Supp. at 581–82. Considering both the causal connection as well as the additional enhancements created by the Proposed Settlement, the court concluded class counsel could reasonably be credited with all of the benefits provided under the settlement.

Turning to the value of the settlement, the district court found the only "specific, comprehensive valuation of the settlement that is of record" was submitted by class counsels' expert, Robert Hoyer.[101] Relying on Hoyer's ***331** figures, the fee examiner's report calculated the

value of the proposed settlement between $1.2 and $2 billion, depending on the number of class members who ultimately have claims remediated through the ADR process. Fee Examiner's Report at 56. But the district court "question[ed] the reasonableness of any valuation that may differ by as much as $800 million," and expressed concern that a range of possible values might not satisfy the requirement that a district court determine the actual value of the settlement when calculating the award of attorneys' fees. Fee Opinion, 962 F.Supp. at 583. Consequently, the court found "the nature of the Settlement Agreement simply [did] not lend itself to a reasonable valuation" and rejected the fee examiner's report. *Id.*

The court also found it imprudent to apply the lodestar method as its primary tool in calculating attorneys' fees.[102] First, the court noted there was no need in this instance to "ensure the procurement of competent counsel," one of the underlying purposes of the lodestar method. Additionally, the court found the involvement of over 25 law firms and 250 attorneys and paralegals would make a lodestar calculation time-consuming and burdensome.[103] Finally, the court reasoned that application of the lodestar method was unnecessary because a modified version of the percentage-of-recovery method could be applied. *Id.* at 27–28.

The district court decided to calculate the fee award in two parts; first, an award based on "a percentage of recovery on the known value of the settlement—Prudential's guaranteed minimum payout of $410 million (the "Minimum Fund")," Fee Opinion, 962 F.Supp. at 584; and second, an award based on a "separate percentage of recovery with respect to the future, additional value of benefits to be paid to class members who come forward under the Settlement Agreement (the "Future Fund")." *Id.*

Examining several factors in order to calculate an appropriate percentage under this two tier analysis, the court noted that, although percentages from 20 to 30% have been deemed appropriate, the exceptional size of the class recovery in this instance counseled in favor of a lower percentage of recovery. The district court examined the fee awards in other cases involving substantial recoveries, and found a range of 4.1% to 17.92% in cases where the recovery exceeded $100 million. The district court also considered the quality of class counsel's representation, the "innovative" terms of the settlement, the enhancements over the Task Force Plan, and the overall fairness of the settlement. *Id.* at 585–87. The court concluded the "results achieved by plaintiffs' counsel in ***332** this case in the face of significant legal, factual and logistical obstacles and formidable opposing counsel, are nothing short of remarkable." *Id.* at 585–86.

Finally, the court considered the fee percentage private parties would likely have negotiated. The fee examiner's report examined the fee awarded in the settlement between Penzoil and Texaco and concluded that class counsel would have received a contingent fee of at least 10–15%. Fee Examiner's Report at 61. While the court ultimately rejected the fee report, it nonetheless agreed that "given the obvious risks and burdens required for its prosecution, lawyers of plaintiffs' counsels' standing would have negotiated a fee of at least 10 to 15% of the recovery."[104] Fee Opinion, 962 F.Supp. at 587 (quoting Fee Examiner's Report at 61).

Turning to the first part of its bifurcated fee award, the district court found that 11% was a fair and reasonable recovery with respect to the $410 million Minimum Fund. Accordingly, the court ordered Prudential to pay class counsel $45 million, plus expenses, within five days. The court then conditioned the second half of the fee award on the number of claims ultimately handled through the ADR process. In the event 330,000 claims were filed by June 1, 1997, Prudential would pay class counsel an additional $45 million. Assuming the full $90 million were awarded, the fee would equal approximately 6.7% of the minimum recovery guaranteed by Prudential under the settlement.[105] The court found this figure to be fair and reasonable. In the event the 330,000 threshold were not met, class counsel would not be entitled to an automatic fee award, but would receive a 5% contingent fee based on the value of the Future Fund—"the total value of the settlement less the Minimum Fund"—to be determined annually on the anniversary date of the Fee Opinion.[106] Fee Opinion, 962 F.Supp. at 588–89.

The court then applied the lodestar method as a cross-check of its initial calculation. According to an analysis provided by Lead Counsel, the lodestar as of January 31, 1997 was $17.7 million, plus expenses of just over $3 million. *Id.* at 591. Using these figures, the court found the maximum fee award of $90 million would be

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equivalent to a multiplier of 5.1 and an average hourly rate of $1,148.70. The court found that, when the lodestar was updated, the resulting multiplier and hourly rate would be lower. Nonetheless, the district court found these higher, unadjusted figures were substantially less than the multiplier and average hourly rate applied by the district court and affirmed by this court in *Weiss v. Mercedes–Benz of N. Am., Inc.,* 66 F.3d 314 (3d Cir.1995), *aff'g* 899 F.Supp. 1297, 1304 (D.N.J.). Consequently, the district court concluded the cross-check under the lodestar supported the fairness and reasonableness of the fee award. Fee Opinion, 962 F.Supp. at 592–93. [107]

***333** The district court summarized its reasons why this fee arrangement was both appropriate and beneficial. *Id.* at 589–91. First, the court found the award "obviate[d] the need to guesstimate the value of the settlement and ensures an award of attorneys' fees that is rationally related to the success of the settlement." *Id.* at 589. Second, the fee award used the percentage-of-recovery method preferred in common fund cases and avoided the difficulties in applying the lodestar method. Third, the court found the bifurcated award worked as a safeguard in the event the settlement was "unsuccessful" by only providing a portion of the award up front, and making the second part of the award dependent on the actual remediation rate. Fourth, the court noted the fee award generally upheld the agreement of the parties. Fifth, the court reasoned the bifurcated award would provide class counsel an incentive to pursue diligently remediation for class members. Finally, the court found the fee arrangement "answer[ed] the few class members, including Krell, who objected to the parties' fee agreement as a 'lay down' by Prudential." *Id.* at 591.

C. *Analysis*

"[A] thorough judicial review of fee applications is required in all class action settlements." *G.M. Trucks,* 55 F.3d at 819. When parties are negotiating settlements, the court must always be mindful of the "danger ... that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees." *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518, 524 (1st Cir.1991). On appeal, we review the district court's award of attorney's fees for an abuse of discretion. *G.M. Trucks,* 55 F.3d at 782.

There are two basic methods for calculating attorneys' fees—the percentage-of-recovery method and the lodestar method. "[E]ach method has distinct advantages for certain kinds of actions, which will make one of the methods more appropriate as a primary basis for determining the fee." *G.M. Trucks,* 55 F.3d at 820. The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund "in a manner that rewards counsel for success and penalizes it for failure." *Id.* at 821. The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation. *Id.* [108] It may also be applied in cases where the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method. *Id.* Although each of these methods is generally applied to certain types of cases, we have noted previously that "it is sensible for a court to use a second method of fee approval to cross check" its initial fee calculation. *Id.* at 820.

We agree with the district court that this case is more appropriately viewed under the common fund paradigm than as a statutory fee-shifting case. [109] Consequently, the ***334** district court was required to make a "reasonable estimate" of the settlement's value in order to calculate attorneys' fees using the percentage-of-recovery method. *Id.* at 822 (holding that "the district court on remand needs to make some reasonable assessment of the settlement's value"); *Weiss v. Mercedes–Benz of N. Am., Inc.,* 899 F.Supp. at 1304. But, as the district court noted, this is "an atypical common fund case" involving an uncapped, "future fund" whose ultimate value is dependent on the final number of claims remediated under the settlement, and, as a result, "the settlement ... cannot reasonably be valuated." Fee Opinion, 962 F.Supp. at 583. The fee examiner's report reflected this uncertainty. The report could only offer a range of possible values, with the highest and lowest figures separated by over $800 million. Even class counsel's own expert conceded that his calculations were merely "approximations." Hoyer Aff. ¶ 18. Consequently, a straightforward application of the percentage-of-recovery test is difficult in this instance.

The district court attempted to overcome this problem by bifurcating the fee award, exercising its sound discretion to award reasonable attorneys' fees. *Silberman v. Bogle,* 683 F.2d 62, 64–65 (3d Cir.1982). The district court's plan was designed to overcome the speculative nature of the tentative and imprecise settlement valuations. It took into account the settlement's more definite terms by providing an immediate payment based on a percentage of the guaranteed minimum recovery of $410 million, while requiring future payments to be based on actual results in recognition that the ultimate class recovery is not quantifiable at this point. We hold the district court's creation of a bifurcated fee structure was an appropriate and innovative response to the structure of the settlement, and well within its sound discretion. [110]

Our review does not end here, however. We must still examine the fee award calculated by the district court under this bifurcated structure and determine whether the amount of the award was fair and reasonable. Before doing that, however, we will first address two objections raised by Krell which focus on procedural aspects of the fee award. First, Krell claims the settling parties improperly discussed attorneys' fees and entered into a "clear-sailing fee" agreement, thereby creating a conflict between class counsel and the class. Second, Krell maintains the attorneys' fee award adversely affects class members by reducing the value of the members' equity interest in Prudential. The net result, he argues, is that class members are forced to shoulder the burden of the fee award, despite class counsel's and Prudential's assertions to the contrary. [111]

1. "Clear–Sailing" Fee Agreement

Krell maintains the settling parties improperly entered into negotiations on ***335** counsel fees before concluding settlement negotiations. Krell hypothesizes that because Prudential wanted as broad a release as possible in order to avoid all future liability, they offered class counsel large fees.

In both its Fairness Opinion and its Fee Opinion, the district court addressed Krell's contention the parties simultaneously negotiated the settlement and fee agreements. The district court found "the parties obviated the danger of an actual or apparent conflict of interest on the part of class counsel by negotiating in a manner expressly recommended by the Third Circuit in *Prandini* and by a Task Force appointed by the Third Circuit to report on the subject of court awarded attorneys' fees." Fee Opinion, 962 F.Supp. at 577 (citing *Court Awarded Attorney Fees,* Report of the Third Circuit Task Force, 108 F.R.D. 237 (Oct. 8, 1995)). [112] Relying on the settling parties' sworn affidavits, [113] the district court found all parties acted appropriately, having first completed negotiation of the Settlement Agreement on September 22, 1996 and then obtained the court's authorization on October 11, 1996 to address fees. *Id.* at 577 n. 14; *see also* Fairness Opinion, 962 F.Supp. at 542 ("The parties' negotiation of attorneys' fees was completely appropriate and followed the final settlement negotiations."). The court also found Krell had failed to produce "sound evidence" to support its contentions.

We agree with the district court. There is no indication the parties began to negotiate attorneys' fees until after they had finished negotiating the settlement agreement. On review we grant deference to the district court's factual findings. Despite Krell's repeated references to the "September 22, 1996 clear sailing fee provision," the Settlement Agreement signed on that date did not contain a "clear sailing" provision. Unlike Section K of the final Stipulation of Settlement filed on October 28, 1996, the September 22, 1996 Settlement Agreement did not address the amount of fees, the timetable for the payment of fees, or Prudential's agreement not to object to any fee petition filed by plaintiffs' counsel. As Lead Counsel notes, the September 22 Settlement Agreement contained a termination provision which allowed Prudential, but not plaintiffs, to terminate the agreement if the issue of attorneys' fees was not resolved to its satisfaction. [114] Lead Counsel Brief at 83–84.

2. Adverse Effect on Class Members

Krell also claims the district court failed to consider the negative financial impact the settlement would have on class members. According to this argument, class members, who as policyholders have an "equity interest" in Prudential's surplus, are harmed because the settlement will decrease that surplus. Krell Brief at 67–68.

***336** The district rejected this argument, finding the payment of attorneys' fees would not have a negative

financial impact on class members. The court reasoned that "any such payment of fees may come from the proceeds of director and officer liability insurance or from Prudential's capital surplus ... [and] will not necessarily affect policyholders' future dividends and interest payments on their policies." Fee Opinion, 962 F.Supp. at 589 n. 40.

Krell points to no record evidence to demonstrate the settlement would have a detrimental effect on the dividends of Prudential policyholders. Krell cites only to Exhibit G of his fee discovery motion, dated December 11, 1996, which contains the affidavit of Professor David F. Babbel of The Wharton School of the University of Pennsylvania, originally filed in connection with the Phoenix Home Life Mutual Insurance Company litigation in New York state court. Although Professor Babbel's affidavit explains that compensation paid by a mutual insurer to a hypothetical class comprised of the insurer's policyholders may result in "a reduction in dividends paid to the policyholders, or a reduction in the surplus that backs the claims of the policy owners against the firm," Babbel Aff. ¶ 9, he concludes the proposed settlement [115] "[took] advantage of the financial strength and economies of scale available to" the mutual insurer and overcame the concerns for the policy owners' equity interest. Babbel Aff. ¶ 11. We see no error here.

3. Fairness of the Award

Krell's remaining objections focus on whether the district court properly calculated the fee award. In particular, he challenges the court's decision to credit class counsel for all of the benefits created by the Task Force plan, as well as its determination of the appropriate fee percentage. Krell also contends the district court improperly denied his requests for discovery, and as a result did not have sufficient information to assess the fairness of the award. Because the discovery issues are intertwined with the court's final calculation of class counsel's fee, we will address these objections together.

a. The Value of the Settlement

As noted, the district court found the settlement was most closely aligned to the common fund paradigm and that a percentage-of-recovery calculation was the appropriate measure of the attorneys' fee award. In addition, the court created a bifurcated award designed to compensate class counsel based on the "guaranteed minimum" benefit created under the settlement, while at the same time tying the second part of the award to the class's response rate, in order to create an incentive for class counsel's continued participation in the remediation process. While we agree with both the method of calculation selected by the court and the structure of the fee award it crafted, we are nonetheless troubled by the actual calculation of class counsel's fee.

In particular, we question the court's decision to base its fee calculation on "the entire value of the settlement, including any portion which would have been provided to the class under the Task Force Plan." Fee Opinion, 962 F.Supp. at 581 (emphasis omitted). This decision was based on the court's conclusion that class counsel was a "material factor in bringing about the regulators' Task Force plan." *Id.* at 582. The court offered two reasons for this conclusion. First, the court found "Prudential's counsel acknowledged the causal relationship between the lawsuits and the Task Force's formation and subsequent remediation plan." *Id.* (citing Fee Examiner's Report at 56). Second, the district court explained "the record shows that plaintiffs' counsel otherwise substantially contributed to the terms of the Task Force plan." *Id.*

The district court relied in part on our decision in *Institutionalized Juveniles v. Secretary of Pub. Welfare,* 758 F.2d 897 (3d Cir.1985). [116] In that case, a class action civil ***337** rights lawsuit was filed on behalf of all juveniles in Pennsylvania who had been voluntarily committed to state mental health institutions. The class challenged the constitutionality of Pennsylvania's "voluntary" commitment statute on due process and equal protection grounds. Pennsylvania eventually enacted legislation and accompanying regulations which provided much of the relief sought by the class, and the district court entered judgment for defendants and terminated the class. Plaintiffs petitioned for attorneys' fees under 42 U.S.C. § 1988. We affirmed the causation finding, noting "the district court specifically found that defendants had been 'extensively involved in the legislative process' and that defendants 'actively worked with the legislature to achieve passage of the 1976 Act.' " 758 F.2d at 917. The district court here placed great emphasis on our holding that "although the litigation must have been a 'catalyst' ... it need not have been the only catalyst." *Id.* at 916. As

a result, the district court concluded it "should consider not only those remedies conferred directly through the litigation process, but also those extra-judicial benefits to the plaintiffs which resulted from counsels' efforts in the litigation." Fee Opinion, 962 F.Supp. at 581 (citations omitted).

As a preliminary matter, we believe the facts of that case are distinguishable. In *Institutionalized Juveniles,* we noted the record contained an affidavit from the chairman of the Pennsylvania Senate Health and Welfare Committee responsible for drafting the litigation in question, in which he confirmed that the litigation, and plaintiffs' counsel in particular, were an " 'important catalyst' in bringing about the changes in Pennsylvania law." 758 F.2d at 917. In addition, it is easy to overstate the principle set forth in *Institutionalized Juveniles.* While a party need not be the only catalyst in order to be considered a "material factor" and may be credited for extra-judicial benefits created, there must still be a sound basis that the party was more than an initial impetus behind the creation of the benefit. Allowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs attorneys to "minimize the costs of failure ... by free riding on the monitoring efforts of others." Coffee, *Understanding the Plaintiff's Attorney,* 86 Colum. L.Rev. at 681 (noting that the "classic illustration of this pattern is in the field of antitrust enforcement, where private antitrust class actions have tended to piggyback on a prior governmental proceeding").

It is not clear on the record before us that class counsel had so significant a role in the institution of the Task Force proceedings that the district court was justified in crediting counsel for all of the benefits created under the Task Force plan. Indeed the district court offers no record citation or other explanation to supports its assertion that class counsel made "substantial contributions" to the terms of the Task Force plan.

After reviewing the record, we have doubts whether class counsel was a material factor in bringing about the Task Force plan. Although Prudential may have urged the formation of the Task Force following the institution of the lawsuits, there is evidence to suggest that, absent the institution of the class action proceedings, state regulators would have reached an agreement with Prudential similar to the Task Force plan. For example, Lead Counsel notes that "[a]t least every five years, the New Jersey Department of Banking and Insurance is required to conduct a market conduct examination of ***338** Prudential ... [and in] March 1995, New Jersey was beginning another such examination." Weiss Aff. ¶ 27. The results of that examination were issued on July 28, 1996, only a few weeks after the Task Force Report, and examined a number of the same issues as the Task Force Report, including customer complaints of vanishing premiums, misrepresentation, improper replacements, and other improper underwriting other than replacements. Furthermore, the Task Force itself explained that it was formed "in response to widespread allegations of improper sales and marketing activity of life insurers" in general, not just allegations involving Prudential. Taken together, the record evidence raises questions about whether the district court could appropriately base class counsel's fee on the entire value of the proposed settlement.

Assuming *arguendo* that class counsel was a "catalyst" for the Task Force plan, the question remains to what degree that factor must be considered when calculating the fee award. "[N]umerous courts have concluded that the amount of the benefit conferred logically is the appropriate benchmark against which a reasonable common fund fee charge should be assessed." Conte, 1 *Attorney Fee Awards* § 2.05, at 37. The district court found class counsel should be credited for the entire value created by the Task Force plan, instead of only those enhancements created by class counsel under the Settlement Agreement. We are not so certain. Krell notes that a stay order was in place from October 1995 until after the Task Force issued its report on July 9, 1996, and questions how the district court could credit class counsel for the entire value of the Task Force Plan. In addition, we question why class counsel should be credited for the global enhancements negotiated between Prudential and each of the four objecting states, enhancements which the district court found were incorporated into the final settlement.

We do not dispute that class counsel's efforts benefitted the class and that they should receive a fee award which recognizes those efforts. The district court described several enhancements class counsel made to the Task Force plan. *See supra* § I.B.1. & notes 21–22. Even Krell conceded that class counsel created additional benefits

for the class. Fee Hr'g Tr. at 17–18. Our concern is not the number of enhancements created, but rather how to value the benefits created by class counsel. The crux of this inquiry is distinguishing those benefits created by class counsel from the benefits created under the Task Force Plan. This determination is especially crucial in consumer class actions where federal or state agencies, including attorneys general, have conducted their own investigations of wrongdoing. The district court did not address these issues. Because it credited class counsel with creating the entire value of the settlement it did not attempt to distinguish between those benefits created by the Task Force and those created by class counsel. Consequently, we will remand to the district court for further examination.

In addition, the matters raised here may counsel in favor of allowing additional limited discovery on this issue on remand. While plaintiffs' expert found that class counsel was responsible for $1.123 billion of the settlement's total value, he also conceded that those figures were merely "approximations." Krell claims the lack of discovery prevented him from performing a similar analysis and rebutting the expert's valuations. Although mindful of the common wisdom that "discovery in connection with fee motions should rarely be permitted," *Manual for Complex Litigation, Third* § 24.224, we believe limited discovery may be necessary in this instance to properly determine the value of those benefits for which class counsel can properly be credited. We leave this to the sound discretion of the district court.

b. The Appropriate Percentage Recovery

We are also troubled by the district court's calculation of the appropriate percentage award. The district court actually examined two distinct percentages in connection with its bifurcated fee award. First, it awarded class counsel approximately 11% of the "Minimum Fund" of $410 million created by the settlement, resulting in an initial award of $45 million. Second, based on the submission of at least 330,000 election forms, the court awarded class counsel an additional $45 ***339** million. Assuming the threshold were met and the full $90 million fee were awarded, the court found this fee constituted 6.7% of the "common fund" created under the settlement,[117] a figure the district court concluded was "fair and reasonable ... [and] comport[ed] with the Fee examiner's recommendation of an award of 7–8%." Fee Opinion, 962 F.Supp. at 587–88.

The district court considered several factors in order to determine the appropriate percentage award, including the size of the award, fee percentages applied in other class actions, the quality of class counsel, and the fee percentage that would likely have been negotiated between private parties. While we agree these factors offer some guidance, in cases of this magnitude they should receive less weight.

In considering the size of the expected recovery under the proposed settlement, the district court observed that "percentage awards generally decrease as the amount of the recovery increases." Fee Opinion, 962 F.Supp. at 580 (citations omitted). The basis for this inverse relationship is the belief that "[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *In re First Fidelity Bancorporation Securities Litigation,* 750 F.Supp. 160, 164 n. 1 (D.N.J.1990). The district court concluded that "some reduction is appropriate in this case where the recovery will equal at least $410 million." Fee Opinion, 962 F.Supp. at 585.

We agree with the district court's analysis, but question whether the "reduction" implemented adequately adjusted the fee in relation to the size of this settlement. Compared to the other large settlements examined by the district court, the size of this settlement exceeds all of them by a considerable margin.[118] Yet the 6.7% fee the court awarded was actually higher than some of the smaller cases it used as a benchmark.

The district court also examined the fee awards in class actions with recoveries exceeding $100 million and found the fee percentages ranged from 4.1% to 17.92%. *Id.* at 585. The court reasoned the "enormous settlements" in those cases made them comparable, and provided some guidance as to an appropriate percentage. *Id.* at 586 n. 32. While we agree this is an appropriate factor to consider in most class actions, we believe in this instance the size of the class and the settlement render such comparisons unreliable. As noted, the fee percentage awarded by the court was actually higher than some of the fee awards in these large class actions, despite the court's finding that the common fund here would be at least $410 million and could increase to more than $1 billion.

The district court also found class counsel's representation and the results achieved were "nothing short of remarkable." *Id.* at 585–86. Among the factors it examined were the "innovative" terms of the settlement, including the availability of full compensatory relief, the extensive and comprehensive outreach, and the multi-tiered review process designed to ensure fair scoring of claims; the approval given to the settlement by insurance regulators from all fifty states and the District of Columbia; and the standing and skill of class counsel.

We agree. As discussed, the settlement is a fair and reasonable resolution of this class action. Furthermore, there is no doubt as to class counsel's skill and reputation. All ***340** agree class counsel added value to the Task Force plan. [119]

The district court then noted the fee examiner's conclusion that "were this case the subject of a private contingent fee agreement at the time of engagement, counsel might well have demanded and received ... upward of 20%, and even as high as 40%, of any future recovery." *Id.* at 587 (quoting Fee Examiner's Report at 60). While the court did not give great weight to this hypothetical exercise, it nonetheless agreed with the fee examiner's conclusion that class counsel "would have negotiated a fee of at least 10 to 15% of the recovery." *Id.* (quoting Fee Examiner's Report at 61).

We question the significance of this inquiry to class action lawsuits of this magnitude. While such private fee arrangements might be appropriate in smaller class actions or litigation involving individual plaintiffs, we do not believe they provide much guidance in cases involving the aggregation of over 8 million plaintiffs and a potential recovery exceeding $1 billion.

Because the district court's basis for, and calculation of, the appropriate fee percentage was unclear in light of the facts and cases it referenced, and because it should set forth a reasoned basis and conclusion regarding the proper percentage applicable in this case, we will remand for a more thorough examination and explication of the proper percentage to be awarded to class counsel in this case, in light of the magnitude of the recovery.

c. Lodestar Calculation

Krell objects to the district court's application of the lodestar method to cross-check its fee award, in particular its application of a "risk" multiplier to the lodestar in order to bring the calculation in line with the fee awarded under the percentage-of-recovery method. In addition, Krell contends the court improperly based its lodestar calculation on inaccurate time summaries provided by class counsel.

i. Multiplier

Once the district court created its bifurcated fee award using the percentage-of recovery model, it employed the lodestar method to cross-check the fee award. *See G.M. Trucks,* 55 F.3d at 820. Based on the analysis submitted by Lead Counsel, the court found the lodestar as of January 31, 1997 was approximately $17.7 million [120] plus expenses of just over $3 million. While it noted this figure was understated because it did not include hours billed after Lead Counsel submitted the analysis, the court found the lodestar figure would result in a multiplier of only 5.1 and an average hourly rate of $1,148.70 if the full $90 million were awarded under the modified fee schedule. The court found this multiplier was "substantially less" than the multiplier approved by this Court in *Weiss v. Mercedes–Benz of North America, Inc.,* 66 F.3d 314 (3d Cir.1995), *aff'g* 899 F.Supp. 1297, 1304 (D.N.J.) (awarding a fee that resulted in a multiplier of 9.3 and an average hourly rate of $2,779.63).

We question the use of such a large a multiplier in this instance. Courts apply multipliers to lodestar calculations for various reasons. Multipliers may reflect the risks of nonrecovery facing counsel, may serve as an incentive for counsel to undertake socially beneficial litigation, or may reward counsel for an extraordinary result. By nature they are discretionary and not susceptible to objective calculation. The Third Circuit Task Force on Court Awarded Attorney Fees implicitly recognized this difficulty. *Court Awarded Attorney Fees,* 108 F.R.D. at 247 (the lodestar calculation "is subject to manipulation by judges who ... first determine what they wish to award, either in percentage or dollar amount terms, and then massage the major variables in the [lodestar] fee-setting procedure"). Consequently, courts must take care to explain how ***341** the application of a multiplier is justified by the facts of a particular case. *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d

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40 (1983) ("It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award."); *Ranco Industrial Products Corp. v. Dunlap,* 776 F.2d 1135, 1140 (3d Cir.1985) ("[C]areful appellate review requires that the district court explain on the record the basis for its calculation.").

In this instance, the court offers little explanation as to why a multiplier was necessary or appropriate. With no explanation for its application, we have no basis to evaluate it. [121] While we are cognizant that "[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied," 3 *Newberg* § 14.03 at 14–5, we cannot assess the propriety of a multiplier without findings to review. [122]

Furthermore, the testimony of one of plaintiffs' own experts appears to call into question the multiplier of 5.1. Plaintiffs' expert noted the speed and quality of the results achieved were attributable "in no small part to the fact that many of class counsel had participated in the New York Life insurance litigation ... in which they created what became the blueprint for the Task Force plan which, in turn, became the baseline from which class counsel began their negotiations with Prudential." Joint Appendix at 4793. While plaintiffs' expert reasoned this expertise should not lead to the conclusion that class counsel "should not be rewarded for what arguably appears to be duplicative," we also decline to draw the opposite conclusion.

We recognize the district court employed the lodestar calculation only as a cross check. Yet we cannot agree with its conclusion that the "cross-check under the lodestar method confirms that the fees and expenses awarded here are fair and reasonable under the circumstances of this case." Fee Opinion, 962 F.Supp. at 592–93. Based on the present record, we cannot find a justification for the multiplier, which appears merely to correspond with the total fee award. Our concerns regarding the lodestar calculation only underscore our questions about the propriety of the district court's fee award.

ii. Time Records

Krell also disputes the district court's calculation of the lodestar figure, claiming its reliance on time summaries, rather than detailed time records, undermines its value as a cross-check of the fee award. Krell raises certain issues which allegedly demonstrate the unreliability of class counsel's time summaries. First, he questions the number of hours worked by class counsel, noting the figure seems high in light of the district court's order staying discovery from October 1995 until August 1996. [123] Second, ***342** Krell alleges Lead Counsel's fee petition contained "millions of dollars of overcharges and potential overcharges." [124] Third, Krell notes the lodestar amount nearly doubled between the November and the February petitions, with Lead Counsel claiming additional time had been spent on due diligence, despite the fact that due diligence was expected to end on October 28, 1996. Finally, Krell points out that the fee examiners' report included a $1 million overcharge for expenses. [125]

The district court disagreed, finding detailed time summaries were unnecessary where, as here, it was merely using the lodestar calculation to double check its fee award. The court also dismissed Krell's objection to the hours allegedly worked after the settlement was filed on October, 1996, reasoning that class counsel had other responsibilities after that date, including monitoring the 800 number established under the settlement, negotiating the outreach program, and preparing documents in support of the settlement.

As we have noted, district courts generally decide fee awards without full blown discovery. In any event, whether to grant discovery is committed to the sound discretion of the court. Also, we are mindful of the Supreme Court's admonition that "[a] request for attorneys' fees should not result in a second major litigation." *Hensley,* 461 U.S. at 437, 103 S.Ct. 1933. We recognize the lodestar calculation in this case was solely intended as a cross-check of the court's primary fee calculation using the percentage-of-recovery methodology, which counsels a cautious approach to additional fee discovery. Furthermore, our primary concern with the lodestar approach here is the multiplier. As a result, we see no abuse of discretion in declining to grant discovery here on the time records. As we have set forth, the district court on remand should reconsider permitting limited discovery on the benefits to the class secured by class counsel.

D. *Conclusion*

In awarding attorneys' fees, the district court has considerable discretion. We recognize that in cases of this magnitude, the broad standards set forth in the case law provide little guidance. What is important is that the district court evaluate what class counsel actually did and how it benefitted the class. Furthermore, where so much of the settlement was achieved by the Task Force, and other enhancements resulted from the separate negotiations of state regulators, it is essential to separate out the benefits attributable to class counsel.

VII. KRELL'S MOTION TO RECUSE

A. *Procedural History*

On December 3, 1996, the Krell and Kittle plaintiffs moved on an emergency basis to recuse the district judge from this case under 28 U.S.C. § 455,[126] alleging *inter alia* improper *ex parte* meetings and judicial interference with related state court proceedings. The court issued a show cause order dated December 5, 1996, requesting interested parties to oppose or support the motion, and scheduled a hearing for December 13, 1996.[127] Following oral argument, the court ***343** denied Krell's motion. Krell subsequently filed a petition for mandamus with this court, again seeking recusal. That petition was denied without opinion on February 7, 1997. On appeal, Krell once more raises the issue of the district court's recusal. Once more, we shall reject it.

On appeal, Krell reasserts his claim that the district court should have recused itself based on its "tireless and unrelenting" bias in favor of the settling parties. According to Krell, "the District Court did what was necessary to impose upon Prudential's policyholders one sweeping class action resolution providing global peace for Prudential." Krell Reply Brief at 67. But Krell's briefs offer no new arguments in support of his claims. We review under an abuse of discretion standard. *United States v. Antar,* 53 F.3d 568, 573 (3d Cir.1995).

B. *Legal Standard*

The Krell objectors brought this motion under 28 U.S.C. §§ 455(a), 455(b)(1) and 455(b)(5)(iv).[128] A party seeking recusal need not show actual bias on the part of the court, only the possibility of bias. *Liteky v. United States,* 510 U.S. 540, 553, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). But, as we noted in *Antar,* "[b]iases stemming from facts gleaned during judicial proceedings themselves must be particularly strong in order to merit recusal." 53 F.3d at 574. The court must "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky,* 510 U.S. at 555, 114 S.Ct. 1147. Under § 455(a), "if a 'reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality' under the applicable standard, then the judge must recuse." *Antar,* 53 F.3d at 574 (quoting *In re Larson,* 43 F.3d 410, 415 (8th Cir.1994)).

C. *Krell's Arguments on Appeal*

With these standards in mind, we now examine Krell's specific arguments.

1. Ex Parte Meetings

First, Krell argues the court's remarks at an October 1996 hearing indicate the district judge had an off-the-record discussion of alleged document destruction with Attorney David Gross, counsel to former Prudential employee David Fastenberg. At that hearing, the judge stated that "Fastenberg's own lawyers say there was no document destruction." Tr. of Hearing, Joint App. at 1975. According to Krell, this was an acknowledgment that the court "had obtained off-the-record factual information concerning a material and disputed evidentiary matter (document destruction) then before it." Krell Brief at 17. We cannot agree.

Prudential fired Fastenberg for allegedly allowing the destruction of documents in the office he supervised. In response, Fastenberg filed a wrongful termination suit against Prudential, denying his involvement in any document destruction. Consequently, Fastenberg's denial was already a matter of public record. In addition, as noted by the district court at the recusal hearing, Fastenberg's termination and his subsequent lawsuit were widely reported in the press. Joint App. at 4728; *see also* Joint App. at 11421–11438. Finally, Krell has offered no other evidence to support his contention that the district judge had an improper, *ex parte* ***344** meeting with Fastenberg's attorney. Based on the record before us, we se no abuse of discretion.

2. The Conference With State Insurance Regulators

Krell also claims the district court held an improper, nonjudicial conference with insurance regulators and the news media on October 16, 1996, in order to discuss the proposed settlement. Krell claims that notice of this meeting was not provided to counsel of record, and thus he was deprived of the opportunity to present the court and the regulators with class concerns and objections. In addition, Krell takes issue with several statements made by the district court at the conference.

The district judge addressed Krell's concerns about the content of the October 16 meeting during the recusal hearing, noting that "the Court did not request the meeting, nor did it set the agenda." Joint App. at 4725. The meeting was organized by Lead Counsel and counsel for Prudential, and the insurance regulators were invited by the "New Jersey Insurance Regulators." *Id.* Lead Counsel explained the meeting was called in mid-October to address the possibility of merging the two then-pending settlements—the Task Force settlement and the proposed national class settlement. The Task Force settlement called for Prudential to begin sending class notices and election forms to policyholders by November 1, 1998. The meeting on October 16 was called to discuss timing issues related to the November notice deadline and the Rule 23 approval process. Both Prudential and Lead Counsel contend the October 16 conference transcript demonstrates that the adequacy of the settlement was not discussed during this meeting.

Once again, we see no abuse of discretion. As the settling parties note, and a review of the transcript confirms, the adequacy of the settlement was not discussed at the October 16 meeting. The primary issue considered by the parties at that conference was the timing of the notice Prudential was required to send under the Task Force Plan. The district court gave no indication that his decision was contingent upon or affected by Prudential's obligations under the Task Force plan. Consequently, Krell was not prejudiced by his counsel's absence.

Krell next accuses the district court of using "an off-therecord procedure to convene" the October 16, 1996 conference. Krell Brief at 18 n. 19. According to Krell, "there is no record as to how, when and why this conference came about, [and] there is no record which reflects why the Court determined not [sic] to inform various *non-party* insurance regulators and news reporters but not interested parties including Krell." *Id.*

This statement is untrue. As the district court explained, the October 16 meeting was organized by Lead Counsel and Prudential, not the district court. Consequently, the court did nothing to prejudice Krell. [129]

Krell also objects to the district judge's reference to the proposed settlement as "my settlement." Krell claims that Judge Wolin demonstrated a bias in favor of the settlement when he "exhorted" those present to "hang together [so that we may] accomplish what we have to accomplish for all our respective interests."

We accept the district court's explanation that he was merely using the expression "my settlement" as a convenient method to distinguish between the Proposed Settlement and the Task Force Settlement. Joint App. at 4726. At the October 16th hearing, the district court made it clear that it had not yet made any decisions regarding the terms of the proposed settlement or the proposed settlement class. "No one should leave here today thinking that Judge Wolin's silence, Judge Wolin's nod, a smile at a particular time, means that he will approve this settlement. I don't have the slightest idea. I don't know who the objectors are. I haven't heard any evidence." Tr. of October 16 Hearing at 38. Clearly, Krell's allegation has no merit.

***345** 3. *Rutt v. Prudential*

Third, Krell argues the district court attempted to influence the Pennsylvania state court proceeding in *Rutt v. Prudential,* scheduled before Judge Allison in the Court of Common Pleas for Lancaster County. According to Krell, the record indicates that Prudential's attorney informed Judge Allison that the district judge was "receptive to a discussion" with Judge Allison regarding potential ethical improprieties implicating both cases. Krell also claims that, at the show cause hearing on December 2, 1996, "Judge Wolin stated he could speak with any state court and saw nothing wrong with the use of the Court's name in the way it was used by Prudential to influence Judge Allison in *Rutt.*" Krell Brief at 18–19. The settling parties note the district court expressly

denied attempting to influence Judge Allison. *See* Tr. of December 2, 1996 Show Cause Hearing at 6–7.

In late 1996, Prudential moved to disqualify Bruce Miller, lead counsel in the parallel actions filed against Prudential by a group of former Prudential agents, on the grounds that Miller had arranged for one of his clients to be paid for testimony in a state court action against Prudential in Alabama. The district court requested and received from Mr. Miller certain documents relating to the Alabama case of *Key v. Prudential* and reviewed those documents *in camera.* Concerned that the documents raised certain ethical concerns, the district court issued an order to show cause on November 20, 1996 why those documents should not be released to Prudential. Prudential, concerned about Miller's representation in the Pennsylvania state court case *Rutt v. Prudential,* sought to raise the issue of possible ethical improprieties with Judge Allison. During an on-the-record conference in Judge Allison's chambers, Harold Hirshman, Prudential's attorney and a partner of Prudential's counsel in this matter, provided Judge Allison with a copy of the district court's November 20th letter and show cause order with respect to Mr. Miller. Mr. Hirshman also informed Judge Allison that "[t]he one thing we did learn in addition to what I've already said, or my office learned, I did not speak to Judge Wolin's office myself, is that Judge Wolin is receptive to a discussion with Your Honor by telephone about his views, and we have no objection to that telephone call going ahead." Tr. of November 26, 1996 Hearing in *Rutt v. Prudential* at 4. Mr. Hirshman goes on to suggest that Judge Allison "place such a call to Judge Wolin and see what he has to say." *Id.* at 5. According to Krell, this was a clear attempt by the district court to influence the *Rutt* litigation, and demonstrates a bias in favor of Prudential.

We disagree. We do not impute any bias to the district court. There is no indication the district court asked Mr. Hirshman to make such a representation to Judge Allison. On the contrary, during the show cause hearing on December 2, 1996, the district court explicitly stated that he did "not send any representative to see Judge Allison in the Pennsylvania case of *Rutt v. Prudential.*" Tr. of December 2, 1996 Show Cause Hearing at 6–7. According to the district judge, he had merely stated that, if a state court judge called him, he would speak to that judge "as a matter of courtesy." *Id.* at 7. There is nothing in the record, save the statements made by Mr. Hirshman, to support Krell's contention.

Finally, we note that we see nothing wrong with members of the federal and state judiciary trying to coordinate where their cases overlap. Coordination among judges can only foster the just and efficient resolution of cases.

There is no basis for believing the district court was attempting to influence the state court proceedings in *Rutt.* Krell's claims, now before us for the second time, are clearly without merit. We find no abuse of discretion here.

The resolution of a class action, especially one as large as this, is never a simple task. Based on our review of the record, we note the extraordinary manner in which the district judge addressed the complex legal and factual issues raised by this case and handled the myriad procedural and administrative responsibilities which accompany a class action of this size.

***346** VIII. CONCLUSION

For the foregoing reasons, we will affirm the certification of the proposed class and the approval of the settlement, and vacate and remand on the issue of attorneys' fees.

ROTH, Circuit Judge, concurring.

While I join in the majority's ultimate conclusion that the district court had jurisdiction over the claims of all classmembers, I respectfully disagree with its determination in subsection III.A.1 that the district court had supplemental jurisdiction by virtue of its federal question jurisdiction over the federal securities claims of named plaintiff, Martin Dorfner. Only 30% of the absent classmembers have claims arising under federal law; the remaining classmembers assert claims under state fraud statutes. Under the Supreme Court's decision in *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), courts may exercise supplemental jurisdiction only when the federal and state claims arise from a common nucleus of operative fact. Thus, for example, supplemental jurisdiction may be asserted when the federal and state claims "are merely alternative theories of recovery based on the same acts." *Lyon v. Whisman,* 45 F.3d 758, 761 (3d Cir.1995) (quoting *Lentino v. Fringe Employee Plans, Inc.,* 611 F.2d 474, 479 (3d Cir.1979)).

In this case, the district court found the federal and state claims alleged by class members to be "inextricably

intertwined" because they "are premised upon a common course of conduct by Prudential; all related to the same alleged company-wide development and implementation of patently fraudulent sales techniques." *In re the Prudential Ins. Co. of America Sales Practices Litigation,* 962 F.Supp. 450, 501 (D.N.J.1997). Although the injuries of all classmembers may arise from a common scheme to defraud, it is far from clear that all of their state claims share a common nucleus of operative fact with Dorfner's federal securities claims.

In contrast, I find the requirement of a common nucleus of operative fact would be satisfied if the basis for the application of supplemental jurisdiction was derived from the district court's diversity jurisdiction over the state law claims of the remaining named plaintiffs. These plaintiffs raise a more diverse array of claims than those alleged by Dorfner. As a group, their claims are representative of the claims of the class as a whole.

The majority opinion undertakes a detailed and well-reasoned analysis of the present uncertainty surrounding the use of diversity jurisdiction as a basis for supplemental jurisdiction in subsection III.A.2, only to avoid answering the ultimate question of whether the Supreme Court's decision in *Zahn v. International Paper Co.,* 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), remains good law following the enactment of 28 U.S.C. § 1367. I would reach this question and would hold that under the plain language of § 1367, the amount-in-controversy requirement articulated in *Zahn* is no longer applicable to absent classmembers.

I am concerned that, by avoiding the question of whether § 1367 overrules *Zahn* and by basing its finding of jurisdiction on the securities claims, the majority establishes a dangerous precedent. I fear the majority's decision on jurisdiction risks opening the federal courts to a wide array of state claims whenever a complaint incorporates both federal and state claims, no matter how tangentially related the state claims might be to federal claim upon which jurisdiction is based. As this Court wrote in *Lyon,* "when a court exercises federal jurisdiction pursuant to a rather narrow and specialized federal statute it should be circumspect when determining the scope of its supplemental jurisdiction." 45 F.3d at 764.

Accordingly, I join with the majority in holding that the district court had jurisdiction over the claims of all classmembers, but I do so based on my determination that supplemental jurisdiction can be derived from the diversity claims of the named plaintiffs.

All Citations

148 F.3d 283, 41 Fed.R.Serv.3d 596

Footnotes

1 The New Jersey Department of Banking and Insurance also conducted an independent market conduct investigation of Prudential's New Jersey business. Its report was issued on July 9, 1996.

2 According to the Task Force Report, eleven states and the District of Columbia "actively participated" in the investigation: Arizona, Arkansas, California, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Ohio, and Washington. These twelve jurisdictions represented approximately 36.5 percent of the 10.7 million Prudential policies sold during the investigation period. *Report of the Multi–State Life Insurance Task Force and Multi–State Market Conduct Examination of the Prudential Insurance Company of America* at 1–2 ("Task Force Report"). The Attorney General of the State of Connecticut began a separate investigation of Prudential in April 1995, in response to the filing of a class action complaint in United States District Court for the District of Connecticut. Although the Connecticut Insurance Commissioner subsequently joined the Multi–State Task Force, the Attorney General completed its independent investigation and issued a report on November 21, 1995.

3 According to the Task Force Report, a combination of regulatory and economic changes in the 1970s and 1980s created an atmosphere within the insurance industry that was more amenable to the replacement of insurance policies. For example, the rise in interest rates allowed insurance companies to offer new products "designed to compete with banks, money market funds and newly founded life insurers," and thus led companies to abandon their usually conservative approach. Task Force Report at 7. At the same time, the original model replacement regulations, which stated that replacement transactions were generally not in the best interest of the customer, were modified to allow for these transactions in certain cases. *See* discussion *infra* § V.A.4. & n. 66. As a result of these changes, replacement activity flourished.

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4 The Task Force found that, "[b]ecause of the nature of the transactions and possible improprieties, an electronic analysis could not identify every instance of sales abuse or violation of law or regulation." Task Force Report at 6.

5 The structure of this remediation plan was based on a settlement reached between a number of the class counsel here and New York Life Insurance Company in a similar class action. Task Force Report at 198.

6 More than 100 actions have been centralized in the District of New Jersey by the MDL Panel. *In re The Prudential Ins. Co. of America Sales Practice Litigation,* 962 F.Supp. 450, 479 n. 13 (D.N.J.1997) ("Fairness Opinion").

7 Appellant Krell moved the district court to remand his case to state court. After the district court denied that motion on April 16, 1996, Krell filed a petition for mandamus relief with this Court. We denied that motion without opinion on September 25, 1996.

8 Krell declined to join the class, claiming that Ohio policyholders with replacement claims deserved the protection of Ohio insurance law. Krell Brief at 5.

9 According to Lead Counsel, the negotiations then proceeded through three stages. The first, from July 6th through August 16th, involved preliminary negotiation of the terms of settlement. During the second phase, which ran from August 17th through September 22nd, the parties negotiated the details of the actual Settlement Agreement. Finally, from September 23rd until October 28th, the parties worked out the final Stipulation of Settlement. Weiss Aff.¶ 103.

10 While the Complaint stated that "Prudential's scheme involved [these] three notorious deceptive life insurance sales tactics," Second Am. Cons.Compl. ¶ 5, the allegations detailed therein also refer to other sales abuses which fall outside these three categories. *See, e.g.,* Second Am. Cons.Compl. ¶ 89–91 (alleging Prudential took affirmative steps to conceal its misrepresentations); ¶ 114–16 (alleging Prudential agents informed the Nicholson plaintiffs to "ignore" notices concerning lapses in their policies); ¶ 128 (alleging a Prudential agent made unauthorized withdrawals from the policy of named plaintiff Dorfner).

11 Carol Nicholson brought suit as executrix of the estate of her deceased husband Keith. From 1966 to 1984, the Nicholsons purchased four Prudential policies worth approximately $30,000. In 1986, Keith Nicholson purchased an addition $100,000 policy, allegedly as a result of Prudential's fraudulent sales practices. Carol Nicholson alleged churning, vanishing premium and investment plan claims.

Martin Dorfner and his wife operate a small grocery store in Pennsylvania. By July 1989, they owned several Prudential policies. Dorfner alleges that his Prudential agent informed the Dorfners that they were entitled to a "free" policy, and proceeded to open another whole life policy for them using funds drawn from their existing policies. In addition, the same agent persuaded the Dorfners to purchase a $50,000 variable appreciable life insurance policy from Prudential in April 1991, allegedly using misleading sales information. Dorfner brought suit in January 1995, alleging churning and vanishing premium claims.

Vincent and Elizabeth Kuchas are Connecticut residents who purchased individual variable life policies from Prudential. In 1987, their agent suggested that they purchase additional policies. The Kuchases allege that they informed the agent that they were seeking an investment similar to an IRA, and could not afford an investment plan if they had to continue payment on their current Prudential policies. The agent allegedly persuaded the Kuchases to purchase two VAL policies while misinforming them as to their continuing payment obligations with respect to their initial policies. In September 1994, the Kuchases learned that the initial policies had lapsed and that their agent had taken out loans against the initial policies to pay for the VALs. They filed suit in February 1995.

Norman Gassman, an Ohio citizen, filed suit against Prudential in May of 1995, alleging an investment plan claim. According to Gassman, a Prudential agent persuaded Gassman to take $20,000 from a certificate of deposit and "invest" it in a VAL policy. Gassman alleges that the agent held himself out as a "financial planner" or "financial consultant" and explained that a VAL policy was part of an "investment plan," paid a higher rate of interest than a CD at a low risk, and was tax free. In reliance on these representations, Gassman purchased the VAL policy.

12 On October 25, 1996, Prudential formally responded to plaintiffs' discovery requests, producing over one million pages of documents, 160 computer diskettes, and more than 500 audio and video tapes. *See* Weiss Aff. ¶ 85.

13 Although § K of the Settlement Agreement was entitled "Attorneys' Fees, Costs and Expenses," subsection K.1 was left blank. Subsection K.2 addressed certain additional expenses to be included in any payment of fees, and guaranteed that any payment of fees would not reduce the remedies provided under the agreement. Subsection K.3 also provided that Prudential's liability for fees would be limited only to those fees expressly provided for by the Settlement Agreement.

14 The injunction barred policyholders from pursuing overlapping litigation unless the policyholder had opted out of the class, and prevented them from excluding other policyholders from the class. After the class notice was mailed, several named plaintiffs in a competing nationwide class action, filed and certified in Alabama state court three days after the Settlement Agreement was signed (the "Steele action"), opted out of the class. The so-called "Steele Opt-outs" also attempted, as

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class representatives in the Steele action, to execute opt-outs on behalf of the entire class. At Prudential's request, the district court issued an Order to Show Cause on January 22, 1997. On May 28, 1997, the district court ruled that the opt-out of the Steele class was null and void as a violation of the permanent injunction. The Steele Opt-outs filed an appeal with this Court. We affirmed the district court in an unpublished opinion.

15 In December 1996, Krell moved the district court to recuse itself. The district court denied the motion, and Krell's subsequent petition for mandamus relief was denied by this Court without opinion on April 4, 1997.

16 The following were explicitly excluded from the class: (1) policyholders who were represented by counsel and had already settled a claim and signed a release with Prudential; (2) policyholders that are corporations, banks, trusts or other non-natural entities that purchased policies as corporate or trust-owned life insurance and under which (a) there are fifty or more separate insured individuals, or (b) the aggregate premium paid over an eight year period, ending with the close of 1996, exceeds $1 million; and (3) those policyholders who were issued policies in 1995 by Prudential Select Life Insurance Company of America. Stipulation of Settlement at 13.

17 The financed insurance criteria include an assessment of Prudential's conformity with state replacement laws.

18 The scoring system set forth in the Stipulation of Settlement is as follows:

— A score of “3” is assigned in the event that either (i) Company Documentation expressly supports the Misstatement, or (ii) the Agent Statement confirms the Claimant's allegation of the Misstatement and this confirmation is not undermined by Available Evidence.

— A score of “2” is assigned in the event that the alleged Misstatement is not expressly in writing and the Agent Statement denies the allegations, but (i) Available Evidence, on balance, supports the Claimant's allegation of the Misstatement, or (ii) the Agent has a Complaint History.

— A score of “1” is assigned in the event that the alleged Misstatement is not expressly in writing and the Agent Statement denies the allegation, and Available Evidence, on balance, neither supports nor undermines the Claimant's allegation of the Misstatement.

— A score of “0” is assigned in the event that Available Evidence exists which undermines the Claimant's allegation of the Misstatement and suggests that no Misstatement occurred.

— A score of “N/A” is assigned in the event that the Claim Resolution Factor is “not applicable” to the Claim submitted.

Prudential Alternative Dispute Resolution Guidelines, Stipulation of Settlement, Ex. B, at 9.

19 During this phase of the review, claimants may receive cost-free representation from a representative selected by class counsel and approved by the state regulators. The claimant is entitled to a full rehearing if the representative determines that a “manifest injustice” has occurred.

20 Under the Stipulation of Settlement, the following relief is available based on the category of claim proven:

Financed Insurance—The policyholder may obtain a refund of the loans, dividends, or values improperly used, with interest in some cases. The policyholder also may be entitled to cancel the “new” policy and get back some or all of the premiums paid, with interest in some cases.

Abbreviated Payment—The policyholder may be permitted to cancel the policy and obtain a refund of some or all of the premiums paid, with interest in some cases. Alternatively, the policyholder may be permitted to keep the policy without having to make any additional out-of-pocket payments for some or all of the premiums due.

Investment Product—The policyholder may be allowed to cancel the policy and obtain a refund of some or all of the premiums paid, with interest in some cases. Alternatively, the policyholder may be able to exchange the policy for an annuity.

Other Claims—If a policyholder was misled in some other way, the policyholder may be allowed to cancel the policy and obtain a refund of some or all of the premiums paid, with interest in some cases, or may be able to use the refund to purchase another policy.

Fairness Opinion, 962 F.Supp. at 490 (citing February 1, 1997 Notice at 7–8).

21 The district court noted several improvements to the Settlement's ADR process that would enhance the ability of a policyholder to establish the presumption that he or she was misled. These enhancements to the ADR process were:

(1) Provided that boilerplate statements in policy illustrations and contracts explaining that the dividends, interest or investment returns are “not guaranteed” or “non-guaranteed,” will not independently undermine a claim;

(2) Reduced from six complaints to three the number of policyholder complaints against an agent which would entitle a claimant to a score of at least “2”; and

(3) Extended the period during which policyholder complaints would be considered from July 9, 1996 to February 1, 1997.

Fairness Opinion, 962 F.Supp. at 492.

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22 The district court also noted the proposed settlement "include [d] significant improvements in the factors and evidentiary considerations used to evaluate claims." Fairness Opinion, 962 F.Supp. at 492. The court found that the settlement enhanced the Task Force ADR plan by:

(1) Allowing a claimant's score to be raised if documents originally kept by Prudential that could affect the scoring have improperly been destroyed and no copies can be located;

(2) Allowing the claimant's score for "churning" to be raised if 12% of the selling agent's total sales were "financed insurance" sales, as opposed to a threshold figure of 15% under the Task Force plan;

(3) Allowing a claimant's score to be raised if blank, unsigned disbursement forms were used without the policyholder's consent;

(4) Allowing a claimant's score to be raised for "vanishing premium" claims if an agent used the phrases "vanishing premium" or "vanishing point" in writing in connection with the sale of the policy at issue;

(5) Removing as a negative consideration the fact that a policy lapsed prior to the date when the premiums were to "vanish", if it appears that the policyholder became aware, prior to the misrepresented "vanish" date, that the policy would not perform as illustrated;

(6) Requiring Prudential to contact agents regarding policies they sold to obtain additional information about the sale of the policy, and to encourage honest responses by agreeing not to take disciplinary action against an agent based on his or her truthful statements;

(7) Removing Prudential from its co-equal role with the regulators in the selection of a representative to advocate on behalf of the claimant at the arbitration level, and eliminating the $10 million cap on the funding the representative could receive; and

(8) Creating an entirely new position, the "Claimant Representative," selected by Class Counsel and responsible for overseeing the entire process on behalf of the claimant, including the initial claim review.

Id. at 492–93.

23 The enhancements to the ADR remedies were:

(1) The settlement provided 100% interest to claimants scoring a "2" or a "3" in the ADR process (compared to the Task Force plan, which provided zero interest for scores of "2"), and allows rescission of the policy and a refund of the premiums, with interest;

(2) The settlement allowed a claim receiving a either a "2" or a "3" to receive relief where a policy lapsed before the claimant died, as opposed to the requirement under the Task Force plan that a claimant receive a "3." three.

(3) Full compensatory relief for a vanishing premium claim where a Prudential agent promised the claimant would have a "paid up" policy;

(4) Removal of the exclusion in the Task Force plan which prevented claims on behalf of the decedent where the policyholder/decedent died while the policy was in force.

Fairness Opinion, 962 F.Supp. at 493–94.

The court found that the settlement enhanced the Basic Claim Relief by:

(1) Eliminating fifty basis points on Optional Premium Loans;

(2) Increasing Prudential's contributions to the annual premiums for Enhanced Value Policies;

(3) Increasing Prudential's contributions toward the purchase price of Enhanced Value Annuities;

(4) Creating a new form of Basic Claim relief known as Mutual Fund Enhancements, for which Prudential would contribute 4% of the initial purchase price to the fund, up to a maximum of $2,000.

Id. at 494.

24 At oral argument, Lead Counsel noted that approximately 1.8 million phone calls had already been processed. Tr. of Oral Argument, January 26, 1998, at 125 (Testimony of Melvyn Weiss).

25 The district court postponed the hearing date, originally set for January 21, 1997, in order to allow policyholders more time to respond to the class notice and to provide the parties more time to prepare.

26 The district court noted five enhancements which resulted from the negotiations between the state regulators and Prudential. These were:

(1) The extension of the complaint history cut-off until February 1, 1997;

(2) An increase in the interest paid on claims receiving a score of "2" from 50% to 100%;

(3) The addition of an evidentiary criterion allowing the claim evaluator to consider that a claimant was 60 years or older at the time of the sale;

(4) The addition of a claim resolution factor awarding an automatic score of "3" if a claimant's life insurance application contained an unauthorized signature; and

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(5) The requirement that Prudential provide claimants, at the claimants request, with current account information, such as outstanding loans, dividend payments and "currently illustrated year of abbreviation."

Fairness Opinion, 962 F.Supp. at 498.

27 Krell disputes this finding, and argues that the additional enhancements benefitted only the citizens of those four states. Krell Brief at 47 n. 56. Krell's argument relies primarily on its assertion that Florida residents received better notice and were benefitted by more favorable evidentiary presumptions, including a more favorable definition of replacements. *Id.; see also* Krell Reply Brief at 49–51. Lead Counsel responds that the court was correct to rely on Prudential's statements in open court to the effect that the enhancements would be available to all class members. Lead Counsel Brief at 58. Additionally, Lead Counsel notes that the district court found the settlement was fair and reasonable even without the state-negotiated enhancements. *Id.*

We disagree with Krell. At the Fairness Hearing on February 24, 1997, Krell raised his concern regarding the state-negotiated enhancements. Prudential explained that "the ADR plan changes that were agreed to with the four states in terms of modifications of scoring and relief will be made available nationally through the class settlement." Tr. of Fairness Hearing at 141. An examination of the settlements signed by the four objecting states and the Amendment to Stipulation of Settlement filed by the settling parties supports the district court's finding. Also, while Prudential's explanation does not specifically respond to Krell's assertion that Florida residents received enhanced notice, we do not believe this is significant. As discussed *infra,* we find the notice provided under the settlement was adequate, and it is not rendered inadequate by any additional notice provisions negotiated by an individual state. Finally, Krell's argument with respect to replacement claims misses the mark. As Prudential explained at the hearing, the "scoring enhancements [in the ADR process] where there was a violation of state regulations on replacement will be based on each states' individual replacement regulations where the policy was sold ... [t]he Florida provision is confirmatory and expands what is already in the plan." Tr. of Fairness Hearing at 174. Thus, any provision negotiated by Florida regarding the definition of replacement is based on Florida law and is not applicable to other states.

28 The 1996 Amendment to 28 U.S.C. § 1332, which raised the amount-in-controversy requirement from $50,000 to $75,000, did not take affect until after the filing of the Second Amended Consolidated Complaint. *See* Pub.L. No. 104–317, § 205(b) (1996).

29 They also argue that Dorfner could not be expected to bring both his federal claims and his purely state law claims in the same suit.

30 The *Lyon* court found that "under any standard, the nexus between the federal and state claims in this case is inadequate" to support supplemental jurisdiction. 45 F.3d at 762. The court went on to note:

Lyon's FLSA claim involved very narrow, well-defined factual issues about hours worked during particular weeks. The facts relevant to her state law contract and tort claims, which involved Whisman's alleged underpayment of a bonus and its refusal to pay the bonus if Lyon started looking for another job, were quite distinct. In these circumstances it is clear that there is so little overlap between the evidence relevant to the FLSA and state claims, that there is no "common nucleus of operative fact" justifying supplemental jurisdiction over the state law claims. In fact, it would be charitable to characterize the relationship of the federal and state claims as involving even a "loose" nexus.

Id. at 763.

31 Section 10(b) of the Securities Exchange Act of 1934 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

32 Section 20(a) of the Securities Exchange Act of 1934 provides:

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a).

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33 Furthermore, many plaintiffs had more than one claim stemming from the conduct of Prudential's sales agents. For example, named plaintiff Nicholson alleged churning, vanishing premium and investment plan claims, while named plaintiff Dorfner alleged churning and vanishing premium claims. *See supra* note 11.

34 Section 1367 provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiff under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367.

35 It is interesting to note that one of the primary rationales for class actions is allowing access to the courts for parties whose individual claims are so small that it would be economically infeasible to pursue them individually. *See* 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 4.27 at 4–107 to 4–109 (3d ed.1992). Consequently, upholding *Zahn* 's amount-in-controversy requirement would largely undercut this purpose.

36 The Federal Courts Study Committee Working Papers showed that the matter had come to the attention of the Committee. 1 Federal Courts Study Committee Working Papers and Subcommittee Reports 561 n. 33 (“From a policy standpoint, [*Zahn*] makes little sense, and we therefore recommend that Congress overrule it.”). Nonetheless, the Committee did not adopt the proposal and, indeed, cautioned against reliance on the Working Papers. *See* Preface to Working Papers (“These [Working Papers] were valued background materials which the Committee determined should be published for general consideration whether or not the Committee agreed with their substantive proposals.... In no event should the [Working Papers] be construed as having been adopted by the Committee.”).

37 Appellants have questioned whether the notice adequately described the category of “other improper sales practices” claims so as to inform members that they might have a valid, compensable claim against Prudential. We believe it did. *See* discussion *infra* § V.C.2.

38 As noted above, the district court partially granted Prudential's motion to dismiss on May 10, 1996.

39 The proposed settlement in *Georgine* was the by-product of ongoing negotiation and litigation involving a group of asbestos manufacturers and a myriad of plaintiffs whose cases had been consolidated in the Eastern District of Pennsylvania by the Multidistrict Litigation Panel. Counsel for both sides negotiated separate settlements to resolve both the then-pending claims against the CCR and the inventory of unfiled claims held by plaintiffs' counsel. Once the extant cases were settled, the parties filed the *Georgine* class action on behalf of approximately 2 million individuals who had not previously filed lawsuits against the asbestos defendants, but who had been exposed to asbestos products produced by defendants. While some members of the class had suffered physical injuries as a result of their exposure, other members of the class were “exposure-only” plaintiffs who had not yet developed any asbestos-related illness. The parties simultaneouslyfiled a complaint, an answer, a proposed settlement and a joint motion for conditional class certification. The district court granted the motion, and subsequently approved the settlement. On appeal, the *Georgine* court vacated the district court's opinion and remanded for decertification of the class, finding that the class did not satisfy the typicality, adequacy of representation, predominance and superiority requirements of Rule 23. *Georgine,* 83 F.3d at 618. The Supreme Court affirmed. *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2244.

> Throughout this opinion, we will distinguish between the opinions of this Court and the Supreme Court by referring to the Supreme Court's decision as *Amchem,* and referring to this Court's opinion as *Georgine.*

40 The district court did not have the benefit of the *Amchem* decision when it rendered its opinion, and did not take settlement into consideration when conducting its certification analysis.

41 In his separate opinion concurring in part and dissenting in part, Justice Breyer, joined by Justice Stevens, questioned the consistency of the majority approach. "If the majority means that these pre-settlement questions are what matters, then how does it reconcile its statement with its basic conclusion that 'settlement is relevant' to class certification." *Amchem,* 521 U.S. at ——, 117 S.Ct. at 2254.

42 Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

43 Rule 23(b)(1) authorizes certification in cases where separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Rule 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B). Rule 23(b)(2) authorizes class actions seeking declaratory or injunctive relief, for example civil rights cases alleging class based discrimination.

44 Rule 23(b)(3) provides:

> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

45 Rule 23(e) provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

Fed.R.Civ.P. 23(e)

46 Courts frequently examine the Rule 23(a) requirement of commonality in conjunction with Rule 23(b)(3)'s "predominance" standard, reasoning that the "predominance requirement incorporates the commonality requirement." *Georgine,* 83 F.3d at 626; 1 *Newberg on Class Actions*§ 3.13, at 3–71. Although the district court followed this approach and examined the predominance and commonality requirements together, appellants have not questioned the court's finding that the proposed class satisfies this element of Rule 23(a).

47 The district court found that plaintiffs would need to establish the following common factual issues at trial:

- Prudential's common course of conduct;
- Prudential's development of the sales presentations and materials, and artificial inflation and maintenance of dividend scales;
- the sale of replacement and vanishing premium policies by material omission;
- the misrepresentation of policies as investment or retirement plans;
- the failure to train or supervise agents;
- Prudential's unwillingness to prevent deceptive sales practices; and
- Prudential's scienter.

Fairness Opinion, 962 F.Supp. at 512.

The district court also found that plaintiffs would need to establish the following common legal issues at trial:

- whether policyholder reliance could be presumed;
- whether Prudential's offer to finance a policyholder's purchase of a policy constitutes an enforceable financing contract distinct from the policy itself;
- whether Prudential breached the financing contract;
- whether Prudential breached an obligation of good faith and fair dealing;

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· whether constructive trust principles apply to premiums received as a result of deceptive sales practices;
· whether compensatory claims can be effectively quantified on a class wide basis; and
· whether punitive damages should be imposed.

Id.

48 The court also cited the following as examples of issues common to all class members: Prudential's fraudulent concealment of its misrepresentations; the use of substantially similar, and sometimes identical, oral and written misrepresentations by Prudential agents in furtherance of its fraudulent scheme; the required use of pre-approved written marketing materials; and the fact that Prudential trained its agents to use these fraudulent sales techniques. Fairness Opinion, 962 F.Supp. at 513–16.

49 Krell objects to the district court's reference to *Baby Neal,* complaining that the court was inappropriately applying the Rule 23(b)(2) standard for injunctive relief in a Rule 23(b)(3) class action. The objection is clearly without merit. The district court applied *Baby Neal* in the context of its Rule 23(a) "commonality" analysis, a factor applicable whether the class action is brought under Rule 23(b)(2) or (b)(3).

50 Krell also argues the court improperly evaluated the typicality requirement because it merely presumed the factual and legal elements of named plaintiffs' claims were aligned with the claims of absentee class members. Krell's claim that the district court presumed typicality simply ignores the findings contained in the district court's opinion.

51 *Falcon* involved a Mexican–American employee who was denied a promotion, allegedly based on his national origin. After obtaining a right-to-sue letter from the EEOC, Falcon commenced a class action under Title VII of the Civil Rights Act of 1964, alleging discrimination against Mexican–Americans with respect to promotion. The class, however, was comprised of all Mexican–American employees and Mexican–Americans who had been denied employment.

52 The court specifically noted that the fee agreement negotiated with Prudential subsequent to the negotiation of the Proposed Settlement did not undermine the adequacy of class counsel's representation. Fairness Opinion, 962 F.Supp. at 519; *see also infra* § VI.C.1.

53 The district court explicitly rejected this argument. Fairness Opinion, 962 F.Supp. at 522. For a more detailed discussion of Krell's replacement claims, see *infra* § V.A.4.

54 While we reached a different conclusion in *Georgine,* our decision there turned on our belief that the case "could not be broken into anywhere near that small a number of patterns." 83 F.3d at 627 n. 13.

55 In addition, Krell's concern is addressed by the fact that "the ADR scoring procedures specifically incorporate state replacement regulations." Fairness Opinion, 962 F.Supp. at 550 n. 79.

56 Rule 23(b)(3) lists the following factors for consideration by the courts:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

57 While we believe the district court correctly analyzed whether application of the laws of the fifty states would be manageable, we note this analysis, depending on the facts in each case, may no longer be necessary in the context of settlement-only class certification. *See Amchem,* 521 U.S. at ——, 117 S.Ct. at 2248 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial.").

58 The district court expressly left open the possibility that it would create subclasses if they became necessary. Fairness Opinion, 962 F.Supp. at 525.

59 Both Rule 23(e) and Rule 23(c) require that notice of the proposed settlement be given to all members of the class as directed by the court. For a discussion of the notice provided, see discussion *infra* § V.C.2.

60 Prudential contends that nearly "[e]very argument Krell makes is based on th[e] mistaken premise that his 'replacement claims' were stronger than the misrepresentation claims of the other Class Members." Prudential Brief at 41 & n. 10. As a result, Prudential argues, all but one of the objections to the settlement's fairness are "felled by Krell's error of law." *Id.* We do not agree that Krell's arguments can be dismissed so easily, and will address Krell's replacement claim objections in the context of his other arguments.

61 We also note that no parties have objected to this portion of the district court's analysis.

62 The court found that approximately 700 of those who opted out wrote "to indicate they do not feel they were misled in the purchase of their insurance, are satisfied with their policies, and do not want to participate in the action against Prudential." Fairness Opinion, 962 F.Supp. at 537 n. 61.

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63 Krell argues that the low response rate was the result of inadequate notice. We disagree. As discussed *infra* § V.C.2, we believe the class notice adequately apprised the class members of their right to enter an appearance, file objections, or opt out of the proposed class, and provided a detailed explanation of the procedures for doing so.

64 This discovery included over 1 million documents, 160 computer diskettes, 500 audio and video tapes. Fairness Opinion, 962 F.Supp. at 541.

65 Prudential also notes that Ohio state courts have found that a violation of state replacement laws does not give rise to a private cause of action. Prudential Brief at 36 (citing *Springfield Impregnators, Inc. v. Ohio State Life Ins. Co.,* No. C.A. 3090, 1994 WL 95219 at *9 (Ohio App. Mar. 23, 1994); *Strack v. Westfield Companies,* 33 Ohio App.3d 336, 515 N.E.2d 1005, 1007–08 (Ohio App.1986)).

66 The Task Force also noted that, in 1985, the Federal Trade Commission acknowledged that many older insurance policies were "candidates for replacement." Task Force Report at 42–3 (quoting Michael P. Lynch and Robert J. Mackay, *Life Insurance Products and Consumer Information,* Staff Report, Bureau of Economics, Federal Trade Commission, Washington, D.C. (November 1985)).

67 We note that even if the different claims alleged by plaintiffs require proof of different elements to establish liability, those differences are adequately addressed during the ADR process. ADR claims will be examined using a set of criteria specific to the type of claim filed. For example, the evidentiary considerations for a churning claim include misstatements by a Prudential agent concerning the applicable interest rate on a policy loan, the policyholder's annual income, and the use of blank, signed disbursement forms. *Prudential Alternative Dispute Resolution Guidelines,* Stipulation of Settlement, Ex. B, at 17. Considerations for a vanishing premium claim include whether the policyholder was advised to disregard notices from Prudential, whether the policyholder made a "significant financial decision" in reliance on the belief that premium payments would cease, and whether the policyholder received altered or unclear sales materials from an agent. *Id.* at 26–27.

68 The district court also noted that "[n]one of the four states that objected to the Proposed Settlement have ever prohibited financed insurance sales and three of the four did not regulate in any respect financed insurance sales for great portions of the Class Period." Fairness Opinion, 962 F.Supp. at 549 n. 77.

69 Prudential argued that consideration of this factor was unnecessary because of the uncapped nature of the relief. The district court rejected this claim, noting that while the compensatory relief was uncapped, the "punitive damages" component of the settlement-the Additional Remediation Amount—was limited, and thus the district court was obligated to examine this factor.

70 The court found that Prudential's credit rating had already declined during the course of the litigation. Fairness Opinion, 962 F.Supp. at 540.

71 In response, Krell contends that the court's belief that full compensatory relief is available relies on the flawed "assumption that 100% of the wrongfully replaced policyholders will understand the notice *and* form the requisite 'belief' *and* complete the 16 page proof of claim form and thereafter prevail in ADR." Krell Brief at 45. But Krell ignores the fact that any claim, whether brought at trial or under the ADR process, will require evidence of deceptive conduct in order to support liability.

72 The district court also took notice of the procedural safeguards contained in the ADR process, including the four tier review process designed to ensure an accurate and fair scoring of class members' claims. *See* discussion *supra* § I.B.1.

73 *See* Edward H. Cooper, Mass Torts Model, prepared for the Conference On Mass Torts, Mass Torts Working Group, Philadelphia, PA (May 1998).

Other related factors that also may be relevant to this inquiry are discussed by Judge William Schwarzer in his article, *Settlement of Mass Tort Class Actions: Order Out of Chaos,* 80 Cornell L.Rev. 837, 843–44 (May 1995). The factors suggested by Judge Schwarzer include:

(1) Whether the prerequisites set forth in subdivisions (a) and (b) [of Rule 23] have been met;

(2) Whether the class definition is appropriate and fair, taking into account among other things whether it is consistent with the purpose for which the class is certified, whether it may be overinclusive or underinclusive, and whether division into subclasses may be necessary or advisable;

(3) Whether persons with similar claims will receive similar treatment, taking into account any differences in treatment between present and future claimants;

(4) Whether notice to members of the class is adequate, taking into account the ability of persons to understand the notice and its significance to them;

(5) Whether the representation of members of the class is adequate, taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants;

(6) Whether opt-out rights are adequate to fairly protect interests of class members;

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(7) Whether provisions for attorneys' fees are reasonable, taking into account the value and amount of services rendered and the risks assumed;

(8) Whether the settlement will have significant effects on parties in other actions pending in state or federal courts;

(9) Whether the settlement will have significant effects on potential claims of class members for injury or loss arising out of the same or related occurrences but excluded from the settlement;

(10) Whether the compensation for loss and damage provided by the settlement is within the range of reason, taking into account the balance of costs to defendant and benefits to class members; and

(11) Whether the claims process under the settlement is likely to be fair and equitable in its operation.

80 Cornell L.Rev. at 843–44.

74 The Rules Enabling Act grants the Supreme Court the "power to prescribe general rules of practice and procedure." 28 U.S.C. § 2072(a). The Act further provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

75 The McCarran–Ferguson Act provides "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Krell claims the Federal Rules of Civil Procedure constitute an Act of Congress for purposes of the McCarran–Ferguson Act. Krell further contends the proposed settlement "relieves Prudential of compliance with state insurance laws" which regulate the form and content of documents used to sell insurance or modify existing insurance contracts. Consequently, Krell reasons that the approval of the class action settlement under Rule 23 must violate the McCarran–Ferguson Act.

76 For a discussion of whether settlements of class actions under Rule 23 violate the Rules Enabling Act, see Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments,* 39 Ariz. L.Rev. 615 (Summer 1997) (responding to arguments that the proposed inclusion of a "settlement-only" class in Rule 23 violates the Rules Enabling Act); *but see* Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of MassTort Settlements Negotiated Under Federal Rule 23,* 39 Ariz. L.Rev. 461 (Summer 1997).

77 In support of its contention, Krell argues the sale of insurance under the Basic Claim Relief and the modification of existing contracts by the incorporation of the release and ADR provision in all contracts since 1982 violates state laws regulating the form and content of insurance contracts. Krell further contends the class certification and settlement notices would not pass muster under state laws requiring that material used to advertise new insurance sales or modify insurance contracts not be misleading, because the class notice omits material facts, including: (a) the nature of the "other sales" claims; (b) the district court's finding that the jury value of each class member's claim could exceed $50,000; and (c) the indirect payment of Lead Counsel's fees by the class members. Finally, Krell contends that the settlement violates state laws barring mandatory arbitration of claims.

Prudential and Lead Counsel respond by noting that the insurance regulators for all 50 states and the District of Columbia have endorsed the settlement, and that the requirements of state insurance laws have been incorporated in the ADR scoring system. They also respond that: (a) the settlement agreement and class notice are not insurance contracts or policy forms and therefore need not meet state requirements for form, content and readability; (b) the district court found that the Settlement and Class Notice are excluded from the NAIC definition of advertising; and (c) the ADR is not "mandatory arbitration" but rather constitutes part of the settlement.

We agree. The settlement does not violate applicable state law.

78 Discovery concerns relating to attorneys' fees will be addressed separately. *See infra* § VI.C.

79 The district court suggested that alternative methods might be available to test the veracity of the affidavits.

80 Krell also argues that the proposed class here is an "across the board" sales practice class, and that the Supreme Court has "rejected the creation of an 'across the board' racial discrimination class because its overbreadth posed serious unfairness to absent class members bound by the judgment." Krell Brief at 28–29 (citing *Falcon,* 457 U.S. at 161, 102 S.Ct. 2364). As discussed earlier, Krell misreads the Supreme Court's decision in *Falcon. See supra* n. 51 and accompanying text.

81 The district court also rejected Krell's objection to the scope of the release on the grounds that class members could simply have opted out of the class. While we agree with the statement as a factual matter, it does not address Krell's concern. The court's line of reasoning would render any objection meritless, and consequently we reject it.

82 "[I]t is widely recognized that courts without jurisdiction to hear certain claims have the power to release those claims as part of a judgment." *Grimes,* 17 F.3d at 1563; *see also Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1287–88 (9th Cir.), *cert. denied,* 506 U.S. 953, 113 S.Ct. 408, 121 L.Ed.2d 333 (1992) (noting that the weight of authority holds that a federal court may release claims which are not in the complaint provided they are based on the "same factual predicate"). As we noted in *Grimes,* "[t]his rule of law serves the important policy interest of judicial economy by permitting parties

to enter into comprehensive settlements that 'prevent relitigation of settled questions at the core of a class action.' " 17 F.3d at 1563 (quoting *TBK Partners Ltd. v. Western Union Corp.,* 675 F.2d 456, 460 (2d Cir.1982)).

83 Although the release provides that class members waive certain state law protections against the waiver of claims through general releases, that waiver provision is limited to claims arising out of Prudential's "insurance sales practices." Stipulation of Settlement at 36. Of course, we express no opinion of the validity of the waiver of any state law protections.

84 Rule 23(c)(2) provides:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

Fed.R.Civ.P. 23(c)(2).

85 Rule 23(e) provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

Fed.R.Civ.P. 23(e).

86 The individual notice provided a description of the litigation, the settlement class, and the terms of the proposed settlement, including the relief available. It set out the information regarding the fairness hearing, including the date of the hearing, the opportunity for class members to appear at the hearing, and the procedure for filing objections with the court. The notice also explained the consequences for class members who remain in the class and provided the full text of the release. Finally, the notice provided class members with the toll-free 800 number established by Prudential to address class member concerns.

87 The Stipulation of Settlement also provided the parties would remail any returned notices containing a forwarding address, and retain an independent research firm to determine a current address for any returned notices that did not contain a forwarding address. Stipulation of Settlement § G.3.

88 The publication notice described the settlement class and provided information regarding, *inter alia,* the hearing, the deadline for opting out or entering an appearance, and the consequences of opting out or remaining in the class.

89 On January 6, 1997, the district court postponed the fairness hearing from January 21 until February 24, 1997. Although not required to do so, the district court ordered the parties to provide additional notice to all class members notifying them of the postponement.

90 We note that, in addition to the outreach program implemented by the settling parties, several states conducted there own outreach programs to supplement the notice provided under the settlement. For example, the California Department of Insurance ran a series of television and radio advertisements during the three weeks preceding the June 1, 1997 claim filing deadline. *Prudential v. Florida,* No. 97–5264 (3d Cir. May 22, 1997), slip op. at 6.

91 The district court took judicial notice of the news coverage received by the settlement, including wire service articles published in various state, local and trade newspapers. Fairness Opinion, 962 F.Supp. at 496.

92 For example, following the court's approval of the settlement, the parties provided additional notice to those class members who initially excluded themselves from the class. The notice explained that several enhancements had been made to the original settlement remediation plan as a result of negotiations with various states, and provided an election form with which the class members could indicate their decision to rejoin the class and elect either the ADR process or Basic Claim Relief. A similar notice was provided to the rest of the class, extending the date for electing the ADR process or Basic Claim Relief until June 1, 1997.

93 Under the category of "other claims," the notice explains that "[i]f evidence shows other improper life insurance sales practices, you may be remedied through the cancellation of your policy with a refund of some or all of the premiums you paid, including interest in some cases, or the issuance of a substitute product purchased with the amount otherwise available for refund." Class Notice at 11.

94 Section K.1. of the Proposed Settlement Agreement states:

> Lead Counsel agrees to make, and the Defendants agree not to oppose, an application for an award of Attorney's Fees in the Centralized Proceeding not to exceed a total of $90 million (the "Total Fees"). Additionally, Class Members will not be required to pay any portion of the Attorneys' Fees.

Stipulation of Settlement § K.1.

95 These costs included the publication, printing and mailing costs of various class notices; post-office box rental costs; the costs of establishing and maintaining the 800 telephone number established under the settlement; the costs of processing the exclusion requests and Election Forms; and all administrative costs associated with both the ADR Process and Basic Claim Relief, including the fees paid to claim evaluators and Appeals Committee members.

96 Lead Counsel was responsible for the allocation and distribution of the fee award among the 25 law firms representing plaintiffs, Stipulation of Settlement ¶ K.2, and consequently the court need not undertake the difficult task of assessing counsels' relative contributions. *See* Dennis E. Curtis & Judith Resnik, *Contingency Fees In Mass Torts: Access, Risk, And The Provision Of Legal Services When Layers Of Lawyers Work For Individuals And Collectives of Clients,* 47 DePaul L.Rev. 425, 448–49 (Winter 1998) (noting the difficulty of "assessing the value of contributions of a multitude of attorneys to a particular outcome").

97 This figure assumes a 3% remediation rate, which is equivalent to the remediation of approximately 330,000 claims.

98 Although Krell filed an emergency motion to vacate this order, the district court denied the motion on the grounds that Krell had waived his right to object. *See* Fee Opinion, 962 F.Supp. at 575 n. 9 (citing *In re Prudential Ins. Co. of America Sales Practice Litigation,* No. 95–cv–4704, slip op. (D.N.J. Feb. 11, 1997)). Krell has renewed his objections to the fee examiner on appeal.

99 The court reasoned that, although the class settlement and the attorneys' fee award were negotiated independently, Prudential was responsible for both and therefore they are drawn from the same "fund." In addition, the court found that the minimum payments required of Prudential constituted a common fund on which it could accurately calculate a portion of the fee award. Fee Opinion, 962 F.Supp. at 579.

100 The district court also rejected separate fee petitions filed by attorneys for various objectors. Fee Opinion, 962 F.Supp. at 593–94 ("The Court finds that Objectors' Attorneys neither improved the settlement, assisted the court nor enhanced the recovery ... [and] will deny the Objectors' Attorneys request for attorneys' fees.").

101 Hoyer calculated the settlement's total value at $1.987 billion, assuming 330,000 remediated claims. He attributed $1.187 billion to the ADR program, and the remaining $799 million to Basic Claim Relief. Hoyer also calculated the value of the Task Force plan to be approximately $863 million, with $490 attributable to the ADR program and $373 attributable to Basic Claim Relief. This represents a total enhancement of $1.123 billion. Hoyer also found the settlement would result in increased remediation, calculating that for every 110,000 claims remediated under the proposed settlement, only 83,300 claims would be remediated under the Task Force plan. *See* Hoyer Aff. ¶¶ 6, 11, 13, 15; Fee Opinion, 962 F.Supp. at 575.

Prudential submitted separate valuations from Patricia Guinn, of Tillinghast–Towers Perrin, and Daniel McCarthy, of Milliman & Robertson, Inc., calculating the value of the ADR and Basic Claim Relief. Guinn found that the "shared elements" of the ADR programs contained in the Task Force plan and the proposed settlement have a value of $221 million per 110,000 claims remedied. She also calculated that, with the enhancements, the number of claims remedied would rise to 118,480 and have a value of $261.2 million. McCarthy calculated that the value of the Basic Claim Relief under the proposed settlement would range from $272 million to $686 million, and that the best estimate of its value was $425 million. This was an improvement over the value of the Basic Claim Relief contained in the Task Force plan, which ranged from $208 million to $535 million, with a "best estimate" of $330 million. Fee Opinion, 962 F.Supp. at 582 n. 25. Although the district court accepted Hoyer's calculations, it found the valuations submitted by Guinn and McCarthy were flawed. The court noted that Guinn's calculations did not provide an estimate of the number of claims that would ultimately be addressed. Similarly, the court questioned McCarthy's conservative estimate of the value of the Basic Claim Relief, which was far below previous calculations, noting that the "BCR valuations generally have gone uncontested in this litigation." *Id.*

102 The lodestar method calculates the attorneys' fees based on the number of hours reasonably expended by counsel.

103 The court found that, as of January 31, 1997, the lodestar amount totaled $17.7 million, a figure which did not include "significant events" such as the fairness hearing, which occurred after that date. Fee Opinion, 962 F.Supp. at 584 & n. 29.

104 While the district court does not offer any explanation of the "risks and burdens" facing class counsel, we assume this is a reference to the risks of establishing liability and damages at trial discussed in the court's fairness opinion. *But see* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan. L.Rev. 497, 578 (Feb.1991) (arguing that a multiplier designed to address the contingency factor is unnecessary because "there appears to be no appreciable risk of nonrecovery, for virtually all cases are settled").

105 Under the settlement, Prudential guaranteed to pay a minimum of $260 million per 110,000 claims processed. Assuming 330,000 claims, this would result in a minimum payment of $780 million. In addition, Prudential promised to pay an additional remediation amount of $300 million in the event more than 330,000 claims were remediated. Combining these

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figures with the minimum valuation of the Basic Claim Relief—$272 million—the court calculated that Prudential would be obligated to pay $1.352 billion. *See* Fee Opinion, 962 F.Supp. at 589 n. 38.

106 This figure was capped so that the total fee award, including the initial $45 million, would not exceed $90 million. Fee Opinion, 962 F.Supp. at 589.

107 Krell objected to the district court's application of the lodestar method, arguing the court improperly based its calculations on time summaries provided by class counsel rather than detailed time reports. The court rejected this argument, reasoning that the time summaries were sufficient in this case because the court was only using the lodestar analysis as a cross-check on the fee award. Fee Opinion, 962 F.Supp. at 591 n. 47. In addition, the court noted that the lodestar figures used were actually understated because they did not include time spent by class counsel subsequent to January 31, 1997. *Id.*

108 Some critics have argued that the lodestar method gives attorneys an incentive to increase their billable hours by delaying settlement as long as possible. *See, e.g., Court Awarded Attorney Fees,* Report of the Third Circuit Task Force, 108 F.R.D. 237, 247–48 (Oct. 8, 1995) (citing *In re Fine Paper Antitrust Litigation,* 751 F.2d 562 (3d Cir.1984)). Others contend the lodestar method creates a rift between the class and its counsel, and may lead to collusive settlements in which plaintiffs' attorneys are willing to accept a low settlement in exchange for lucrative fees. *See, e.g.,* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 Colum. L.Rev. 669, 716–17 (May 1986).

109 While the use of contingent fees has generally been favored, courts have encountered several difficulties in determining the correct fee. Fee cutting in aggregate mass torts can usually be justified because the aggregation of claims lessens the force of the traditional justifications for contingency fees—enabling access, providing legal services and rewarding risk. *See* Curtis & Resnik, *Contingency Fees In Mass Torts,* 47 DePaul L.Rev. at 448. Yet aggregation does not entirely eliminate the risks involved in mass torts, and thus these cases often require difficult factual analysis to determine an appropriate fee. We note that there may be better ways to assess the work done by attorneys in these kinds of cases. Administrative regulations or the fees awarded in probate court may provide a closer analogy than the individual contingent award common in individual cases. *Id.* at 454.

110 We note, however, that we have some doubt as to the ultimate effectiveness of the incentives created by the fee award. The court hoped that, by linking the fee award to a threshold number of responses, class counsel will have an incentive to remain involved. But here that threshold figure was easily met, and thus the incentive for class counsel's continued involvement has been removed. While we believe that incorporating such an incentive is appropriate, it would be arguably more effective to link the second half of the fee award to a threshold which is more indicative of the settlement's success. For example, basing the second portion of the fee on the number of claims actually remediated would better serve the district court's goal of encouraging class counsel's continued participation.

111 Krell also renews his objection that the fee examiner in this case did an inadequate job of reviewing Lead Counsel's fee request. Krell claims that the fee examiner was a Rule 53 special master, as stated in the February 11, 1997 order, and thus was required to keep a record. Instead, Krell claims the fee examiner based his conclusions on *ex parte* submissions and kept no record of the evidence or testimony he considered. The district court rejected these arguments in its Fee Opinion, concluding that Krell misunderstood the fee examiner's role. First, the court noted that the November 6, 1996 order does not refer to Rule 53, and points out that, at the fee hearing on March 10, 1996, the court specifically stated that the fee examiner had been appointed as a technical expert under Rule 54(d)(2)(D). Second, the court said it had already addressed Krell's "hyper-technical" arguments for disqualification of the fee examiner in its opinion denying Krell's emergency motion to vacate the November 6th order. Finally, the court noted it had determined not to adopt the Fee Examiner's Report. Fee Opinion, 962 F.Supp. at 576 n. 11. We see no abuse of discretion here.

112 In *Prandini v. National Tea Co.,* 557 F.2d 1015 (3d Cir.1977), we rejected a settlement agreement which contained an award of attorneys' fees, holding class counsel should not simultaneously negotiate both a settlement and attorneys' fees. The Task Force, concerned about the chilling effect *Prandini* might have on settlement, suggested "the defendant should be permitted to make an offer of settlement that is conditional on a subsequent satisfactory resolution of the question of fees," or the parties could seek the court's permission to discuss fees. *Court Awarded Attorney Fees,* 108 F.R.D. at 269. The Supreme Court has also held that parties may simultaneously negotiate a "defendant's liability on the merits and his liability for his opponents' attorney's fees." *Evans v. Jeff D.,* 475 U.S. 717, 738 n. 30, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986).

113 The district court found it could properly rely on the settling parties' affidavits, noting the Third Circuit Task Force report specifically authorizes a district court to "ascertain whether improper talks have taken place by requesting the information

in a signed statement that would be subject to the sanction provisions of Federal Rules 7 and 11." Fee Opinion, 962 F.Supp. at 577 n. 14 (quoting *Court Awarded Attorney Fees,* 108 F.R.D. at 267).

114 Section N.3 of the Settlement Agreement provides:

> Notwithstanding the preceding subsection N.2., Plaintiffs may not terminate the Settlement Agreement solely because of the amount of Attorneys' Fees awarded by the [District] Court or any appellate court(s). Prudential, however, may elect to terminate the Settlement Agreement on or before October 25, 1996, if the Settling parties cannot agree on the amount of Attorneys' Fees that Plaintiffs will apply for and Prudential will not oppose.

115 The settlement in that case contained relief similar to the ADR process and Basic Claim Relief available here.

116 Krell argues that this reliance is misplaced. Krell contends that *Institutionalized Juveniles* only addresses the question of counsel's entitlement to attorneys' fees in the context of a statutory fee-shifting case, but not the distinct question of how much of a common fund may be attributed to the efforts of counsel. We disagree. The question of entitlement to a statutory fee shifting award and the entitlement to a portion of a common fund are analogous, and the same concerns undergird the determination in both cases. As we noted in *Institutionalized Juveniles,* the relevant inquiry to determine eligibility for fees (whether plaintiffs prevailed and whether the litigation was causally linked to the relief obtained) "focuses a court's attention on the benefits actually received and caused by plaintiffs, [and] will determine not only the often evident threshold question of eligibility for fees, but it will also be critical in determining the amount of a reasonable fee award, in that the final award must depend on a full assessment of the extent of the benefits received by plaintiffs." 758 F.2d at 910.

117 The court calculated this figure by taking the minimum ADR payment required in the event 330,000 claims were remediated—$1.08 billion—and adding the lowest estimated value for Basic Claim Relief—$272 million. The resulting "common fund" would be $1.352 billion.

118 Among the settlements considered by the district court were *In re Baldwin–United Corp. Litig.,* 1986 WL 12195 (S.D.N.Y.), where attorneys' fees constituted 4.1% of the $183.8 million settlement fund; *In re Agent Orange Prod. Liab. Litig.,* 611 F.Supp. 1296 (E.D.N.Y.1985), where the fee award constituted 5.5% fee of the $180 million settlement fund; and *In re MGM Grand Hotel Fire Litig.,* 660 F.Supp. 522 (D.Nev.1987), where the fee award constituted 7% fee of the $205 million settlement fund. This comparison does not include the $3 billion recovery in the *Penzoil* litigation, for which plaintiffs' counsel received an estimated fee of 14% based on a privately negotiated fee agreement. *See* Fee Opinion, 962 F.Supp. at 587 n. 35 (citations omitted).

119 The district court noted that Krell's counsel conceded that "there is no question that lead counsel is entitled to a fee. They have created benefits." Fee Opinion, 962 F.Supp. at 578 n. 15 (quoting Fee Hr'g Tr. at 17–18).

120 This figure is based on the 75,607 hours claimed by class counsel, and excludes the district court's estimate of the hours spent in connection with the court-ordered investigation of alleged document destruction.

121 Interestingly, the district court noted in its opinion there was some question as to the application of multipliers following the Supreme Court's decision in *City of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), and claimed to avoid the issue by not considering risk enhancement factors in its determination of the appropriate percentage. Fee Opinion, 962 F.Supp. at 581 n. 24.

> As the district court discussed, the Supreme Court held risk enhancements are inappropriate in the statutory fee-shifting context. *See Dague,* 505 U.S. at 565–67, 112 S.Ct. 2638. Although the Supreme Court has not addressed whether this prohibition also applies in common fund cases, the district court found "the Court's reasoning for excluding risk enhancements in fee-shifting cases applies equally to common fund cases." In addition, the court also took notice that jurisdictions are split as to the application of risk enhancements in the common fund context. Fee Opinion, 962 F.Supp. at 581 n. 24 (citing Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 49, 70–71 (Fed. Judicial Ctr.1994); 3 *Newberg* § 14.03 (Supp. July 1996)). Assuming that multipliers for risk or counsel's expertise are appropriate in the lodestar cross-check in common fund cases, they require particular scrutiny and justification.

122 The Federal Judicial Center has also noted that the application of the lodestar method in common fund cases requires "virtually the same analysis as it does in fee-shifting cases." A. Hirsch & D. Sheehey, *Awarding Attorneys' Fees,* at 67. In addition, the Judicial Center notes that "[s]ome of the factors justifying an adjustment of the lodestar in feeshifting cases will also apply in a common fund situation" regardless of which method is used to calculate fees. *Id.* at 69.

123 Although the district court based its Fee Opinion on Lead Counsel's analysis of the lodestar as of January 31, 1997, Krell relies primarily on Lead Counsel's fee petition dated November 22, 1996. Krell Brief at 63. Krell raises many of the same issues with regard to the revised fee petition, filed by Lead Counsel on February 7, 1997. *Id.* at 64–65.

124 Krell claims that at least one law firm which petitioned for fees was fictitious. According to Krell, the son of a senior partner at Co–Lead Counsel Much, Shelist, Freed, Deneberg, Ament, Bell & Rubenstein, filed a fee petition for a non-existent

firm requesting over $2 million. The district court deemed these mistakes unintentional and irrelevant. Fee Opinion, 962 F.Supp. at 592 n. 47.

125 The district court denied Krell's motion for fee discovery by order dated February 18, 1997.

126 The Krell and Kittle plaintiffs were joined in their motion by Bruce Miller, on behalf of former Prudential agent Ricky Martin and as lead counsel in the Agent Action, and Anderson B. Doguli, representing seven individual policyholders from the state of Florida.

127 In an emergency motion to amend the Court's Order, Krell argued that the existing record was sufficient for the court to decide the recusal motion, and that supplementary evidence was improper. Krell's Brief in Support of Emergency Motion to Amend December 5, 1996 Show Cause Order at 1–2. On appeal, Krell argues that, under *Alexander v. Primerica Holdings, Inc.,* 10 F.3d 155, 163–64 (3d Cir.1993), the district court improperly supplemented the then-existing record and allowed other parties to do the same. Krell Reply Brief at 68. We disagree. In its decision granting a petition of mandamus seeking the recusal of the district court judge, the *Alexander* court specifically considered evidence which was not part of the record at the time the initial motion to recuse was filed. In particular, the court examined a letter written by the district court judge in response to the petition for mandamus, and found that the letter gave the appearance that the judge was biased against the moving party. 10 F.3d at 165–66.

128 These subsections of 28 U.S.C. § 455 provide:

> (a) Any justice, judge, or magistrate of the Unite d States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) [The judge] shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (5) He or his spouse ...:
>
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

129 In addition, Lead Counsel argues that Krell's counsel was not counsel of record in this case and thus was not entitled to notice of the conference. At the recusal hearing, the district court observed that “Mr. Malakoff, on behalf of Kittle and Krell, has consistently maintained that he is not part of the national class action.” Joint App. at 4721.

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10 F.3d 189
United States Court of Appeals,
Third Circuit.

Edward M. CARLOUGH; Pavlos Kekrides; Nafssica Kekrides, his wife; Laverne Winbun, Executrix of the Estate of Joseph E. Winbun, Deceased, and in her own right; Ambrose Vogt, Jr.; Joanne Vogt, his wife; Carlos Raver; Dorothy M. Raver, his wife; John A. Baumgartner; Anna Marie Baumgartner, his wife; Timothy Murphy; Gay Murphy, his wife; Ty T. Annas; Fred Angus Sylvester, on Behalf of Themselves and all Others Similarly Situated.
Carl D. Roland; Gloria J. Roland, his wife; Walter L. Mays, Sr.; Shirley G. Mays, his wife, Plaintiffs–Intervenors,
v.
AMCHEM PRODUCTS, INC.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Certainteed Corporation; C.E. Thurston & Sons, Inc.; Dana Corporation; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials Corporation; I.U. North America, Inc.; Maremont Corporation; National Gypsum Company; National Services Industries, Inc.; NOSROC Corporation; Pfizer, Inc.; Quigley Company, Inc.; Shook & Fletcher Insulation Company; T & N, PLC; Union Carbide Chemicals and Plastics Corporation; United States Gypsum Company, Third–Party Plaintiffs,
v.
ADMIRAL INSURANCE COMPANY; Affiliated FM Insurance Company; AIU Insurance Company; Allianz Insurance Company; Allianz Underwriters Insurance Company, Individually and as Successor to Allianz Underwriters Inc.; Allstate Insurance Company, as Successor to Northbrook Excess and Surplus Insurance Company and Northbrook Insurance Company; American Bankers Insurance Company of Florida; American Centennial Insurance Company; American Home Assurance Company; American Motorists Insurance Company; American Re–Insurance Company; Appalachian Insurance Company of Providence; Argonaut Insurance Company; Atlanta International Insurance Company; Britamco, Limited; Caisse Industrielle D'Assurance Mutuelle; C.E. Heath Compensation and Liability Insurance Company, as Successor to Employers' Surplus Lines Insurance Company; Centennial Insurance Company; Central National Insurance Company of Omaha; Chicago Insurance Company; City Insurance Company; Colonia Versicherung Aktiengesellschaft; Columbia Casualty Company; Commercial Union Insurance Company, as Successor to Columbia Casualty Company, Employers Commercial Union Insurance Company, Employers Commercial Union Insurance Company of America, and Employers' Liability Assurance Corporation Limited; Compagnie Europeenne D'Assurances Industrielles S.A.; the Constitution State Insurance Company; Continental Casualty Company; Employers Mutual Casualty Company; Evanston Insurance Company; Executive re Indemnity, Inc., as Successor to American Excess Insurance Company; Federal Insurance Company; General Reinsurance Corporation; Gibraltar Casualty Company; Government Employees Insurance Company; Granite State Insurance Company; Great American Insurance Company, Individually and as Successor to Transport Indemnity Company; Highlands Insurance Company; the Home Indemnity Company; the Home Insurance Company; Houston General Insurance Company; Hudson Insurance Company; INSCO, Limited; Insurance Company of the State of Pennsylvania; Interstate Fire & Casualty Company; Jefferson Insurance Company of New York; Landmark Insurance Company; La Preservatrice Fonciere Tiard, Individually and as Successor to La Fonciere Assurances Transports Accidents and La Preservatrice; Le Secours; Lexington Insurance Company; Lilloise D'Assurances, as Successor to Lilloise D'Assurances Et De Reassurances; London Guarantee and Accident Company of New York; Lumbermens Mutual Casualty Company; Maryland Casualty Company; Mead Reinsurance Corporation; Michigan Mutual Insurance Company; Mutuelle Generale Francaise; National American

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Insurance Company of California, as Successor to the Stuyvesant Insurance Company; National Union Fire Insurance Company of Pittsburgh, Pa.; Northbrook Indemnity Company; North Star Reinsurance Corporation; Northwestern National Insurance Company, Individually and as Successor to Bellefonte Insurance Company; Old Republic Insurance Company; Pennsylvania Manufacturers' Association Insurance Company; the Protective National Insurance Company of Omaha; Prudential Reinsurance Company; Puritan Insurance Company, Individually and as Successor to the Manhattan Fire and Marine Insurance Company; Ranger Insurance Company; Republic Insurance Company; SAFECO Insurance Company of America; Safety National Casualty Corporation, as Successor to Safety Mutual Casualty Corporation; St. Paul Fire and Marine Insurance Company, Individually and as Successor to Birmingham Fire Insurance Company; St. Paul Guardian Insurance Company; St. Paul Surplus Lines Insurance Company; Stonewall Insurance Company; Stonewall Surplus Lines Insurance Company; Sun Alliance and London Insurance PLC; Tokio Marine & Fire Insurance Company; the Travelers Indemnity Company; the Travelers Insurance Company; Unigard Security Insurance Company, as Successor to Unigard Mutual Insurance Company; Union Des Assurances De Paris; Yosemite Insurance Company; Certain Underwriters at Lloyds of London, (Including John Does 1 to 200, Being Fictitious Names), and Certain London Market Companies (Including John Does 201 to 400, Being Fictitious Names), Third–Party Defendants, Gregory Gore, William C. Ferrel, Michael P. Conley, and Lynn A. Conley; their attorneys, agents and employees; and the class they purport to represent in the action filed in the Circuit Court of Monongalia County, West Virginia on March 17, 1993, captioned Gore et al. v. Amchem Products, Inc. et al., C.A. No. 93–C–195, [*] Appellants.

No. 93–1482.

Argued July 27, 1993.

Decided Dec. 1, 1993.

Synopsis

In class action against asbestos miners, manufacturers, distributors and suppliers, the United States District Court for the Eastern District of Pennsylvania, Lowell A. Reed, Jr., J., issued preliminary injunction against absent members of plaintiff class from prosecuting separate class action in state court or initiating similar actions in any other forum, and appeal was taken. The Court of Appeals, Mansmann, Circuit Judge, held that: (1) district court did not have personal jurisdiction over the absent plaintiffs and issuance of injunction was premature where absent plaintiffs had not yet been afforded opportunity to opt out; (2) district court was obliged to ascertain, at least in a preliminary fashion, its own subject matter jurisdiction before issuing injunction in aid of that jurisdiction; (3) district court's jurisdiction would be recognized in light of its subsequent determinations on those matters; and (4) injunction was appropriate as necessary in aid of jurisdiction under the Anti-Injunction Act and the All-Writs Act, given establishment of opt-out period, where prospect of settlement was imminent and the plaintiffs in the state suit were seeking to challenge in state court the propriety of the federal class action.

Affirmed.

Attorneys and Law Firms

***192** Gene Locks, Jonathan W. Miller, Greitzer & Locks, Philadelphia, PA, Ronald L. Motley, Joseph Rice, Ness, Motley, Loadholt, Richardson & Poole, Charleston, SC, L. Joel Chastain, Desa A. Ballard, Ness, Motley, Loadholt, Richardson & Poole, Barnwell, SC, for appellees Edward M. Carlough, Pavlos Kekrides, Nafssica Kekrides, Laverne Winbun, Ambrose Vogt, Jr., Joanne Vogt, Carlos Raver, Dorothy M. Raver, John A. Baumgartner, Anna Marie Baumgartner, Timothy Murphy, Gay Murphy, Ty T. Annas, Fred Angus Sylvester.

John D. Aldock, (argued), Wendy S. White, David M. Battan, Shea & Gardner, Washington, ***193** DC, John G. Gaul, Center for Claims Resolution, Princeton, NY, for appellees Amchem Products, Inc., A.P. Green Ind., Inc., Armstrong World Industries, Inc., Certainteed Corp., CE Thurston & Sons, Dana Corp., Ferodo America, Inc., Flexitallic, Inc., GAF Bldg. Materials, I.U. North

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America, Inc., Maremont Corp., Nat. Gypsum Co., Nat. Ser. Ind., Inc., NOSROC Corp., Pfizer, Inc., Quigley Co., Inc., Shook & Fletcher Insulation Co., T & N PLC, Union Carbide Chemicals and Plastics Corp., U.S. Gypsum.

Elit R. Felix, II, Margolis, Edelstein, Scherlis & Kraemer, Philadelphia, PA, for appellees Allianz Ins. Co., Allianz Underwriters, individually and as successor to Allianz Underwriters Inc., Argonaut Ins. Co., Chicago Insurance Co., Interstate Fire & Cas. Co.

Joseph M. Oberlies, Connor & Weber, Philadelphia, PA, for appellee American Centennial Ins.

Stephen F. Brock, Manta & Welge, Philadelphia, PA, for appellees American Re–Insurance Co., Exec. re Indem., as successor to American Excess Ins. Co.

Lawrence M. Silverman, Silverman, Coopersmith & Frimmer, Philadelphia, PA, for appellees Central Nat. Ins. Co. of Omaha; Protective Nat. Ins. Co. of Omaha.

John P. O'Dea, Stradley, Ronon, Stevens & Young, Philadelphia, PA, for appellees Columbia Cas. Co., Cont. Cas. Co.

Jay M. Levin, Cozen & O'Connor, Philadelphia, PA, for appellee Commercial Union Ins. Co., as successor to Columbia Cas. Co., Employers Commercial Union Ins. Co., Employers Commercial Union Ins. Co. of America, and Employers' Liability Assur. Corp. Ltd.

Daniel P. Lynch, Timby, Brown & Timby, Philadelphia, PA, for appellees Constitution State, Travelers Indem. Co., Travelers Ins. Co.

David J. D'Aloia, Sean R. Kelly, Saiber, Schlesinger, Satz & Goldstein, Newark, NJ, for appellees Gibraltar Cas. Co., Prudential Reins. Co.

Rudolph Garcia, Saul, Ewing, Remick & Saul, Philadelphia, PA, for appellee Maryland Cas. Co.

Lewis R. Olshin, Duane, Morris & Heckscher, Philadelphia, PA, for appellee Pa. Mfg. Assn. Ins. Co.

Stephen P. Chawaga, Fitzpatrick & Tanker, Philadelphia, PA, Debra M. Patalkis, Chadbourne & Parke, New York City, for appellee Republic Ins. Co.

Thomas W. Henderson (argued), Tybe A. Brett, Antonio D. Pyle, Henderson & Goldberg, Pittsburgh, PA (Scott S. Segal, Segal & Davis, Charleston, WV, of counsel), for appellants Gregory Gore, William C. Ferrel, Michael P. Conley, Lynn A. Conley, their attorneys, agents and employees, and the class they purport to represent in the action filed in the Circuit Court of Monongalia County, WV, on March 17, 1993, captioned Gore et al. v. Amchem Products, Inc., et al., C.A. No. 93–C–195.

David L. Meade, Shinaberry, Meade & Venezia, L.C., William C. Field, James Humphreys, Stuart Calwell, Calwell & McCormick, Charleston, WV, for amicus curiae Shinaberry, Meade & Venezia, L.C., William C. Field, Law Offices of James Humphreys, and Calwell & McCormick.

Before: MANSMANN, GREENBERG and LEWIS, Circuit Judges.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

The appellants, the "*Gore* plaintiffs", are absent members of a purported federal plaintiff class in an action brought pursuant to Federal Rule of Civil Procedure 23(b)(3) for asbestos-related tort damages in the United States District Court for the Eastern District of Pennsylvania. Simultaneously with the federal class action, but prior to the establishment of an opt out period in the federal suit, the *Gore* plaintiffs initiated a class action in the State Circuit Court of Monongalia County, West Virginia, against the same defendants named in the federal class action. The federal district court issued a preliminary injunction pursuant to the Anti–Injunction Act and the All–Writs Act, enjoining the *Gore* plaintiffs from prosecuting their state claims on the ground that the injunction was "necessary in aid" of the federal court's jurisdiction. The *Gore* plaintiffs appeal that injunction.

***194** The *Gore* plaintiffs first asserted that the injunction was not binding on them because it purported to be effective outside of the jurisdictional reach of the federal district court. Essentially, the *Gore* plaintiffs claimed that unresolved jurisdictional challenges to the federal district court's subject matter jurisdiction in the action *sub judice* deprived the district court of authority to issue the injunction. The *Gore* plaintiffs further claimed, among other things, that the district court failed to observe the basic requisite of obtaining personal jurisdiction over the absent class members whom it purported to bind under the

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injunction. The injunction was issued prior to notice to the *Gore* plaintiffs of the commencement of the federal class action, prior to the establishment of the "opt out" period, without the *Gore* plaintiffs' consent to the jurisdiction of the federal court, and without some of the *Gore* plaintiffs having minimum contacts with the Eastern District of Pennsylvania. These claims have since been vitiated by a belated October 6, 1993 order of the district court finding that it indeed had subject matter jurisdiction over the *Carlough* action, and an even more belated October 27, 1993, order of the district court approving notice to be disseminated to the *Carlough* class. Nevertheless, we find that the *Gore* appeal continues to be viable because the question remains whether the injunction, which is still operative over the pending *Gore* action in the state court, is permitted under the "necessary in aid" exception to the interdicts of the Anti–Injunction Act, 28 U.S.C. § 2283, and the All Writs Act, 28 U.S.C. § 1651.

The appellees, numerous asbestos producers jointly represented by the Center For Claims Resolution (the "CCR") and named as defendants in both actions, assert that the district court may consider the merits of the proposed settlement agreement filed simultaneously with the federal class action complaint before the state court entertains the *Gore* plaintiffs' request for declaratory judgment, when such a declaration allegedly would threaten to undermine the district court's oversight of the settlement. Thus they argue that the injunction must continue to be maintained in aid of the district court's jurisdiction. Prior to the elimination of the *Gore* appellants' jurisdictional challenges, the CCR defendants had asserted that because the federal class action was going to afford the *Gore* plaintiffs an opportunity to "opt out," the *Gore* plaintiffs were required to await the establishment and commencement of the "opt out" period and to exercise that option before prosecuting their related state action. The future, but certain, opportunity to "opt out," they argued, dispelled any concerns of comity and federalism.

In light of the district court's resolution of the serious challenges to its jurisdiction, our holding will turn on the application of the "necessary in aid of jurisdiction" exception to the Anti–Injunction and All–Writs Acts. We will also address the issues vitiated by the district court's October 6 and October 27, 1993 opinions because of their currency in our developing class action jurisprudence.

I.

A.

On January 15, 1993, a class action complaint pursuant to Fed.R. of Civ.P. 23(b)(3), an answer and a stipulation of settlement were simultaneously filed in the United States District Court for the Eastern District of Pennsylvania. The complaint was brought on behalf of Edward M. Carlough and other named plaintiffs [1] representing the putative class consisting of

> (a) All persons ... who have been exposed in the United States ..., either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States ..., and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or ***195** death in any state or federal court against the Defendant(s)....
>
> (b) All spouses, parents, children, and other relatives ... of the class members ... who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member ... in any state or federal court against the Defendant(s)....

The "*Carlough* plaintiffs" seek recovery for asbestos-related personal injury caused by the exposure of members of the putative class to the asbestos and asbestos-containing products of the defendants, who are miners, manufacturers, distributors, and suppliers of asbestos or asbestos-containing products, and their predecessors-in-interest, jointly represented by the Center For Claims Resolution. [2] Upon the joint motions of the named plaintiffs and the CCR members, the district court issued a conditional class certification order for the class defined in the complaint for purposes of settlement on January 29, 1993. The certification order further indicated that notice to absent class members would be given as to the pendency of the federal class action and of their rights to exclude themselves from the class.

On March 1, 1993, the district court issued a Rule to Show Cause and ordered a preliminary hearing on whether

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the action should be finally certified as a Rule 23(b)(3) class and whether the settlement was "fair, adequate and reasonable." The parties were directed to file with the Clerk memoranda of law and any other documents in support of their respective positions no later than March 19, 1993. Among the various motions and objections filed in response to the Rule to Show Cause were challenges to the district court's subject matter jurisdiction under Article III of the United States Constitution and under the federal diversity statute, 28 U.S.C. § 1332, as well as challenges to the district court's personal jurisdiction over the parties. [3] Although these issues were resolved in the interim between the filing of the present appeal and the entering of our opinion and order in this matter, they were pending when the present appeal was taken.

On March 17, 1993, Gregory Gore, a resident of West Virginia, William Ferrel, a resident of Ohio, and Michael and Lynn Conley, residents of Pennsylvania, filed a related asbestos class action complaint, in the state court of West Virginia, under West Virginia law on behalf of themselves and as representatives of a putative class of plaintiffs similarly situated. *Gore et al. v. Amchem Products, Inc., et al.,* C.A. No. 93–C–195 (Circuit Court of Monongalia County, West Virginia). This state class action, which names the same CCR defendants as in the *Carlough* federal class action, was commenced prior to the impending "opt out" period of the federal action and prior to the district court's determination of its subject matter and personal jurisdiction, and seeks as relief a declaration that the proposed *Carlough* settlement is unenforceable and not entitled to full faith ***196** and credit in the West Virginia courts and is not binding on members of the purported West Virginia class. It further seeks a declaration that the *Gore* plaintiffs are adequate representatives of the purported West Virginia class and are authorized to "opt out" of the purported federal class in *Carlough* on behalf of the entire West Virginia class. Finally, the *Gore* action seeks compensatory damages for each member of the West Virginia class for injury caused by the defendants' conduct in violation of West Virginia law, as well as punitive damages. The class of persons defined in the West Virginia suit parallels that defined in the federal *Carlough* suit, except that the West Virginia class is limited to persons whose claims are based on asbestos exposure occurring in West Virginia and is further limited to persons "who do not presently have a diagnosed medical condition related to asbestos."

On April 12, 1993, the defendant members of the CCR sought a temporary restraining order and preliminary injunction enjoining the West Virginia plaintiffs, their attorneys, agents and employees, and the class they purport to represent, from taking any steps in the further prosecution of their state claim or from pursuing similar "duplicative" litigation in any other forum. A telephonic hearing was held two days later concerning CCR's motion, and a temporary restraining order was granted the following day, April 15, valid until April 25, 1993. In issuing the temporary restraining order, the court found that

> [T]he CCR Defendants may suffer irreparable harm in the prosecution of the *Gore* action as the relief prayed for is substantially preemptive in nature as it relates to the present [*Carlough*] case. Further, the court finds CCR Defendants have established a reasonable probability of success on the merits of their request for an injunction and that a [sic] there is a substantial possibility of harm to a multitude of other potential class members, and that the public interest favors the issuance of this temporary restraining order.

Upon the expiration of the terms of the temporary restraining order, and upon a renewed motion for preliminary injunction, the district court extended the temporary restraining order through April 30, 1993 and scheduled a hearing on that date. After the hearing, the court further extended the temporary restraining order through May 5, 1993. When the extension expired, the district court granted a preliminary injunction, restraining and enjoining the *Gore* plaintiffs, their attorneys, agents and employees, and the class they purport to represent "from taking any steps in the prosecution of the [*Gore*] action and from initiating similar litigation in any other forum." The *Gore* plaintiffs appealed this order. During the pendency of this appeal, the district court resolved the challenges to its subject matter jurisdiction, ruling in an October 6, 1993 opinion that it had Article III and 28 U.S.C. § 1332 subject matter jurisdiction over

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the *Carlough* class action.[4] Shortly thereafter, ***197** on October 27, 1993, the district court approved the plan for dissemination and content of notice of the commencement of the federal action to all putative members of the *Carlough* plaintiff class.[5]

B.

The district court grounded its authority for granting the preliminary injunction in the Anti–Injunction Act, 28 U.S.C. § 2283 (1970), and the All–Writs Act, 28 U.S.C. § 1651 (1988). The Anti–Injunction Act provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The All–Writs Act in part provides that:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In granting the injunction, the district court relied on the parallel "necessary in aid of jurisdiction" language of the two Acts and cited several cases in which federal courts have enjoined or upheld injunctions against absent class members who have initiated a duplicative state court suit, derived from the same matters pending in the federal district court. *See, e.g., In re Asbestos School Litigation,* 1991 WL 61156, 1991 U.S.Dist. LEXIS 5142 (E.D.Pa. April 16, 1991) (construing All–Writs Act and Anti–Injunction Act similarly, and holding that stay of state proceeding is "necessary in aid of jurisdiction" when parallel action would seriously impair federal court's flexibility and authority or opportunity to adjudicate as to the *res*), *aff'd mem.,* 950 F.2d 723 (3d Cir.1991); *In re Baldwin–United Corp. (Single Premium Deferred Annuities Ins. Litigation),* 770 F.2d 328 (2d Cir.1985) (injunction proper when multi-defendant opt out class action is so far advanced that it is equivalent to a *res* over which district court requires control, and potential for onslaught of duplicative state proceedings would seriously impair federal court's flexibility and authority); *see also In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332 (5th Cir.1981), *cert. denied,* 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982).

The district court rejected the *Gore* plaintiffs' reliance on our prior holdings in *In re Real Estate Title and Settlement Services Antitrust Litigation,* 869 F.2d 760 (3d Cir.) *cert. denied,* 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 44 (1989) and in *In re Glenn W. Turner Enterprises Litigation,* 521 F.2d 775 (3d Cir.1975). The court distinguished our reversal of the injunction in *In re Real Estate Title* on the ground that it involved an absent class member who was *denied* the opportunity to opt out and who also had never consented to jurisdiction, whereas the *Gore* plaintiffs were going to be afforded an opportunity to opt out of the *Carlough* action. With regard to *In re Glenn Turner,* the district court's decision again turned on the state court plaintiffs' ability to opt out of the federal action. In *In re Glenn Turner,* the successful appeal from the injunction order was brought by the State Attorney General, who as a non-class member, was not eligible to opt out of the federal action. We thus permitted him to maintain a collection suit in state court, which was commenced subsequent to a restitution judgment in state court, but prior to class certification in the related federal action. We held, however, that the injunction as against class members, who could opt out, was valid as a directive ***198** facilitating the efficient management of the federal class action. By analogy, the district court reasoned that once the opt out period is commenced in the *Carlough* action, an unrealized but future certainty at the time the district court issued its order, the *Gore* plaintiffs would then be able to individually opt out of *Carlough* and file claims for asbestos-related injuries against the *Carlough* defendants in the forum of their choice, safeguarding policies of federalism and making the *Gore* action unnecessary. The court characterized the sole purpose of the *Gore* action as "preemptive" of the federal class action.

In addition, the district court rejected the *Gore* plaintiffs' contentions that the federal court lacked personal jurisdiction, finding that the Federal Rules of Civil Procedure allow federal courts to bind absent class members in opt out class actions, even without minimum contacts, without impinging federal due process protections, and concluding that the injunction was "necessary to protect [its] jurisdiction" under the All–Writs Act and the Anti–Injunction Act. [6]

Finally, the court held that issuance of the injunction enjoining absent class members was proper notwithstanding pending jurisdictional motions. Citing *In re Asbestos School Litigation,* 1991 WL 61156, 1991 U.S.Dist. LEXIS 5142 (E.D.Pa. April 16, 1991) (presumption against injunction overcome despite pending jurisdictional issues where time and expense incurred by parties and court on settlement is great and absent class member failed to opt out). Without any preliminary discussion of its jurisdiction, the district court summarily stated that "if it is finally determined that this Court lacks jurisdiction, the injunction over the *Gore* suit will be lifted." App. at 529.

The district court subsequently resolved the jurisdictional challenges and approved the plan for dissemination of notice to be implemented on November 1, 1993, and ending on December 27, 1993. The court set the deadline for opting out of the class for January 24, 1994, and set the final fairness hearing in the *Carlough* action for February 22, 1994.

We have jurisdiction to review a preliminary injunction granted by the district court. 28 U.S.C. § 1292(a)(1). The *Carlough* action was brought in the federal district court pursuant to the diversity statute. 28 U.S.C. § 1332. We will review whether the district court's issuance of the preliminary injunction was within the sound discretion of the court, or whether it was a clear error of law. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931–32, 95 S.Ct. 2561, 2567–68, 45 L.Ed.2d 648 (1975); *Loretangeli v. Critelli,* 853 F.2d 186, 193 (3d Cir.1988).

II.

We discuss first the jurisdictional issues which we find resolved by the two orders of the district court entered subsequent both to the issuance of the preliminary injunction and to the appeal taken from that injunction. We note that neither the Anti–Injunction Act, 28 U.S.C. § 2283 (1970), nor the All–Writs Act, 28 U.S.C. § 1651 (1988), dispels the federal court's jurisdictional requisite or divests the West Virginia court of its jurisdiction to adjudicate the *Gore* action, but rather the judicial authority extended by the Acts is wholly derivative in nature. Thus the application of the Anti–Injunction and All–Writs Acts should have been *preceded* by the satisfaction of jurisdictional prerequisites. *See Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 287, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234 (1970) (exceptions to § 2283 should not be enlarged by liberal statutory construction). Nevertheless, we will recognize the district court's jurisdiction over the *Carlough* action and the *Gore* plaintiffs in light of its belated October orders.

Turning to the question of personal jurisdiction over the *Gore* plaintiffs, we recognize ***199** that it is a fundament of personal jurisdiction in a court of law that a defendant be actually domiciled or present within the territory of the forum court, without which the court would lack authority to bind that defendant. *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Though this standard has been elaborated, and to some extent relaxed, particularly to befit the practical realities of the modern corporate entity and to reflect the replacement of the *capias ad respondendum* with personal service of process and modern forms of notice, it remains beyond cavil, as a general principle of jurisdictional authority, that "in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* (citations omitted). *International Shoe* arose in the state court system and the opinion expressed the due process guarantees of the Fourteenth Amendment; nonetheless, the minimum contacts requirement for personal jurisdiction applies to federal courts having subject matter jurisdiction on the basis of diversity of citizenship as well as cases brought on the basis of a federal claim. *See In re Real Estate Title,* 869 F.2d 760, 766 n. 6 (3d Cir.1989). Thus, it would offend the Fifth Amendment's guarantee of due process for a federal court to enjoin an absentee class member whose minimum contacts with the forum have not been established or, in

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lieu of minimum contacts, who has not consented to the court's jurisdiction, explicitly or inferentially.

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the Supreme Court held that a court may bind an absent *plaintiff* class member to a class action damages judgment, despite the absentee's lack of minimum contacts with the forum, without abrogating minimal due process protection. 472 U.S. 797 at 811–12, 105 S.Ct. at 2974–75. The absentee plaintiff class member's due process rights would be satisfied if the plaintiff received reasonable notice, an opportunity to be heard and to meaningfully partake in the litigation, adequate representation, and "at a minimum ... an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* at 812, 105 S.Ct. at 2975. The Court justified the relaxation of the minimum contacts standard for personal jurisdiction as applied to absent plaintiffs by adverting to the relatively less onerous burdens placed by a state on an absent plaintiff class member as compared to those placed on an absent defendant. *Id.* at 808, 105 S.Ct. at 2973. A plaintiff class member who is afforded an opportunity to opt out, but who fails to exercise that option, may be deemed to have consented to jurisdiction. *Id.* at 812, 105 S.Ct. at 2975. As we noted in *In re Real Estate Title,* "[t]he procedural protections of Fed.R.Civ.P. 23 replace the rigid rules of personal jurisdiction in this context and are all that is needed to meet the requirements of due process." 869 F.2d 760, 766 (3d Cir.1989) (footnote omitted.)

In re Real Estate Title afforded us an opportunity to examine *Shutts* and to reaffirm the critical importance of the right to opt out in drawing any inference of consent to jurisdiction by absent plaintiff class members who otherwise would have no affiliation with the forum. We held that

> [I]f the member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action.

In re Real Estate Title, 869 F.2d at 769. Because neither the opportunity to opt out (or any indicia of consent) nor minimum contacts were present, we held that the federal district court was not authorized to enjoin a state court damages suit brought by two state school boards, the absent plaintiffs in the related federal multi-district class action, against title insurance companies, the defendants in both the federal and state actions, ***200** for violations of state antitrust law. [7] We confirmed that the traditional minimum contacts requirement applies to enjoining a plaintiff who has *not* been allowed to opt out of a class action. *See also Compagnie des Bauxites de Guinea v. Insurance Company of North America,* 651 F.2d 877, 880 (3d Cir.1981) (district court must have personal jurisdiction over party before it can enjoin actions) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 112, 89 S.Ct. 1562, 1570, 23 L.Ed.2d 129 (1969)), *aff'd sub nom Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea,* 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

As in *In re Real Estate Title,* the present case was distinguishable from *Shutts* during the interim when the absent class plaintiffs had not yet been notified and the opt out period had not yet been established in that the *Gore* plaintiffs had not yet been afforded the opportunity to opt out—an essential component of personal jurisdiction in lieu of the more traditional minimum contacts. The lack of personal jurisdiction over the *Gore* plaintiffs at that time is further evidenced in the record by clear indications that the *Gore* plaintiffs did not consent to the district court's jurisdiction. Not only did the *Gore* complaint expressly indicate the desire to be excluded from the federal action, but the *Gore* plaintiffs had not received notice of the *Carlough* proceedings prior to the motions to enjoin their state court actions. *Cf. Battle v. Liberty Nat. Life Ins. Co.,* 877 F.2d 877, 883 (11th Cir.1989) (after Fed.R.Civ.P. 23(b)(3) notice had been effected on about 90% of class, district court properly issued injunctive order pursuant to Anti–Injunction Act). Although an inference of consent might have been drawn from silence or inaction after notice and the running of the opt out period, *Shutts,* 472 U.S. at 806–14, 105 S.Ct. at 2971–75, we find no precedent for assuming consent prior to notice and the commencement of the opt out period. [8] Thus, with neither express or inferred consent, nor minimum contacts, and prior to notice and the commencement of the opt out period, the district court did not have personal jurisdiction

over the *Gore* plaintiffs and did not have authority to bind their actions when it issued the injunction. In short, the district court's pre-notice, pre-opt out period injunction was premature.

We do not believe that the mere promise, even certain eventuality, that the opportunity to opt out of the class will be offered to absent class plaintiffs satisfies the requirements of due process as defined by *Shutts.* There the Supreme Court specifically required that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. at 812, 105 S.Ct. at 2974. Because of this emphasis by the Supreme Court on the *receipt* of the opt out forms, we reject the district court's implication here that the opt out requirement is satisfied in all cases where a class action will provide for the opportunity to opt out.

***201** Thus, prior to notice and the opt out period, and absent minimum contacts with the Pennsylvania forum or consent to its jurisdiction, a federal injunction enjoining state action would violate due process. *See In re Real Estate Title,* 869 F.2d at 762. Strictly and narrowly enforcing the requisite opportunity to opt out for Rule 23 class plaintiffs before exerting personal jurisdiction comports with the overall class action mechanism and is derived from policy considerations bearing upon comity and federalism. Here the district court's premature issuance of the injunction threatened to compromise these principles. Nevertheless, once the district court approved the dissemination of notice and commenced the opt out period pursuant to its October 27, 1993 order, the jurisdictional problem was resolved. Thus, despite the district court's initial jurisdictional overreach, we will recognize its legitimate exercise of personal jurisdiction over the *Gore* appellants.

III.

As with personal jurisdiction, the district court was obliged to ascertain, at least in a preliminary fashion, its own subject matter jurisdiction over the *Carlough* case before issuing an injunction in aid of that jurisdiction. Without this preliminary determination, the court should not have adverted to the Anti–Injunction Act or the All–Writs Act for authority to issue the injunction, especially in light of the fact that serious challenges to the court's Article III jurisdiction in *Carlough* were pending at time the court enjoined the *Gore* plaintiffs. *Cf. Atlantic Coast Line,* 398 U.S. at 295, 90 S.Ct. at 1747 (stating that "if the District Court does have jurisdiction," it may issue an injunction which is "*necessary in aid of* " that jurisdiction); *In re Baldwin–United Corp.,* 770 F.2d at 335 ("When a federal court has jurisdiction over its case in chief, ... the All–Writs Act grants it ancillary jurisdiction to issue writs 'necessary or appropriate in aid of ' that jurisdiction"). The district court's opinion in support of its preliminary injunction did not indicate any such initial determination with regard to its subject matter jurisdiction, although the court thoroughly addressed the matter in its October 6, 1993 opinion.

We appreciate that an initial jurisdictional inquiry may indicate the need for extensive discovery, which, if undertaken prior to examining whether an injunction is necessary in aid of the court's jurisdiction, could hinder the efficient resolution of the case. A court may need to act promptly to safeguard its jurisdiction in the face of interference by parallel actions brought in a state court. In cases in which complex jurisdictional issues have been raised, the initial jurisdictional determination need not await extensive discovery, but may be based on the information reasonably and immediately available to the court. *Cf. Industrial Electronics Corp. v. Cline,* 330 F.2d 480, 482 (3d Cir.1964) (where jurisdictional issues raised in context of Rule 65 motion for preliminary injunction, movant must establish "reasonable probability of ultimate success upon the question of jurisdiction when the action is tried on the merits"); *see Schell v. Food Machinery Corp.,* 87 F.2d 385, 387 (5th Cir.) ("A federal court may sometimes enjoin proceedings in a state court to protect its own jurisdiction lawfully acquired, but may not interfere even temporarily when it has none"), *cert. denied,* 300 U.S. 679, 57 S.Ct. 670, 81 L.Ed. 883 (1937). Although the district court did not make this initial jurisdictional determination, in light of its in-depth resolution of the matter in its October 6, 1993 opinion, we will recognize the court's subject matter jurisdiction over the *Carlough* action.

IV.

Having determined that the district court satisfactorily, albeit belatedly, ascertained its jurisdictional authority, we turn now to the remaining question of the propriety of the

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court's application of the "necessary in aid" exception to the Anti–Injunction and All–Writs Acts. [9]

***202** In *In re Glenn Turner,* 521 F.2d 775 (3d Cir.1975), we examined the "necessary in aid of the court's jurisdiction" exception to the Anti–Injunction Act. There the Attorney General instituted a collection suit in a state court following a money judgment and just days after the federal district court had certified the federal class action. Nevertheless, execution upon the state court judgment was effectively enjoined by order of the district court, purportedly by authority of the Anti–Injunction Act. In reversing the injunction of the district court, we reiterated that for the "necessary in aid of jurisdiction" exception to apply, " 'it is not enough that the requested injunction is related to that jurisdiction, but it must be "*necessary in aid of* " that jurisdiction.' " *In re Glenn Turner,* 521 F.2d at 780 (citing *Atlantic Coast Line R.R. Co.,* 398 U.S. 281, 295, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970)). We noted that the exception authorizing injunctions necessary in aid of the court's jurisdiction applies only " 'to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.' " *Id.* Finally, we held that Fed.R.Civ.P. 23(b)(3) does not prohibit state proceedings when an action for the same cause is pending in federal court. In recognition of the independence and equivalent stature of the state and federal courts, we held that actions derived from the same cause against the same defendants may be maintained simultaneously in federal and state court. The effect of a judgment in one would be determined by the principle of res judicata. *In re Glenn Turner,* 521 F.2d at 780–81 (citing *Kline v. Burke Constr. Co.,* 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922); *Jos. L. Muscarelle, Inc. v. Central Iron Mfg. Co.,* 328 F.2d 791 (3d Cir.1964)). Moreover, we held that the state citizens on whose behalf judgment was entered in state court "were not proper members of the [federal] class by virtue of the state judgment, rendering unnecessary their opting out before the district court finally determined the class membership." *In re Glenn Turner,* 521 F.2d at 781.

Thus, simultaneous federal and state adjudications of the same in personam cause of action do not of themselves trigger the necessary in aid exception, and the letter and spirit of the Anti–Injunction Act and All–Writs Act counsel a restrictive application of that exception. The Supreme Court has cautioned, in deference to principles of federalism, that

> [a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

Atlantic Coast Line R.R. Co., 398 U.S. 281, 297, 90 S.Ct. 1739, 1748, 26 L.Ed.2d 234 (1970).

Despite the deference paid to the independence of the state courts and principles of comity, there are instances in which courts of appeals have determined that state actions must be enjoined to allow the federal court to proceed ably with pending matters. We find the standard enunciated in these cases in which the courts have upheld issuance of "necessary in aid of" injunctions persuasive and relevant here.

In *In re Asbestos School Litigation,* 1991 WL 61156, 1991 U.S.Dist. LEXIS 5142 (E.D.Pa. April 16, 1991), *aff'd mem.,* 950 F.2d 723 (3d Cir.1991), we affirmed without an opinion, a district court's issuance of an injunction ***203** prohibiting absent class members from pursuing a state court asbestos property damage suit which duplicated a federal school property class action. There, after an absent member in the federal class action failed to opt out, it filed a state court suit against a group of defendants seeking relief corresponding to that in the action pending in federal court. Several of the defendants requested that maintenance of the state court suit be enjoined. Adverting to the complexity of the federal class action and its impending settlement, the court granted the injunction on the ground that the state action so impeded the prosecution of the federal action as to warrant resort to the "necessary in aid" exception.

Our sister circuits have also identified impending and finalized settlements in federal actions as justifying

"necessary in aid of jurisdiction" injunctions of duplicative state actions. In *In re Baldwin United Corp.,* 770 F.2d 328 (2d Cir.1985), a consolidated MDL proceeding, over 100 lawsuits were brought against 26 defendants by holders of securities. After years of negotiations, many defendants agreed to a settlement and signed stipulations to that effect. Prior to the entry of final judgment approving the settlements, the attorneys general of several states made known their intent to commence enforcement suits in their state courts seeking restitution and other damages against some of the defendants. The district court enjoined the imminent state proceedings under the necessary in aid exception to the All–Writs Act, explaining:

> that the existence of actions in the state court would jeopardize its ability to rule on the settlements, would substantially increase the cost of litigation, would create a risk of conflicting results, and would prevent the plaintiffs from benefitting from any settlement already negotiated or from reaching a new and improved settlement in federal court.

Id. at 333.

The Court of Appeals for the Second Circuit affirmed, adding that,

> [t]he existence of multiple and harassing actions by the states could only serve to frustrate the district court's efforts to craft a settlement in the multi-district litigation before it.
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> * * * * * *
>
> Under the circumstances we conclude that the injunction ... was ... unquestionably "necessary or appropriate in aid of" the federal court's jurisdiction.

Id. at 337–38. *See also In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332 (5th Cir.1981), *cert. denied,* 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982) (state court proceeding halted to protect federal jurisdiction over imminent settlement); *Battle v. Liberty National Life Ins.,* 877 F.2d 877, 882 (11th Cir.1989) (collateral state proceedings enjoined under necessary in aid exception); *James v. Bellotti,* 733 F.2d 989, 994 (1st Cir.1984) (provisionally improved settlement may justify protective injunction against state court suits).

Here the prospect of settlement was indeed imminent, as in other cases in which federal courts have issued injunctions. Additionally, as the district court found, the nature of the *Gore* suit provides further justification for the injunction. The *Gore* plaintiffs are not requesting relief strictly parallel to that sought in the federal forum. Rather than requesting damages for exposure to asbestos, the stated purpose of the *Gore* suit is to challenge the propriety of the federal class action, which the district court characterized as a preemptive strike against the viability of the federal suit, and to obtain rulings from the West Virginia state court regarding the West Virginia class members' right to opt out of the federal action. In addition, *Carlough* is an opt out federal class action posing no impediment to the *Gore* plaintiffs' individual exercise of their opt out right and option to commence their own respective lawsuits in the forum of their choice. *Cf. In re Real Estate Title,* 869 F.2d 760, 769 (injunction not proper where no opportunity to opt out); *In re Glenn Turner,* 521 F.2d 775, 778–79 (injunction precluded for non-class members but not precluded as against members of an opt out class where necessary to orderly and efficient federal class management). Thus, we agree with the district court findings that judicial precedent as well as the preemptive ***204** cast of the *Gore* suit and the recent establishment of the opt out period overcome the reluctant disposition of the courts to issue a necessary in aid injunction.

We hold that given the establishment of an opt out period and the *Gore* plaintiffs' ability to opt out, it is within the sound discretion of the district court to enjoin their action in state court. The *Gore* plaintiffs individually are at liberty to pursue litigation of their asbestos-related injury claims in the forum of their choice. This ability abrogates any argument of the *Gore* plaintiffs that their West Virginia rights are not adequately addressed by the federal court settlement. Injunction of that portion of the *Gore* suit seeking a ruling from the West Virginia court permitting a mass opting out of all West Virginia plaintiffs is also necessary in aid of the district court's jurisdiction. At this mature phase of the settlement proceedings and after years of pre-trial negotiation, a mass opting out of West Virginia plaintiffs clearly would be disruptive to

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the district court's ongoing settlement management and would jeopardize the settlement's fruition. In addition, a mass opting out presents a likelihood that the members of the West Virginia class will be confused as to their membership status in the dueling lawsuits. All members of the *Gore* class are only now receiving notice of the federal suit. A declaration by the West Virginia court at this time that all West Virginia members of the federal class are now in the West Virginia suit (and we make no comment as to the legal authority of the West Virginia court to so rule) could cause havoc.

We note also that litigating the propriety of the federal settlement in West Virginia would subject the CCR defendants to unnecessarily duplicative and costly efforts when a fairness hearing has already been scheduled in the district court. Although there is no prohibition against related causes of action being adjudicated in both state and federal forums, two actions here would unduly burden the defendants.

We find it difficult to imagine a more detrimental effect upon the district court's ability to effectuate the settlement of this complex and far-reaching matter than would occur if the West Virginia state court was permitted to make a determination regarding the validity of the federal settlement. Challenges that the settlement violates West Virginia law can be presented to the district court, and those plaintiffs wishing to preserve their claims for West Virginia adjudication may opt out of the federal class.

Given the concerns of the district court to finalize the settlement and given the time invested in reaching that goal, we find that the district court did not abuse its discretion in determining that the injunction should issue. We will, therefore, affirm the order of the district court granting preliminary relief in favor of the defendants.

V.

The order of the district court of May 6, 1993 enjoining the *Gore* plaintiffs, their attorneys, agents and employees, and the class they purport to represent from taking any further steps in the prosecution of their claims in the Circuit Court of Monongalia County, West Virginia, or from initiating similar litigation in any other forum, is affirmed.

All Citations

10 F.3d 189, 62 USLW 2377

Footnotes

* Pursuant to F.R.A.P.Rule 12(a).

1 The named plaintiffs are Edward M. Carlough; Pavlos Kekrides and Nafssica Kekrides; Laverne Winbun; Ambrose Vogt, Jr. and Joanne Vogt; Karlos Raver and Dorothy M. Raver; John A. Baumgartner and Anna Marie Baumgartner; Timothy Murphy and Gay Murphy; Ty T. Annas; Fred Angus Sylvester.

2 The CCR defendants are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Certainteed Corporation; C.E. Thurston & Sons, Inc.; Dana Corporation; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials Corporation; I.U. Northamerica, Inc.; Maremont Corporation; National Gypsum Company; National Services Industries, Inc.; NOSROC Corporation; Pfizer, Inc.; Quigley Company, Inc.; Shook & Fletcher Insulation Company; T & N, plc; Union Carbide Chemicals and Plastics and United States Gypsum Company.

3 Among the pleadings filed in response to the Rule to Show Cause were:

(1) Motion to dismiss claims of plaintiffs Carlough, Vogt, Murphy, and Annas for lack of subject matter jurisdiction and for failure to state a claim, or in the alternative, motion for partial decertification filed by plaintiffs represented by Baron & Budd, C.A. No. 93–0215, United States District Court for the Eastern District of Pennsylvania, March 16, 1993.

(2) Motion to dismiss for lack of jurisdiction under the doctrine of feigned and collusive cases filed by plaintiffs represented by Baron & Budd, C.A. No. 93–0215, United States District Court for the Eastern District of Pennsylvania, March 16, 1993.

(3) Motion to dismiss for lack of case or controversy filed by plaintiffs represented by Henderson & Goldberg, C.A. No. 93–CV–0215, United States District Court for the Eastern District of Pennsylvania, March 17, 1993.

(4) Objections to class certification and approval of the stipulation of settlement filed by plaintiffs represented by Henderson & Goldberg, C.A. No. 93–CV–0215, United States District Court for the Eastern District of Pennsylvania, March 16, 1993.

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4 In an opinion of more than 50 pages, the district court dispelled the various challenges to its Article III jurisdiction, its statutory diversity jurisdiction, allegations of collusion between the named parties, as well as the allegation that the case is moot. In a nutshell, the district court held the following:

> 1. While many members of the *Carlough* class are "exposure-only" plaintiffs, with no measurable or diagnosable manifestation of asbestos related injury, the potential for asbestos-related illness to manifest in "exposure-only" plaintiffs is enough to satisfy the "injury in fact" requirement of Article III standing. Thus, the court has subject matter jurisdiction regardless of the legal significance of the "injury in fact" sustained by the exposure-only plaintiffs.
>
> 2. When punitive damages are included, the amount in controversy for exposure-only plaintiffs is not clearly less than the statutory requisite of section 1332 diversity jurisdiction. Hence, diversity jurisdiction is not destroyed. Furthermore, a settlement for less than the $50,000 statutory requisite does not destroy diversity jurisdiction.
>
> 3. Collusion or feigned adversity may not be inferred to exist between the parties merely from the fact that the complaint and settlement were filed simultaneously, inasmuch as pre-filing settlement negotiations do not evidence "friendly" law suits and the *Carlough* settlement was, at any rate, a contingent proposal between adverse parties. The fact that the CCR defendants agreed to pay class counsel fees is also no indication of collusion, but is rather standard. Thus, the "case or controversy" requirement of Article III is met.
>
> 4. The *Carlough* case is not mooted by the proposed settlement because the proposed settlement, is, of course, contingent on the court's approval.

5 On October 29, 1993, 1993 WL 441720, the district court entered a memorandum and order denying the motions of certain objectors for certification of various orders for interlocutory appeal of the January 29, 1993 order conditionally certifying the *Carlough* class pursuant to 28 U.S.C. § 1292(b) and for stay of the district court's order of October 27, 1993 approving the content of notice and the dissemination scheme. The objectors then filed an emergency motion to stay the October 27, 1993 order, as well as a petition for mandamus directing vacatur of the October 6, 1993 order (subject matter jurisdiction) and the October 27, 1993 order (notice). The emergency motion to stay was denied, and the objectors filed a motion for leave to withdraw the petition for writ of mandamus on November 1, 1993.

6 The *Gore* plaintiffs had further argued that the CCR defendants did not meet the prerequisites for equitable relief under Fed.R.Civ.P. 65. The court dismissed that claim, concluding that the "prerequisites for equitable relief under Rule 65 do not apply to the preliminary injunction requested in this case." Although the *Gore* plaintiffs reassert in this appeal their argument that Fed.R.Civ.P. 65 applies to the preliminary injunction in question, we decide this case on other grounds and hence do not reach this issue.

7 We further noted in *In re Real Estate Title* that, despite the federal court's inability to enjoin the state action, the settlement of the federal class action would still have value to the title companies. We noted that the settlement afforded the title companies the defense that the school boards were precluded from proceeding with the state court on the ground that they were bound to the settlement. In turn, we noted that the school boards could claim inadequate representation in the federal class action, or perhaps raise other due process claims which would invalidate the settlement as to themselves. If the school boards could demonstrate either that they were not members of the federal class, or that the federal proceeding did not comply with due process guarantees, then the state court action would not be prohibited by the terms of the federal class action settlement.

8 It might have been persuasive, as we conjectured in *In re Real Estate Title,* that "in a hybrid class action that involves important injunctive and damage components, a defendant need only consent to a class certification that allows for opt outs in order to avoid due process challenges to the settlement in multiple fora, as long as the court approves that certification." *In re Real Estate Title,* 869 F.2d at 770. But facing the issue squarely in the present case, we find no reason to relax the jurisdictional requisite to a binding in personam judgment beyond *Shutts* and other precedent, which allow an inference of consent to jurisdiction where an absent plaintiff class member is notified and fails to exercise the opt out prerogative.

9 The All–Writs Act, 28 U.S.C. § 1651, provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Anti–Injunction Act, 28 U.S.C. § 2283, states that:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The two statutes act in concert to permit issuance of an injunction. While the Anti–Injunction Act does not provide positive authority for issuance of injunctions, it describes those situations where injunctions are not permitted. The All–Writs Act, by contrast, grants the federal courts the authority to issue injunctions where necessary in aid of their

jurisdiction. The parallel "necessary in aid of jurisdiction" language is construed similarly in both the All–Writs Act and the Anti–Injunction Act. *See In re Asbestos School Litigation,* 1991 WL 61156, 1991 U.S.Dist. LEXIS 5142 (E.D.Pa. April 16, 1991), *aff'd 'mem.,* 950 F.2d 723 (3d Cir.1991).

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 114. Class Actions

28 U.S.C.A. § 1715

§ 1715. Notifications to appropriate Federal and State officials

Effective: February 18, 2005
Currentness

(a) Definitions.--

(1) Appropriate Federal official.--In this section, the term "appropriate Federal official" means--

(A) the Attorney General of the United States; or

(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

(2) Appropriate State official.--In this section, the term "appropriate State official" means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

(b) In general.--Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of--

(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

(2) notice of any scheduled judicial hearing in the class action;

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(3) any proposed or final notification to class members of--

(A)(i) the members' rights to request exclusion from the class action; or

(ii) if no right to request exclusion exists, a statement that no such right exists; and

(B) a proposed settlement of a class action;

(4) any proposed or final class action settlement;

(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

(6) any final judgment or notice of dismissal;

(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

(c) Depository institutions notification.--

(1) Federal and other depository institutions.--In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

(2) State depository institutions.--In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

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(d) Final approval.--An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

(e) Noncompliance if notice not provided.--

(1) In general.--A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

(2) Limitation.--A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

(3) Application of rights.--The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

(f) Rule of construction.--Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.

CREDIT(S)

(Added Pub.L. 109-2, § 3(a), Feb. 18, 2005, 119 Stat. 7.)

28 U.S.C.A. § 1715, 28 USCA § 1715
Current through P.L. 116-16.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Hernandez v. Bridgestone Americas Tire Operations, LLC, S.D.Iowa, June 17, 2015

631 F.3d 913
United States Court of Appeals,
Eighth Circuit.

In re UNITEDHEALTH GROUP INCORPORATED SHAREHOLDER DERIVATIVE LITIGATION.
S. Michael Scheeringa, Objector–Appellant,
Jan Brandin, In the right of and for the benefit of UnitedHealth Group, Inc.; Jacksonville Police & Fire Pension Fund; Louisiana Municipal Police Employees' Retirement System; Louisiana Sheriffs' Pension & Relief Fund; Public Employees' Retirement System of Mississippi; St. Paul Teachers' Retirement Fund; Association; Fire & Police Pension Association of Colorado; Public Employees' Retirement System of Ohio; State Teachers' Retirement System of Ohio; Connecticut Retirement Plans and Trust Funds; Plaintiffs' Coordinating Committee, Plaintiffs–Appellees,
v.
William W. McGuire, M.D.; Stephen J. Hemsley; William C. Ballard, Jr.; James A. Johnson; Thomas H. Kean; Douglas W. Leatherdale; Mary O. Mundinger; Robert L. Ryan; William G. Spears; Gail R. Wilensky; UnitedHealth Group, Inc.; James G. Carlson; Arnold H. Kaplan; David P. Koppe; David J. Lubben; Thomas P. McDonough; Jeannine M. Rivet; R. Channing Wheeler; Travers H. Wills; Richard T. Burke; Donna E. Shalala; Robert J. Sheehy, Defendant–Appellees.

No. 09–2900.
|
Submitted: Nov. 16, 2010.
|
Filed: Jan. 26, 2011.

Synopsis

Background: Following settlement of shareholders' derivative suit, shareholders moved for final approval of settlement and attorney's fees and expenses. The United States District Court for the District of Minnesota, 631 F.Supp.2d 1151, James M. Rosenbaum, J., approved settlement and awarded shareholders $175,000 in computer research costs. Shareholder who was not a named plaintiff in derivative action appealed.

Holdings: The Court of Appeals, Beam, Circuit Judge, held that:

shareholder failed to file a timely and proper objection with district court, as required to have standing to appeal;

notice adequately advised shareholders of terms of settlement; and

online legal research costs were recoverable.

Dismissed.

Attorneys and Law Firms

***915** Edward Frank Siegel, argued, Edward C. Cochran, on the brief, Cleveland, OH, for appellant.

Karl L. Cambronne, argued, Minneapolis, MN, Jack L. Chestnut, Karin Ennette Peterson, Ann E. Walther, Jeffrey D. Bores, Brian F. Rice, Minneapolis, MN, Edward F. Haber, Michelle H. Blauner, Boston, MA, Jay W. Eisenhofer, Alessandra Phillips, Wilmington, DE, Michael J. Barry, Adam Wierzbowski, Beata Gocyk–Farber, C. Chad Johnson, New York, NY, on the brief, for appellee.

Before SMITH, BEAM, and BENTON, Circuit Judges.

Opinion

BEAM, Circuit Judge.

Objector–Appellant S. Michael Scheeringa challenges the district court's order requiring UnitedHealth Group, Inc., (UnitedHealth) to reimburse derivative counsel for online-research expenses that counsel incurred while litigating a shareholder-derivative suit that ended in a large recovery pursuant to a settlement agreement. In response, Appellees filed a motion to dismiss Scheeringa's appeal, arguing that he lacks standing under Federal Rule of Appellate Procedure 3(c) to pursue this appeal. We grant Appellees' motion and dismiss Scheeringa's appeal.

I. BACKGROUND

This appeal arises out of a shareholder-derivative suit against the executives of UnitedHealth, which lasted more than three years before ending in the largest derivative settlement in United States history. Scheeringa is a shareholder who, at all relevant times, owned shares of stock in UnitedHealth. Appellees are UnitedHealth shareholders who served as lead plaintiffs in the derivative suit.

After years of litigation and months of negotiation, parties to the derivative suit reached an initial settlement agreement in 2007. On December 19, 2008, the district court [1] preliminarily approved the proposed settlement and scheduled a hearing to consider its fairness and adequacy. The hearing was set for February 13, 2009. The court also required UnitedHealth to notify all shareholders of the proposed settlement and of their rights as shareholders. The district court approved a Notice of Proposed Settlement of Derivative Lawsuits (Notice) on December 19, 2008, and UnitedHealth mailed it to all record shareholders on or before January 2, 2009. The Notice explained relevant details of the proposed settlement agreement and informed shareholders that derivative counsel intended to request reimbursement to "not to exceed" forty-seven million dollars in fees and expenses. It also notified shareholders that they had a right to object to any part of the settlement—including the request for attorneys fees and costs—and explained that, in order to exercise that right, a shareholder had to send a letter to the court no later than January 23, 2009. The Notice specifically said that, unless a shareholder filed an objection by this deadline, the shareholder ***916** waived his right to object to any part of the settlement—including attorneys fees and costs—and waived his right to appeal.

On January 30, 2009, derivative counsel filed a fee petition, detailing hours worked, hourly rates charged, and expenses incurred. After 5:00 p.m. on February 12, 2009—several weeks after the objection deadline and the day before the settlement hearing—Scheeringa filed a written objection to the settlement agreement. The objection noted Scheeringa did not wish to personally appear at the settlement hearing. In his objection, Scheeringa argued that the settlement agreement was unfair because the Notice sent to shareholders did not satisfy Federal Rule of Civil Procedure 23(h), that the attorneys fees were excessive, and that derivative counsel should not be reimbursed for costs associated with online legal research.

At the settlement hearing, the district court declined to consider Scheeringa's objection because it was untimely. After hearing arguments from the parties, the court approved the settlement agreement and awarded $29,253,853 in attorneys fees and $514,591.78 in litigation expenses, including $175,000 in computer research costs.

Scheeringa filed the instant appeal, arguing that the Notice approved by the district court did not comply with the requirements of Federal Rule of Civil Procedure 23(h) and that the district court abused its discretion by reimbursing derivative counsel for online-research expenses. In October 2010, Scheeringa filed a motion to withdraw the portion of his brief arguing that the Notice UnitedHealth sent out did not comply with the requirements of the Federal Rules of Civil Procedure; Scheeringa conceded that his argument was based on a misreading of Federal Rule of Civil Procedure 23(h), which applies only to certified class actions and not to shareholder derivative suits. Appellees filed a motion to dismiss Scheeringa's appeal for a lack of appellate standing. Both Scheeringa's appeal and Appellees' motion to dismiss are before us.

II. DISCUSSION

A. Appellate Standing

Appellees argue that Scheeringa does not have a right under Federal Rule of Appellate Procedure 3(c) to pursue this appeal because he was not a party to the derivative suit and he did not intervene below. We have not yet decided whether a shareholder who is not a named plaintiff in a derivative action must formally intervene in order to appeal the settlement of that derivative suit, and we do not decide that question today. Rather, we grant Appellees' motion and dismiss Scheeringa's appeal on a more fundamental ground; because Scheeringa did not timely object with the district court, he has no right to appeal its order.

As a general rule, only parties to a lawsuit have the right to appeal an adverse judgment. *Karcher v. May,* 484 U.S. 72, 77, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987). The Supreme Court has carved out narrow exceptions to this rule. Scheeringa argues that one of those exceptions applies here. He relies on *Devlin v. Scardelletti,* where

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the Supreme Court held that, in a certified class action under Federal Rule of Civil Procedure 23, an unnamed class member with no opportunity to opt-out of the class could appeal the district court's approval of the settlement without intervening in the suit. 536 U.S. 1, 14, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002). Appellees counter that *Devlin* is limited to certified class actions and does not apply to shareholder-derivative suits. Neither the Supreme Court nor we have decided whether the *Devlin* exception extends to non-party ***917** shareholders who wish to appeal a derivative-suit-settlement agreement. [2]

However, regardless of its scope, *Devlin* does not control this case. Scheeringa failed to take a basic step that the appellant in *Devlin* took: Scheeringa did not file a timely objection with the district court. We hold that —at a minimum—a shareholder must file a timely and proper objection with the district court before appealing a settlement agreement. *See In re Integra Realty Res., Inc.,* 354 F.3d 1246, 1257–58 (10th Cir.2004) (dismissing appeal where objector failed to follow proper procedure for filing objection). This requirement follows from the fundamental principle of waiver. *Devlin,* 536 U.S. at 13, 122 S.Ct. 2005 (dealing with untimely objections "implicates basic concerns about waiver and should be easily addressable by a court of appeals"). A shareholder —or an unnamed class member for that matter—must file a timely objection pursuant to district court procedure, or else he loses any right he would have otherwise had to appeal a settlement agreement.

The district court properly determined Scheeringa's objection was untimely. In contrast to the more extensive requirements governing notice in certified class actions, the rule governing derivative actions requires only that notice be given to shareholders in "the manner that the court orders." Fed.R.Civ.P. 23.1(c). Here, the district court set a deadline for objections and approved the Notice that UnitedHealth sent out to all shareholders. The district court did not err by declining to consider Scheeringa's objection, which was filed twenty days after the objection deadline and less than twenty-four hours before the settlement hearing. Scheeringa originally argued that the district court erred by finding his objection was untimely because its decision was based on notice that was inadequate under Rule 23(h). However, Scheeringa withdrew this argument, conceding that the more elaborate requirements that apply to certified class actions do not apply to shareholder derivative suits. Aside from the withdrawn argument, Scheeringa's brief contains no argument that his objection should have been considered timely filed.

At oral argument, Scheeringa urged that he should not be penalized for the tardiness of his objection to online-research costs because derivative counsel did not file detailed fee statements until after the objection deadline. Scheeringa cited no authority for this argument. We interpret this argument as challenging the sufficiency of notice provided and conclude it is meritless.

The purpose of a settlement notice is to provide "shareholders with sufficient information for them to make a 'rational decision whether they should intervene in the settlement approval procedure.' " *Maher v. Zapata Corp.,* 714 F.2d 436, 451 (5th Cir.1983) (quoting Wright & Miller, *Federal Practice & Procedure: Civil* § 1839 (1972)). The Notice that UnitedHealth sent out served this purpose. It discussed in detail the terms of the settlement and included an estimate of the fees and expenses that would be requested. Further, it provided a toll free number that allowed shareholders to obtain more information. While the notice ***918** did not specifically itemize all expenses, a notice need not be a complete source of information about a settlement agreement, and shareholders are not permitted to rely on it as such. *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 122 (8th Cir.1975); *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1153 (8th Cir.1999) ("It is well settled that the notice is not required to provide a complete source of information.") (quotations and citations omitted). The notice here was adequate because it provided Scheeringa with sufficient information to either object to the estimated requests for attorney fees and expenses or to inquire further about potential objections. [3] *See Grunin,* 513 F.2d at 122 (noting that it was sufficient if a notice contained a general summary of benefits to class members and an "estimation" of attorneys fees and expenses). Scheeringa neither objected to the fees nor inquired further until the eve of the settlement hearing.

Timely objection is a requirement for a shareholder to appeal a settlement agreement reached in a derivative action. Scheeringa did not timely object and, therefore, has no right to pursue this appeal.

B. Merits

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Even if we were to reach the merits of Scheeringa's claim, we would affirm the district court's reimbursement of online-research expenses. Awards of fees and expenses are committed to the sound discretion of the district court. *Petrovic,* 200 F.3d at 1145. Scheeringa has not established that the district court abused its discretion by reimbursing derivative counsel for online-research costs.

Scheeringa argues that the district court abused its discretion because, under Eighth Circuit precedent, online-research expenses are not reimbursable as a matter of law. In support of this argument, he cites *Standley v. Chilhowee R–IV School District,* 5 F.3d 319 (8th Cir.1993) and *Leftwich v. Harris–Stowe State College,* 702 F.2d 686 (8th Cir.1983). However, Scheeringa overstates the reach of those cases. *Standley* and *Leftwich* both involved the reimbursement of costs under fee-shifting statutes. Districts courts in this circuit have found these cases do not control where, as here, expenses are being reimbursed pursuant to a negotiated settlement. *See, e.g., Yarrington v. Solvay Pharm., Inc.,* 697 F.Supp.2d 1057, 1067 (D.Minn.2010). We agree.

The district court did not abuse its discretion in reimbursing derivative counsel for online-research costs in this case. The Supreme Court has noted that reasonable attorneys fees include litigation expenses when it is "the prevailing practice in a given community" for lawyers to bill those costs separately from their hourly rates. *Missouri v. Jenkins,* 491 U.S. 274, 287, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989). This is how online research typically works in practice. *InvesSys, Inc. v. McGraw–Hill Cos., Ltd.,* 369 F.3d 16, 23 (1st Cir.2004) ("As configured by the provider, computer-aided research is often a variable cost in an individual case—that is, the cost varies (from zero upward) depending on the amount of Westlaw or Lexis service used in the case."). The prevailing view among other circuits is to permit ***919** awards to reimburse counsel for the reasonable costs of online legal research. *Id.; Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 369 F.3d 91, 98 (2d Cir.2004); *In re Continental Illinois Sec. Litig.,* 962 F.2d 566, 570 (7th Cir.1992). The district court did not abuse its discretion by doing so here.

Further, contrary to concerns raised by Scheeringa, this will not result in unfair double billing. Electronic research services "presumably save money by making legal research more efficient." *Role Models Am., Inc. v. Brownlee,* 353 F.3d 962, 975 (D.C.Cir.2004). The cost of online research is normally matched with a reduction in the amount of time an attorney researches. *Haroco, Inc. v. American Nat. Bank & Trust Co. of Chicago,* 38 F.3d 1429, 1440–41 (7th Cir.1994). "[I]f reimbursement at market rates is disallowed, the effect will be to induce lawyers to substitute their own, more expensive time for that of ... the computer." *In re Continental Illinois Sec. Litig.,* 962 F.2d at 570.

Because *Standley* and *Leftwich* do not control, and because it is reasonable to reimburse derivative counsel for online-research services, the district court did not abuse its discretion by reimbursing derivative counsel for online-research expenses.

III. CONCLUSION

For the foregoing reasons, we dismiss Scheeringa's appeal.

All Citations

631 F.3d 913, 78 Fed.R.Serv.3d 862

Footnotes

1 The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota, now retired.

2 There is some support for requiring shareholders that wish to appeal to intervene—even though non-named class members are not required to do so—because of the unique characteristics of a derivative suit, *see Felzen v. Andreas,* 134 F.3d 873, 875–76 (7th Cir.1998), but the majority of courts to consider the question have not required would-be-appellant shareholders to intervene. *See Kaplan v. Rand,* 192 F.3d 60, 67 (2d Cir.1999); *Bell Atl. Corp. v. Bolger,* 2 F.3d 1304, 1310 (3d Cir.1993).

3 Further, Scheeringa could have filed a timely objection with the district court about any relevant information he believed was missing from the Notice—namely the detail about expenses that would be submitted by derivative counsel—and requested an extension of time so that he could examine the detailed fee report before objecting. Again, he failed to do so.

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Hernandez v. Restoration Hardware, Inc., Cal., January 29, 2018

354 F.3d 1246
United States Court of Appeals,
Tenth Circuit.

In re INTEGRA REALTY RESOURCES, INC.; Integra—A Hotel and Restaurant Company; BHC of Denver, Inc., Debtors.
Jeffrey A. Weinman, as Trustee for the Integra Unsecured Creditors' Trust, Plaintiff–Appellee,
v.
Fidelity Capital Appreciation Fund, Defendant–Appellee,
and
Jeffrey D. Zyskowski and Marilyn J. Zyskowski, Defendants–Appellants.
Jeffrey A. Weinman, as Trustee for the Integra Unsecured Creditors' Trust, Plaintiff–Appellee,
v.
Fidelity Capital Appreciation Fund, Defendant–Appellee,
and
Eliezer Eisenberg, Defendant–Appellant.
Jeffrey A. Weinman, as Trustee for the Integra Unsecured Creditors' Trust, Plaintiff–Appellee,
v.
Fidelity Capital Appreciation Fund, Defendant–Appellee,
and
James Caldwell, Joselito Millan, Robert Allen Ward, Marjorie Ward, Marvin Bartling, Dominic Gioioso, Leon Bell, Irwin Yamamoto, and Thomas R. Ulie, as custodian FBO Alexander James Ulie, Defendants–Appellants.
Jeffrey A. Weinman, as Trustee for the Integra Unsecured Creditors' Trust, Plaintiff–Appellee,
v.
Fidelity Capital Appreciation Fund, Defendant–Appellee,
and
Dexter Yamamoto, Ronald Yamamoto, George Yamasaki, Jr., and Edward Blizewski, Defendants–Appellants.
Jeffrey A. Weinman, as Trustee for the Integra Unsecured Creditors' Trust, Plaintiff–Appellee,
v.
Fidelity Capital Appreciation Fund, Defendant–Appellee,
and
E. Thomas Spengler, Defendant–Appellant.

Nos. 99–1547, 99–1548, 99–1569, 99–1586, 00–1018.
|
Jan. 14, 2004.

Synopsis

Background: Claims which belonged to Chapter 11 estate were transferred, pursuant to terms of plan to reorganization, to unsecured creditors' trust, and trustee of trust filed complaint against debtor's shareholders seeking relief for alleged fraudulent transfer and unlawful distribution of dividend. The United States Bankruptcy Court for the District of Colorado, Patricia A. Clark, J., 179 B.R. 264, granted trustee's motion to certify defendant class. Following denial of defendants' motions to dismiss or for entry of summary judgment, 198 B.R. 352, the District Court, Walker D. Miller, J., withdrew reference, and entered order approving proposed settlement. Defendants appealed. The Court of Appeals, Ebel, Circuit Judge, 262 F.3d 1089, entered order dismissing appeals.

Holdings: On subsequent appeal, the Court of Appeals, Stephen H. Anderson, Circuit Judge, held that:

objecting class representative, who had not opted out of class settlement, was party having right to appeal from district court's order approving class settlement;

decision by Court of Appeals on prior appeal, that named representative provided adequate representation for defendant class and that due process in context of defendant class did not require that each class member receive actual notice, was law of the case;

bankruptcy court properly certified defendant class, based on likelihood, as opposed to mere possibility, that adjudication with respect to individual class members would be dispositive of interests of other class members; and

proposed settlement was not excessive.

Affirmed.

Attorneys and Law Firms

***1250** Jeffrey J. Greenbaum, Sills, Cummis, Radin, Tischman, Epstein & Gross, P.A., Newark, NJ (Steven D. Gorelick, Sills, Cummis, Radin, Tischman, Epstein & Gross, Newark, NJ; Chesley K. Culp III and Dianne M. Kueck, Moye, Giles, O'Keefe, Vermeire & Gorrell LLP, Denver, CO, with him on the briefs) for Defendants–Appellants.

John C. Smiley (Harold G. Morris, Jr., and Patrick D. Frye with him on the brief), Lindquist & Vennum, P.L.L.P., Denver, CO, for Plaintiff–Appellee.

Before TACHA, Chief Judge, and ANDERSON and BRISCOE, Circuit Judges.

Opinion

***1251** STEPHEN H. ANDERSON, Circuit Judge.

In these appeals, we consider for a second time challenges to the settlement of a defendant class action arising out of the 1992 bankruptcy of Integra Realty Resources, Inc. ("Integra"). *See Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 262 F.3d 1089 (10th Cir.2001) ("*Integra I*").

The appellants contend that the district court erred in approving the class settlement because: (1) the bankruptcy court's certification of (allegedly) a Fed.R.Civ.P. 23(b)(1)(A) class was improper; (2) inadequate notice to members of the class at every critical stage of the proceedings violated both due process and the requirements of Rule 23; (3) the class members lacked adequate representation because, among other things, the interests of one class representative, Fidelity Capital Appreciation Fund ("Fidelity") and its counsel, designated as lead counsel, conflicted with those of other class members; (4) the settlement was not fairly negotiated, and is unfair, unreasonable, and excessive; (5) the district court erred by failing to weigh various defenses and objections (more fully set out below), and failed to consider other legal and factual issues; and (6) the bankruptcy court erred in denying a dispositive motion seeking to dismiss this action on any of four separate grounds set forth in the motion (more specifically described below).

These issues are substantially identical to the ones raised in *Integra I;* but we addressed only some of them in *Integra I* due to our conclusion that the appellants lacked standing to appeal. [1] The Supreme Court's subsequent decision in *Devlin v. Scardelletti,* 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), undercut that ruling. Accordingly, the appellants here further assert that they and the *Integra I* appellants have "standing" to appeal and that we should reopen the appeals dismissed in *Integra I.* They urge us to reverse the order entered by the district court approving the class settlement, vacate the class settlement and the class certification upon which it was based, vacate the judgments against the appellants entered pursuant to the settlement, and dismiss the action in its entirety. Defendants–Appellants' Br. at 3.

For the reasons set out below, we conclude that certain of these appellants have the right to appeal the settlement and that, therefore, the issues are properly before us. We further conclude that there is no reversible error. Accordingly, we affirm the settlement approval order and resulting judgments of the district court against these appellants.

BACKGROUND

The history of this case is set out in detail in three prior published opinions. *See* ***1252** *Integra I; Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 198 B.R. 352 (Bankr.D.Colo.1996); *Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 179 B.R. 264 (Bankr.D.Colo.1995). We summarize some, and repeat and add to other of those underlying facts as follows.

Integra was incorporated as a hotel business in 1969 and went public in 1980 under the name Brock Hotel Corporation. About that time it expanded into the restaurant business through a subsidiary corporation, ShowBiz Pizza Place, Inc., in which Brock had a 57% stock ownership interest. In 1985 ShowBiz Pizza Place purchased most of the assets of a competitor and changed its name to ShowBiz Pizza Time, Inc. ("ShowBiz"). In 1986 Hallwood Group, Inc. ("Hallwood"), a publicly traded merchant banking firm, entered the picture. It

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implemented a financial restructuring plan through which, in addition to the restructuring of Brock's debt, Hallwood acquired 14% of Brock's stock, placed five Hallwood directors on Brock's seven-person board, and caused Brock to increase its ownership of ShowBiz stock to 90%.

In 1987 Brock, through a wholly-owned subsidiary, BHC Acquisition Corp. ("BAC"), bought most of the assets of Monterey House, Inc. (Tex–Mex restaurants). The financial burden of that acquisition led to a negative cash flow at Brock and reliance on ShowBiz for varying degrees of financial support.

In 1988 Brock was renamed "Integra—a Hotel and Restaurant Company," and continued trading as such on the New York Stock Exchange. At the beginning of the year Integra, pursuing its two lines of business, owned and operated thirty-eight hotels in twenty-two states and, through ShowBiz and BAC, 183 restaurants in twenty-one states. ShowBiz had 125 of the restaurants and BAC had fifty-eight.

In July 1988 Integra and ShowBiz, with Hallwood's continuing involvement, undertook further corporate and financial restructuring. Integra sold BAC to ShowBiz, which then owned Integra's entire restaurant operation. A complex series of debt and securities transactions also took place. Most pertinent to this case, Integra, ShowBiz, and Hallwood agreed to a plan whereby Integra would spin off its 90% stake in ShowBiz to Integra shareholders in December 1988. The spinoff was to be tax free under § 355 of the Internal Revenue Code, 26 U.S.C. § 355, and required no vote by or compensation from the Integra shareholders. The plan contemplated that the ShowBiz stock would be listed and traded on the NASDAQ.

As indicated above, it is alleged that Integra was experiencing financial difficulties that would be exacerbated by the distribution of its restaurant business to its shareholders. Significantly in that regard, prior to the spinoff ShowBiz mailed to each shareholder of Integra or ShowBiz a prospectus containing the following warning, which also appeared in the registration statement filed with the SEC:

> *If ... Integra is unable to satisfy its future cash requirements, a recipient of the [ShowBiz] Common Stock in the Integra Distribution might be required to surrender to a trustee in bankruptcy, or creditors, of Integra the shares of the [ShowBiz] Common Stock received in the Integra Distribution, or the value thereof.*

In re Integra Realty Res., Inc., 198 B.R. at 355 (quoting ShowBiz prospectus) (emphasis added).

The closing took place on December 30, 1988, at which time Integra delivered 3,822,230 shares of ShowBiz common stock to be distributed to the 5,415 record owners of Integra common stock at a final distribution ratio of .429 ShowBiz shares ***1253** for each share of Integra. On January 3, 1989, one day before public trading in ShowBiz stock began, the closing price of Integra was $4–7/8 ($4.88) per share. The next day, January 4, 1989, Integra closed at $1–3/4 ($1.75) per share and ShowBiz closed at $5 ½ ($5.50) per share, amounting, when combined, to a paper loss of $0.77 per Integra share as a result of the spinoff.

After distributing its restaurant business to its shareholders, Integra went straight downhill. Within one year, its stock was at $0.25 per share. The NYSE halted trading in the stock on December 6, 1991, with the price at $0.125 per share. On July 14, 1992 Integra filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, continuing the chain of events which began with the 1988 spinoff and which underlies these appeals.

Meanwhile, ShowBiz stock prospered. It was trading at $51.75 per share (split adjusted) on the date Integra filed its petition in bankruptcy. By December 1, 1997, the date of the amended class settlement agreement between class counsel and the Trustee, ShowBiz shares were at $75.39 (split adjusted) and, by March 6, 1998, a few weeks prior to the fairness hearing on the class action settlement in district court, the stock price reached $101.25 per share (the last quote available in the record). In sum, the aggregate market value of the 3,822,230 shares of ShowBiz stock went from $21,022,265 on the first day of trading after the spinoff to $387,000,787 at the time of the settlement fairness hearing. The aggregate total settlement which the district court was asked to approve, and which is before us (assuming, hypothetically, that all shareholders were to settle at $7.00 per share, without taking into account those who settled separately before class certification) amounts to $26,755,610.

Commencement of the Adversary Proceeding

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In 1994 the bankruptcy court approved Integra's First Amended Chapter 11 Plan of Reorganization (the "Plan"). The Plan canceled the equity interests of the approximately 7,000 shareholders still holding Integra common stock and approved the formation of a trust to act on behalf of Integra's unsecured creditors (the "Trust"). Pursuant to the Plan the bankruptcy court assigned to the Trust a variety of potential claims, including all claims against any person or entity arising from the December 1988 distribution by Integra of the ShowBiz stock.

The Plan also incorporated a settlement agreement between Integra, the Trust and various Hallwood-related individuals and entities with respect to claims that Integra might assert against Hallwood and the five Hallwood-appointed directors. Hallwood paid $9 million directly to the Trust in settlement, and another $1 million to Integra to purchase all of the newly-issued reorganized Integra stock, which amount Integra then assigned to the Trust. Pursuant to the agreement and payment, the bankruptcy court released the settling parties from further liability for Integra's claims, which are defined as follows: "[A]ll Core Claims and Claims ... which Integra and the Bankruptcy Estate ever had or now has or may have at the Effective Date, including without limitations Claims held in Integra's corporate capacity and Claims arising in or under Chapter 5 of the Bankruptcy Code." *Integra I,* 262 F.3d at 1097. In accord with the settlement, the bankruptcy court also issued an injunction barring suits by "All Persons" against or affecting any of the settling parties with respect to these claims. Appellants' App. Vol. 1 at 281–83.

Subsequently, the plaintiff in this case, Jeffrey A. Weinman, as Trustee for the ***1254** unsecured creditors' Trust, filed this adversary proceeding against Fidelity and all other beneficial recipients of the ShowBiz shares distributed in the 1988 spinoff. The suit sought to recover those shares or their value for the benefit of the Trust beneficiaries. The Trustee's theory was that the distribution was a fraudulent transfer pursuant to the Texas Fraudulent Transfer Act, Texas Bus. & Com.Code Ann. §§ 24.001 -.012, or an unlawful dividend pursuant to the Delaware Code, Del.Code Ann. tit. 8, §§ 160, 173 and 174(a). The complaint sought relief pursuant to several provisions of the United States Bankruptcy Code, 11 U.S.C. §§ 105, 544, 550, 1123 and 1145.

Certification of a 23(b)(1) Defendant Class

The original complaint, filed by the Trustee on July 11, 1994, listed over 800 individual shareholders as defendants. This list was expanded to include approximately 6000 defendants by the time of the fourth amended complaint, filed August 30, 1996. The original complaint also requested, pursuant to Fed. R. Bankr.P. 7023, which incorporates Fed.R.Civ.P. 23, that the court certify a defendant class of all spinoff shareholders and designate all 800 defendants listed as class representatives.

On February 5, 1995, the bankruptcy court granted the Trustee's motion and certified a defendant class under Rule 23(b)(1) of "all persons or entities that were the beneficial recipients of the December 1988 transfer of 3,822,230 shares of ShowBiz Pizza Time, Inc. stock from Integra (except those with whom settlement has been reached)." *In re Integra Realty Res., Inc.,* 179 B.R. at 272. However, the court limited the number of class representatives to seven, including Fidelity, which was the largest recipient of ShowBiz shares in the spinoff, and E. Thomas Spengler, one of the appellants in the present appeal. *Id.* After a hearing, the court, in an order dated May 19, 1995, designated Fidelity's counsel as sole class counsel, reasoning that Fidelity's counsel had demonstrated competence to act in that capacity while other attorneys representing other class representatives "have not consistently displayed the same capability or familiarity with the local pleading practice, case management practice and indeed the law in this jurisdiction." Appellants' App. Vol. 2 at 378. Subsequently, in response to the motion of defendants seeking a jury trial, the district court on July 27, 1995 withdrew the reference of this adversary proceeding to the bankruptcy court, but remanded for the administration of all pretrial matters.

Fidelity's Preliminary Dispositive Motion and Subsequent Settlement

Acting on behalf of the class, Fidelity filed a preliminary dispositive motion in the bankruptcy court seeking dismissal of the action on three dispositive grounds: that the distribution constituted a settlement payment and thus under 11 U.S.C. § 546(e) was not subject to recovery by the Trustee; the fraudulent conveyance claim is governed by Delaware law and is therefore barred by Delaware's three-year statute of limitations; and the Delaware unlawful dividend statute does not provide creditors with a claim

against shareholders. *In re Integra Realty Res., Inc.,* 198 B.R. at 353. Fidelity also argued that post-distribution creditors were barred from recovery. *Id.* at 363. The court decided all four issues against Fidelity. *Id.* at 363–65. In an order dated August 8, 1996, the district court denied Fidelity's motion for leave to pursue an interlocutory appeal from that decision.

Thereafter, Fidelity and the Trustee engaged in extended settlement negotiations, reaching an initial agreement in May 1997. In light of this agreement, the district court on November 12, 1997 withdrew its ***1255** remand of the adversary proceeding to the bankruptcy court. In December 1997 the Trustee and Fidelity submitted an amended agreement to the district court. Under the terms of this agreement, each class member would pay the Trustee the lesser of $7 per share of ShowBiz stock received or the amount obtained for the stock if it had been sold.

In accord with Rule 23(e)'s provisions regarding class action settlements, the district court scheduled a fairness hearing for March 24, 1998. The court ordered notice of the settlement and the hearing to be mailed to each known defendant class member at the address according to the Trustee's records. The notice informed class members that the court had set February 24, 1998 as the deadline by which those who wished to submit written comments on the settlement must submit them, and those who wished to object at the fairness hearing must file a Notice of Intention to Appear and Object together with supporting documents. The notice included the court's warning that class members who did not file the requisite notice of intention to appear and object would not be "entitled in any way to contest the approval of the Settlement" at the fairness hearing. Trustee's App. Vol. 3 at 2136.

The vast majority of the class members submitted neither comments nor a notice of intention to appear and object. Among those who did were appellant Dominic Gioioso, who filed written objections, and attorney I. Walton Bader, who filed a notice of intent to appear and object along with written objections on behalf of an informal committee of ShowBiz shareholders as well as a list of individual class members that included appellants Spengler and Thomas R. Ulie as Custodian for Alexander James Ulie.

On March 23, 1998, the day before the settlement fairness hearing was scheduled to take place, the Trustee acquiesced to the demand, expressed in some of the filed objections, that class members be allowed to opt out of the settlement in order to continue litigating their defenses against the Trustee's claims. The Trustee and Fidelity then amended the settlement agreement to include such an opt-out provision.

At the fairness hearing on March 24, 1998, those making appearances in order to object to the settlement included Mr. Bader, on behalf of both the committee and the list of individual class members that included Mr. Spengler and Mr. Ulie as Custodian. The objectors, essentially raising the issues now pursued on appeal, argued that the class certification was improper; that Fidelity had not adequately represented the class; that for various reasons the settlement agreement was not fair and reasonable; that the bankruptcy court erred in denying Fidelity's preliminary dispositive motion; and that the class action notices that had been issued in the case were inadequate to satisfy either the requirements of due process or of Rule 23. In response to the objectors' concern that many class members may not have received the notice of the settlement and hearing, the court ordered the Trustee to submit a report on the deliverability of that notice.

The Trustee did so on April 24, 1998. His report indicates that notice of the settlement and hearing was mailed to the 6,423 known members of the class. Of these, approximately 1,455 notices, representing 296,292 shares, were returned as undelivered. Appellants' App. Vol. 3 at 829.

Following the hearing and the Trustee's submission of this report, the district court on July 7, 1999 issued an order and final judgment approving the settlement agreement with the opt-out provision. Pursuant ***1256** to the court's order, the Trustee gave defendant class members notice of the court's approval both by mail, as before, and by publication. The notice included the deadline—September 15, 1999—by which each class member must either accept the settlement without individual defenses; accept the settlement subject to individual defenses or objections as to the number of shares held; or opt out of the settlement and remain a defendant in the adversary proceeding. Class members who did nothing before the deadline would have individual final judgments entered against them three days after the deadline. Class members who raised individual

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defenses or objections would not have a final judgment entered against them until their individual issues were judicially resolved. *Id.* at 843.

According to the Trustee, only some 250 of the more than 6,000 defendants opted out of the settlement—approximately 4–1/2 percent. Plaintiff–Appellee's Resp. Br. at 10. Additionally, of course, some of the appellants in *Integra I,* and all of those in this appeal, did not opt out, choosing, instead, to appeal. Individual final judgments have been entered against each of the appellants in this case. Appellant Spengler originally asserted an individual defense but then withdrew it and consented to the entry of final judgment.

DISCUSSION

A.

Standing / Right to Appeal

In *Integra I* we dismissed the appeals for lack of standing. We reasoned first that appellants who had opted out of the settlement lacked standing to contest the settlement on appeal. *Integra I,* 262 F.3d at 1103. Next, applying our rule in *Gottlieb v. Wiles,* 11 F.3d 1004 (10th Cir.1993), we held that unnamed class members who had judgments entered against them but who had failed to file intervention motions in the district court, pursuant to Fed.R.Civ.P. 24(a), lacked standing to appeal. *Integra I,* 262 F.3d at 1103.

As indicated above, the Supreme Court subsequently ruled in a class action without opt-out rights that an unnamed class member is not required to seek intervention in the district court in order to appeal, although "object[ion] during the fairness hearing" in the district court remains a requirement. *Devlin,* 536 U.S. at 11, 122 S.Ct. 2005. The Court also clarified that the issue relating to whether a class member can appeal from a district court's approval of a class settlement is not one of Article III jurisdiction or of prudential standing, as we characterized it in *Integra I.* Rather, the issue is "whether [the appellants] should be considered a 'party' for the purposes of appealing the approval of the settlement." *Id.* at 7, 122 S.Ct. 2005. The Court explained that "[n]onnamed class members ... may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id.* at 9–10, 122 S.Ct. 2005. The Court articulated the issue in terms of "the right to appeal." *Id.* at 7, 122 S.Ct. 2005. Accordingly, we proceed on that characterization.

All of the individuals involved in the five appeals now before us were named as defendants at the outset of the suit, prior to class certification. All but three of them neither filed written objections to the settlement nor moved to intervene; nor did they appear at the fairness hearing. One of the remaining three, Mr. Gioioso, filed a written objection but did not file notice of his intent to appear and object and did not appear at the fairness hearing. As indicated above, two others, Mr. Ulie in his custodial capacity and Mr. Spengler, did ***1257** file notices of intention to appear and object and did appear at the fairness hearing through counsel, Mr. Bader. As further indicated above, none of the appellants (including Ulie in his capacity as custodian) opted out of the settlement, and all had final judgments entered against them pursuant to the terms of the settlement.

In asserting their right to appeal, the appellants rely on the fact that they were all originally individually named as defendants in this action. They argue that as named defendants having individual judgments entered against them, they have the right to appeal these judgments. In their view, certification of the case as a class action with named class representatives did not diminish their status as named parties. In so arguing, they necessarily contend that our opinion in *Integra I* was wrong when it classified the originally-named defendants as unnamed members of the class following class certification. *See Integra I,* 262 F.3d at 1104 n. 14. In support, they argue that *Devlin* not only changed the intervention rules we applied in *Integra I,* it clarified how we should treat named parties as well. In any event, they argue, Spengler, Ulie and Gioioso have the right to appeal.

At the outset we note that nothing in *Devlin* overrides the conclusion we reached in *Integra I* that "[d]espite having been named in the complaint, Appellants nonetheless appear now as unnamed class members, because the district court certified the case as a class action and designated representative defendants...." *Id.* Accordingly, we reject the argument here, as we did in *Integra I,* that

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the appellants have the right to appeal judgments entered against them simply because they were originally named as parties.

Additionally, *Devlin* reinforces the proposition that an unnamed class member who does not opt out and desires to appeal a class settlement must at least object in the district court. *Devlin,* 536 U.S. at 11, 122 S.Ct. 2005. A motion to intervene pursuant to Rule 24(a) serves the same purpose. Since all but three of the appellants in these appeals neither objected nor sought to intervene in the district court, we hold that they have no right to appeal.

That leaves appellants Gioioso, Ulie and Spengler, who did object, either directly or through counsel, and who did not opt out. As to them, we first address the Trustee's threshold argument that where the option to opt out of a settlement exists, that forecloses any right to appeal the settlement. Plaintiff–Appellee's Resp. Br. at 19–21. Contrary to the Trustee's assertions, we did not so hold in *Integra I.* Rather, our analysis of the intervention requirement necessarily proceeded on the premise that failure to opt out of the settlement was not itself a bar to appeal. While *Devlin* involved a non-opt out class, the Court's reasoning also suggests that the right of an objecting class member to appeal must be recognized. We now make explicit what we implicitly held in *Integra I* and hold that a class member who does not opt out of a settlement but objects at the fairness hearing and against whom a final judgment is entered has the right to appeal the district court's approval of the settlement. *See Thompson v. Metro. Life Ins.,* 216 F.R.D. 55, 70 (S.D.N.Y.2003). This answers the question we left open in *Rutter & Wilbanks Corp. v. Shell Oil Co.,* 314 F.3d 1180, 1185 n. 2 (10th Cir.2002), as to whether *Devlin* applies to opt-out class settlements.

Under that rule, it would appear that all three objecting class members, Gioioso, Ulie and Spengler, qualify as parties having the right to appeal. But, on further analysis, we cannot reach that conclusion as to Mr. Gioioso because his written objection does not meet the district court's stated requirements for objecting ***1258** at the fairness hearing. The district court allowed class members to file comments on the settlement agreement in writing without making an appearance at the fairness hearing. However, it specified that in order to preserve a right to contest the approval of the settlement at the fairness hearing, a class member must file a Notice of Intention to Appear and Object. This requirement was included in the Notice of Proposed Class Settlement and Rights of Class Members that was mailed to all known class members. Mr. Gioioso presumably received this Notice since he filed written objections in response. We hold that Mr. Gioioso did not take the procedural steps necessary to have "objected during the fairness hearing" as required by *Devlin,* 536 U.S. at 11, 122 S.Ct. 2005.

Messrs. Ulie as custodian and Spengler, however, have the right to appeal. Both, through counsel, filed the required notice of intent and appeared at the fairness hearing. But there is an overriding and dispositive reason as to Mr. Spengler.

As indicated above, Mr. Spengler was designated by the bankruptcy court as one of the seven class representatives when the court certified this suit as a defendant class action. *In re Integra Realty Res., Inc.,* 179 B.R. at 272. As an alternative to our holding that objecting unnamed class members have the right to appeal an opt-out settlement, we also hold that an objecting class representative, who has not opted out of the settlement, is a party having the right to appeal. We implied as much in *Integra I,* 262 F.3d at 1103. Thus, we reject the Trustee's argument that opting out of the settlement was the only permissible avenue for Mr. Spengler to take. In effect, the Trustee's position, unsupported by any direct authority, is that a class action settlement with an opt-out provision can never be appealed, even by a class representative. We disagree. Likewise, we reject the argument that Spengler's consent to a judgment forfeited his right to appeal. A final judgment is a prerequisite to appeal, and was so as to Mr. Spengler. In short, Mr. Spengler is a proper party to appeal, and his appeal is sufficient to bring before us the issues outlined above. [2]

Because Mr. Spengler's appeal is sufficient, and since, as the following discussion shows, we rule for the Trustee on the merits, the other appellants' arguments in support of their right to appeal are, as a practical matter, moot in any event.

B.

Integra I—Law of the Case

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Adequacy of Class Representative and Notice to Class Members

The division of appeals in this case between those considered in *Integra I* and those now before us was for administrative, not for substantive reasons. The case in the district court is common to all appeals, and the central issues, briefs and counsel in the appeals here duplicate those in *Integra I.* Accordingly, as the appellants recognize, Defendants Appellants' Reply Br. at 21–22, the issues raised and decided in *Integra I,* which are raised again here, are subject to the law of the case doctrine.

"The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *United States v.* ***1259** *LaHue,* 261 F.3d 993, 1010 (10th Cir.2001) (further quotation omitted). It "applies to issues previously decided, either explicitly or by necessary implication." *Octagon Res., Inc. v. Bonnett Res. Corp. (In re Meridian Reserve, Inc.),* 87 F.3d 406, 409 (10th Cir.1996) (further quotation omitted). And, " 'when a rule of law has been decided adversely to one or more codefendants, the law of the case doctrine precludes all other codefendants from relitigating the legal issue.' " *LaHue,* 261 F.3d at 1010 (quoting *United States v. Aramony,* 166 F.3d 655, 661 (4th Cir.1999)). The same applies to the claims of fellow class members on direct appeal.

We have emphasized that exceptions to this rule are rare:

> [W]e will depart from the law of the case doctrine in three exceptionally narrow circumstances: (1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice.

Id. at 1010–11 (further quotation omitted).

In *Integra I* we directly considered and decided two major issues raised by the appellants here: "whether Fidelity provided adequate representation for the class members, and whether notice afforded to the appellants was adequate to satisfy the dictates of the Due Process Clause." *Integra I,* 262 F.3d at 1107.

The appellants urge that we reexamine those issues. They invoke the above-described exceptions to the law of the case rule, arguing that *Devlin's* holding on the right to appeal tainted all the issues we decided in *Integra I,* that, in any event, we only narrowly considered those issues, and that fundamental fairness dictates that we take a "fresh look" at the issues in question. Defendants–Appellant's Reply Br. at 21–22. We reject these arguments, as discussed below.

1. Adequacy of Fidelity's Representation

In seeking to avoid our holding in *Integra I* on the adequacy of Fidelity's representation, the appellants accuse the *Integra I* court of "failing to appreciate the seriousness" of the issue and treating it only narrowly. Defendants–Appellants' Br. at 48. In support they cite Wright & Miller's criticism of *Integra I.* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3902.1 at 105–06 & nn. 6–7 (Supp.2003). And, as indicated above, they also invoke the perceived impact of *Devlin* and manifest injustice.

In particular the appellants contend first that "Fidelity was not typical of the class members because it was the largest recipient of ShowBiz stock as a result of the Spin–Off and had sold those shares at a price [$37 per share] higher than practically all other class members." Defendants–Appellants' Br. at 46. Second, they argue that, as a large mutual fund, Fidelity's primary duties to its shareholders conflicted with the interests of the members of the class. *Id.* at 45–46. And, third, they assert that the agreement for the payment of Fidelity's attorneys' fees out of the settlement fund both created and demonstrated a conflict of interest as to members of the class. *Id.* at 47. In short, the appellants contend that Fidelity was not an adequate representative because it was atypical of members of the class and had irreconcilable conflicts, thus violating the requirements of Rule 23(a) and due process.

Each of those arguments, and others, regarding the adequacy of Fidelity's representation, were presented to and considered by us in *Integra I.* See ***1260** Defendants–

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Appellants' Br. (Docket Nos. 99–1483, 99–1498 and 99–1523) at 33–38. We held, in part:

> Fidelity's purported conflicts did not render it inadequate to represent the class either at the beginning of the proceedings or at any later stage of the litigation. Although we recognize that Fidelity's potential liability far exceeded that of any other class member, its interests were aligned with those of the other class members in that all concerned wished to limit their liability to the lowest possible amount. Moreover, Fidelity's ownership of a large block of shares would have created a greater incentive to bring the per-share costs of settlement down to the lowest possible level. For similar reasons, although Fidelity had fiduciary duties to its shareholders in addition to its responsibilities to the class, we do not believe those duties were in conflict because Fidelity's duty to each was vigorously to litigate the class issues and to reduce the class liability as much as possible.
>
> Likewise the settlement agreement's provision for partial payment of Fidelity's expenses in litigating the suit, while potentially troubling, does not in and of itself render Fidelity inadequate.....
>
> In this case, the district court did not abuse its discretion in concluding that Fidelity remained an adequate representative notwithstanding that the settlement agreement created a pool to offset some of their litigation costs.

Integra I, 262 F.3d at 1112.

We are unpersuaded that *Integra I* either failed to consider and decide the issues on representation raised by the appellants here, or that *Devlin* compels us to revisit those issues, or, finally, that any sufficient basis exists to justify ignoring the law of the case established by *Integra I:* Fidelity was an adequate representative of the class.

2. Whether Notice to the Class Members Satisfied Due Process

In *Integra I* we considered (1) whether the pre-certification notice that was given violated due process such that class certification following such notice was improper; (2) whether due process in the context of a defendant class requires that all class members receive actual notice; and (3) whether due process required that new notice of the class settlement be given after the opt-out provision was added and before the fairness hearing took place. *Integra I,* 262 F.3d at 1108–11. Because the Appellants here focus their arguments on the second of these issues, we limit our discussion to whether *Integra I's* holding on that issue is the law of the case.

The *Integra I* appellants, like the Appellants here, argued that "all of the members of the defendant class are entitled to actual notice before they can be bound to a judgment." *Id.* at 1110. We rejected this argument, relying on the Supreme Court's holding that notice satisfies due process when it is " 'reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Id.* (quoting *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). We held that the notice given here satisfied that requirement, even though, for example, 1455 of the 6423 notices sent regarding the settlement fairness hearing were not actually received. *Id.* at 1110–11. We emphasized that the *Integra I* appellants had made "no showing ... that some better method of notification offered a practicable means of notifying the class." *Id.* at 1111.

Appellants add little to the arguments of their fellow class members in *Integra I.* They suggest that, at least in regard to the final notice of the settlement, where the ***1261** district court was aware that the prior notice of the hearing had failed to reach 1455 class members, "the district court should have required greater efforts to reach [those] defendants." Defendants–Appellants' Br. at 52. In support of this claim, they cite one case in which the court had ordered the non-class party to remail notices that were returned by the postal service and to "retain an address research firm to research any returned notices that do not include a forwarding address." *In re The Prudential Ins. Co. of Am. Sales Practices Litig.,* 177 F.R.D. 216, 222 (D.N.J.1997). That court, however, recognized that its notice instructions "far exceeded the requirements of Rule 23 and due process." *Id.* at 232. Here, while the district court did not require the use of an address research service after receiving the Trustee's report on the results of the hearing notice, it did order that notice of the settlement's approval be given by publication as well as by mail. In the absence of a showing by the appellants that another reasonable method of supplementing the Trustee's mailing list would have significantly increased the number of notices actually received, we adhere to *Integra I's* holding that the notice given satisfied due process.

In reaching this conclusion, we are cognizant of the concern that, in some isolated instances, individual class members may have a judgment entered against them without having received actual notice of the opportunity to raise objections or individual defenses before the expiration of the deadline for doing so. *See also* Herbert B. Newberg & Alba Conte, 2 *Newberg on Class Actions* §§ 4:70,:71 (4th ed.2002) (raising the concern that defendant class members without notice may be bound by a settlement even after the statute of limitations for the original claim has run). We are nonetheless persuaded to adhere to *Integra I* based on two of its points in particular. First, we recognized that imposing a requirement of actual notice to every class member would place an impossible constraint on defendant class action litigation. *Integra I,* 262 F.3d at 1110 (citing *Mullane,* 339 U.S. at 313–14, 70 S.Ct. 652). Second, we noted that individual class members may "challenge the binding effect of the settlement as to themselves in a collateral action." *Id.* at 1111 n. 18; *see* 4 Newberg & Conte, *supra,* § 11:64. Based on these considerations, we see no basis for deviating from the law of the case doctrine with regard to the appellants' notice claims.

C.

Whether the Bankruptcy Court's Certification

of this Action as a Defendant Class Action was Proper

We turn now to the first of the two major issues on the merits raised in this appeal and not previously considered in *Integra I.* The appellants contend that we must vacate the settlement agreement because it is based upon an erroneous class certification. We agree that the appropriateness of class certification lies at the heart of this case. Class action settlements are premised upon the validity of the underlying class certification. Moreover, a trial court overseeing a class action retains the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment. *See* Fed.R.Civ.P. 23(c)(1).

We therefore reject the Trustee's argument that the bankruptcy court's certification order is unreviewable because it was interlocutory and thus was made moot by the settlement. Plaintiff–Appellee's Br. at 26. Rather, we hold that the appellants' objections to class certification at the settlement fairness hearing were ***1262** "sufficient to preserve the right of the objectors to contest the class certification on appeal." *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1145 (8th Cir.1999); *see also Namoff v. Merrill Lynch, Pierce, Fenner & Smith (In re Dennis Greenman Sec. Litig.),* 829 F.2d 1539, 1542–43 (11th Cir.1987) ("In order to preserve an appeal from a class settlement, a class member must, during the course of proceedings, object to either the terms of the settlement or to the nature of the class certification.") (citation omitted).

We review the bankruptcy court's certification of a defendant class pursuant to Rule 23(b)(1) for an abuse of discretion. *J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir.1999). "There is no abuse of discretion when the trial court applies the correct criteria [under Rule 23] to the facts of the case." *Id.* (further quotation omitted). We reject the appellants' argument that the heightened scrutiny dictated by *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620–21, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), for settlement-only certifications applies to this case since here, unlike in *Amchem,* the class was certified before settlement negotiations began and the designated class counsel acted as the negotiator for the class. *See Petrovic,* 200 F.3d at 1145–46.

Under Rule 23, a trial court determining whether class certification is appropriate must first find that a proposed class meets the four prerequisites of numerosity, commonality, typicality, and fair and adequate representation set forth in Rule 23(a).[3] Of these, Appellants challenge only the fourth, claiming that Fidelity and its counsel failed to "fairly and adequately protect the interests of the class" as required by Rule 23(a)(4). As we determined above, the law of the case doctrine applies to and resolves the issue of Fidelity's adequacy as a class representative.

Rule 23 also requires the trial court to find that the plaintiff's claim is maintainable as a class action under one of the three categories of suits described in Rule 23(b).[4] *Adamson v. Bowen,* 855 F.2d 668, 675 (10th Cir.1988). Here, as indicated above, the bankruptcy court, on motion of the Trustee, concluded that the Trustee's claim could be maintained under either (b)(1) or (b)(3) and certified

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a defendant class of spinoff shareholders under (b)(1). ***1263** *In re Integra Realty Res., Inc.,* 179 B.R. at 272.

Appellants argue this was error, and the defendant class should have been certified under 23(b)(3), which allows class members to opt out of the class, rather than 23(b)(1), which requires no such opt-out right. [5] They maintain that had the class been certified under (b)(3), Fidelity would have been in a stronger bargaining position vis-a-vis the Trustee when negotiating the settlement. The question, then, is whether the bankruptcy court applied the correct criteria when it determined that 23(b)(1) was the most appropriate category for class certification in this case.

The appellants and the Trustee are at odds in regard to which subsection of Rule 23(b)(1) [6] the bankruptcy court applied. The appellants strongly assert that the bankruptcy court applied subsection (A), evidently believing that certification under subsection (A) would clearly be improper for a suit seeking to recover monetary damages. However, the bankruptcy court failed to specify which subsection of (b)(1) it was applying. Rather, the court's language suggests that it considered both subsections applicable. [7] We conclude that the bankruptcy court certified the class under both subsection (A) and subsection (B) and may therefore uphold the certification under either subsection.

We uphold the bankruptcy court's certification under subsection (B) rather than under subsection (A). A widely-recognized limitation on (b)(1)(A) certification requires that there be "more than the mere possibility that inconsistent judgments and resolutions of identical questions of law would result if numerous actions are conducted instead of one class ***1264** action." *Nat'l Union Fire Ins. Co. v. Midland Bancor, Inc.,* 158 F.R.D. 681, 687 (D.Kan.1994); *see* 2 Newberg & Conte, *supra,* § 4:4. Here, it is not clear that recovery of some ShowBiz shares but not others would require the Trustee to fulfill mutually conflicting obligations. Because we are uncertain regarding the applicability of subsection (A) to this case, we turn to review the bankruptcy court's certification under subsection (B).

We hold that the bankruptcy court properly certified the class under Rule 23(b)(1)(B), based on the court's conclusion that, in the absence of class certification, the Trustee's first suit against a defendant or group of defendants could be dispositive of all remaining suits. This first suit would thus decide the rights of absent shareholders without the class action's assurance that they be adequately represented.

We believe that the particular context of this case distinguishes it from that in which the First Circuit recently held, agreeing with the "vast majority of courts confronted with the question," that "the certification of a class under Rule 23(b)(1)(B) cannot rest solely on an anticipated stare decisis effect." *Tilley v. TJX Cos.,* 345 F.3d 34, 42 (1st Cir.2003). The First Circuit reasoned that if the "mere possibility" of a stare decisis effect on future actions were sufficient to justify a(b)(1)(B) class, "it would render the other categories under Rule 23(b) superfluous" because Rule 23(a)(2) already requires that all class actions have "questions of law or fact common to the class." *Id.* at 41–42.

Here, we are convinced that litigation of the Trustee's fraudulent transfer and unlawful dividend claims against one defendant shareholder would present more than the "mere possibility" of a stare decisis effect on future defendants. For one thing, the issue of whether the ShowBiz spinoff constituted a fraudulent transfer or an unlawful dividend is entirely independent of the identity of the defendant shareholder. There is no allegation that any of the shareholders participated in any fraudulent or unlawful activity. As a mere passive recipient of the ShowBiz stock, a defendant here has only a small number of possible individual defenses, such as the claim that he only acted as a conduit for the actual recipients of the stock, or that he had a smaller number of shares than alleged. In such circumstances, a court's conclusions regarding the primary legal and factual issues in the first case would not only form the basis for the application of stare decisis in subsequent cases; they would almost inevitably prove dispositive in those cases. *See Lynch Corp. v. MII Liquidating Co.,* 82 F.R.D. 478, 483 (D.S.D.1979) (certifying defendant class of shareholders under (b)(1)(B)); *Guy v. Abdulla,* 57 F.R.D. 14, 18 (N.D.Ohio 1972) (holding that (b)(1)(B) certification of a defendant class is appropriate for the purpose of deciding common issues in a bankruptcy trustee's action to recover voidable preferences and fraudulent conveyances).

Also significant is the fact that, were the Trustee to proceed against the defendants individually rather than as a class, he would likely do so in a single forum, the

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Bankruptcy Court of the District of Colorado, pursuant to that court's jurisdiction under 28 U.S.C. § 1334. This probability further increases the likelihood that the first case would prove dispositive.

Appellants argue that "due process requires the provision of opt-out rights in a money damages class action," and that therefore the bankruptcy court's certification of a mandatory (non-opt-out) (b)(1) class is inappropriate in this case. Defendants–Appellants' Br. at 40. For this proposition Appellants rely on the Supreme Court's decision in ***1265** *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), which addressed the due process rights of absent plaintiff class members as to whom the forum state court lacked personal jurisdiction. The question remains open as to class actions in *federal* court. *See Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) (dismissing a writ of certiorari as improvidently granted and thus refraining from deciding whether an opt-out right in monetary damages cases in federal court was constitutionally required). Moreover, *Shutts* expressly limited its holding "to those class actions which seek to bind known *plaintiffs* concerning claims wholly or predominately for money judgments." *Shutts,* 472 U.S. at 811 n. 3, 105 S.Ct. 2965 (emphasis added). The Ninth Circuit's *Brown* decision, applying *Shutts* to federal court actions, also dealt with a plaintiff class. *Brown v. Ticor Title Ins. Co.,* 982 F.2d 386, 392 (9th Cir.1992), *cert. dismissed, Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). Essentially, these decisions allow potential plaintiffs to take their chances in regard to whether a class action or an individual suit would be most effective in maximizing the amount of damages they might recover.

Regardless of whether *Shutts* ' reasoning would apply in the general context of defendant class actions in federal court where the plaintiff seeks primarily monetary damages, we do not think it applies here. "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.' " *Bowen v. Massachusetts,* 487 U.S. 879, 893, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988). The Trustee's action, under § 550 of the Bankruptcy Code, was an attempt to "recover ... property transferred, or if the court so orders, the value of such property." 11 U.S.C. § 550(a). This provision "[n]owhere ... speak[s] in terms of 'liability' for a wrongful act or in terms of 'money damages.' " *Branch v. F.D.I.C.,* 825 F.Supp. 384, 419 (D.Mass.1993). " 'The legislative theory' " in such an action " 'is cancellation [of the transfer], not the creation of liability for the consequences of a wrongful act.' " *Id.* (quoting *Robinson v. Watts Detective Agency, Inc.,* 685 F.2d 729, 738 (1st Cir.1982)).

This distinction is relevant for our due process analysis because, unlike the typical class action damage case, where "the individual circumstances of each class member are typically of material importance," it is "virtually never the case" that the proceeds of a single fraudulent transfer or unlawful dividend would be recoverable from one defendant shareholder but not from another. *Turner v. Bernstein,* 768 A.2d 24, 33 (Del.Ch.2000). This is certainly true here because the Trustee's right to recover the ShowBiz stock or its value depends entirely on the propriety of Integra's spinoff under applicable bankruptcy and other law. The culpability of individual defendants is of no consequence in this analysis. In the event that a court had declared the spinoff a fraudulent transfer or unlawful dividend, judgment against each defendant would be calculated according to "a common formula or guideline," 2 Newberg & Conte, *supra,* § 4:49, based on the amount of ShowBiz stock each defendant had received, and subject only to limited individual defenses, which are not waived as a result of class certification. In such a context, certification of a mandatory defendant class does not violate due process as long as the class is adequately represented. *Hansberry v. Lee,* 311 U.S. 32, 43, 61 S.Ct. 115, 85 L.Ed. 22 (1940). We thus hold that in the circumstances of this case, certification of a mandatory defendant class was not barred simply because the Trustee sought to recover the ShowBiz stock or its monetary value.

***1266** Consequently, as indicated above, we conclude that the bankruptcy court did not abuse its discretion by certifying a mandatory defendant class under Rule 23(b)(1)(B) rather than an opt-out class under Rule 23(b)(3). The court's decision was in accord with a general preference for certifying defendant classes under 23(b)(1) or (b)(2) rather than (b)(3) in order to promote judicial economy and prevent the class action device from becoming ineffective as a result of numerous opt-outs by individual defendants. *See* 2 Newberg & Conte, *supra,* § 4:64. Because we uphold the bankruptcy court's 23(b)(1)(B) certification, we need not reach the issue of whether settlement negotiations were prejudiced by the alleged inappropriate certification.

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D.

Whether the Settlement Was Fair, Reasonable, and Adequate

Appellants also challenge the fairness, reasonableness, and adequacy of the settlement agreement itself. The district court approved the settlement agreement as fair, reasonable, and adequate based on the four factors outlined in *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir.1984). The court found that (1) the settlement was fairly and honestly negotiated, (2) serious legal and factual questions placed the litigation's outcome in doubt, (3) the immediate recovery was more valuable than the mere possibility of a more favorable outcome after further litigation, and (4) the Trustee and Fidelity believed the settlement was fair and reasonable. Appellants' App. Vol. 3 at 837.

We review a district court's approval of a class action settlement agreement for an abuse of discretion. *Rutter & Wilbanks Corp.*, 314 F.3d at 1186. We will not disturb the district court's approval "absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment." *Id.* at 1187 (further quotation omitted).

We first address the appellants' claim that the terms of the settlement are excessive. Essentially, the appellants argue that the settlement, by requiring defendant class members to pay up to $7 per share of ShowBiz stock, is inherently unfair because even if the Trustee could have succeeded in litigation on the merits, the maximum amount he could have recovered was $5.50 per share. In other words, they contend that the value of the ShowBiz stock, for purposes of 11 U.S.C. § 550(a), could not be more than its price at the time of the spinoff. We reject the appellants' argument because, as discussed below, the amount actually recoverable by the Trustee if he had prevailed on the merits is far from clear.

In the case of a fraudulent transfer, § 550(a) allows a bankruptcy trustee to recover "the property transferred, or if the court so orders, the value of such property." 11 U.S.C. § 550(a). " 'Section 550(a) is intended to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred.' " *Hirsch v. Steinberg (In re Colonial Realty Co.)*, 226 B.R. 513, 525 (Bankr.D.Conn.1998) (quoting *Hirsch v. Gersten (In re Centennial Textiles, Inc.)*, 220 B.R. 165, 176 (Bankr.S.D.N.Y.1998)). Normally this is achieved by allowing the trustee to recover the actual property transferred. *See id.* However, where the property is unrecoverable, "courts allow the trustee to recover the value of the property." *Id.*

This is where the difficulty in our case begins because § 550(a) " 'does not define "value," nor indicate at what time "value" is to be determined.' " *Id.* (quoting *Gennrich v. Montana Sport U.S.A., Ltd. (In re Int'l Ski Serv., Inc.)*, 119 B.R. 654, 658 (Bankr.W.D.Wis.1990)). The court in *In* ***1267** *re Colonial* identified as a general rule that "the market value of the property at the time of transfer, less the consideration received, is the proper measure of recovery under § 550." *Id.* It thus rejected the trustee's argument that the bankruptcy estate should recover the appreciated value of transferred stock.

Our own review of fraudulent transfer cases has revealed no such general rule, however, particularly where the property in question has, as here, appreciated since the time of the transfer. The cases cited by *In re Colonial* and by the appellants in support of this rule all deal with instances where the transferred property had *decreased* in value since the time of the transfer. *See Kepler v. Sec. Pac. Hous. Servs. (In re McLaughlin)*, 183 B.R. 171, 176–77 (Bankr.W.D.Wis.1995); *Shape, Inc. v. Midwest Eng'g (In re Shape, Inc.)*, 176 B.R. 1, 3 (Bankr.D.Me.1994); *Official Creditors Comm. v. Agri Dairy Prods., Inc. (In re James B. Downing & Co.)*, 74 B.R. 906, 911 & n. 6 (Bankr.N.D.Ill.1987). The rationale behind the rule in those cases is to avoid the inequity *to the bankruptcy estate* that would result if the court ordered the return of the actual property at issue. *See Tidwell v. Chrysler Credit Corp. (In re Blackburn)*, 90 B.R. 569, 573 (Bankr.M.D.Ga.1987) ("Because of the depreciable nature of the property involved [here], the Court finds that Trustee is entitled to recover the value of the property at the time of transfer."). As the *In re Colonial* court recognized, " 'the proper focus in [§ 550(a)] actions is not on what the transferee gained by the transaction, but rather on what the bankruptcy estate lost as a result of the transfer.' " *In re Colonial Realty Co.*, 226 B.R. at 525 (quoting *Gill v. Maddalena (In re Maddalena)*, 176 B.R. 551, 557 (Bankr.C.D.Cal.1995)). Rather than *In re Colonial's* rule, we believe the only generally

applicable rule in regard to § 550(a) valuation is that "the time at which the value is measured depends upon the circumstances of each individual case." *Pritchard v. Brown (In re Brown)*, 118 B.R. 57, 60 (Bankr.N.D.Tex.1990) (quoting *In re Blackburn,* 90 B.R. at 573 (citing 4 Collier on Bankruptcy ¶ 550.02 n. 6 (15th ed.1987))).

Cases in which the value of transferred property appreciated after the transfer are rare. We are aware of only one case other than *In re Colonial* dealing with such circumstances, and there the bankruptcy court ordered the return of transferred stock that had appreciated since the transfer. *Cooper v. Ashley Communications, Inc. (In re Morris Communications NC Inc.)*, 75 B.R. 619, 629 (Bankr.W.D.N.C.1987), *rev'd on other grounds by Cooper v. Ashley Communications, Inc. (In re Morris Communications)*, 914 F.2d 458 (4th Cir.1990).

We therefore reject the appellants' assertion that the settlement imposed a cost on shareholders higher than they would ever have to pay if the case proceeded in litigation. As charted in Fidelity's memorandum to the district court in support of the settlement agreement, the value of ShowBiz shares on the stock market since the time of the spinoff ranged from approximately $5.50 to $101.25 per share. Appellants' App. Vol. 4 at 1367. If the lower courts had held that the spinoff constituted a fraudulent transfer or unlawful dividend, defendant class members may have been ordered to return their stock. Alternatively, they may have been ordered to pay an amount somewhere between $5.50 and $101.25 per share. The only way to determine precisely what the outcome would have been was to litigate the case to conclusion (which, we note, defendant class members had the option of doing by opting out of the settlement). We therefore conclude that the terms of the settlement, limiting the Trustee's recovery ***1268** to the lesser of $7 per share or the amount for which the stock was ultimately sold, are not inherently unfair.

The appellants' remaining arguments revolve around the form of the district court's opinion. The appellants argue that the district court "did not adequately support its approval of the Settlement" by explaining the reasons for its approval and for its rejection of the objections that were raised. Defendants–Appellants' Br. at 54–55 (citing *Maher v. Zapata Corp.,* 714 F.2d 436, 455 (5th Cir.1983)). To be sure, " 'a reviewing court [must] have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.' " *Newman v. Stein,* 464 F.2d 689, 692 (2d Cir.1972) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 434, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968)). However, while more extensive explanation by the district court may have been helpful to our review, we will not overturn the district court's decision on the basis of a "merely formal" deficiency as long as the decision finds support in the record. *Protective Comm.,* 390 U.S. at 437, 88 S.Ct. 1157.

The bulk of the appellants' arguments contesting the settlement's fairness concern the district court's alleged failure to take into account various issues and facts in its holding. These include Fidelity's alleged conflict of interest, the propriety of class certification, the likelihood of defendants' success in litigation based on the defenses raised in the preliminary dispositive motion, the Trustee's prior settlement with Hallwood and Hallwood's consequent release from liability related to the spinoff, and the number of objections to the settlement. All of these arguments essentially restate the appellants' contention that the district court erred by failing to explain its holding in sufficient detail, with reference to these facts and issues. We agree with the appellants that all of these factors should have been part of the mix in the district court's consideration of the settlement's fairness. However, for the same reasons explained above, we disagree that the district court's failure to refer to these factors in its order constitutes *definitive* proof that it failed to consider them in reaching its decision.

The district court claimed, in its order and final judgment, to have considered all prior proceedings in the case and all objections and submissions that were made in connection with the proposed settlement, and, in the absence of evidence to the contrary, we assume that it did so. Appellants' App. Vol. 3 at 836. The materials before the district court included the memoranda in support of the settlement submitted by both the Trustee and Fidelity, each of which were supplemented by substantial evidentiary appendices that focused primarily on the history of Integra, its involvement with Hallwood, and the factual details of the spinoff; Integra's financial condition before and after the spinoff; the fluctuating value of ShowBiz stock after the spinoff; and the bankruptcy

court's approval of Integra's reorganization plan. The materials also included all written objections to the settlement. At the settlement fairness hearing, the district court heard from the Trustee's counsel and Fidelity's counsel in support of the settlement, then heard objections presented by Mr. Greenbaum, an attorney appearing on his own behalf, and Walton Bader, representing a number of defendant class members, and also heard individual issues raised by a number of other attorneys and pro se defendants. Appellants' App. Vol. 3 at 699–792. The district court also had before it the bankruptcy court's prior opinions on class certification and Fidelity's ***1269** preliminary dispositive motion. The record thus indicates that the district court was aware of all the issues that appellants now argue should have been considered when determining the settlement's fairness.

Having carefully reviewed the record, in light of the four *Jones* factors listed above, we believe that the district court did not abuse its discretion by approving the settlement. What is clear from the record is that this litigation involved a number of contentious issues that could not have been decided on the merits without extensive further proceedings. We are unwilling to overturn the settlement of this drawn-out case based on the mere possibility that Fidelity and the defendant class could have prevailed, or that Hallwood could have been forced to indemnify all defendant class members, [8] if the case had been tried to its conclusion.

E.

Whether the Bankruptcy Court Erred by Denying Fidelity's Dispositive Motion

In their final argument, the appellants urge us to review the bankruptcy court's denial of Fidelity's dispositive motion and conclude that the court's legal conclusions were in error. Such a review would require us to consider the merits of the ShowBiz shareholders' legal arguments in regard to the Trustee's fraudulent transfer and unlawful dividend claims. The lower courts never reached a final judgment on these issues. Rather, the case has now been resolved, as far as these appellants are concerned, by a settlement agreement, which takes the place of a final judgment on the merits. Significantly, the settlement agreement itself does not preserve the rights of settling parties to appeal the merits of the case. We believe that allowing settling parties to appeal the merits, after the settlement agreement has been upheld, would effectively negate the presumed intent of the settling parties to end their litigation without reaching the merits. We therefore hold that the appellants' claims in regard to the dispositive motion are moot. *See* 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, et al., *supra,* § 3533.2, at 233 (2d ed. 1984) ("Settlement moots an action...."). Here, had the appellants wished to preserve their right to appeal the bankruptcy court's denial of the dispositive motion, they could have done so by opting out of the settlement and receiving a judgment on the merits in the district court.

CONCLUSION

For the foregoing reasons, the decision of the district court upholding the settlement agreement is AFFIRMED.

All Citations

354 F.3d 1246, 42 Bankr.Ct.Dec. 111

Footnotes

1 In both *Integra I* and here we joined numerous appeals for procedural purposes and, as relevant here, the appellants joined in a single opening and reply brief. *See* Fed. R.App. P. 3(b)(2). The same counsel and virtually identical briefs on the merits were before us then and again now.
Due to the congruence of issues in the *Integra I* appeals and the subsequently docketed appeals now before us, we abated these appeals pending our decision in *Integra I.* Following that decision, we ordered the parties to file briefs addressing whether our decision in *Integra I* dictated that these appeals should also be dismissed. Shortly before the Supreme Court's decision in *Devlin v. Scardelletti,* 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), was issued, we ordered the parties to file briefs on the merits. Because the five separate appeals addressed here (Docket Nos. 99–

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1547, 99–1548, 99–1569, 99–1586 and 00–1018) have been combined for convenience, we refer at various places to this appeal in the singular.

2 We note that the caption in *Integra I* lists E. Thomas Spengler among one group of defendant-appellants. It seems that Spengler was included in the caption as a member of the Ad Hoc Protective Committee for ShowBiz Stockholders and thus did not bring his status as class representative to the attention of the court. *See Integra I,* 262 F.3d at 1097–98 nn. 4, 5. More to the point, Mr. Spengler's separate appeal is before us here.

3 **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
Fed.R.Civ.P. 23(a).

4 **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

.....

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(b).

5 **(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

....

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; ...

Fed.R.Civ.P. 23(c)(2).

6 Subsection (1)(A) focuses on the risk of separate adjudications to the nonclass party, here the Trustee, and is satisfied when separate actions would result in "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Fed.R.Civ.P. 23(b)(1)(A). Subsection (1)(B) focuses on the risk of separate actions to the individual potential class members, here the spinoff shareholders, and applies when "adjudications [against] individual members of the class ... would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed.R.Civ.P. 23(b)(1)(B); *see* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *supra,* §§ 1773, 1774 (2d ed.1986).

7 *Compare In re Integra Realty Res., Inc.,* 179 B.R. at 271 (invoking subsection (A)'s concern with the effect of failing to certify on the non-class party by comparing the case here to a prior non-class action where "differing interpretations of the law assured a right of recovery by the trustee in some cases and denied it against other defendants who were similarly situated"); *with id.* (invoking subsection (B)'s concern with the effect of failing to certify on potential class members by noting that if it did not certify a class, "a judge in a later case could be constrained by stare decisis to apply previously adopted rules to different defendants," with the result that "as a practical matter the first suit could be dispositive of the class interests"); *id.* at 272 (concluding that "[c]lass certification will assure that the rights of absent parties are adequately protected and not summarily dealt with by the application of stare decisis from a case to which they were not a party").

8 As we noted in *Integra I,* we express no opinion in regard to whether the Trustee's settlement with Hallwood prevents defendant class members from seeking indemnification from Hallwood. 262 F.3d at 1097 n. 3.

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13

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Smith v. SEECO, Inc., 8th Cir.(Ark.), April 23, 2019

122 S.Ct. 2005
Supreme Court of the United States

Robert J. DEVLIN, Petitioner,
v.
Robert A. SCARDELLETTI, et al.

No. 01–417.
|
Argued March 26, 2002.
|
Decided June 10, 2002.

Synopsis

Retiree sought to intervene in class action to challenge settlement relating to his retirement plan. The United States District Court for the District of Maryland, J. Frederick Motz, Chief District Judge, denied intervention, and retiree appealed. The Court of Appeals for the Fourth Circuit, 265 F.3d 195, affirmed in part, and reversed in part and remanded. Retiree petitioned for certiorari which was granted. The Supreme Court, Justice O'Connor, held that nonnamed class member who objected in a timely manner to approval of class action settlement at the fairness hearing had the power to bring an appeal without first intervening; abrogating *Cook v. Powell Buick, Inc.,* 155 F.3d 758; *Gottlieb v. Wiles,* 11 F.3d 1004; *Guthrie v. Evans,* 815 F.2d 626; and *Shults v. Champion Int'l Corp.,* 35 F.3d 1056.

Reversed and remanded.

Justice Scalia filed dissenting opinion in which Justices Kennedy and Thomas, JJ., joined.

****2006 *1** *Syllabus* [*]

Petitioner retiree participates in a defined benefits pension plan (Plan) that was amended in 1991 to add a cost of living increase (COLA). Because the Plan could not support such a large benefits increase, its trustees ultimately eliminated the COLA in 1997 and filed a class action in the Maryland Federal District Court, seeking a declaratory judgment that the 1997 amendment was binding on all Plan members or that the 1991 COLA was void. Petitioner's separate challenge to the 1997 amendment was dismissed by a New York Federal District Court, which found that the Maryland court should resolve the matter. By this time, the Maryland court had already conditionally certified a class under Federal Rule of Civil Procedure 23(b)(1). After the trustees asked the court to approve their settlement with the class representatives, petitioner moved to intervene. The District Court denied his motion as untimely. It then heard objections to the settlement, including those advanced by petitioner, and approved the settlement. Petitioner appealed. The Fourth Circuit affirmed the District Court's denial of intervention and held that, because petitioner was not a named class representative and because he had been properly denied the right to intervene, he lacked standing to challenge the settlement.

Held: Nonnamed class members like petitioner who have objected in a timely manner to approval of a settlement at a fairness hearing have the power to bring an appeal without first intervening. Pp. 2009–2013.

***2** a) This issue, though framed by the Fourth Circuit as one of standing, does not implicate the jurisdiction of the courts, as petitioner satisfies both constitutional and prudential standing requirements. What is at issue is whether petitioner is a "party" for purposes of appealing the settlement approval, for only a lawsuit's parties, or those that properly become parties, may appeal an adverse judgment. This Court has never restricted the right to appeal to named parties. Petitioner's interest in the settlement approval is similar to those of the nonnamed parties this Court has allowed to appeal in the past. He objected to the settlement at the fairness hearing, as permitted by the Federal Rules of Civil Procedure. And the settlement's approval notwithstanding his objections amounted to a final decision of his right or claim sufficient to trigger his right to appeal. That right cannot be effectively accomplished through the named class representative—once the named parties reach a settlement that is approved over the petitioner's objections, petitioner's interests diverge from those of the class representative. *Marino v. Ortiz,* 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629, in which white police officers who were not members of the class of minority officers who had brought a racial discrimination suit were not allowed to appeal the settlement, is not to the contrary. Although the settlement affected them, the

District Court's decision did not dispose of any right or claim they might have had because they were not class members. Nor does considering nonnamed class members as parties for the purpose of bringing an appeal conflict with any other aspect of class action procedure. **2007 Such members may be parties for some purposes and not for others. What is important here is that they are parties in the sense of being bound by the settlement. Allowing them to appeal a settlement approval when they have objected at the fairness hearing preserves their own interests in a settlement that will bind them, despite their expressed objections before the trial court. Allowing such appeals will not undermine the class action goal of preventing multiple suits. Restricting the power to appeal to those members who objected at the fairness hearing limits the class of potential appellants considerably. Pp. 2009–2011.

(b) This Court rejects the Government's argument that class members should be required to intervene for purposes of appeal. Nor does the Court agree with the Government that the structure of class action procedural rules requires intervention for purposes of appeal. A procedure that allows nonnamed class members to object to a settlement at the fairness hearing without first intervening should similarly allow them to appeal the district court's decision to disregard their objections. Moreover, no statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the *3 right to appeal from an action that finally disposes of one's rights has a statutory basis. 28 U.S.C. § 1291. Pp. 2011–2013.

265 F.3d 195, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined, *post,* p. 2013.

Attorneys and Law Firms

Thomas C. Goldstein, Washington, DC, for petitioner.

Laurence S. Gold, for respondents.

Patricia A. Millett, Washington, DC, for United States as amicus curiae, by special leave of the Court, supporting the respondents.

Opinion

Justice O'CONNOR delivered the opinion of the Court.

Petitioner, a nonnamed member of a class certified under Federal Rule of Civil Procedure 23(b)(1), sought to appeal the approval of a settlement over objections he stated at the fairness hearing. The Court of Appeals for the Fourth Circuit held that he lacked the power to bring such an appeal because he was not a named class representative and because *4 he had not successfully moved to intervene in the litigation. We now reverse.

I

Petitioner Robert Devlin, a retired worker represented by the Transportation Communications International Union (Union), participates in a defined benefits pension plan (Plan) administered by the Union. In 1991, on the recommendation of the Plan's trustees, the Plan was amended to add a cost of living adjustment (COLA) for retired and active employees. As it turned out, however, the Plan was not able to support such a large benefits increase. To address this problem, the Plan's new trustees sought to freeze the COLA. Because they were concerned about incurring Employee Retirement Income Security Act of 1974 (ERISA) liability by eliminating the COLA for retired workers, see 29 U.S.C. § 1054(g)(1) (1994 ed.) (providing that accrued benefits "may not be decreased by an amendment of the plan"), the trustees froze the COLA only as to active employees. Because the Plan still lacked sufficient funds, the new trustees obtained an equitable decree from the United States District Court for the District of Maryland in 1995 declaring that **2008 the former trustees had breached their fiduciary duties and that ending the COLA for retired workers would not violate ERISA. *Scardelletti v. Bobo,* 897 F.Supp. 913 (D.Md.1995); *Scardelletti v. Bobo,* No. JFM–95–52 (D.Md., Sept.8, 1997). Accordingly, in a 1997 amendment, the new trustees eliminated the COLA for all Plan members.

In October 1997, those trustees filed the present class action in the United States District Court for the District

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of Maryland, seeking a declaratory judgment that the 1997 amendment was binding on all Plan members or, alternatively, that the 1991 COLA amendment was void. Originally, petitioner was proposed as a class representative for a subclass of retired workers because of his previous involvement in the issue. He refused to become a named representative, however, preferring to bring a separate action in ***5** the United States District Court for the Southern District of New York, arguing, among other things, that the 1997 Plan amendment violated the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* (1994 ed. and Supp. V). The New York District Court dismissed petitioner's claim involving the 1997 amendment, which was later affirmed by the Second Circuit because:

> "The exact COLA issue that the appellants are pursuing ... is being addressed by the district court in Maryland .... It seems eminently sensible that the Maryland district court should resolve fully the COLA amendment issue." *Devlin v. Transportation Communications Int'l Union,* 175 F.3d 121, 132 (C.A.2 1999).

At the time petitioner's claim was dismissed, the District Court in Maryland had already conditionally certified a class under Federal Rule of Civil Procedure 23(b)(1), dividing it into two subclasses: a subclass of active employees and a subclass of retirees. On April 20, 1999, petitioner's attorney sent a letter to the District Court informally seeking to intervene in the class action. On May 12, 1999, petitioner sent another letter repeating this request. He did not, however, formally move to intervene at that time.

Also in May, the Plan's trustees and the class representatives agreed on a settlement whereby the COLA benefits would be eliminated in exchange for the addition of other benefits. On August 27, 1999, the trustees filed a motion for preliminary approval of the settlement. On September 10, 1999, petitioner formally moved to intervene pursuant to Federal Rule of Civil Procedure 24. On November 12, 1999, the District Court denied petitioner's intervention motion as "absolutely untimely." *Scardelletti v. Debarr,* 265 F.3d 195, 201 (C.A.4 2001). It then heard objections to the settlement, including those advanced by petitioner, and, concluding that the settlement was fair, approved it. App. C to Pet. for Cert. 1–3.

***6** Shortly thereafter, petitioner noted his appeal, challenging the District Court's dismissal of his intervention motion as well as its decision to approve the settlement. The Court of Appeals for the Fourth Circuit affirmed the District Court's denial of intervention under an abuse of discretion standard. 265 F.3d, at 203–204. It further held that, because petitioner was not a named representative of the class and because he had been properly denied the right to intervene, he lacked standing to challenge the fairness of the settlement on appeal. *Id.,* at 208–210.

Petitioner sought review of the Fourth Circuit's holding that he lacked the ability to appeal the District Court's approval of the settlement. We granted certiorari, 534 U.S. 1064, 122 S.Ct. 663, 151 L.Ed.2d 578 (2001), to resolve a disagreement among the Circuits as to whether nonnamed class members who fail to properly intervene may bring an appeal of the approval of a settlement. Compare *Cook v. Powell Buick, Inc.,* 155 F.3d 758, 761 (C.A.5 1998) (holding that nonnamed class members who have not successfully intervened ****2009** may not appeal settlement approval); *Gottlieb v. Wiles,* 11 F.3d 1004, 1008–1009 (C.A.10 1993) (same); *Guthrie v. Evans,* 815 F.2d 626, 628–629 (C.A.11 1987) (same); *Shults v. Champion Int'l Corp.,* 35 F.3d 1056, 1061 (C.A.6 1994) (same), with *In re PaineWebber Inc. Ltd. Partnerships Litigation,* 94 F.3d 49, 53 (C.A.2 1996) (any nonnamed class member who objected at the fairness hearing may appeal); *Carlough v. Amchem Prods., Inc.,* 5 F.3d 707, 710 (C.A.3 1993) (same); *Marshall v. Holiday Magic, Inc.,* 550 F.2d 1173, 1176 (C.A.9 1977) (same).

II

Although the Fourth Circuit framed the issue as one of standing, 265 F.3d, at 204, we begin by clarifying that this issue does not implicate the jurisdiction of the courts under Article III of the Constitution. As a member of the retiree class, petitioner has an interest in the settlement that creates a "case or controversy" sufficient to satisfy the constitutional ***7** requirements of injury, causation, and redressability. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); see also *In re Navigant Consulting, Inc., Securities Litigation,* 275 F.3d 616, 620 (C.A.7 2001).

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Nor do appeals by nonnamed class members raise the sorts of concerns that are ordinarily addressed as a matter of prudential standing. Prudential standing requirements include:

> "[T]he general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

Because petitioner is a member of the class bound by the judgment, there is no question that he satisfies these three requirements. The legal rights he seeks to raise are his own, he belongs to a discrete class of interested parties, and his complaint clearly falls within the zone of interests of the requirement that a settlement be fair to all class members. Fed. Rule Civ. Proc. 23(e).

What is at issue, instead, is whether petitioner should be considered a "party" for the purposes of appealing the approval of the settlement. We have held that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz,* 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) *(per curiam)*. Respondents argue that, because petitioner is not a named class representative and did not successfully move to intervene, he is not a party for the purposes of taking an appeal.

We have never, however, restricted the right to appeal to named parties to the litigation. In *Blossom v. Milwaukee & Chicago R. Co.,* 1 Wall. 655, 17 L.Ed. 673 (1864), for instance, we allowed a bidder for property at a foreclosure sale, who was not a ***8** named party in the foreclosure action, to appeal the refusal of a request he made during that action to compel the sale. In *Hinckley v. Gilman, C. & S.R. Co.,* 94 U.S. 467, 24 L.Ed. 166 (1877), we allowed a receiver, who was an officer of the court rather than a named party to the case, to appeal from an order "relat[ing] to the settlement of his accounts," reasoning that "[f]or this purpose he occupies the position of a party to the suit." *Id.,* at 469. More recently, we have affirmed that "[t]he right of a nonparty to appeal an adjudication of contempt cannot be questioned," *United States Catholic Conference v. Abortion Rights Mobilization, Inc.,* 487 U.S. 72, 76, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988), given the binding nature of that adjudication upon the interested nonparty.

Justice SCALIA attempts to distinguish these cases by characterizing them as appeals from collateral orders to which the appellants "*were* parties." *Post,* at 2014 (dissenting opinion). But it is difficult to ****2010** see how they were parties in the sense in which Justice SCALIA uses the term—those " 'named as a party to an action,' " usually " 'in the caption of the summons or complaint.' " *Post,* at 2013 (quoting Restatement (Second) of Judgments § 34(1), p. 345 (1980); *id.,* Comment *a,* Reporter's Note, at 347). Because they were not named in the action, the appellants in these cases were parties only in the sense that they were bound by the order from which they were seeking to appeal.

Petitioner's interest in the District Court's approval of the settlement is similar. Petitioner objected to the settlement at the District Court's fairness hearing, as nonnamed parties have been consistently allowed to do under the Federal Rules of Civil Procedure. See Fed. Rule Civ. Proc. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs"); see also 2 H. Newberg & A. Conte, Class Actions § 11.55, p. 11–132 (3d ed.1992) (explaining that Rule 23(e) entitles all class members ***9** to an opportunity to object). The District Court's approval of the settlement —which binds petitioner as a member of the class— amounted to a "final decision of [petitioner's] right or claim" sufficient to trigger his right to appeal. See *Williams v. Morgan,* 111 U.S. 684, 699, 4 S.Ct. 638, 28 L.Ed. 559 (1884) (describing the cases discussed above). And like the appellants in the prior cases, petitioner will only be allowed to appeal that aspect of the District Court's order that affects him—the District Court's decision to disregard his objections. Cf. *supra,* at 2008–2009. Petitioner's right to appeal this aspect of the District Court's decision cannot be effectively accomplished through the named class representative—once the named parties reach a settlement that is approved over petitioner's objections, petitioner's interests by definition diverge from those of the class representative.

*Marino v. Ortiz, supra,*is not to the contrary. In that case, we refused to allow an appeal of a settlement by a group of white police officers who were not members of the class of

minority officers that had brought a racial discrimination claim against the New York Police Department. Although the settlement affected them, the District Court's decision did not finally dispose of any right or claim they might have had because they were not members of the class.

Nor does considering nonnamed class members parties for the purposes of bringing an appeal conflict with any other aspect of class action procedure. In a related case, the Seventh Circuit has argued that nonnamed class members cannot be considered parties for the purposes of bringing an appeal because they are not considered parties for the purposes of the complete diversity requirement in suits under 28 U.S.C. § 1332. See *Navigant Consulting,* 275 F.3d, at 619; see also *Snyder v. Harris,* 394 U.S. 332, 340, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969). According to the Seventh Circuit, "[c]lass members cannot have it both ways, being non-parties (so that more cases can come to federal court) but still having a party's ability to litigate independently." 275 F.3d, at 619. Nonnamed class members, ***10** however, may be parties for some purposes and not for others. The label "party" does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.

Nonnamed class members are, for instance, parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them. See *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). Otherwise, all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation ****2011** involving a large number of class members with similar claims—would be defeated. The rule that nonnamed class members cannot defeat complete diversity is likewise justified by the goals of class action litigation. Ease of administration of class actions would be compromised by having to consider the citizenship of all class members, many of whom may even be unknown, in determining jurisdiction. See 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1755, pp. 63–64 (2d ed.1986). Perhaps more importantly, considering all class members for these purposes would destroy diversity in almost all class actions. Nonnamed class members are, therefore, not parties in that respect.

What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing. To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court. Particularly in light of the fact that petitioner had no ability to opt out of the settlement, see Fed. Rule Civ. Proc. 23(b)(1), appealing the approval of the settlement is petitioner's only ***11** means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.

Justice SCALIA rightly notes that other nonnamed parties may be bound by a court's decision, in particular, those in privity with the named party. See *post,* at 2015. True enough. It is not at all clear, however, that such parties may not themselves appeal. Although this Court has never addressed the issue, nonnamed parties in privity with a named party are often allowed by other courts to appeal from the order that affects them. 5 Am.Jur.2d, Appellate Review § 265 (1995).

Respondents argue that, nonetheless, appeals from nonnamed parties should not be allowed because they would undermine one of the goals of class action litigation, namely, preventing multiple suits. See *Guthrie v. Evans,* 815 F.2d, at 629 (arguing that allowing nonnamed class members' appeals would undermine a "fundamental purpose of the class action": "to render manageable litigation that involves numerous members of a homogenous class, who would all otherwise have access to the court through individual lawsuits"). Allowing such appeals, however, will not be as problematic as respondents claim. For one thing, the power to appeal is limited to those nonnamed class members who have objected during the fairness hearing. This limits the class of potential appellants considerably. As the longstanding practice of allowing nonnamed class members to object at the fairness hearing demonstrates, the burden of considering the claims of this subset of class members is not onerous.

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III

The Government, as *amicus curiae,* admits that nonnamed class members are parties who may appeal the approval of a settlement, but urges us nonetheless to require class members to intervene for purposes of appeal. See Brief for ***12** United States et al. as *Amici Curiae* 12–27. To address the fairness concerns to objecting nonnamed class members bound by the settlement they wish to appeal, however, the Government also asserts that such a limited purpose intervention generally should be available to all those, like petitioner, whose objections at the fairness hearing have been disregarded. Federal Rule of Civil Procedure 24(a)(2) provides for intervention as of right:

> "Upon timely application ... when the applicant claims an interest relating to the property or transaction which is the ****2012** subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

According to the Government, nonnamed class members who state objections at the fairness hearing should easily meet these three criteria. For one thing, it claims, a settlement binding on them will establish the requisite interest in the action. Moreover, it argues, any intervention motion filed "within the time period in which the named plaintiffs could have taken an appeal" should be considered "timely filed" for the purposes of such limited intervention. *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 396, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977). Finally, it asserts, the approval of a settlement over a nonnamed class member's objection, and the failure of a class representative to appeal such an approval, should "invariably" show that the class representative does not adequately represent the nonnamed class member's interests on appeal. Brief for United States et al. as *Amici Curiae* 20.

Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the Government's suggested requirement. It identifies only ***13** a limited number of instances where the initial intervention motion would be of any use: where the objector is not actually a member of the settlement class or is otherwise not entitled to relief from the settlement, where an objector seeks to appeal even though his objection was successful, where the objection at the fairness hearing was untimely, or where there is a need to consolidate duplicative appeals from class members. *Id.,* at 23–25. In such situations, the Government argues, a district court can disallow such problematic and unnecessary appeals.

This seems to us, however, of limited benefit. In the first two of these situations, the objector stands to gain nothing by appeal, so it is unlikely such situations will arise with any frequency. Justice SCALIA argues that if such objectors were undeterred by this fact at the time they filed their original objections, they will be undeterred at the appellate level. See *post,* at 2016–2017. This misunderstands the point. As to the first group—those who are not actually entitled to relief—one would not expect them to have filed objections in the district court in the first place. The few irrational persons who wish to pursue one round of meaningless relief will, I agree, probably be irrational enough to pursue a second. But there should not be many of such persons in any case. As for the second—those whose objections were successful at the district court level—they were far from irrational in the filing of their initial objections, and they should not generally be expected to lose this level of sensibility when faced with the prospect of a meaningless appeal. Moreover, even if such cases did arise with any frequency, such concerns could be addressed by a standing inquiry at the appellate level.

The third situation—dealing with untimely objections—implicates basic concerns about waiver and should be easily addressable by a court of appeals. A court of appeals also has the ability to avoid the fourth by consolidating cases raising ***14** duplicative appeals. Fed. Rule App. Proc. 3(b)(2). If the resolution of any of these issues should turn out to be complex in a given case, there is little to be gained by requiring a district court to consider these issues, which are the type of issues (standing to appeal, waiver of objections below, and consolidation of appeals)

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typically addressed only by an appellate court. As such determinations still would most likely lead to an appeal, such a requirement would only add an additional layer of complexity before the appeal of the settlement approval may finally be heard.

**2013 Nor do we agree with the Government that, regardless of the desirability of an intervention requirement for effective class management, the structure of the rules of class action procedure requires intervention for the purposes of appeal. According to the Government, intervention is the method contemplated under the rules for nonnamed class members to gain the right to participate in class action proceedings. We disagree. Just as class action procedure allows nonnamed class members to object to a settlement at the fairness hearing without first intervening, see *supra,* at 2010, it should similarly allow them to appeal the District Court's decision to disregard their objections. Moreover, no federal statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the right to appeal from an action that finally disposes of one's rights has a statutory basis. 28 U.S.C. § 1291.

IV

We hold that nonnamed class members like petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening. We therefore reverse the judgment of the Court of Appeals for the Fourth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

*15 Justice SCALIA, with whom Justice KENNEDY and Justice THOMAS join, dissenting.

"The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz,* 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) *(per curiam);* Fed. Rule App. Proc. 3(c)(1) ("The notice of appeal must ... specify the party or parties taking the appeal"). This is one well-settled rule that, thankfully, the Court leaves intact. Other chapters in the hornbooks are not so lucky.

I

The Court holds that petitioner, a nonnamed member of the class in a class action litigated by a representative member of the class, is a "party" to the judgment approving the class settlement. This is contrary to well-established law. The "parties" to a judgment are those named as such—whether as the original plaintiff or defendant in the complaint giving rise to the judgment, or as "[o]ne who [though] not an original party ... become[s] a party by intervention, substitution, or third-party practice," *Karcher v. May,* 484 U.S. 72, 77, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987). As the Restatement puts it, "[a] person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action," Restatement (Second) of Judgments § 34(1), p. 345 (1980) (hereinafter Restatement); "[t]he designation of persons as parties is usually made in the caption of the summons or complaint but additional parties may be named in such pleadings as a counterclaim, a complaint against a third party filed by a defendant, or a complaint in intervention," *id.,* § 34, Comment *a,* Reporter's Note, at 347. As was the case here, the only members of a class who are typically named in the complaint are the class representatives; thus, it is only these members of the class, and those who intervene or otherwise enter through third-party practice, who are parties to the class judgment. This is confirmed by the application of those Federal Rules of Civil Procedure that confer upon *16 "parties" to the litigation the rights to take such actions as conducting discovery and moving for summary judgment, *e.g.,* Fed. Rules Civ. Proc. 30(a)(1), 31(a)(1), 33(a), 34(a), 36(a), 45(a)(3), 56(a), 56(b), 56(e). It is undisputed that the class representatives are the only members of the class who have such rights.

Petitioner was offered the opportunity to be named the class representative, but **2014 he declined; nor did he successfully intervene. *Ante,* at 2008. Accordingly, he is not a party to the class judgment.

A

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The Court does not deny that, at least as a general matter, only those persons named as such are the "parties." Rather, it contends that persons "may be parties for some purposes and not for others," *ante,* at 2010, and that petitioner is a party to the class judgment at least for the "purposes of appealing," *ante,* at 2009. [1] The Court bases these contentions on three of our precedents, which it says stand for the proposition that "[w]e have never ... restricted the right to appeal to named parties to the litigation." *Ibid.* These precedents stand for nothing of the sort.

All of these precedents are perfectly consistent with the rule that only named parties to a judgment can appeal the judgment because they involved appeals not from judgments but from collateral orders. The appellants were allowed to appeal from the collateral orders to which they *were* parties, ***17** even though they were *not* named parties to (and hence would not have been able to appeal from) the underlying judgments. We made this distinction between appealing the judgment and appealing a collateral order quite explicit in *Blossom v. Milwaukee & Chicago R. Co.,* 1 Wall. 655, 17 L.Ed. 673 (1864). In that case, the appellant was not a named party to the underlying foreclosure decree, from which it was therefore "certainly true that he [could not] appeal," yet he was a party (obviously, as the movant) to the motion he filed asking the court to complete the foreclosure sale, and therefore could appeal from *the order denying that motion. Ibid.* Our decisions in *Hinckley v. Gilman, C. & S.R. Co.,* 94 U.S. 467, 24 L.Ed. 166 (1877), and *United States Catholic Conference v. Abortion Rights Mobilization, Inc.,* 487 U.S. 72, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988), are to the same effect. In the former, the appellant was not a named party to the underlying foreclosure decree, from which we said he "cannot and does not attempt to appeal," but he was obviously a party to the collateral order directing him by name to transfer funds to the court, from which we said he could appeal. 94 U.S., at 469. In the latter, witnesses who had been dismissed as named parties to the underlying litigation, 487 U.S., at 75, 108 S.Ct. 2268, were allowed to appeal from a collateral order holding them in contempt for their failure to comply with a subpoena addressed to them (and to which they were therefore obviously parties), *id.,* at 76, 108 S.Ct. 2268. These cases demonstrate why, even though petitioner should not be able to appeal the District Court's judgment approving the class settlement, there is no dispute that petitioner could (and did) appeal the District Court's collateral order denying his motion to intervene; as the movant, he was a party to the latter. See *Marino,* 484 U.S., at 304, 108 S.Ct. 586 ("[S]uch motions are, of course, appealable"). [2]

****2015 *18** B

The Court's other grounds for holding that petitioner is a party to the class judgment are equally weak. First, it contends that petitioner should be considered a party to the judgment because, as a member of the class, he is bound by it. *Ante,* at 2011 ("What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement"). This will come as news to law students everywhere. There are any number of persons who are not parties to a judgment yet are nonetheless bound by it. See Restatement § 41(1), at 393 (listing examples); *id.,* § 75, Comment *a,* at 210 ("A person is bound by a judgment in an action to which he is not a party if he is in 'privity' with a party"). Perhaps the most prominent example is precisely the one we have here. Nonnamed members of a class are bound by the class judgment, even though they are not parties to the judgment, because they are represented by class members who are parties:

> "A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is ... [t]he representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member." *Id.,* § 41(1)(e), at 393.

Accord, *id.,* § 75, Comment *a,* at 210 ("Persons bound through representation by virtue of a relationship with a party are to be contrasted with persons bound by a judgment because they are parties ..."). Petitioner here, in the words of the Restatement, "is not a party" but "is bound by [the] judgment ***19** as though he were a party." Because our "well-settled" rule allows only "parties" to appeal from a judgment, petitioner may not appeal the class settlement. [3]

Second, the Court contends that petitioner should be considered a party to the judgment because he filed an objection to the class settlement. We have already held, however, that filing an objection does *not* make one a

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party if he does not also intervene. *Marino, supra,* at 304, 108 S.Ct. 586.

II

The most pernicious aspect of today's decision, however, is not its result, but its reasoning. I mentioned in a recent dissent the Court's "penchant for eschewing clear rules that might avoid litigation," *US Airways, Inc. v. Barnett,* 535 U.S. 391, 412, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002). ****2016** Today's opinion not only eschews such ***20** a rule; it destroys one that previously existed. It abandons the bright-line rule that only those persons named as such are parties to a judgment, in favor of a vague inquiry "based on context." *Ante,* at 2010 ("The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context"). Although the Court does not say how one goes about selecting the result-determinative "context" for its oh-so-sophisticated new inquiry, I gather from its repeated invocation of this phrase that the relevant context in the present case is the "goals of class action litigation," *ante,* at 2010. This means, I suppose, that, in a labor case, who are the parties to a judgment will depend on the goals of the labor laws, and, in a First Amendment case, who are the parties to a judgment will depend on the goals of the First Amendment. Or perhaps not.

What makes this exponential increase in indeterminacy especially unfortunate is the fact that it is utterly unnecessary. Despite the Court's assertion in one breath that treating nonnamed class members as parties is the "only means" by which they would not be "deprive[d] ... of the power to preserve their ... interests," *ante,* at 2011, the Court in the next breath concedes that there is another —and very easy—means for nonnamed class members to do just that: becoming parties to the judgment by moving to intervene. *Ante,* at 2012 (noting "the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal"). The Court does not dispute that nonnamed class members will typically meet the requirements for intervention as of right under Federal Rule of Civil Procedure 24, including intervention only for the purpose of appeal, and even after the class judgment has been entered. [4] *Ante,* at 2011.

***21** The Court *does* dispute whether there is any "value" in requiring nonnamed class members who object to the settlement to intervene in order to take an appeal. *Ante,* at 2012. In my view, avoiding the reduction to indeterminacy of the hitherto clear rule regarding who is a party is "value" enough. But beyond that, it makes sense to require objectors to intervene before appealing, for the reason advanced by the Government: to enable district courts "to perform an important screening function." Brief for United States et al. as *Amici Curiae* 23. For example, when considering whether to allow an objector to intervene, a district court can verify that the objector does not fall outside the definition of the settlement class and is otherwise entitled to relief in the class action, that the objection has not already been resolved in favor of the objector in the approved settlement, and that the objection was presented in a timely manner. *Id.,* at 23–24. The Court asserts that there is no "value" to these screening functions because a court of appeals can pass on those matters just as easily, and in any event an objector who is unable to obtain relief from the class settlement will not seek to appeal "with any frequency," as he "stands to gain nothing by appeal." *Ante,* at 2012.

As to the last point: The person who has nothing to gain from an appeal also had nothing to gain from filing his objection in the first place, but was undeterred (as many are), see, *e.g.,* ****2017** *Shaw v. Toshiba America Information Systems, Inc.,* 91 F.Supp.2d 942, 973–974, and nn. 17–18 (E.D.Tex.2000). The belief that meritless objections, undeterred the first time, will be deterred the second, surely suggests the triumph ***22** of hope over experience. [5] And as for the suggestion that the court of appeals can pass on these questions just as easily: Since when has it become a principle of our judicial administration that what *can* be left to the appellate level *should* be left to the appellate level? Quite the opposite is true. District judges, who issue their decrees in splendid isolation, can be multiplied *ad infinitum.* Courts of appeals cannot be staffed with too many judges without destroying their ability to maintain, through en banc rehearings, a predictable law of the circuit. In any event, the district court, being intimately familiar with the facts, *is* in a better position to rule initially upon such questions as whether the objections to the settlement were procedurally deficient, late filed, or simply inapposite to the case. If it denies interventions on such grounds, and if the denials are not appealed, the court of appeals will be spared the trouble of considering those objections altogether.

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And even when the denials are appealed, the court of appeals will have the benefit of the district court's opinion on these often fact-bound questions. (Typically, the only occasion the district court would have had to pass on these questions is in the course of considering the motion to intervene; when considering whether to approve the class settlement, district courts typically do not treat objections individually even on substance, let alone form. *E.g., id.,* at 973–974.) Finally, it is worth observing that the Court's assertions regarding the merits of allowing objectors to appeal a class settlement without intervening apply with equal force to the objectors who sought to appeal ***23** the class judgment in *Marino.* Yet there we concluded (no doubt for the reasons discussed above) that "the better practice" is to require objectors "to seek intervention for purposes of appeal." 484 U.S., at 304, 108 S.Ct. 586.

For these reasons, I would affirm the Court of Appeals.

All Citations

536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27, 70 USLW 4495, 70 USLW 4496, 52 Fed.R.Serv.3d 833, 27 Employee Benefits Cas. 2825, 02 Cal. Daily Op. Serv. 5026, 2002 Daily Journal D.A.R. 6347, Pens. Plan Guide (CCH) P 23978X, 15 Fla. L. Weekly Fed. S 354

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The Court provides only one other example of a purpose for which a nonnamed class member is purportedly a "party": we have, it says, tolled the statute of limitations for such a person between the time the class action is filed and the time class certification is denied. *Ante,* at 2010 (citing *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)). Not even petitioner, however, is willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.* Brief for Petitioner 24–26. This lonesome example is, in other words, entirely irrelevant to the question of party status.

2 The Court finds it "difficult" to understand how the appellants in these cases can be considered parties in the traditional sense because they were not named in the "summons or complaint." *Ante,* at 2010 (internal quotation marks omitted). Quite so. Our whole point *is* that, in order to appeal a collateral order, one need not be a party to the underlying litigation (and therefore need not be named in the complaint giving rise to that litigation), but need only be a party to the *collateral proceedings* (and therefore need only be named in the filings giving rise to those proceedings).

3 The Court contends that those in privity with the parties to a judgment are "often allowed by other courts" to appeal by mere virtue of the fact that they are bound by the judgment. *Ante,* at 2011 (citing 5 Am.Jur.2d § 265 (1995)). I should think that the significant datum on this point is not that such appeals have been "often allowed by other courts," but that they have *never* been allowed by this Court. Indeed, the "other courts" whose opinions are cited by the authority on which the Court relies consist *entirely* of state courts, with the exception of one federal case decided before our decision in *Marino v. Ortiz,* 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) *(per curiam),* which affirmed the "well-settled" rule that in federal court "only parties to a lawsuit ... may appeal an adverse judgment." *Id.,* at 304, 108 S.Ct. 586. While this difference between the procedures of federal and state courts seemingly escapes the Court's attention, it was well enough recognized (and the clear federal rule acknowledged) in the very next paragraph of the American Jurisprudence annotation on which the Court relies:

"*Caution:* Applicable rules of procedure may bar a nonparty from taking an appeal notwithstanding his or her interest in the subject matter of the case. Thus, the United States Supreme Court has, under the Federal Rules of Appellate Procedure, rejected the principle of permitting appeal by a nonparty who has an interest affected by the trial court's judgment, stating that the better practice is for such nonparty to seek intervention for the purposes of appeal." 5 Am.Jur.2d, Appellate Review § 265, at 40 (citing *Marino, supra*).

4 It is true that petitioner's motion to intervene was denied as untimely by the District Court. Even if this decision was correct, a question on which petitioner did not seek certiorari, it does not cast doubt on the ability of the ordinary nonnamed class member to intervene for purposes of appeal. Petitioner was *not* the ordinary nonnamed class member seeking intervention for purposes of appeal. He moved to intervene *generally,* Brief for Petitioner 6, despite having rejected invitations to participate in the litigation until after the settlement was preliminarily approved.

5 The Court assures us that these appeals will be "few" because, like the objections on which they are based, they are "irrational." *Ante,* at 2012. To say that the substance of an objection (and of the corresponding appeal) is irrational is

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not to say that it is irrational to make the objection and file the appeal. See *Shaw,* 91 F.Supp.2d, at 973–974, and n. 18 (noting " 'canned' objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests"). The Court cites nothing to support its sunny surmise that the appeals will be few.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Gehrich v. Chase Bank USA, N.A., N.D.Ill., March 2, 2016

753 F.3d 718
United States Court of Appeals,
Seventh Circuit.

Kent EUBANK, et al., Plaintiffs–Appellants,
and
Leonard E. Saltzman, et al., Plaintiffs–Appellees,
v.
PELLA CORPORATION and Pella Windows and Doors, Inc., Defendants–Appellees.
Appeals of Ron Pickering and Michael J. Schulz, Objecting class members.

Nos. 13–2091, 13–2133, 13–2136, 13–2162, 13–2202.
|
Argued April 22, 2014.
|
Decided June 2, 2014.

Synopsis

Background: Window buyers brought class action against manufacturer, alleging fraudulent concealment of inherent product defect. Parties reached a settlement, and the United States District Court for the Northern District of Illinois, Eastern Division, James B. Zagel, J., approved the settlement. Objectors to the settlement appealed.

The Court of Appeals, Posner, Circuit Judge, held that approval of the settlement was not warranted.

Reversed and remanded.

Attorneys and Law Firms

***719** David M. Oppenheim, Anderson & Wanca, Rolling Meadows, IL, Jeffrey A. Leon, Complex Litigation Group LLC, Highland Park, IL, Hall Adams, III, Law Offices of Hall Adams LLC, Chicago, IL, John Jacob Pentz, III, Sudbury, MA, for Plaintiffs–Appellees.

Aaron D. Van Oort, Faegre Baker Daniels LLP, Minneapolis, MN, John Allen Roberts, Edwards Wildman Palmer LLP, Chicago, IL, for Defendants–Appellees.

Theodore H. Frank, Washington, DC, Peter F. Higgins, Lipkin & Higgins, Chicago, IL, Joseph Darrell Palmer, Law Office of Darrell Palmer, Carlsbad, CA, for Appellant.

Before POSNER, WILLIAMS, and TINDER, Circuit Judges.

Opinion

POSNER, Circuit Judge.

The class action is an ingenious procedural innovation that enables persons who have suffered a wrongful injury, but are too numerous for joinder of their claims alleging the same wrong committed by the same defendant or defendants to be feasible, to obtain relief as a group, a class as it is called. The device is especially important when each claim is too small to justify the expense of a separate suit, so that without a class action there would be no relief, however meritorious the claims. Normally only a few of the claimants are named as plaintiffs (sometimes only one, though there are several in this case). The named plaintiffs are the representatives of the class—fiduciaries of its members—and therefore charged with monitoring the lawyers who prosecute the case on behalf of the class (class counsel). They receive modest compensation, in addition to their damages as class members, for their normally quite limited services—often little more than sitting for a deposition—as class representatives. Invariably they are selected by class counsel, who as a practical matter control the litigation by the class. The selection of the class representatives by class counsel inevitably dilutes their fiduciary commitment.

The class action is a worthwhile supplement to conventional litigation procedure, David L. Shapiro, "Class Actions: The Class As Party and Client," 73 *Notre Dame L. Rev.* 913, 923–24 (1998); Arthur R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'," 92 *Harv. L. Rev.* 664, 666–68 (1979), but it is controversial and embattled, see Robert H. Klonoff, "The Decline of Class Actions," 90 *Wash. U. L. Rev.* 729, 731–33 (2013), in part because it is frequently abused. Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* 1–2 (2009); Jonathan R. Macey & Geoffrey P. Miller, "The Plaintiffs' Attorney's Role

in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform," 58 *U. Chi. L. Rev.* 1, 3–4 (1991); John C. Coffee, Jr., "Rethinking the Class Action: A Policy Primer on Reform," 62 *Ind. L.J.* 625, 627 (1987). The control of the class over its lawyers usually is attenuated, often to the point of nonexistence. Except for the named plaintiffs, the members of the class are more like beneficiaries than like parties; for although they are authorized to appeal from an adverse judgment, *Smith v. Bayer Corp.*, —— U.S. ——, 131 S.Ct. 2368, 2379, 180 L.Ed.2d 341 (2011); *Devlin v. Scardelletti,* 536 U.S. 1, 9–10, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), they have no control over class counsel. In principle the named plaintiffs do have that control, but as we've already hinted this is rarely true in practice. Class actions are the brainchildren of the lawyers who specialize in prosecuting such actions, and in picking ***720** class representatives they have no incentive to select persons capable or desirous of monitoring the lawyers' conduct of the litigation.

A high percentage of lawsuits is settled—but a study of certified class actions in federal court in a two-year period (2005 to 2007) found that *all* 30 such actions had been settled. Emery G. Lee III et al., "Impact of the Class Action Fairness Act on the Federal Courts" 2, 11 (Federal Judicial Center 2008). The reasons that class actions invariably are settled are twofold. Aggregating a great many claims (sometimes tens or even hundreds of thousands—occasionally millions) often creates a potential liability so great that the defendant is unwilling to bear the risk, even if it is only a small probability, of an adverse judgment. At the same time, class counsel, un-governed as a practical matter by either the named plaintiffs or the other members of the class, have an opportunity to maximize their attorneys' fees—which (besides other expenses) are all they can get from the class action—at the expense of the class. The defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class. From the selfish standpoint of class counsel and the defendant, therefore, the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees. As we said in *Creative Montessori Learning Centers v. Ashford Gear LLC,* 662 F.3d 913, 918 (7th Cir.2011), "we and other courts have often remarked the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests. *Reynolds v. Beneficial National Bank,* [288 F.3d 277, 279 (7th Cir.2002)]; *Culver v. City of Milwaukee,* [277 F.3d 908, 910 (7th Cir.2002)]; *Greisz v. Household Bank (Illinois), N.A.,* 176 F.3d 1012, 1013 (7th Cir.1999); *Duhaime v. John Hancock Mutual Life Ins. Co.,* 183 F.3d 1, 7 (1st Cir.1999); *In re General Motors Corp. Pick–Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 805 (3d Cir.1995); *Plummer v. Chemical Bank,* 668 F.2d 654, 658 (2d Cir.1982)."

Fortunately the settlement, including the amount of attorneys' fees to award to class counsel, must be approved by the district judge presiding over the case; unfortunately American judges are accustomed to presiding over adversary proceedings. They expect the clash of the adversaries to generate the information that the judge needs to decide the case. And so when a judge is being urged by both adversaries to approve the class-action settlement that they've negotiated, he's at a disadvantage in evaluating the fairness of the settlement to the class. *In re General Motors Corp. Pick–Up Truck Fuel Tank Products Liability Litigation, supra,* 55 F.3d at 789–90; Redish, *supra,* at 188.

Enter the objectors. Members of the class who smell a rat can object to approval of the settlement. See, e.g., *Reynolds v. Beneficial National Bank, supra,* 288 F.3d at 287–88; Edward Brunet, "Class Action Objectors: Extortionist Free Riders or Fairness Guarantors," 2003 *U. Chi. Legal F.* 403, 411–12. If their objections persuade the judge to disapprove it, and as a consequence a settlement more favorable to the class is negotiated and approved, the objectors will receive a cash award that can be substantial, as in *In re Trans Union Corp. Privacy Litigation,* 629 F.3d 741 (7th Cir.2011).

***721** In this case, despite the presence of objectors, the district court approved a class action settlement that is inequitable—even scandalous. The case underscores the importance both of objectors (for they are the appellants in this case—without them there would have been no appellate challenge to the settlement) and of intense judicial scrutiny of proposed class action settlements.

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The suit was filed in the summer of 2006, almost eight years ago. Federal jurisdiction was based on the Class Action Fairness Act's grant of federal jurisdiction over class actions in which there is at least minimal (as distinct from complete) diversity of citizenship. 28 U.S.C. § 1332(d)(2)(A). The defendants are Pella Corporation and an affiliate that we can ignore. Pella is a leading manufacturer of windows. The suit alleges that its "Proline Series" casement windows (a casement window is a window attached to its frame by hinges at the side) manufactured and sold between 1991 and 2006 had a design defect that allowed water to enter behind the window's exterior aluminum cladding and cause damage to the window's wooden frame and to the house itself. Pella's sale of the defective windows is alleged to have violated the product-liability and consumer-protection laws of a number of states in which the windows were sold.

The district judge certified two separate classes: one for customers who had already replaced or repaired their defective windows, the other for those who hadn't. The latter class sought only declaratory relief and so was nationwide, but the former sought damages and was limited to customers in six states, with a separate subclass for each state. We upheld the certifications over Pella's objections in *Pella Corp. v. Saltzman,* 606 F.3d 391 (7th Cir.2010) (per curiam).

Class counsel negotiated a settlement of the class action with Pella in the fall of 2011. The district judge gave final approval to the settlement in 2013, precipitating the objectors' appeals. The settlement agreement ignores the certification of the two classes and purports to bind a single nationwide class consisting of all owners of Pella Proline windows containing the defect, whether or not the owners have already replaced or repaired the windows. This provision is the first of many red flags that the judge failed to see: "the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *In re Joint Eastern & Southern District Asbestos Litigation,* 982 F.2d 721, 743 (2d Cir.1992); see also Amchem *Products, Inc. v. Windsor,* 521 U.S. 591, 627–28, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Smith v. Sprint Communications Co.,* 387 F.3d 612, 614–15 (7th Cir.2004).

Initially there was only one named plaintiff, a dentist named Leonard E. Saltzman. His son-in-law, Paul M. Weiss, was lead counsel for the class, continuing in that role throughout the district court proceedings that culminated in the approval of the settlement. Technically the law firm of which he is the founder and senior partner (Complex Litigation Group LLC) is a lead class counsel too, along with two of his partners in the firm. The settlement agreement designates still another firm as a lead class counsel as well; but the fee petition describes that firm as merely a class counsel. The agreement gave lead class counsel "sole discretion" to allocate the award of attorneys' fees to which the parties had agreed among the class counsel, and Weiss proposed to allocate 73 percent of the fees to his own firm. Realistically *he* was the lead class counsel.

***722** Weiss's wife—Saltzman's daughter—is a lawyer too, and a partner in her husband's firm. Both spouses are defendants in a lawsuit charging them with misappropriation of the assets of their former law firm, Freed & Weiss LLC, and other misconduct relating to that firm. *Freed v. Weiss,* No. 2011–CH–41529 (Ill. Cook County Ch. Div.). Weiss is also a defendant in a second, similar suit, *Lang v. Weiss,* No. 2012–CH–05863 (Ill. Cook County Ch. Div.). (The two suits are discussed in Sarah Zavala, "Cook County Suits Involve Alleged Takeover at Freed and Weiss," *Madison–St. Clair Record,* March 7, 2012, pp. 1, 8.) The Freed & Weiss firm was still another class counsel in the present case; and one of the objectors points out that "the dissolution and descent into open warfare that consumed Freed & Weiss in 2011 and 2012 clearly rendered that firm inadequate class counsel, especially in light of the articulated financial needs of the partners that drove the settlement of this case." And six weeks ago the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission recommended in a 94–page report that the Supreme Court of Illinois suspend Weiss from practicing law for 30 months because of repeated misconduct. *In re Paul M. Weiss,* No. 08 CH 116 (Ill. Att'y Registration & Disciplinary Commission Hearing Board, Apr. 17, 2014). The recommended penalty is severe by Illinois standards; the state allows lawyers sanctioned with "disbarment" to apply for reinstatement to the bar after 60 (in some cases just 36) months. Ill. S.Ct. R. 767(a); Illinois Attorney Registration & Disciplinary Commission, *Annual Report of 2013,* at 21, 25.

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The impropriety of allowing Saltzman to serve as class representative as long as his son-in-law was lead class counsel was palpable. See *Greisz v. Household Bank (Illinois),* 176 F.3d 1012, 1014 (7th Cir.1999); *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1155 (8th Cir.1999); *Zylstra v. Safeway Stores, Inc.,* 578 F.2d 102, 104 (5th Cir.1978); *Turoff v. May Co.,* 531 F.2d 1357, 1360 (6th Cir.1976) (per curiam); "Developments in the Law—Class Actions," 89 *Harv. L. Rev.* 1318, 1585–86 n. 29 (1976). Weiss may have been desperate to obtain a large attorney's fee in this case before his financial roof fell in on him.

Early in the case four other class members had been added as plaintiffs, making a total of five including Saltzman. When the settlement was presented to the district court for preliminary approval, the four class members who had been added as named plaintiffs opposed it, leaving only Saltzman among the original class members to support it. But pursuant to a motion filed by George Lang, who at the time was a partner of Weiss, four other class members were added as named plaintiffs. (Lang says that Weiss rather than he picked them.)

Weiss removed the original four class members who had opposed the settlement; naturally their replacements joined Saltzman in supporting it.

Lang now represents the defrocked named plaintiffs, who are four of the six objectors. A lawyer's switching sides in the same lawsuit would normally be considered a fatal conflict of interest, but the courts are lenient when it is a class action lawyer. E.g., *Bash v. Firstmark Standard Life Ins. Co.,* 861 F.2d 159, 161 (7th Cir.1988). For often "only the attorneys who have represented the class, rather than any of the class members themselves, have substantial familiarity with the prior proceedings, the fruits of discovery, the actual potential of the litigation. And when an action has continued over the course of many years, the prospect of having those most familiar with its course and status be automatically disqualified whenever ***723** class members have conflicting interests would substantially diminish the efficacy of class actions as a method of dispute resolution." *In re "Agent Orange" Product Liability Litigation,* 800 F.2d 14, 18–19 (2d Cir.1986).

As finally approved by the district judge, the settlement directed Pella to pay $11 million in attorneys' fees to class counsel. The basis of this figure was the plaintiffs' claim that the settlement was worth $90 million to the class. Were that so, then considering the multistate scope of the suit and perhaps the length of time that elapsed between its filing and the approval of the settlement by the district court in May 2013 (our "perhaps" reflecting doubt that the time was well spent), the fee award, equal to 12 percent of the amount of the settlement earmarked for the class members, would have been defensible. But the settlement did not specify an amount of money to be received by the class members as distinct from class counsel. Rather it specified a procedure by which class members could claim damages. So there was an asymmetry: class counsel was to receive its entire award of attorneys' fees up front; class members were to obtain merely contingent claims, albeit with a (loosely) estimated value of $90 million (actually far less, as we'll see).

The named plaintiffs were each awarded compensation (an "incentive award," as it is called) for their services to the class of either $5,000 or $10,000, depending on their role in the case. Saltzman, being the lead class representative, was slated to be a $10,000 recipient.

Although the judge rightly made incentive awards to the class representatives who had opposed the settlement as well as to those who had approved it, the settlement agreement itself had provided for incentive awards only to the representatives who supported the settlement. This created a conflict of interest: any class representative who opposed the settlement would expect to find himself without any compensation for his services as representative. Still another questionable provision of the settlement, which the judge refused to delete, made any reduction in the $11 million attorneys' fee award revert to Pella, rather than being added to the compensation of the class members.

Not only did the settlement agreement not quantify the benefits to the class members, but the judge approved it before the deadline for filing claims. He made no attempt to estimate how many claims were likely to be filed, though without such an estimate no responsible prediction of the value of the settlement to the members of the class could be made. Furthermore, the judge's approval of the settlement (over the objection of the former class representatives and other class members) is squeezed into two two-page orders (the second addressed to the attorneys' fee award) that ignore virtually all the objections to the settlement. Unheeded was our warning that "because class actions

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are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir.2004) (citations omitted).

The settlement should have been disapproved on multiple grounds. To begin with, it was improper for the lead class counsel to be the son-in-law of the lead class representative. Class representatives are, as we noted earlier, fiduciaries of the class members, and fiduciaries are not allowed to have conflicts of interest without the informed consent of their beneficiaries, ***724** which was not sought in this case. Only a tiny number of class members would have known about the family relationship between the lead class representative and the lead class counsel—a relationship that created a grave conflict of interest; for the larger the fee award to class counsel, the better off Saltzman's daughter and son-in-law would be financially—and (which sharpened the conflict of interest) by a lot. They may well have had an acute need for an infusion of money, in light not only of Weiss's ethical embroilment, which cannot help his practice, but also of the litigation against him by his former law partners and his need for money to finance his new firm. The appellees (primarily Saltzman, who is still a named plaintiff, and Pella) point out that Saltzman was one of five class representatives, and the other four didn't have a conflict of interest. But the four other *original* class representatives had opposed the settlement, whereupon they had been replaced by new named plaintiffs—selected by the conflicted lead class counsel.

Weiss's ethical embroilment was another compelling reason for kicking him and Saltzman off the case. The disciplinary proceeding against Weiss was already under way when the settlement agreement was negotiated. It was very much in his personal interest, as opposed to the interest of the class members, to get the settlement signed and approved *before* the disciplinary proceeding culminated in a sanction that might abrogate his right to share in the attorneys' fee award in this case. He could negotiate a quick settlement only by giving ground to Pella, which upon discovering the box that Weiss was in would have stiffened its terms (it plays hardball, as its conduct throughout this litigation has demonstrated).

So Weiss's ethical troubles should have disqualified him from serving as class counsel even if his father-in-law hadn't been in the picture. Another suspicious feature of the settlement, doubtless also related to Weiss's woes, was Pella's agreeing to a $2 million advance of attorneys' fees to lead class counsel before notice of the settlement was sent to the members of the class.

Counsel for a certified class is appointed by the district judge presiding over the class action, and in deciding to appoint a lawyer to be class counsel the court "may consider," besides the lawyer's competence, experience, and related professional qualifications, "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed.R.Civ.P. 23(g)(1)(B), (g)(4). "When class counsel have demonstrated a lack of integrity, a court can have no confidence that they will act as conscientious fiduciaries of the class." *Creative Montessori Learning Centers v. Ashford Gear LLC, supra,* 662 F.3d at 918. Weiss was unfit to represent the class.

Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that "the representative parties will fairly and adequately protect the interests of the class." This both Saltzman and the other class representatives who approved the settlement failed to do. The settlement that the district judge approved is stacked against the class. Pella itself estimates the value of the settlement to the class at only $22.5 million—and that is an overestimate. The settlement strews obstacles in the path of any owner of a defective Proline Series casement window. A member of the class may either file a claim with Pella, period, or file a claim that he must submit to arbitration with Pella. If he chooses the first option, he is limited to a maximum damages award of $750 per "Structure," ***725** confusingly defined not as a window but as the entire building containing the window. There's also a per-window damages cap that ranges from $60 to $100 (with an additional $0 to $250 for the cost of installation), depending on when the class member purchased his window and when he replaced it. And the cap falls to zero unless he gave "notice" to Pella before replacing the defective window.

A class member who chooses arbitration can receive up to $6000 per "Structure" (defined the same way), and doesn't have to prove that his window or windows were in fact defective, only that they were in the category of Pella windows that contained the design defect. But if Pella

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convinces the arbitrator that the damage the claimant is seeking compensation for was not caused by the defect or by "any other defect in the structure" (whatever that means), or that the claimant was compensated for the damage from some other source, the claimant gets nothing; and likewise if Pella successfully interposes a complete defense, such as that the statute of limitations had run. The settlement allows Pella to assert ten categories of defenses, including "natural weathering." And the limitations periods applicable to the class members' claims vary from three to five years and involve different accrual and tolling rules. Statutes of repose are also in the picture.

Pella also reserved in the settlement agreement the right to plead and prove partial defenses such as comparative fault and failure to mitigate damages. And some claimants are entitled only to "coupons" (discounts on *future* purchases of Pella windows, discounts that may be worth very little to current owners of Pella's defective windows) —a warning sign of a questionable settlement. *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.,* 463 F.3d 646, 654 (7th Cir.2006); *In re HP Inkjet Printer Litigation,* 716 F.3d 1173, 1179–80 (9th Cir.2013); Christopher R. Leslie, "The Need to Study Coupon Settlements in Class Action Litigation," 18 *Geo. J. Legal Ethics* 1395, 1396–98 (2005); Geoffrey P. Miller & Lori S. Singer, "Nonpecuniary Class Action Settlements," *Law & Contemp. Probs.,* vol. 60, Autumn 1997, pp. 97, 108; cf. 28 U.S.C. § 1712 (Coupon Settlements).

Some class members may be entitled only to an extension of warranty, under a program (the "Proline Service Enhancement Program") that Pella had adopted *before* the settlement and that requires class members to deduct $100 per window from the cost of installation or other labor services required to replace it. The $90 million estimate of the value of the settlement to the class includes the value of these warranty extensions even though they were a contractual entitlement that preceded the settlement rather than being conferred by it and thus were not part of the value created by the settlement, although the settlement does forbid Pella to revoke the extensions, which confers a bit of extra value.

The claim forms are long—12 pages for the "simple" claim with its $750 ceiling, 13 pages for the claim that has the higher ceiling ($6000) but requires the claimant to run the gauntlet of arbitration, doubtless without assistance of counsel or expert witnesses, because the legal fees and experts' fees would quickly mount to or above $6000, leaving the claimant with nothing or even less than nothing: additional bills to pay. There is no provision for shifting the legal or expert-witness costs of a victorious claimant in the arbitration proceeding to Pella.

Both forms require a claimant to submit a slew of arcane data, including the "Purchase Order Number," "Glass Etch Information," "Product Identity Stamp," and ***726** "Unit ID Label" of each affected window. The claim forms are so complicated that Pella could reject many of them on the ground that the claimant had not filled out the form completely and correctly.

And that's assuming that class members even *attempt* to file claims. The notice of settlement that was sent to them is divided into 27 sections, some with a number of subsections. For example, the section on eligibility for benefits under the settlement lists nine criteria that must be satisfied while the section on "How Do I Get Out of the Settlement?" specifies six requirements that must be met for a class member to be allowed to opt out of the settlement. And to object to the settlement the class member must satisfy seven other criteria, one of which is again multiple, as it requires listing "each specific reason for your objection."

Considering the modesty of the settlement, the length and complexity of the forms, and the unfamiliarity of the average homeowner with arbitration, we're not surprised that only 1276 claims (of which only 97 sought arbitration) had been filed as of February 2013, out of the more than 225,000 notices that had been sent to class members. The claims sought in the aggregate less than $1.5 million and were likely to be worth even less because Pella would be almost certain to prevail in some, maybe most, of the arbitration proceedings. It's been found that on average consumers prevail in arbitration roughly half the time, and those who win are awarded roughly half of what they seek. Christopher R. Drahozal & Samantha Zyontz, "An Empirical Study of AAA Consumer Arbitrations," 25 *Ohio St. J. Dispute Resolution* 843, 898–900 (2010). The implication is that Pella would be able to knock 75 percent off the damages sought by class members who filed claims that were submitted to arbitration.

A class recovery of little more than $1 million is a long way from the $90 million that the district judge

thought the class members likely to receive were the suit to be litigated. It's true that another 9500 or so simple claims were filed after the district court entered its final judgment, plus another 1387 claims that would require arbitration. But Pella's estimate that the class will recover $22.5 million assumes against all reason that every one of the claims will reap the maximum authorized benefits—$750 for the simple claims and $6000 for the claims that go to arbitration. And that recovery would be only $17 million, not $22.5 million (Pella contends, however, that the extension of its warranty is worth another $5.5 million to the class). There is no evidence that Pella would pay the maximum benefits on all, or indeed on any, of the claims.

If the average payment were half the amount of the claim—a very generous assumption given the estimate of a 75 percent success rate for Pella—the aggregate value of the settlement to the class ($8.5 million) would be less than the attorneys' fees ($11 million). Even the $8.5 million figure is an exaggeration, because the settlement subtracts from the award compensation received from any other source—and one of the other sources is the warranty program.

We don't understand the judge's valuing the settlement at $90 million or thinking the feeble efforts of class counsel led by Weiss to obtain benefits for the class (as distinct from benefits for themselves in the form of generous attorneys' fees) worth $11 million. The restrictions that Pella was allowed to place on the settlement would, if upheld, enormously reduce the class members' recovery of their losses, and the residue is to be returned to Pella. Class counsel sold out the class.

***727** The class as we said could not expect to receive more than $8.5 million from the settlement, given all the obstacles that the terms of the settlement strewed in the path of the class members. And even that figure seems too high. For if the class received that amount, this would indicate that Pella had agreed to pay attorneys' fees equal to 56 percent of the total settlement ($11 million = .56 x ($8.5 million + $11 million)) in order to induce class counsel to settle the case on terms that would minimize Pella's overall liability.

We note the remarkable statement in Saltzman's brief defending the settlement that "in comparison to this $90 million independent valuation of the Settlement, a trial of the certified claims here, even with a complete victory, would result in an award of $0." Zero? But if Pella has no liability, why would it agree to a $33.5 million settlement ($22.5 million in estimated damages plus the $11 million in attorneys' fees)? Saltzman appears to believe that the alternative of litigating the class action to judgment would be infeasible because the court would go crazy trying to determine the damages of each of several, maybe many, thousand class members. He neglects to mention that we rejected this argument when we approved class certification. *Pella Corp. v. Saltzman, supra,* 606 F.3d at 395–96; see also 1966 Advisory Committee Notes to Fed.R.Civ.P. 23; *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796, 801 (7th Cir.2013); *In re Whirlpool Corp. Front–Loading Washer Products Liability Litigation,* 722 F.3d 838, 860–61 (6th Cir.2013); *Tardiff v. Knox County,* 365 F.3d 1, 6–7 (1st Cir.2004); 2 *Newberg on Class Actions* § 4:54, pp. 205–10 (5th ed.2012). Pella argues that it would fight the individual damages claims if the case were litigated. But the settlement agreement allows it to fight the damages claims submitted to it pursuant to the agreement.

In the district court Saltzman valued the case if it went to trial at $50 million. If he was lying and actually thinks the case worthless, how could he have been an effective class representative even if he had had no conflict of interest?

The mystery deepens: Pella thinks the case if tried would be worth only $14.5 million to the class members. If that is so, why has it agreed to a settlement that it claims will cost it $33.5 million? Because it would incur legal fees and other expenses of more than $19 million ($14.5 million + $19 million = $33.5 million)? But if the case were tried, class counsel would incur heavy expenses as well, which would induce it to settle for less than $14.5 million. The truth must be that, protected by the bristling technicalities of the settlement agreement, Pella does not believe that the settlement will cost it anywhere near $14.5 million.

If Saltzman is right and damages if the case were tried would be zero, a settlement of $90 million would be a remarkable achievement. (Also an inexplicable one.) But the district judge did not find that the trial would yield zero damages. He didn't estimate the likely outcome of a trial, as he should have done in order to evaluate the adequacy of the settlement. *Reynolds v. Beneficial National Bank, supra,* 288 F.3d at 285.

Saltzman as we said defends the $90 million figure as an "independent valuation" of the settlement. But the

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only evidence we can find supporting that valuation is the affidavit of an accountant—hired and paid by Weiss's law firm, so hardly independent. Maybe by "independent" Saltzman is referring (though he doesn't say so) to the fact that the settlement was mediated by two retired judges. One, however, stopped mediating (we don't know why) before the negotiations were ***728** completed and the other limited his mediation to issues of attorneys' fees.

Saltzman and Pella argue that the objectors did not present an expert witness to support their estimate of the value of the litigation, and Saltzman did: the brother of one of Saltzman's lawyers! Anyway Saltzman has implicitly repudiated his expert, who did *not* testify that the value of the suit if litigated was $0.

Saltzman and Pella point out that the notice of the settlement sent to the class members provoked few objections. Of course not; it was not intended to; it was incomplete and misleading. It failed to mention that four of the five original class representatives had opposed the settlement and been promptly replaced by other persons, selected by class counsel; that the only original representative who had supported the settlement was the father-in-law of the lead class counsel who was both in financial trouble and ethically challenged; that up to half the recipients of the notice would if they filed a claim and it was accepted receive only a coupon discount on a future purchase of a Pella window; and that four of the original class representatives believed the notice of the settlement misleading because it implied that class members would be guaranteed at least $750 or $6000 in response to their claim, whereas these were ceilings and were not even potential payments to those class members entitled only to coupons. The judge was informed of these objections to the notice but declined to order it modified. He said that the notice was "fair," that it was "a neutral communication from the court." It was not neutral and it did not provide a truthful basis for deciding whether to opt out. The judge said the objectors could send their own notice to the class members. But what would the recipient of two conflicting notices do? And it wouldn't be just two. For if the objectors sent their own notice class counsel would send out a rebuttal notice. Better for the court to make sure that the single notice it sent would be a responsible communication rather than an un-candid communication from class counsel than to subject the class members to a blizzard of conflicting notices.

All this is academic, however, because opting out of a class action is very rare. Virtually no one who receives notice that he is a member of a class in a class action suit opts out. He doesn't know what he could do as an opt-out. He's unlikely to hire a lawyer to litigate over a window. In fact the opt-outs in this case were only one twentieth of one percent of the recipients of the notice of approved settlement. A study of other product-liability class actions found that the average opt-out percentage was less than one tenth of one percent. Theodore Eisenberg & Geoffrey Miller, "The Role of Opt–Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues," 57 *Vand. L.Rev.* 1529, 1549 (2004); see also *Mars Steel Corp. v. Continental Illinois National Bank & Trust Co. of Chicago,* 834 F.2d 677, 680–81 (7th Cir.1987). Contrary to the statement in Pella's brief, a low opt-out rate is no evidence that a class action settlement was "fair" to the members of the class.

In sum, almost every danger sign in a class action settlement that our court and other courts have warned district judges to be on the lookout for was present in this case. See, e.g., *Synfuel Technologies, Inc. v. DHL Express (USA), Inc., supra,* 463 F.3d at 654; *Smith v. Sprint Communications Co.,* 387 F.3d 612, 614 (7th Cir.2004); *Mirfasihi v. Fleet Mortgage Corp., supra,* 356 F.3d at 785–86; *Reynolds v. Beneficial National Bank, supra,* 288 F.3d at 282–83; *Crawford v. Equifax Payment Services, Inc.,* 201 F.3d 877, 880 (7th Cir.2000); *In* ***729** *re Bluetooth Headset Products Liability Litigation,* 654 F.3d 935, 946–47 (9th Cir.2011); *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518, 525 (1st Cir.1991). Most were not even mentioned by the district judge, and those that were received a brush-off. The settlement flunked the "fairness" standard by the one-sidedness of its terms and the fatal conflicts of interest on the part of Saltzman and Weiss. This is a case in which "the lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information." *Kamilewicz v. Bank of Boston Corp.,* 100 F.3d 1348, 1352 (7th Cir.1996) (dissent from denial of rehearing en banc).

A couple of loose ends remain to be tied up:

1. Saltzman has moved to dismiss the appeals on the ground that the appellants—objectors to the settlement approved by the district judge—lack standing to litigate their objections. Since absent objectors have standing to

appeal from an adverse judgment, *Devlin v. Scardelletti, supra,* 536 U.S. at 14, 122 S.Ct. 2005, named objectors must as well. Even named plaintiffs who *settle* nevertheless have standing to appeal a denial of class certification. *Espenscheid v. DirectSat USA, LLC,* 688 F.3d 872, 876 (7th Cir.2012).

2. Objector Schulz asks us to sanction Saltzman's lawyers for filing the motion on standing. Saltzman's removal as lead plaintiff and his lawyers' removal as class counsel are sanction enough; because the motion on standing was indeed frivolous, little time was spent on it either by us judges or by the objectors' lawyers. Both motions (standing and sanctions) are therefore denied.

To conclude:

After eight largely wasted years, much remains to be done in this case. For starters, Saltzman, Paul Weiss, and Weiss's firm, Complex Litigation Group, must be replaced as class representative (Saltzman), and as class counsel (Weiss and his firm), respectively. And since we are rejecting the settlement agreement, the plaintiffs named in the third amended complaint, whom that agreement caused to be substituted for the original named plaintiffs (other than Saltzman), must be discharged and the four original named plaintiffs (whom we've called the "defrocked" plaintiffs) reinstated.

The judgment is reversed and the case remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

All Citations

753 F.3d 718, 88 Fed.R.Serv.3d 920

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Nigh v. Humphreys Pharmacal, Inc., S.D.Cal., October 23, 2013

696 F.3d 811
United States Court of Appeals,
Ninth Circuit.

Sean LANE; Mohannaed Sheikha; Sean Martin; Ali Sammour; Mohammaed Zidan; Sara Karrow; Colby Henson; Denton Hunker; Firas Sheikha; Hassen Sheikha; Linda Stewart; Tina Tran; Matthew Smith; Erica Parnell; John Conway; Phillip Huerta; Alicia Hunker; Megan Lynn Hancock, a minor, by and through her parent Rebecca Holey; Austin Muhs; Catherine Harris; Mario Herrera; Maryam Hosseiny, individually and on behalf of themselves and all others similarly situated, Plaintiffs–Appellees,
v.
FACEBOOK, INC., a Delaware corporation; Blockbuster, Inc., a Delaware corporation; Fandango, Inc., a Delaware corporation; Hotwire, Inc., a Delaware corporation; Sta Travel, Inc., a Delaware corporation; Overstock.com, Inc., a Delaware corporation; Zappos.com, Inc., a Delaware corporation; Gamefly, Inc., a Delaware corporation, Defendants–Appellees,
Ginger McCall, Class Member, Objector–Appellant.
Sean Lane; Mohannaed Sheikha; Sean Martin, individually, and on behalf of themselves and all others similarly situated; Ali Sammour; Mohammaed Zidan; Sara Karrow; Colby Henson; Denton Hunker; Firas Sheikha; Hassen Sheikha; Linda Stewart; Tina Tran; Matthew Smith; Erica Parnell; John Conway; Phillip Huerta; Alicia Hunker; Megan Lynn Hancock, a minor, by and through her parent Rebecca Holey; Austin Muhs; Catherine Harris; Mario Herrera; Maryam Hosseiny, individually and on behalf of themselves and all others similarly situated, Plaintiffs–Appellees,
v.
Facebook, Inc., a Delaware corporation; Blockbuster, Inc., a Delaware corporation; Hotwire, Inc., a Delaware corporation; Fandango, Inc., a Delaware corporation; Sta Travel, Inc., a Delaware corporation; Overstock.com, Inc., a Delaware corporation; Zappos.com, Inc., a Delaware corporation; Gamefly, Inc., a Delaware corporation, Defendants–Appellees,
Megan Marek; Benjamin Trotter, Class Members, Objectors–Appellants.

Nos. 10–16380, 10–16398.
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Argued and Submitted Oct. 12, 2011.
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Filed Sept. 20, 2012.

Synopsis

Background: Members of online social network brought putative class action against network and operators of websites that had participated in network's program which had updated members' personal profiles on network to reflect actions taken by members on participating operators' websites, alleging violations of Electronic Communications Privacy Act, Computer Fraud and Abuse Act, Video Privacy Protection Act (VPPA), California's Consumer Legal Remedies Act, and California's Computer Crime Law. The United States District Court for the Northern District of California, Richard Seeborg, J., certified settlement class and approved class settlement over objections. Objecting class members appealed.

Holdings: The Court of Appeals, Hug, Circuit Judge, held that:

cy pres remedy included in settlement provided for "next best distribution" to class;

presence of network's employee on board of directors of charity organization that was to be set up using cy pres funds did not preclude approval of settlement as fair, reasonable, and adequate;

that settlement agreement provided for creation of new grant-making entity, rather than providing for cy pres funds to be given to already-existing organization, did not preclude approval of settlement as fair, reasonable, and adequate;

conclusion that settlement amount was substantial was not abuse of discretion; and

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notice of proposed settlement satisfied rule.

Affirmed.

Kleinfeld, Circuit Judge, filed a dissenting opinion.

Attorneys and Law Firms

***815** Michael H. Page, Public Citizen Litigation Group, Washington, D.C.; Steven F. Helfand, Helfand Law Offices, San Francisco, CA, for the objectors-appellants.

Scott A. Kamber, Kamber Law, LLC, New York, NY, for the plaintiffs-appellees.

Michael G. Rhodes, Cooley LLP, San Francisco, CA, for the defendants-appellees.

Appeal from the United States District Court for the Northern District of California, ***816** Richard Seeborg, District Judge, Presiding. D.C. No. 5:08–cv–03845–RS.

Before: PROCTER HUG, JR., ANDREW J. KLEINFELD, and WILLIAM A. FLETCHER, Circuit Judges.

Opinion by Judge HUG; Dissent by Judge KLEINFELD.

OPINION

HUG, Circuit Judge:

The question presented is whether the district court abused its discretion in approving the parties' $9.5 million settlement agreement as "fair, reasonable, and adequate," either because a Facebook employee sits on the board of the organization distributing *cy pres* funds or because the settlement amount was too low. We hold that it did not.

I

Facebook is an online social network where members develop personalized web profiles to interact and share information with other members. The type of information members share varies considerably, and it can include news headlines, photographs, videos, personal stories, and activity updates. Members generally publish information they want to share to their personal profile, and the information is thereby broadcasted to the members' online "friends" (i.e., other members in their online network).

In November of 2007, Facebook launched a new program called "Beacon." Facebook described the purpose of the Beacon program as allowing its members to share with friends information about what they do elsewhere on the Internet. The program operated by updating a member's personal profile to reflect certain actions the member had taken on websites belonging to companies that had contracted with Facebook to participate in the Beacon program. Thus, for example, if a member rented a movie through the participating website Blockbuster.com, Blockbuster would transmit information about the rental to Facebook, and Facebook in turn would broadcast that information to everyone in the member's online network by publishing to his or her personal profile.

Although Facebook initially designed the Beacon program to give members opportunities to prevent the broadcast of any private information, it never required members' affirmative consent. As a result, many members complained that Beacon was causing publication of otherwise private information about their outside web activities to their personal profiles without their knowledge or approval. Facebook responded to these complaints (and accompanying negative media coverage) first by releasing a privacy control intended to allow its members to opt out of the Beacon program fully, and then ultimately by discontinuing operation of the program altogether.

Unsatisfied with these responses, a group of nineteen plaintiffs filed a putative class action in federal district court against Facebook and a number of other entities that operated websites participating in the Beacon program. The class-action complaint alleged that the defendants had violated various state and federal privacy statutes.[1] Each of the plaintiffs' claims ***817** centered on the general allegation that Beacon participants had violated Facebook members' privacy rights by gathering and publicly disseminating information about their online activities without permission. The plaintiffs sought damages and a variety of equitable remedies for the alleged privacy violations.

Facebook denied liability and filed a motion to dismiss the plaintiffs' claims. Before the district court ruled

on Facebook's motion, the parties elected to attempt settling their case through private mediation. The parties' initial settlement talks reached an impasse over whether Facebook should terminate the Beacon program permanently, but after two mediation sessions and several months of negotiations, Facebook and the plaintiffs arrived at a settlement agreement. In September of 2009, plaintiff Sean Lane submitted the parties' finalized settlement agreement to the district court for preliminary approval.

The terms of the settlement agreement provided that Facebook would permanently terminate the Beacon program and pay a total of $9.5 million in exchange for a release of all the plaintiffs' class claims. Of the $9.5 million pay-out, approximately $3 million would be used to pay attorneys' fees, administrative costs, and incentive payments to the class representatives. Facebook would use the remaining $6.5 million or so in settlement funds to set up a new charity organization called the Digital Trust Foundation ("DTF"). The stated purpose of DTF would be to "fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats." The parties' respective counsel arrived at the decision to distribute settlement funds through a new grant-making organization, rather than simply give the funds to an existing organization, at the suggestion of the private mediator overseeing their negotiations. Neither Facebook's nor the plaintiffs' class counsel was comfortable with selecting in advance any particular non-profit or non-profits to receive the entirety of the settlement fund, so they acceded to the mediator's suggestion that Facebook set up a new entity whose sole purpose was to designate fund recipients consistent with DTF's mission to promote the interests of online privacy and security.

According to DTF's Articles of Incorporation, DTF would be run by a three-member board of directors. The initial three directors were Larry Magrid, a member of the federal government's Online Safety and Technology Working Group and several other online safety organizations; Chris Hoofnagle, director of the Information Privacy Programs at the Berkeley Center for Law and Technology and former director for an office of the Electronic Privacy Information Center; and most relevant here, Timothy Sparapani, Facebook's Director of Public Policy and former counsel for the American Civil Liberties Union. The Articles of Incorporation further provided that all of DTF's funding decisions had to be supported by at least two members of the three-member board of directors but that the plan for succession of directors required unanimous approval. Finally, the Articles of Incorporation provided that DTF would be strictly a grant-making organization and could not engage in lobbying or litigation.

The settlement agreement also provided for the creation of a Board of Legal Advisors within DTF, which would consist of ***818** counsel for both the plaintiff class and Facebook. The purpose of the Board of Legal Advisors would be to advise and monitor DTF to ensure that it acted consistently with its mission as articulated in the settlement agreement.

After a hearing, the district court certified the plaintiff class for settlement purposes and preliminarily approved the parties' proposed settlement. The settlement class consisted of all Facebook members who had visited the website of a Beacon participant that transmitted information about the members' activity to Facebook during the relevant period. The district court ordered Facebook to identify all class members and to send the class notification of the settlement. Following that order, Facebook identified 3,663,651 class members, to whom it provided notice of the settlement in several ways. The principal method was to send an e-mail to the class members. Facebook also posted a notice of the settlement in the "Updates" section of members' personal Facebook accounts and published a separate notice in the national edition of the newspaper *USA Today.* All forms of notice directed class members to a website and toll-free number that contained information about the settlement.

Also pursuant to the district court's order, notice to class members informed them of their right to opt out of the lawsuit and settlement, and to file any written comments or objections with the district court before final approval. At the conclusion of the notice period, 108 class members had opted out of the settlement, and four had filed written objections. The four class members who decided to remain in the lawsuit but file objections to the settlement were Ginger McCall, Megan Marek, Benjamin Trotter, and Patricia Burleson (collectively "Objectors").

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Following a final settlement approval hearing in which the district court heard from both the parties and Objectors, the district court entered an order certifying the settlement class and approving the class settlement. The district court dismissed the plaintiffs' class action consistent with the settlement agreement, and it maintained jurisdiction over implementation of the settlement. The district court also awarded class counsel attorneys' fees in a separate order. The amount of the attorneys' fees was calculated at $2,322,763 under the "lodestar" method, meaning that the court multiplied the number of hours class counsel reasonably spent on the case by a reasonable hourly rate. That amount was combined with costs for a total attorneys' fees award of $2,364,973, which represented less than one-third of the full $9.5 million settlement amount.

Objectors now appeal, contending that the district court abused its discretion in approving the parties' settlement. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

II

A district court's approval of a class-action settlement must be accompanied by a finding that the settlement is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e). Appellate review of the district court's fairness determination is "extremely limited," and we will set aside that determination only upon a "strong showing that the district court's decision was a clear abuse of discretion." *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026–27 (9th Cir.1998) (holding that district court should have broad discretion because it "is exposed to the litigants, and their strategies, positions and proof") (internal quotations omitted).

Both the district court and this court must evaluate the fairness of a settlement ***819** as a whole, rather than assessing its individual components. *See id.* at 1026. As our precedents have made clear, the question whether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in the estimation of the reviewing court. *See id.* at 1027. Although Rule 23 imposes strict procedural requirements on the approval of a class settlement, a district court's only role in reviewing the substance of that settlement is to ensure that it is "fair, adequate, and free from collusion." *See id.*

A number of factors guide the district court in making that determination, including:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Id. at 1026 (hereinafter the "*Hanlon* factors"). Additionally, when (as here) the settlement takes place before formal class certification, settlement approval requires a "higher standard of fairness." *See id.* The reason for more exacting review of class settlements reached before formal class certification is to ensure that class representatives and their counsel do not secure a disproportionate benefit "at the expense of the unnamed plaintiffs who class counsel had a duty to represent." *See id.* at 1027; *see also In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 787 (3d Cir.1995) (explaining that "[w]ith less information about the class" at the early stage before formal class certification, the court "cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees), and other abuses"). Accordingly, when reviewing a district court's approval of a class settlement reached before formal class certification, we will not affirm if it appears that the district court did not evaluate the settlement sufficiently to account for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit.

The settlement in this case provides for a *cy pres* remedy. A *cy pres* remedy, sometimes called "fluid recovery," *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir.2004), is a settlement structure wherein class members

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receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment. As we recently recognized, the "*cy pres* doctrine allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries." *Nachshin v. AOL, LLC,* 663 F.3d 1034, 1036 (9th Cir.2011). For purposes of the *cy pres* doctrine, a class-action settlement fund is "non-distributable" when "the proof of individual claims would be burdensome or distribution of damages costly." *See id.* at 1038 (quoting *Six Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1305 (9th Cir.1990)). The district court's review of a class-action settlement that calls for a *cy pres* remedy is not substantively different from that of any other class-action settlement except that the court should not find the settlement fair, adequate, and reasonable unless the *cy pres* remedy "account[s] for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and ***820** the interests of the silent class members...." *Nachshin,* 663 F.3d at 1036.

III

Objectors challenge the district court's conclusion that the settlement in this case was "fair, reasonable, and adequate" within the meaning of Rule 23(e). The district court arrived at that determination after considering Objectors' written statements and holding a fairness hearing where it provided Objectors an opportunity to be heard. The district court accompanied its fairness conclusion with findings of fact, which included the court's application of the eight *Hanlon* factors to the parties' settlement agreement.

Weighing those factors, the district court found that the settlement should be approved on the basis of the following: (1) reliance on novel legal theories and unclear factual issues undermined the strength of the plaintiffs' case; (2) the complex nature of the plaintiffs' claims increased the risk and expense of further litigation; (3) the class action could be decertified at any time, which "generally weighs in favor of approving a settlement"; (4) "[i]n light of [the] litigation risks and in the context of settlement claims involving infringment of consumers' privacy rights," the class's $9.5 million recovery was "substantial" and "directed toward a purpose closely related to Class Members' interests in this litigation"; (5) the parties had engaged in significant investigation and informal discovery and research, which in addition to information about Beacon that was already publicly known enabled the plaintiff class to "make an informed decision with respect to settlement, even though formal discovery" had not yet been completed; (6) the settlement was "only achieved after intense and protracted arm's-length negotiations conducted in good faith and free from collusion," and that class counsel had "reasonably concluded that the immediate benefits represented by the Settlement outweighed the possibility—perhaps remote—of obtaining a better result at trial"; (7) no government agencies voiced objections or otherwise announced actions arising out of Facebook's Beacon program; and (8) only four class members objected and "slightly more than 100" from a class of over 3.6 million opted out of the settlement.

Objectors raise two issues in opposition to the district court's fairness findings. The first relates to the settlement agreement's provision for a *cy pres* remedy. The second relates to the overall amount of the settlement. Objectors also raise the ancillary argument that notice to class members concerning the settlement was inadequate. We address each of these issues in turn.

1

Objectors' first and strongest objection to the settlement goes to the structure of DTF, the organization that would distribute *cy pres* funds under the settlement agreement. Objectors contend that the presence of Tim Sparapani, Facebook's Director of Public Policy, on DTF's board of directors creates an unacceptable conflict of interest that will prevent DTF from acting in the interests of the class. Citing *Six Mexican Workers,* Objectors claim that the settling parties' decision to disburse settlement funds through an organization with such structural conflicts does not provide the "next best distribution" of those funds and thus is categorically an improper use of the *cy pres* remedy.

We disagree. Objectors' argument misunderstands the *cy pres* doctrine and the principle from our case law that a *cy pres* remedy must provide the "next best distribution" absent a direct monetary payment to absent class members. We do ***821** not require as part of that doctrine that settling parties select a *cy pres* recipient that the court or class members would find ideal. On

the contrary, such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process. *See Hanlon,* 150 F.3d at 1027. The statement in *Six Mexican Workers* and elsewhere in our case law that a *cy pres* remedy must be the "next best distribution" of settlement funds means only that a district court should not approve a *cy pres* distribution unless it bears a substantial nexus to the interests of the class members—that, as we stated in *Nachshin,* the *cy pres* remedy "must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members...." 663 F.3d at 1036. [2]

The *cy pres* remedy in this case properly accounts for the factors outlined in *Nachshin.* Objectors concede that direct monetary payments to the class of remaining settlement funds would be infeasible given that each class member's direct recovery would be *de minimis.* Objectors also do not dispute that DTF's distribution of settlement funds to entities that promote the causes of online privacy and security will benefit absent class members and further the purposes of the privacy statutes that form the basis for the class-plaintiffs' lawsuit. Unlike the *cy pres* remedies we disapproved in *Nachshin* and *Six Mexican Workers,* there is no issue in this case about whether the connection between the *cy pres* recipients and the absent class members is too tenuous, either because the *cy pres* entities' missions are unrelated to the class's interests or because their geographic scope is too limited. *See Six Mexican Workers,* 904 F.2d at 1308; *Nachshin,* 663 F.3d at 1040. The *cy pres* remedy the settling parties here have devised bears a direct and substantial nexus to the interests of absent class members and thus properly provides for the "next best distribution" to the class.

We find no substance in Objectors' claim that the presence of a Facebook employee on DTF's board of directors categorically precludes DTF from serving as the entity that will distribute *cy pres* funds. As the "offspring of compromise," *Hanlon,* 150 F.3d at 1027, settlement agreements will necessarily reflect the interests of both parties to the settlement, including those of the defendant. Defendants often insist on certain concessions in exchange for monetary payments or other demands plaintiffs make, and defendants can certainly be expected to structure a settlement in a way that does the least harm to their interests. Here, in exchange for its promise to pay the plaintiff class approximately $9.5 million, Facebook insisted on preserving its role in the process of selecting the organizations that would receive a share of that substantial settlement fund by providing that one of its representatives would sit on DTF's initial board of directors, and the plaintiffs readily agreed to this condition. That Facebook retained and will use its say in how *cy pres* funds will be distributed so as to ensure that the funds will not be used in a way that harms Facebook is the unremarkable result of the parties' give-and-take negotiations, [3] and the district court ***822** properly declined to undermine those negotiations by second-guessing the parties' decision as part of its fairness review over the settlement agreement.

We also reject Objectors' claim that the settlement agreement's *cy pres* structure is impermissible because the parties elected to create a new grant-making entity, DTF, rather than give *cy pres* funds to an already-existing online privacy organization. Again citing *Six Mexican Workers,* Objectors argue that DTF has "no substantial record of service" and is therefore inherently disfavored as a *cy pres* recipient. But we have never held that *cy pres* funds must go to extant charities in order to survive fairness review, and a settlement agreement that provides for the formation of a new grant-making organization is not subject to a more stringent fairness standard. The reason we found it relevant in *Six Mexican Workers* that the charity organization designated to receive *cy pres* funds had no "substantial record of service" was that there was no way of knowing whether the organization would use the funds to the benefit of class members. *See Six Mexican Workers,* 904 F.2d at 1308. Here, there is no such worry, because the settlement agreement and DTF's Articles of Incorporation tell us exactly how funds will be used —to "fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats." [4] As we have explained, that mission statement provides the requisite nexus between the *cy pres* remedy and the interests furthered by the plaintiffs' lawsuit consistent with the principles we announced in *Nachshin.*

Objectors' contention that the settling parties were prohibited from creating DTF to disburse *cy pres* funds is without merit, and the district court did not abuse its discretion in so concluding.

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2

Objectors' second argument on appeal is that the district court did not sufficiently evaluate the plaintiffs' claims and compare the value of those claims with the class's $9.5 million recovery in the settlement agreement. Objectors contend that the value of the plaintiffs' claims was in fact greater than the $9.5 million the plaintiffs settled for, in large part because some unidentified number of the class members may have a claim under the Video Privacy Protection Act ("VPPA"). The VPPA prohibits any "video tape service provider" from disclosing "personally identifiable information" about one of its consumers, and it provides for liquidated damages in the amount of $2,500 for violation of its provisions. 18 U.S.C. §§ 2710(b) and 2710(c)(2). Objectors contend that the district court was not sufficiently mindful of the possibility that the class's VPPA claims would yield a high recovery at trial, and that the court would not have approved a settlement of $9.5 million if it had paid the proper attention to that possibility.

***823** As an initial matter, we reject Objectors' argument insofar as it stands for the proposition that the district court was required to find a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award. While a district court must of course assess the plaintiffs' claims in determining the strength of their case relative to the risks of continued litigation, *see Hanlon,* 150 F.3d at 1026, it need not include in its approval order a specific finding of fact as to the potential recovery for each of the plaintiffs' causes of action. Not only would such a requirement be onerous, it would often be impossible—statutory or liquidated damages aside, the amount of damages a given plaintiff (or class of plaintiffs) has suffered is a question of fact that must be proved at trial. Even as to statutory damages, questions of fact pertaining to which class members have claims under the various causes of action would affect the amount of recovery at trial, thus making any prediction about that recovery speculative and contingent.

Relatedly, the district court was not required to include among its findings specific commentary on each of the plaintiffs' five statutory claims. All of the plaintiffs' claims arise under similar privacy statutes, and as Facebook correctly points out, the plaintiffs' likelihood of success with regard to each of those claims depends on the same basic legal theories and factual issues. The district court acted properly in evaluating the strength of the plaintiffs' *case* in its entirety rather than on a claim-by-claim basis. *See Hanlon,* 150 F.3d at 1026.

Moreover, the record contradicts Objectors' general argument that the district court did not meaningfully account for the potential value of the plaintiffs' claims, including any claims under the VPPA. Both before and after the final settlement approval hearing, the district court specifically addressed the possibility that the presence of VPPA claims among some class members might affect the class settlement. In its order preliminarily approving the settlement, the district court notified the parties that "final approval will require a sufficient showing that terms of the settlement are reasonable, *specifically in light of the claims under the VPPA, and the apparent availability of statutory penalties thereunder* " (emphasis added). Following the district court's instructions, the parties did address the VPPA issue in their briefing and arguments at the final approval hearing. The district court also heard from Objectors at that hearing, who again argued that the settlement was too low in light of the possibility of recovery under the VPPA.

The district court rejected that argument. It first observed that Objectors had not "brought to the Court's attention any cases in which plaintiffs have been awarded multiple liquidated damages," which if available would likely increase the class's potential recovery under the VPPA substantially (even if only a small number of class members had VPPA claims). The district court further noted that bringing the VPPA claims to trial would involve significant risk for the class given that the plaintiffs' claims relied on "novel legal theories" and "vigorously disputed" factual issues concerning the Beacon program. And although the district court did not mention it in its approval order, the parties had presented evidence to the court that Blockbuster, one of the only defendants that might qualify as a "video tape service provider" and therefore be subject to liability under the VPPA, was on the verge of bankruptcy, likely making any substantial damages against it annihilative. Based on its consideration of these factors, ***824** the district court concluded that the "$9.5 million offered in settlement is substantial."

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That conclusion was not an abuse of the district court's broad discretion. A $9.5 million class recovery would be substantial under most circumstances, and we see nothing about this particular settlement that undermines the district court's conclusion that it was substantial in this case. Objectors are no doubt correct that the VPPA claims of some class members might prove valuable if successful at trial, but that does not cast doubt on the district court's conclusion as to the fairness and adequacy of the overall settlement amount to the class *as a whole.* It is an inherent feature of the class-action device that individual class members will often claim differing amounts of damages—that is why due process requires that individual members of a class certified under Rule 23(b)(3) be given an opportunity to opt out of the settlement class to pursue their claims separately, as were the class members in this case. *See Hanlon,* 150 F.3d at 1024. But a class-action *settlement* necessarily reflects the parties' pre-trial assessment as to the potential recovery of the entire class, with all of its class members' varying claims. So even if some of the class members in this case would have successful claims for $2,500 in statutory damages under the VPPA, those individuals represent, to use the candid phrasing of Objectors, "only a fraction of the 3.6 million-person class." Their presence does not in itself render the settlement unfair or the $9.5 million recovery among all class members too low. [5]

Objectors rely significantly on *Molski v. Gleich,* 318 F.3d 937, 949 (9th Cir.2003) *overruled on other grounds by Dukes v. Wal–Mart Stores, Inc.,* 603 F.3d 571 (9th Cir.2010), in claiming that the *cy pres* remedy here "did not adequately protect the interests of the class," but that case does not support Objectors' argument. *Molski* involved a settlement that required the defendant to pay $195,000 in *cy pres* funds in exchange for a release of all the disability-related claims of a large class. 318 F.3d at 943–44. The district court in *Molski* had certified a mandatory settlement class under Rule 23(b)(2) without providing class members an opportunity to opt out of the settlement. *Id.* at 947. In addition to holding that the inability to opt out of the settlement violated class members' due process rights, we held that "use of the *cy pres* award was inappropriate" under the circumstances because the parties had not made any showing that direct distribution of settlement funds to the class would be burdensome or costly. *Id.* at 954–55. We also found "troubling" that the class's recovery under the settlement was so low relative to the high number of potential class members. *See id.*

Unlike the $195,000 *cy pres* fund in *Molski,* the settlement in this case provides for a substantial $9.5 million pay-out by Facebook for the benefit of the class and thus does not present a situation in which class representatives and counsel accepted their respective fees as a quid pro quo for quietly going away while the class receives virtually ***825** nothing. *See id.* at 953–54. Also fundamentally different is that class members here received notice and were given the opportunity to opt out of the settlement. And, most essentially, there is no dispute that it would be "burdensome" and inefficient to pay the $6.5 million in *cy pres* funds that remain after costs directly to the class because each class member's recovery under a direct distribution would be *de minimis. See id.* at 955. These features distinguish the present case from *Molski* and help to account for why the latter was one of the "rare" cases where we have intruded into the discretion of the district court by setting aside its determination that a settlement agreement is fundamentally fair. *See Staton v. Boeing Co.,* 327 F.3d 938, 960–61 (9th Cir.2003).

The record here convincingly establishes that the district court accounted for the potential value of the VPPA claims of some class members, and the district court's review of the circumstances surrounding the settlement was sufficiently comprehensive to ensure that class representatives and their counsel did not throw absent class members under the proverbial bus to secure a disproportionate benefit for themselves. *See Hanlon,* 150 F.3d at 1027. That review was accordingly compliant with this circuit's requirement that the district court apply heightened review to a class-action settlement reached before formal certification. *See id.* at 1026. This is particularly manifest in that the district court's detailed approval order included the specific factual finding that the settlement agreement "was only achieved after intense and protracted arm's-length negotiations conducted in good faith and free from collusion." Objectors have not made any showing, let alone a "strong" one, that this or any of the district court's other findings was erroneous or amounted to a "clear abuse of discretion." *See id.* at 1027.

Finally, the litigants devote several pages of briefing to a dispute over whether the settlement agreement's provision mandating the permanent termination of the Beacon program provided any meaningful relief to the plaintiff class. Specifically, Objectors argue that Facebook's promise to terminate Beacon is "illusory"

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because the original program was non-operational at the time of the settlement agreement and thus already "effectively terminated." In light of our holding affirming the district court's conclusion that the $9.5 settlement award substantially furthers the interests of the class, Objectors' argument that Facebook's promise to terminate Beacon provides no meaningful relief is of little moment, and in any event we find that it is without merit. Even assuming Objectors' premise that Beacon was already effectively terminated, absent a judicially-enforceable agreement, Facebook would be free to revive the program whenever it wanted. It is thus false to say that Facebook's promise never to do so was illusory.

We affirm the district court's holding that the settlement was fundamentally fair.

IV

Objectors argue additionally that the notice provided to class members during the opt-out period was insufficient because it did not describe the value of the plaintiffs' statutory claims and "did not accurately describe what the class members would receive in exchange for the release" of those claims. Objectors argue in particular that the notice should have included a description of the VPPA statute, that it should have alerted class members that a Facebook employee would be on the board of the organization distributing *cy pres* funds, and that its reference to Facebook's ***826** promise to terminate Beacon was misleading because Beacon was already dormant.

We disagree. Notice provided pursuant to Rule 23(e) must "generally describe[ ] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir.2009) (internal quotations omitted). That standard does not require detailed analysis of the statutes or causes of action forming the basis for the plaintiff class's claims, and it does not require an estimate of the potential value of those claims. *See id.* (notice need not include "expected value of fully litigating the case"). Nor is there any particular requirement that notice in a class-action settlement involving a *cy pres* remedy name the individuals sitting on the *cy pres* recipient's board of directors, even if one of those individuals has some association with the defendants in the case. Finally, for the same reasons we reject Objectors' argument that Facebook's promise to terminate Beacon was illusory, there was nothing misleading about referencing that promise in the class notice.

We agree with the district court that the notice in this case adequately apprised class members of all material elements of the settlement agreement and therefore complied with the requirements of Rule 23(e).

V

Ultimately, we find little in Objectors' opposition to the settlement agreement beyond general dissatisfaction with the outcome. That dissatisfaction may very well be legitimate insofar as Objectors would have acted differently had they assumed the role of class representatives. But while Objectors may vigorously disagree with the class representatives' decision not to hold out for more than $9.5 million or insist on a particular recipient of *cy pres* funds, that disagreement does not require a reviewing court to undo the settling parties' private agreement. The district court properly limited its substantive review of that agreement as necessary to determine that it was "fair, adequate, and free from collusion." *See id.*

AFFIRMED.

KLEINFELD, Senior Circuit Judge, dissenting:

I respectfully dissent. This settlement perverts the class action into a device for depriving victims of remedies for wrongs, while enriching both the wrongdoers and the lawyers purporting to represent the class.

A. The Facts.

1. "Beacon."

Millions of people connect themselves to their "friends" on Facebook. Some Facebook "friends" are friends in the traditional sense, people we know and like. Some are more in the nature of contacts, or acquaintances, or people we think may want to see what we post. For people who regularly use Facebook to communicate, "friends"

may merely be their address book. The lead plaintiff in this case, Sean Lane, had over 700 Facebook "friends." Facebook operates like a bulletin board, so that "friends" can see whatever a user chooses to post and not make private.

Facebook is "free," furnished without a subscription price. The company makes money by selling advertising. To make such sales more lucrative, Facebook started a program called "Beacon" in November 2007. Like an actual beacon, the program shone light to make something easier to see: in this case, a user's "friends" could see whatever he had bought from ***827** companies that paid Facebook to participate in Beacon. Over forty companies signed up for Beacon, including Blockbuster, a movie retailer, Zappos, a shoe and clothing retailer, and Overstock.com, a discounter. If a Facebook user rented a movie from Blockbuster, for example, Facebook told all his friends what movie he had rented. Facebook told retailers, "Facebook Beacon enables your brand or business to gain access to viral distribution within Facebook. Stories of a user's engagement with your site.... will act as word-of-mouth promotion for your business and may be seen by friends who are also likely to be interested in your product."

Many Facebook users strongly objected to losing the privacy of their purchases. After all, people ordinarily post on their Facebook page only what they want to post, and they had not elected to tell all their "friends" what they had just bought. Some people buy things on the internet precisely because they want more privacy than they would have at a local store. Beacon took away their privacy, and broadcast their purchases to people who users wanted to remain in the dark.

Worse, Facebook made it very hard for users to avoid these broadcasts. The user had to actively opt out. And opting out required video game skills. The user would get a pop-up on his screen asking whether he wanted to opt out, but the pop-up would disappear in about ten seconds. Too slow reading the pop-up or clicking the mouse, and all a user's "friends" would know exactly what he had bought. Since the pop-up disappeared so quickly, someone looking at another window, or answering the phone, or just not paying attention, would likely not even be aware of the opt-out option before it disappeared.

Plaintiff Sean Lane alleges in the complaint that he bought a ring from Overstock.com as a surprise for his wife, but before he gave it to her, Facebook ruined the surprise by spreading the news to his over 700 "friends," including many alumni in his college class. Ginger McCall states that her video rentals at Blockbuster were disclosed to all her "friends." Of the vast number of people whose purchases were broadcast, no doubt some suffered embarrassment, and some suffered damage to employment, business, or personal relationships. Some Blockbuster rentals doubtless included erotica, some Overstock.com purchases probably included gifts meant to look more expensive than they were, and some Zappos purchases were probably more extravagant than purchasers' spouses were aware. Someone who had told her college classmate that she could not attend her wedding because she could not afford the plane fare could lose a friend when Facebook told her classmate that she'd bought $400 shoes. Mr. Lane complains that his wife asked him about his ring purchase before he gave it to her, ruining his Christmas gift to her. His wife might also have been less impressed by the ring than he had hoped, since she and all his other friends could click a link and see that he had bought it cheaply—good for advertising Overstock.com, bad for advertising Mr. Lane's generosity.

Many users' private purchases were exposed, and over 50,000 complained. Within a few weeks (long before this lawsuit was filed), Facebook eliminated the opt-out Beacon program. Facebook changed it to an opt-in program, so that users did not need to maintain video game alertness to avoid disclosure to all their friends. In the opt-in version of Beacon, purchases made in private stayed private unless the user expressly allowed Facebook to publicize them. One of the objectors to the settlement, Ginger McCall, says her movie rentals ***828** were disclosed even after Beacon had supposedly changed to an opt-in, and no findings have been made on whether the opt-in worked or was tricky to operate.

2. The Settlement.

This lawsuit was filed in August 2008, about eight months after the opt-out version of Beacon had ended. The complaint challenged only the opt-out program that had lasted for a few weeks, not the opt-in version that had been in place since then. The parties mediated and settled, all before any class was certified. They agreed to end Beacon,

both opt-in as it then was, and opt-out as it had been originally.

The settlement agreement approved by the district court (mistakenly, in my view) greatly changed the class aspect of the case. First, the parties agreed to certify the class for purposes of settlement. Second, they agreed to expand it far beyond what the complaint had sought. The complaint sought damages only for users affected during the few weeks when they had to opt out, but the settlement expanded the class to include everyone affected during the much longer opt-in period. Since the members of the class got no money from the settlement, the effect of certification and expansion was to bar any claims the expanded class might have, not to provide more people with recompense. In exchange for nothing, class members were barred from suing Facebook, Blockbuster, Overstock.com, or any of the other defendants for any claims arising from or relating to Beacon, "including, without limitation, arising from or related to data gathered from Beacon."

The majority states that Facebook promised never to revive the Beacon program, but this is not quite right. Facebook remained free to revive the program, even the cancelled version under which the subscriber had only a few seconds to opt out. The only limitation the settlement imposed was that Facebook had to call the Beacon program by some other name. The agreement said that Facebook would terminate "the Beacon Program," and defined "Beacon" to mean "the program launched by Facebook on November 6, 2007 and all iterations thereof *bearing the 'Beacon' name*" (emphasis added). The district judge asked about this term, and plaintiffs' attorney expressly conceded that Facebook was free to reinstitute the same program under a different name. "[T]he problem was when you tried to describe the functionality and you preclude Facebook from using that functionality going forward, it becomes truly problematic and becomes impossible to reach an agreement because you're limiting their ability to run their business.... At the end of the day, we could not reach agreement with defendants regarding limiting their future actions as a corporation." That was an on the record concession that the injunction meant as little as it said, and Facebook remained free to do what it had done before, under a different name. The injunctive relief the class received was no relief at all, not even a restriction on future identical conduct.

Facebook users who had suffered damages from past exposure of their purchases got no money, not a nickel, from the defendants. Even those who had rented videos, and were arguably entitled to statutory damages of $2,500 for each disclosure,[1] got ***829** nothing. Class counsel, on the other had, got millions. Plaintiffs' lawyers and Facebook agreed that Facebook would not object to attorneys' fees up to one third of what they called the "settlement fund." One third would be a fee of $3,166,667. The fee would come out of the "settlement fund" and would not be in addition to it, so Facebook had no economic interest in reducing the amount. The fee actually approved by the district court was $2,322,763 plus costs of $42,210.58, 25% of the "settlement fund." That $2.3 million payment was for getting their clients nothing and barring all the claims of a vastly broadened class.

Not a cent of the remaining "settlement fund" money would go to the Facebook users on whose behalf class counsel purportedly settled. The only exceptions were $10,000 to Mr. Lane, $5,000 each to two others, and $1,000 each to the other 19 named plaintiffs, amounting to $39,000 for the few people in the class who presumably had personally agreed to have class counsel represent them.

The remaining millions were to go to a new "privacy foundation" that did not yet exist. The board of the new foundation would be three directors to be agreed upon by Facebook and class counsel, or if they disagreed one chosen by each and the third chosen by those two. Under the agreement, all three directors could come from the Facebook advertising and sales staff if class counsel and Facebook so chose. The board of directors of this "privacy foundation" was to be advised by Facebook's own lawyer and class counsel. The agreement provided that the "privacy foundation" was to use its millions to "fund projects and initiatives that promote the cause of online privacy, safety, and security" however its Facebook-friendly board chose.

B. Analysis.

The class action rule[2] was designed to facilitate lawsuits where individuals' or small groups' judgments would not add up to enough money to justify hiring lawyers, but judgments for large numbers of similarly situated victims of misconduct would. "The policy at the very core of

the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." [3]

This procedural device has obvious attendant risks, because class counsel's "clients" are not clients at all in the traditional sense; they do not hire the lawyer, they do not agree on a fee with him, and they do not control whether he settles their case. They are in no position to prevent class counsel from pursuing his own interests at their expense. [4] The named plaintiffs, those who actually have some chance of directing their lawyers, typically get amounts of cash without much relation to their individual damages, so their incentives align more with class counsel than with their fellow class members.

***830** Defendant and class counsel, in any class action, have incentives to collude in an agreement to bar victims' claims for little or no compensation to the victims, in exchange for a big enough attorneys' fee to induce betrayal of the interests of the purported "clients." The defendant's agreement not to oppose some amount for the fee creates the same incentive as a payment to a prizefighter to throw a fight. A real client may refuse a settlement that is bad for him but benefits his lawyer, but a large class of unknown individuals lacks the knowledge or authority to say no. It is hard to imagine a real client saying to his lawyer, "I have no objection to the defendant paying you a lot of money in exchange for agreement to seek nothing for me." "The absence of individual clients controlling the litigation for their own benefit creates opportunities for collusive arrangements in which defendants can pay the attorneys for the plaintiff class enough money to induce them to settle the class action for too little benefit to the class (or too much benefit to the attorneys, if the claim is weak but the risks to the defendants high)." [5]

Rule 23 protects against these risks much as the courts have traditionally protected against similar risks when attorneys represent children, estates of deceased persons, and unknown persons, by requiring judicial approval of settlements. Approval and review, though, are a weak substitute for real clients, because judges know little about the case beyond what the lawyers tell them. That works much better when the lawyers are on different sides than when they are on the same side. Judges also may face an incentive problem, where a heavy docket cannot easily withstand the additional weight of a huge lawsuit that does not settle. Objectors provide a critically valuable service of providing knowledge from a different point of view, but one that is too often not used effectively. Our review process is supposed to assure that settlement of a class action, despite the risk of perverse incentives, is "fair, reasonable, and adequate" [6] and that notice is given "in a reasonable manner" [7] so that those bound by the settlement have an opportunity to be heard.

In this case, the process has failed. The attorneys for the class have obtained a judgment for millions of dollars in fees. The defendant, Facebook, has obtained a judgment that bars claims by millions of people victimized by its conduct. So have the other companies involved in Beacon. The victims, on the other hand, have obtained nothing. Under the settlement, Facebook even preserved the right to do the same thing to them again.

1. The Settlement is Unfair, Unreasonable, and Inadequate.

The factors for evaluating class action settlements [8] are multifarious and indeterminate, ***831** but the cases have become less tolerant of settlements not beneficial to class members. We used to be extremely deferential when district courts approved settlements, as in *Hanlon v. Chrysler Corp.,* [9] the 1998 case on which the majority relies. We have in the last few years become much less so, as in our recent decisions *In re Bluetooth,* [10] *Nachshin v. AOL, LLC,* [11] and *Dennis v. Kellogg Co.* [12] We still exercise deferential review for abuse of discretion, but do so in light of what we rejected in *Bluetooth, Nachshin,* and *Dennis.* Review for abuse of discretion has never meant that we will affirm whatever a district court does. [13]

An extremely important qualification even in Hanlon was a "higher standard of fairness" [14] when settlement is reached before a class is certified. In this case, not only was settlement reached before class certification, but the class certified for settlement purposes was far broader than the one sought when the case was filed. The *Hanlon* "higher standard of fairness" matters because of "the dangers of collusion between class counsel and the defendant." [15] *Bluetooth* emphasizes the need for

greater scrutiny of precertification settlement on behalf of a class.[16] "Collusion may not always be evident on the face of a settlement, and courts therefore must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations."[17]

Collusion is far more likely before certification, and exponentially higher if the class is expanded as part of the settlement. Here is why. If a lawsuit is only on behalf of named plaintiffs, damages are limited to what they may properly receive, so if a case is reasonably defensible, a defendant may make a sound financial decision to defend. But if a vast class is certified, then even a meritless case may require a defendant to settle or bet all the money it has or can borrow for attorneys' fees, because even a very small chance of a very large verdict is too much to risk. Plaintiffs' counsel want certification, to make the damages enough to be worth the time and expense of the litigation. Defense counsel oppose it, to keep the risk down to a level where they can afford the risk of litigation. Because certification of a class may turn even a meritless plaintiff's case into a bet-the-company defendant's case, defendants usually vigorously oppose class ***832** certification, giving courts the benefit of adversarial presentations.

Once the parties agree to settle, and agree to certify a class, defendant's interests are reversed. Plaintiffs' counsel still have an interest in keeping a large class certified, because the larger the class, the higher the attorneys' fees are likely to be. But if the defendant will get a bar against claims, almost always a term of any settlement, the more people whose claims are barred the better. The risk of having to pay out a huge amount of money gets converted, by class certification, into a certainty that vast numbers of people will be unable to sue the defendant. So when settling before class certification, and agreeing upon class certification as part of the settlement, both sides have the same incentive, to certify the class and make it as vast and all-encompassing as possible. It is a bonanza for the defendant if it can bar the claims not only of everyone in the class described in the complaint, but also of a much larger class on whose behalf more and different claims might have been asserted.

And that is just what happened here. The complaint claims wrongdoing against and damages to Facebook users during the few weeks of the opt-out period of "Beacon." The settlement bars claims of all the users during that period and during the much longer opt-in period. When they settled, Facebook and class counsel shared the same interest, as broad a class certification as possible. Ideally, from both the point of view of both sides' interests (attorneys' fees for one side, protection from claims for the other) the class would include everyone in the world, and bar all claims of any kind from the beginning of time to the present day. They came about as close to that as they plausibly could.

Bluetooth emphasizes that "clear sailing" agreements on attorneys' fees are important warning signs of collusion.[18] We have a version of a clear sailing agreement here: Facebook's agreement not to oppose an attorneys' fees claim of up to $3,166,667. If, as here, the defendant agrees not to oppose an attorneys' fees claim, and defendants payout will be the same no matter how high the fee is, then both sides have an incentive to make the fee large enough to induce plaintiffs' counsel to sacrifice class interests to plaintiffs' attorneys' interests. *Bluetooth* holds that caution is especially necessary when, as here, members of the class receive no money, but class counsel receive a great deal of it.[19] As the amount of the fee to which no objection will be made grows, especially if the fee will not affect the cost to the defendant, it makes economic sense (though not ethical sense) for plaintiffs' counsel to throw the fight for the money.

Strikingly, the settlement here goes even further than coupon settlements, where class members get only discounts if they buy again from the defendant claimed to have wronged them before, while their purported lawyers get huge amounts of money. Here the Facebook users get nothing at all, not even coupons. Every nickel of the remainder of the $9,500,000 after class counsel's cut, administrative costs, and incentive payments to the named plaintiffs, goes not to the victims, but to an entity partially controlled by Facebook and class counsel. The new entity, dressed to look good in old law ***833** French with its "cy pres" award and "non-profit" status, can spend the money to "educate" people about privacy on the internet, perhaps via some instructional videos on how to use all the privacy features available in Facebook.

Arguably, no harm would be done if all claims of wrongdoing to Facebook users from the Beacon program were frivolous. If their claims were worthless, then no wrong is done to them when those claims are barred

and $9.5 million gets transferred to some lawyers they never met and a new entity not likely to benefit them. But that would denigrate the claims too far. There is reason to believe that Facebook needed the shield its $9.5 million bought. Facebook got customer complaints and bad publicity from the opt-out Beacon program. The class had colorable claims. Facebook had a good argument that it was not itself a "video tape service provider" under the federal statute entitling a customer to liquidated damages of $2,500 for disclosure of what videotape someone had rented from Blockbuster,[20] but still had a risk of some sort of vicarious, joint, or "civil conspiracy" liability.[21] If found liable, it was a deep pocket target for the punitive damages for which the statute expressly provides.[22] And at least one federal district court has taken an expansive view of who is a "video tape service provider" prohibited from making disclosures.[23] The facts alleged in the complaint stimulate a concern about the privacy of people's purchases on the internet and the use of customer information by Facebook.

Tort law tends to evolve to make actionable conduct widely seen as harmful, especially when the conduct is willful, as it was here. The plaintiffs' claims and the risk of that evolution of tort law were worth money to avoid, for Facebook. We cannot reasonably say that a risk worth $9.5 million to Facebook to avoid nevertheless had no value whatsoever to the potential claimants whose claims presented that risk. If Facebook users had no colorable claims, why would Facebook have paid $9.5 million to bar them?

2. The Settlement does not Meet our Standards for Cy Pres Awards.

Even if the $9.5 million number, the attorneys' fees, and the absence of any relief whatsoever to class members all were "fair, reasonable and adequate," the new foundation would still not satisfy the standards for cy pres awards. We held in *Dennis v. Kellogg Co.*[24] quoting *Staton v. Boeing Co.*,[25] that cy pres distributions present "a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of negotiations."[26]

Cy pres traditionally was a means by which, say, a bequest to a charity no longer existing when a testator died might be given instead to a similar charity doing similar work. Thus a bequest to the Boys' ***834** Club might go to its replacement, the Boys' and Girls' Club. The doctrine has never meant simply that money for harm to someone would be given to someone else preferred by the defendant and plaintiff's attorney and perhaps by the court. We cautioned in *Nachshin v. AOL* that "When selection of cy pres beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court."[27]

The rules of judicial ethics have in many forms for over a hundred years prohibited judges from endorsing charities, because of the risk that lawyers and litigants will feel compelled to contribute to them.[28] Too liberal an approach to cy pres means that a court may simply order, and not merely encourage, someone subject to its jurisdiction to give to a preferred charity. A defendant may prefer a cy pres award to a damages award, for the public relations benefit. And the larger the cy pres award, the easier it is to justify a larger attorneys' fees award. The incentive for collusion may be even greater where, as here, there is nothing to stop Facebook and class counsel from managing the charity to serve their interests and pay salaries and consulting fees to persons they choose.

Nachshin holds that the district court must ensure that a cy pres award targets the plaintiff class.[29] Here it does not. *Six Mexican Workers v. Arizona Citrus Growers*[30] holds that a district court must reject awards that provide "no reasonable certainty that any member will be benefitted."[31] This one does not. We require an established record of performance by the charity of acts beneficial to people in the wronged class.[32] The cy pres award in this case goes to a new entity with no past performance at all. For all we know it will fund nothing but an "educational program" amounting to an advertising campaign for Facebook. That would appear to satisfy the articles and bylaws, and Facebook, after all, together with class counsel and their nominees, will run it.

3. Notice.

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We review adequacy of notice de novo, not deferentially.[33] This is because notice is a matter of due process of law.[34] If a person owns a claim, it is property, and the owner of the claim is constitutionally entitled not to have it taken from him except with reasonable notice and an opportunity to be heard. Notice in this case was inadequate, most obviously because the class was not sufficiently informed that Facebook itself might be in control of the ***835** money purportedly awarded on account of wrongs it committed against class members. The articles of incorporation and bylaws of the purportedly charitable foundation were posted online for the class to see only a week before the deadline to opt out of the settlement. Those documents said that "Tim Sparapani" would be on the three-person board, but failed to mention who he was, Facebook's own Director of Public Policy. Nor did the notice say that Facebook's counsel, Michael Rhodes, would sit on the foundation's legal advisory board. Class members would have had to look carefully at the settlement agreement and figure out that Mr. Rhodes, the man designated as a legal advisor on page twelve of the settlement agreement, was the same man listed as Facebook's attorney on page five. Class members dependant on the notice would have no idea that the money supposedly paid for wrongs to them was to be spent by agents of the purported wrongdoer.

Conclusion

The majority approves ratification of a class action settlement in which class members get no compensation at all. They do not get one cent. They do not get even an injunction against Facebook doing exactly the same thing to them again. Their purported lawyers get millions of dollars. Facebook gets a bar against any claims any of them might make for breach of their privacy rights. The most we could say for the cy pres award is that in exchange for giving up any claims they may have, the exposed Facebook users get the satisfaction of contributing to a charity to be funded by Facebook, partially controlled by Facebook, and advised by a legal team consisting of Facebook's counsel and their own purported counsel whom they did not hire and have never met.

Facebook deprived its users of their privacy. And now they are deprived of a remedy.

All Citations

696 F.3d 811, 83 Fed.R.Serv.3d 985, 12 Cal. Daily Op. Serv. 10,846, 2012 Daily Journal D.A.R. 13,213

Footnotes

1 Specifically, the plaintiffs alleged violations of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 (1986); the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1986); the Video Privacy Protection Act, 18 U.S.C. § 2710 (1988); California's Consumer Legal Remedies Act, Cal. Civ.Code § 1750; and California's Computer Crime Law, Cal. Pen.Code § 502.

2 Our decision in *Nachshin* was not published at the time of argument in this case, but the principles we announced there were well established. We discuss *Nachshin* here because it provides a helpful summary of existing case law on the *cy pres* doctrine.

3 Objectors argue that Facebook's desire to protect its interest in the *cy pres* distribution process is tantamount to Facebook preserving its right to cause harm to the class. But Objectors' argument assumes a false dichotomy. It is perfectly consistent to say that DTF can be structured both to ensure Facebook's interests are not harmed and to promote the plaintiffs' general interests in the causes of online privacy and security.

4 Objectors suggest that there is no assurance that DTF would perform in accordance with the strictures of its charter document, but that is unsupported speculation. There is no reason to suppose that both the Board of Legal Advisors (consisting of both the settling parties' counsel) and the district court (which retained jurisdiction over implementation of the settlement) would abdicate their responsibility to ensure that DTF performs according to the settlement agreement.

5 Although a settlement is not categorically unfair for certain class members simply because they might recover higher damages than other class members were they to prosecute their claims individually, significant variation in claimed damages among class members is relevant to the Rule 23(b)(3) "predominance" analysis during class certification. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 624–25, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). However, Objectors do not challenge the district court's class certification or its decision to include individuals with VPPA claims in the settlement class, so we express no opinion on that issue here.

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1 18 U.S.C. § 2710(b)(1), (c)(1)–(2) ("A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable.... Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court. The court may award—(A) actual damages but not less than liquidated damage in an amount of $2500; (B) punitive damages; (C) reasonable attorneys' fees and other litigation costs reasonably incurred; and (D) such other preliminary and equitable relief as the court determines to be appropriate.").

2 Fed.R.Civ.P. 23.

3 *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir.1997)).

4 *See, e.g., Staton v. Boeing Co.,* 327 F.3d 938, 959–60 (9th Cir.2003).

5 *Zucker v. Occidental Petroleum Corp.,* 192 F.3d 1323, 1327 (9th Cir.1999).

6 Fed.R.Civ.P. 23(e)(2).

7 Fed.R.Civ.P. 23(e)(1).

8 *See, e.g., Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir.1998) ("Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.") (citation omitted); *Officers for Justice v. Civil Serv. Comm'n of San Francisco,* 688 F.2d 615, 625 (9th Cir.1982) (noting that such factors are "by no means an exhaustive list of relevant considerations.... The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case.").

9 *Hanlon,* 150 F.3d 1011.

10 *In re Bluetooth Headset Products Liab. Litig.,* 654 F.3d 935, 946 (9th Cir.2011).

11 *Nachshin v. AOL, LLC,* 663 F.3d 1034, 1040 (9th Cir.2011).

12 *Dennis v. Kellogg Co.,* No. 11–55674, 2012 WL 2870128 (9th Cir. July 13, 2012).

13 *Cf. Six Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1307–09 (9th Cir.1990) (finding that a district court's use of cy pres to distribute unclaimed settlement funds was an abuse of discretion because it did not "adequately target the plaintiff class and fail[ed] to provide adequate supervision over distribution").

14 *Hanlon,* 150 F.3d at 1026; *see also Molski v. Gleich,* 318 F.3d 937, 953 (9th Cir.2003), *overruled on other grounds by Dukes v. Wal–Mart Stores, Inc.,* 603 F.3d 571 (9th Cir.2010).

15 *Hanlon,* 150 F.3d at 1026.

16 *In re Bluetooth,* 654 F.3d 935, 946–47 (9th Cir.2011).

17 *Id.* at 947.

18 *In re Bluetooth,* 654 F.3d at 947 ("[A] 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds ... carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class.") (citation and quotation omitted).

19 *Id.* at 947.

20 18 U.S.C. § 2710(a)(4), (c)(2).

21 In their complaint, Plaintiffs claimed that Facebook was engaged in a civil conspiracy to violate the Video Privacy Protection Act. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.,* 7 Cal.4th 503, 28 Cal.Rptr.2d 475, 869 P.2d 454, 457 (1994) (giving an overview of the California law of civil conspiracy).

22 18 U.S.C. § 2710(c)(2)(B).

23 *Amazon.com LLC v. Lay,* 758 F.Supp.2d 1154, 1167 (W.D.Wash.2010).

24 *Dennis v. Kellogg Co.,* No. 11–55674, 2012 WL 2870128 (9th Cir. July 13, 2012).

25 *Staton v. Boeing Co.,* 327 F.3d 938 (9th Cir.2003).

26 *Dennis v. Kellogg Co.,* 2012 WL 2870128, at *6.

27 *Nachshin v. AOL, LLC,* 663 F.3d 1034, 1039 (9th Cir.2011).

28 Canon 25 of the Canons of Judicial Ethics, first adopted by the ABA in 1924, states that a judge "should not solicit for charities, nor should he enter into any business relation which ... might bring his personal interest into conflict with the impartial performance of his official duties." Henry S. Drinker, Legal Ethics 274, 333 (1965). The current ABA Model Rules have similar language. Model Code of Judicial Conduct R. 3.7 (2007). Something akin to this was an issue in

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Nachshin, where the judge's husband sat on the board of a legal aid foundation that was to receive a donation as part of the settlement. *Nachshin,* 663 F.3d at 1041.

29 *Nachshin,* 663 F.3d at 1039–40.

30 *Six Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301 (9th Cir.1990).

31 *Id.* at 1308.

32 *Id.*

33 *Silber v. Mabon,* 18 F.3d 1449, 1453 (9th Cir.1994).

34 *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1024 (9th Cir.1998).

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869 F.3d 551
United States Court of Appeals, Seventh Circuit.

IN RE: SUBWAY FOOTLONG SANDWICH MARKETING AND SALES PRACTICES LITIGATION.
Appeal of: Theodore Frank, Objector.

No. 16-1652
|
Argued September 8, 2016
|
Decided August 25, 2017

Synopsis

Background: Consumers brought putative class actions against sandwich restaurant chain owner, which were consolidated by Judicial Panel on Multidistrict LItigation, alleging restaurant engaged in deceptive marketing and sales practices by advertising sandwiches as "footlongs" when some sandwiches were slightly shorter than advertised lengths. The United States District Court for the Eastern District of Wisconsin, Lynn Adelman, J., 316 F.R.D. 240, approved settlement agreement that awarded injunctive relief to the class and $520,000 to class counsel. Class member who unsuccessfully objected to settlement appealed.

Holdings: The Court of Appeals, Sykes, Circuit Judge, held that:

member had standing to appeal, and

class should not have been certified and settlement should not have been approved.

Reversed and remanded.

***552** Appeal from the United States District Court for the Eastern District of Wisconsin. MDL No. 13-02439 —**Lynn Adelman**, *Judge*.

Attorneys and Law Firms

Stephen P. DeNittis, Esq., Attorney, DENITTIS OSEFCHEN, P.C., Marlton, NJ, Thomas A. Zimmerman, Jr., Matthew Charles DeRe, Attorneys, ZIMMERMAN LAW OFFICES, P.C., Chicago, IL, for Plaintiffs–Appellees Nguyen Buren, Jason Leslie, Richard Springer, Barry Gross, and Charles Noah Pendrak.

Theodore H. Frank, Attorney, COMPETITIVE ENTERPRISE INSTITUTE, Washington, DC, Pro Se.

Jeffrey Babbin, John Doroghazi, David R. Roth, Attorneys, WIGGIN & DANA, New Haven, CT, Howard L. Teplinsky, Attorney, BEERMAN SWERDLOVE LLP, Chicago, IL, for Defendant–Appellee Doctor's Associates, Inc., doing business as Subway.

Howard L. Teplinsky, Attorney, BEERMAN SWERDLOVE LLP, Chicago, IL, for Defendants–Appellees Subway Sandwich Shops, Incorporated, John Does, and ABC Corporations.

Before Flaum, Rovner, and Sykes, Circuit Judges.

Opinion

Sykes, Circuit Judge.

In January 2013 an Australian teenager measured his Subway Footlong sandwich and discovered that it was only 11 inches long. He photographed the sandwich alongside a tape measure and posted the photo on his Facebook page. It went viral. Class-action litigation soon followed. Plaintiffs' lawyers across the United States sued Subway for damages and injunctive relief under state consumer-protection laws, seeking class certification under Rule 23 of the Federal Rules of Civil Procedure. ***553** The suits were combined in a multidistrict litigation in the Eastern District of Wisconsin.

In their haste to file suit, however, the lawyers neglected to consider whether the claims had any merit. They did not. Early discovery established that Subway's unbaked bread sticks are uniform, and the baked rolls rarely fall short of 12 inches. The minor variations that do occur are wholly attributable to the natural variability in the baking process and cannot be prevented. That much is common sense, and modest initial discovery confirmed it. As important, no customer is shorted any food *even if* a sandwich roll fails to bake to a full 12 inches. Subway sandwiches are made to order in front of the customer; meat and cheese ingredients are standardized, and "sandwich artists" add toppings in whatever quantity the customer desires.

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With no compensable injury, the plaintiffs' lawyers shifted their focus from a damages class under Rule 23(b)(3) to a class claim for injunctive relief under Rule 23(b)(2). The parties thereafter reached a settlement. For a period of four years, Subway agreed to implement certain measures to ensure, to the extent practicable, that all Footlong sandwiches are at least 12 inches long. The settlement acknowledged, however, that even with these measures in place, some sandwich rolls will inevitably fall short due to the natural variability in the baking process. The parties also agreed to cap the fees of class counsel at $525,000. The district court preliminarily approved the settlement.

Theodore Frank objected. A class member and professional objector to hollow class-action settlements, *see, e.g.*, *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016), Frank argued that the settlement enriched only the lawyers and provided no meaningful benefits to the class. The judge was not persuaded. He certified the proposed class and approved the settlement. Frank appealed.

We reverse. A class action that "seeks only worthless benefits for the class" and "yields [only] fees for class counsel" is "no better than a racket" and "should be dismissed out of hand." *Id.* at 724. That's an apt description of this case.

I. Background

In January 2013 Matt Corby, an Australian teenager, purchased a Subway Footlong sandwich and, for reasons unknown, decided to measure it. The sandwich was only 11 inches long. He took a photo of the sandwich next to a tape measure and posted the photo on his Facebook page. Thus a minor social-media sensation was born. A few media outlets and some Subway customers were inspired to conduct their own sandwich-measuring experiments. *See, e.g.*, Kaylee Osowski, *Some Subway "Footlong" subs don't measure up*, N.Y. POST (Jan. 17, 2013), http://nypost.com/2013/01/17/some-subway-footlong-subs-dont-measure-up.

Subway immediately issued a press release announcing that it had "redoubled" its efforts "to ensure consistency and correct length in every sandwich." The franchisor assured its customers that its "commitment remains steadfast" to ensure that every Footlong sandwich sold at each of its restaurants "worldwide" is at least 12 inches long.

Within days of Corby's post, the American class-action bar rushed to court. Plaintiffs' lawyers sued Subway seeking damages and injunctive relief under the consumer-protection laws of various states.[1] Subway moved to transfer the ***554** cases to a single district court for a multidistrict litigation. The cases—nine in total—were eventually consolidated in the Eastern District of Wisconsin.

In the meantime, the parties agreed to conduct limited informal discovery in anticipation of mediation. The early discovery revealed that the claims were factually deficient. For starters, the vast majority of Subway Footlong sandwiches are, as the name implies, at least 12 inches long. The few that do not measure up generally fall short by only about a quarter-inch, and the shortfalls are the inevitable consequence of natural—and unpreventable—vagaries in the baking process. Additionally, all of Subway's raw dough sticks weigh exactly the same, so the rare sandwich roll that fails to bake to a full 12 inches actually contains no less bread than any other. What's more, Subway standardizes the amount of meat and cheese in each sandwich, and sandwich makers prepare each one to order right in front of the customer, adding toppings on request. So the length of the bread has no effect on the quantity of food each customer receives.

This early discovery, limited though it was, extinguished any hope of certifying a damages class under Rule 23(b)(3). The overwhelming majority of Subway's sandwiches lived up to their advertised length, so individual hearings would be needed to identify which purchasers actually received undersized sandwiches. But sandwich measuring by Subway customers had been a fleeting social-media meme; most people consumed their sandwiches without first measuring them. Proof of injury was nigh impossible because no customer whose sandwich roll actually failed to measure up received any less food because of the shortfall. In addition, the element of materiality—a requirement for a damages claim under most state consumer-protection statutes—was an insurmountable obstacle to class certification. Individualized hearings would be necessary to identify which customers, if any, deemed the minor variation in bread length material to the decision to purchase.

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Rather than drop the suits as meritless, class counsel re-focused their efforts on certifying an injunction class under Rule 23(b)(2) and eventually filed a consolidated class complaint seeking only injunctive relief. Following mediation, the parties agreed in principle to a settlement in which Subway committed to institute a number of practices designed to ensure, to the extent practicable, that its sandwich rolls measure at least 12 inches long and to keep those practices in place for four years.

More specifically, Subway agreed that (1) franchisees would "use a tool" for measuring sandwich rolls; (2) corporate quality-control inspectors would measure a sampling of baked bread during each regularly scheduled compliance inspection; (3) the inspectors would check bread ovens during each compliance inspection "to ensure that they are in proper working order and within operating specifications"; and (4) Subway's website and each franchised restaurant would post a notice explaining that the natural variability in the bread-baking process will sometimes result in sandwich rolls that are shorter than the advertised length. The settlement also explicitly acknowledged that "because of the inherent variability in food production and the bread baking process," Subway could not guarantee that each sandwich roll will "always be exactly 12 inches or greater in length after baking."

Having agreed in substance to the terms of a settlement, the parties spent the next year or so dickering over fees for class counsel and incentive awards for the named plaintiffs. They eventually agreed to cap attorney's fees at $525,000 and incentive ***555** awards at $1,000 for each named plaintiff. The district judge preliminarily approved the settlement and scheduled a fairness hearing. Class counsel filed a motion seeking $520,000 in attorney's fees and a $500 incentive award for each of ten named plaintiffs.

Frank objected to the settlement and class certification. He argued that the proposed injunction didn't benefit the class in any meaningful way and so the settlement was worthless. The judge was unmoved. He approved the settlement and certified a class of "all persons in the United States who purchased a 6-inch or Footlong sandwich at a Subway restaurant between January 1, 2003[,] and ... October 2, 2015." The judge also accepted class counsel's request for $520,000 in fees as reasonable and approved the proposal for a $500 incentive award for each class representative. Final judgment was entered in accordance with these rulings. Frank appealed.

II. Discussion

A. Standing

The first issue on appeal concerns Frank's standing. The plaintiffs and Subway insist that he lacks standing to appeal because he doesn't have any interest in the amount of attorney's fees awarded as part of the settlement. Because the settlement provides only injunctive relief to the class—not monetary relief—any reduction in attorney's fees will return to Subway and not to class members like Frank. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014) ("If the class cannot benefit from the reduction in the award of attorneys' fees, then the objector, as a member of the class, would not have standing to object, for he would have no stake in the outcome of the dispute.").

But Frank's appeal does not take aim at the judge's ruling on class counsel's motion for attorney's fees. He challenges the certification of the class and the approval of the settlement. True, a decision to reverse the judgment will unwind the award of attorney's fees, and neither Frank nor any other class member will benefit from reducing the fees of class counsel to zero. But as a class member who is bound by the settlement, Frank clearly has standing to appeal. *Devlin v. Scardelletti*, 536 U.S. 1, 10, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002). He properly objected at the fairness hearing and may "appeal the approval of a settlement ... that will ultimately bind [him]." *Id.*

B. Class Certification and Settlement Approval

Although the standard of review is deferential—the decision to certify a class and approve a class settlement is committed to the discretion of the district judge—our duty in this context is "far from pro forma." *Pearson*, 772 F.3d at 780. We have explained that a district judge in this situation is akin to "a fiduciary of the class" and "is subject therefore to the high duty of care that the law requires of fiduciaries." *Id.* (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002)). Indeed, and especially in the settlement context, the judge must give the requirements for class certification "undiluted, even heightened, attention." *Amchem Prods., Inc. v. Windsor*,

521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The judge is called to "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006) (quoting *Reynolds*, 288 F.3d at 279).

Rule 23(a) requires that the class representatives "fairly and adequately protect the interests of the class," FED. R. CIV. P. 23(a)(4), and a class-action settlement ***556** may not be approved unless it is "fair, reasonable, and adequate," FED. R. CIV. P. 23(e)(2). Underpinning both requirements is a concern for the unnamed class members whose interests the named plaintiffs represent and the settlement is meant to serve. We have remarked on the tendency of class settlements to yield benefits for stakeholders *other than* the class: Class counsel "support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information." *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996). That is why "objectors play an essential role in judicial review of proposed settlements of class actions and why judges must be both vigilant and realistic in that review." *Pearson*, 772 F.3d at 787.

We put the point more bluntly in another appeal by Frank as the objector: A class settlement that results in fees for class counsel but yields no meaningful relief for the class "is no better than a racket." *In re Walgreen*, 832 F.3d at 724. If the class settlement does not provide "effectual relief" to the class and its "principal effect" is to "induce the defendants to pay the class's lawyers enough to make them go away," then the class representatives have failed in their duty under Rule 23 to "fairly and adequately protect the interests of the class." *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752–53 (7th Cir. 2011) (quoting FED. R. CIV. P. 23(a)(4)). And if the class representatives have agreed to a settlement that provides meaningless relief to the putative class, the district court should refuse to certify or, alternatively, decertify the class. "No class action settlement that yields zero benefits for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand." *In re Walgreen*, 832 F.3d at 724.

The plaintiffs and Subway defend this settlement by insisting that it actually provides meaningful benefits to the class because Subway has bound itself, for a period of four years, to a set of procedures designed to achieve better bread-length uniformity. A simple comparison of the state of affairs before and after the settlement exposes the cynicism in this argument.

Before the settlement, class members could be fairly certain that a Subway Footlong sandwich would be at least 12 inches long. They could rest assured that because all loaves are baked from the same quantity of dough, each sandwich contained the same amount of bread even if an occasional loaf failed to bake to the full 12 inches in length. And if a loaf happened to bake up slightly shorter than 12 inches, customers could be assured of receiving the same quantity of meat and cheese as any other customer; no class member, regardless of bread length, was cheated on the amount of ham or turkey, provolone or pepper jack. As for other sandwich ingredients, class members could be as profligate or as temperate as they pleased: Subway's "sandwich artists" add toppings at the customer's request. In sum, before the settlement there was a small chance that Subway would sell a class member a sandwich that was slightly shorter than advertised, but that sandwich would provide no less food than any other.

After the settlement—despite the new measuring tools, protocols, and inspections—there's *still* the same small chance that Subway will sell a class member a sandwich that is slightly shorter than advertised. Indeed, the settlement explicitly acknowledges that "because of the inherent variability in food production and the bread baking process, [Subway] will never ***557** be able to guarantee that each loaf of bread will always be exactly 12 inches or greater in length after baking." It's safe to assume that Subway customers know this as a matter of common sense, but the settlement requires Subway to include a disclaimer on its website and in a poster prominently displayed at each restaurant: "Due to natural variations in the bread baking process, the size and shape of bread may vary." And after the settlement, just as before, the rare sandwich that falls short of the full 12 inches will still provide the customer the same amount of food as any other. The injunctive relief approved by the district judge is utterly worthless. The settlement enriches only class counsel and, to a lesser degree, the class representatives.

The plaintiffs and Subway observe that the class can return to court with a motion for contempt sanctions

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in the event of any violation of the injunction. They rely on *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014), as support for this point, but that case doesn't help them. In *Eubank* the defendant window manufacturer had offered extended warranties to purchasers before the class litigation; under the proposed settlement, the manufacturer could not revoke the extended warranties. That, we said, "confer[red] a bit of extra value" on the class members. *Id.* at 725.

Here, the procedures required by the settlement do not benefit the class in any meaningful way. The settlement acknowledges as much when it says that uniformity in bread length is impossible due to the natural variability of the bread-baking process. Contempt as a remedy to enforce a worthless settlement is itself worthless. Zero plus zero equals zero.

Because the settlement yields fees for class counsel and "zero benefits for the class," the class should not have been certified and the settlement should not have been approved. *In re Walgreen*, 832 F.3d at 724. Because these consolidated class actions "seek[ ] only worthless benefits for the class," they should have been "dismissed out of hand." *Id.*

REVERSED AND REMANDED.

All Citations

869 F.3d 551, 98 Fed.R.Serv.3d 599

Footnotes

1 Doctor's Associates, Inc., the franchisor for Subway restaurants, is the actual defendant in the suits. For ease of reference, we'll refer to the defendant as Subway.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Harnage v. Dzurenda, D.Conn., March 28, 2016

731 F.3d 241
United States Court of Appeals,
Second Circuit.

Marjorie CHARRON, Theodore Charron, Andres Mares–Muro, Raymond Andrew Stahl–David, Kim Powell, on behalf of themselves and all others similarly situated, Plaintiffs–Appellants,
Enrique Suarez, Hamida Moumouni, Diogenes Abreu, Objectors–Appellants,
Buyers and Renters United to Save Harlem, Anthony Casanovas, Karen Flannagan, Tracey Moore, Russell Taylor, Diane Trummer, Plaintiffs, All Others Similarly Situated, Plaintiffs–Appellees,
v.
Joel WIENER, Pinnacle Group N.Y. LLC, Defendants–Appellees,
Pinnacle Group Corporation,
Pinnacle Group, LLC, Defendants.*

Nos. 12–2834–CV L, 12–2907–CV (CON).
|
Argued: April 22, 2013.
|
Decided: Sept. 30, 2013.

Synopsis

Background: Not-for-profit tenants' advocate and current and former tenants of rent-regulated apartments brought action alleging that landlords had engaged in conspiracy to fraudulently increase rents, in violation of Racketeer Influenced and Corrupt Organizations Act (RICO) and New York Consumer Protection Act (NYCPA). After class was certified, 269 F.R.D. 221, the United States District Court for the Southern District of New York, Colleen McMahon, J., 874 F.Supp.2d 179, approved settlement and awarded attorney fees, and objectors appealed.

Holdings: The Court of Appeals, Gerard E. Lynch, Circuit Judge, held that:

district court did not abuse its discretion in approving class action settlement;

failure to create subclasses did not violate adequacy of representation requirement for class certification; and

rejection of proposed class action settlement by all named class representatives did not require its rejection by court.

Affirmed.

Attorneys and Law Firms

***243** Harold F. McGuire (Kenneth Rosenfeld, James M. Baker, Matthew J. Chachère, Northern Manhattan Improvement Corporation Legal Services, Harvey David Epstein, David A. Colodny, Urban Justice Center, New York, N.Y., on the brief), ***244** Yankwitt & McGuire, LLP, White Plains, New York, for Objectors–Appellants.

Marc Ian Gross, Pomerantz Grossman Hufford Dahlstrom & Gross LLP, New York, N.Y., for Plaintiffs–Appellants.

Richard F. Levy (Joshua H. Rubin, Marisa K. Perry, Katherine A. Neville, on the brief), Jenner & Block LLP, New York, N.Y., for Plaintiffs–Appellees.

Mitchell A. Karlan, Gibson, Dunn & Crutcher LLP, New York, N.Y., for Defendants–Appellees.

Before: CALABRESI, LIVINGSTON, and LYNCH, Circuit Judges.

Opinion

GERARD E. LYNCH, Circuit Judge:

This appeal presents us with a unique variant of the more common general question of when a class-action settlement requires subclassing of the plaintiff class to ensure adequacy of representation pursuant to Federal Rules of Civil Procedure 23(e) and (a)(4). The district court certified the plaintiff classes, which comprise more than 20,000 current and former occupants of rent-regulated apartments in New York City, pursuant to Rules 23(b)(3) (damages) and (b)(2) (injunctive relief). The settlement that was eventually approved by the district court provides no damages relief for claims that tenants were overcharged rent by prior landlords, rather than

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by defendants, or for claims for rent overcharges that predate July 11, 2004 (together, the "Excluded Overcharge Claims"). Appellant objectors to the settlement contend that the lack of separate representation for tenants with Excluded Overcharge Claims during settlement negotiations violated Rule 23 and constitutional due process, and that the district court was therefore required to establish subclasses for tenants who had such claims. Because we reject that contention, and because we also conclude that the settlement was fair, reasonable, and adequate, as required by Rule 23(e)(2), we affirm the judgment of the district court.

BACKGROUND

I. *Plaintiffs' Allegations*

On September 14, 2007, plaintiffs Marjorie Charron, Theodore Charron, Andres Mares–Muro, Raymond Andrew Stahl–David, and Kim Powell, along with Buyers and Renters to Save Harlem, Anthony Casanovas, Karen Flannagan, Tracey Moore, Russell Taylor, and Diane Trummer, filed an amended complaint in the United States District Court for the Southern District of New York. That complaint, as amended again on October 24, 2007, alleged that defendants had engaged in a conspiracy to fraudulently increase rents payable by tenants in over 400 buildings they owned in New York City, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968, and the New York Consumer Protection Act ("NYCPA"), which prohibits "[d]eceptive acts or practices in the conduct of any business," N.Y. Gen.Bus. Law § 349(a). Specifically, plaintiffs alleged that defendants Pinnacle Group N.Y. LLC, Pinnacle Group Corporation, and Pinnacle Group, LLC (collectively, "Pinnacle")[1] and its principal, Joel Wiener, charged tenants higher rents than allowed by New York City rent regulations,[2] refused to acknowledge ***245** tenants' succession rights, misrepresented tenants' rent payment histories, filed meritless eviction suits, and otherwise harassed tenants. The complaint alleged that defendants did so in order to raise rents above legally chargeable levels and to drive tenants out of rent-regulated units, leading to the deregulation of those units and thus allowing defendants to sell the units or charge new tenants a higher, market-rate monthly rent.

II. *Class Certification*

On June 30, 2009, plaintiffs moved pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3) to certify a class of approximately 20,000 former and current residents of Pinnacle-owned buildings. On behalf of the class, they sought compensatory, punitive, and statutory (treble) damages, as well as attorney's fees. They also sought injunctive relief prohibiting defendants from engaging in the conduct alleged in the complaint, appointment of an independent monitor to supervise defendants' compliance, and regular audits of defendants' books. Plaintiffs' proposed class was defined in the Second Amended Complaint as

> All persons who, *at any time from July 11, 2004 to the date of certification,* leased an apartment in the City of New York directly or indirectly owned in whole or in part by the Pinnacle Enterprise. This class seeks certification of claims for declaratory and injunctive relief, and for damages pursuant to 18 U.S.C. § 1962(d) and New York General Business Law § 349(h).

Pls.' Second Am. Compl. ¶ 151 (emphasis added).

On April 27, 2010, the district court certified two classes: an injunctive-relief class comprising all current residents of rent-regulated apartments owned by Pinnacle, and a damages class comprising "all persons who, at any time between July 11, 2004 and the date of this opinion [April 27, 2010], were tenants in rent-regulated apartments in New York City directly or indirectly owned in whole or in part by" Pinnacle. *Charron v. Pinnacle Group N.Y. LLC,* 269 F.R.D. 221, 244 (S.D.N.Y.2010). The district court found that the proposed injunctive—relief class satisfied Rule 23(a)'s four requirements—numerosity, commonality, representativeness, and adequacy of representation—as well as Rule 23(b)(2)'s requirement that injunctive relief be appropriate to the class as a whole. The district court found that while the proposed damages class satisfied Rule 23(a)'s requirements, it did not satisfy Rule 23(b)(3)'s requirement that questions of law or fact common to the members of the class predominate, given the members' individualized issues relating to injury

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and causation.[3] However, even though the action as a whole failed to satisfy Rule 23(b)(3)'s predominance requirement, the district court nonetheless certified a class that was limited to certain common liability issues that *did* satisfy Rule 23(b)(3)'s predominance and ***246** superiority requirements. See Fed.R.Civ.P. 23(c)(4) ("[A]n action may be brought or maintained as a class action with respect to particular issues.").

III. *The Settlement*

After class certification but before any discovery on the merits of the claims had taken place, the parties engaged in extensive settlement negotiations under the supervision of a magistrate judge (Ronald L. Ellis, *Magistrate Judge*). The parties were represented by prominent law firms—the class by Jenner & Block, and Pinnacle by Gibson, Dunn & Crutcher. Class counsel were assisted by Andrew Scherer, an expert in New York landlord-tenant law and rent regulation statutes, and the author of the treatise *Residential Landlord–Tenant Law in New* York. *See Charron v. Pinnacle Group N. Y. LLC,* 874 F.Supp.2d 179, 189 (S.D.N.Y.2012).

Negotiations began in the fall of 2010 and a preliminary formal settlement agreement was reached on August 9, 2011. On August 17, 2011, the magistrate judge approved the settlement. Under the settlement, Pinnacle agreed to maintain "best practices," enforced by a court-appointed claims administrator, with respect to: setting initial rents for new tenants and rent increases for existing tenants; eviction proceedings against tenants; repairs and tenant services; and staff training. Pinnacle was also required to undergo an audit of a random sample of its leases issued from 2008 to 2010 and, depending on the outcome of that audit, potentially to submit to a more extensive audit of all its leases from that period.

Pinnacle also agreed to institute a claims process to pay damages for past rent overcharges as well as for "harassment" claims. Under this system, to be administered by a court appointee, tenants alleging rent overcharge claims may recover their actual damages or, if they can prove willfulness on the part of Pinnacle, double damages. For harassment claims, tenants may recover the greater of a pre-set penalty ranging from $500 to $1500 or their actual damages. The process is informal: tenants may prove their claims through a simple form and are not required to adhere to traditional rules of evidence.

Pinnacle further agreed to pay a total of $2.5 million to certain community legal services organizations and other nonprofit groups, to enable them to provide assistance to tenants wishing to participate in the claims process.

Finally, Pinnacle agreed to pay class counsel $1.25 million in attorney's fees and another $200,000 in expenses.

Importantly for purposes of this appeal, the settlement excluded certain types of claims. In particular, two subgroups of claims otherwise included by the class definition were excluded from the settlement. First, the settlement provided damages relief only for rents set by Pinnacle after July 11, 2004.[4] Second, the settlement specified that, under the claims administration process, it would be "a defense to any allegation of overcharge" that Pinnacle "relied on a rent registered by a prior owner with the New York State Division of Housing and Community Renewal ... or contained in documentation from a prior owner of the [tenant's] building." J. App'x at 276–77.

Following an extended notice period with substantial outreach to class members, only about 1% of the class members opted out or objected to the settlement. ***247** Of the more than 20,000 class members, only 118 objected, and 141 opted out; 56 submitted unsolicited letters in support of the settlement. Id. at 190.

After conducting a fairness hearing, the district court issued a 54–page opinion approving the settlement. Id. It found that notice of the proposed settlement was adequate, that the settlement was fair, adequate, and reasonable pursuant to Rule 23(e), and that there were no intra-class conflicts.

DISCUSSION

Appellants, the initial class representatives as well as three other class members who objected to the settlement, now challenge both the fairness, adequacy, and reasonableness of the settlement and the adequacy of the class members' representation.

I. *Standard of Review*

A district court's approval of a class action settlement is reviewed for exceeding its discretion. *McReynolds v. Richards–Cantave,* 588 F.3d 790, 800 (2d Cir.2009). A

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district court abuses its discretion when its decision rests on an error of law or a clearly erroneous factual finding, or when its decision cannot be located within the range of permissible decisions. *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir.2011). In class settlement cases, we accord the trial judge's views "great weight" because of her position "on the firing line, "where she is" exposed to the litigants, and their strategies, positions and proofs," *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir.2000) (internal quotation marks omitted), and we will "disturb a judicially-approved settlement only when an objector has made a clear showing that the District Court has abused its discretion," *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir.2001) (internal quotation marks omitted). We review factual findings relating to the settlement for clear error and issues of law de novo. *McReynolds*, 588 F.3d at 800.

II. *Analysis*

A. *Fairness of the Settlement*

Federal Rule of Civil Procedure 23(e)(2) provides that a court may approve a class action settlement only if it is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). The court must review the negotiating process leading up to the settlement for procedural fairness, to ensure that the settlement resulted from an arm's-length, good faith negotiation between experienced and skilled litigators. *See McReynolds*, 588 F.3d at 803–04; *D'Amato*, 236 F.3d at 85.

The court must also evaluate substantive fairness, considering the nine *Grinnell* factors set forth in *Detroit v. Grinnell Corp.*:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir.1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000); *see also McReynolds*, 588 F.3d at 804.

***248** The district court carefully analyzed each factor in its thorough opinion, finding that "[o]n balance, the *Grinnell* factors weigh[ed] heavily in favor of final approval of the Settlement Agreement." *Charron*, 874 F.Supp.2d at 196. It found that eight of the nine factors weighed in favor of approval, while the ninth (defendants' ability to withstand a greater judgment) was neutral. *Id.* at 201. We cannot say that the district court's well-reasoned conclusion constituted an abuse of discretion, especially given the deference we accord to trial courts in these situations. *See Joel A.*, 218 F.3d at 139. The district court's reasoning is set out in detail in its opinion, and only a few of the factors require further discussion on appeal. [5]

1. *The Need for Further Discovery*

Appellants argue that concluding the settlement before merits discovery "infected the analysis of virtually every other *Grinnell* factor" to their detriment. We conclude, however, that the discovery conducted was sufficient to permit the district court to evaluate the claims and settlement. Objectors to a settlement have no automatic right to discovery or an evidentiary hearing in order to substantiate their objections. *See, e.g., Malchman v. Davis*, 761 F.2d 893, 897–98 (2d Cir.1985), abrogated on other grounds by *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Instead, where objectors raise "cogent factual objections to the settlement," *id.* at 897 (internal quotation marks omitted), and prior discovery was insufficient or nonadversarial, we instruct district courts "to exercise particular care to see to it that the non-assenting plaintiff [or, by logical extension, objecting class member] has had a full opportunity to develop the basis for his objection." *Saylor v. Lindsley*, 456 F.2d 896, 901 (2d Cir.1972); *cf. Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072,1078 (2d Cir.1995) ("The ultimate responsibility to ensure that the interests

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of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court.").

Here, the district court treated the objections seriously, delaying the fairness hearing many months, requiring revised notice and a 20–building sampling, and ordering the parties to answer detailed questions about the effects of the settlement on various hypothetical class members —actions that imposed significant cost and burden on Pinnacle and on Class Counsel. While the district court denied the objectors' request for lease and rent registration histories for each of the buildings in the sampling, it did so because the objectors could not articulate why they needed the information to substantiate their objections. Ultimately, the preliminary discovery did not bear out the opponents' objections. On this record, we cannot find that the district court exceeded its discretion by declining to order further discovery and approving the settlement based on the information before it.

2. *The Risks of Maintaining a Class Action*

Appellants argue that the district court heavily relied on the specter of decertification if the case were to proceed without explaining why the Supreme Court's decision in ***249** *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), posed a significant risk of decertification in this specific case. The district court concluded, after examining the facts of this case and recent jurisprudence interpreting *Dukes,* that there was a "substantial chance" that a motion to decertify the class would succeed were the settlement to be rejected, and that this possibility weighed strongly in favor of approval.

It is unnecessary, and would be inappropriate, for us to conduct a purely hypothetical discussion of the ultimate merits of a potential decertification motion. Given defendants' repeated statements that they will immediately move for decertification if the settlement is rejected, the large size of the class, the complicated and diverse claims asserted by plaintiffs, and the heightened legal uncertainty necessarily injected by significant recent Supreme Court authority relevant to the propriety of class certification, however, we cannot find that the district court abused its discretion in finding that the class faced significant risks of decertification, that decertification would drastically reduce the chances of any member of the class achieving meaningful relief, and that the litigation risks attendant to these possibilities weighed heavily in favor of the fairness of a settlement under which plaintiffs achieved substantial benefits that (as in any settlement) fell short of what they might have hoped to achieve. [6]

In conclusion, the district court's careful review of the settlement warrants the great deference we normally accord to trial court findings with respect to the fairness of class action settlements. The district court did not simply rubber-stamp the settlement on the basis of boilerplate findings, but wrote a long and careful opinion after engaging in a serious process to air and examine the objections to the settlement. Appellants' claims that the district court's balancing of the *Grinnell* factors was inadequate boil down to the usual contention that the settlement did not get enough for the class. We find no fault in the district court's rejection of that contention.

B. *Adequacy of Representation*

Federal Rule of Civil Procedure 23(a)(4) requires that in a class action, "the interests of the class" must be "fairly and adequately protect[ed]." Fed.R.Civ.P. 23(a)(4). To ensure that all members of the class are adequately represented, district courts must make sure that the members of the class possess the same interests, and that no fundamental conflicts exist among the members. *In re Literary Works,* 654 F.3d at 249; *see also Denney v. Deutsche Bank AG,* 443 F.3d 253, 268 (2d Cir.2006). Adequacy of representation must be determined independently of the fairness of the settlement: "Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the precertification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense." *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 858, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999); *see also Amchem,* 521 U.S. at 622, 117 S.Ct. 2231 ("Federal courts ... lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper.").

***250** Where a fundamental conflict exists that goes "to the very heart of the litigation," *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.,* 504 F.3d 229, 246 (2d Cir.2007), it can be cured by dividing the class "into homogeneous subclasses ... with separate representation to eliminate

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conflicting interests of counsel." *Ortiz,* 527 U.S. at 856, 119 S.Ct. 2295. Such subclassing may provide a key "structural assurance of fair and adequate representation for the diverse groups and individuals affected," *Amchem,* 521 U.S. at 627, 117 S.Ct. 2231, and "serve [s] to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness," *id.* at 621, 117 S.Ct. 2231.

Appellants argue that the settlement in effect created two subclasses with a fundamental conflict: (1) those who may bring their rent overcharge claims before the Claims Administrator, and (2) those with Excluded Overcharge Claims, whose rents (a) were set unlawfully high before Pinnacle took over their buildings, or (b) were set on or before July 11, 2004. Appellants argue that because the settlement discriminates against members with Excluded Overcharge Claims, it creates a fundamental conflict of interest among these two subclasses. They argue that because the two subclasses were not separately represented, as required by Rule 23(a)(4) and *Ortiz,* the settlement must be vacated.

As a preliminary matter, we note that unlike the situation in *Amchem, Ortiz,* and *In Re Literary Works,* the settlement here was not being approved at the same time that the class was being certified. Where settlement and certification proceed simultaneously, courts must give heightened attention to the requirements of Rule 23(a). *See Ortiz,* 527 U.S. at 848–49, 119 S.Ct. 2295; *Amchem,* 521 U.S. at 620, 117 S.Ct. 2231; *In Re Literary Works,* 654 F.3d at 249. That is so because the certification of a mandatory settlement class "effectively concludes the proceeding save for the final fairness hearing," and there is thus a heightened risk of conflating the fairness requirements of Rule 23(e) with the independent requirement of "rigorous adherence to those provisions of the Rule designed to protect absentees," such as Rules 23(a) and (b). *Ortiz,* 527 U.S. at 849, 119 S.Ct. 2295 (internal quotation marks omitted).

Here, by contrast, appellants seek to challenge a subsequent *settlement* on Rule 23(a) grounds, asserting conflicts never raised at the certification stage. In its April 27, 2010 order certifying the class in anticipation of litigation, the district court carefully considered each 23(a) factor, including adequacy of representation, and deemed them to be satisfied. At that stage, no party argued that there were intra-class conflicts based on the nature of the different claims held by different class members. Nor did any appellant ask for separate representation. Rather, plaintiffs argued that Class Counsel could adequately protect the interests of the class. To be sure, appellants argue that class conflicts arose *after* certification, during the course of settlement negotiations that concluded in August 2011. To the extent these conflicts were not apparent at certification, and assuming they were, indeed, "fundamental," Rule 23 and due process would require renewed scrutiny of the suitability of the class. *See, e.g.,* Fed.R.Civ.P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); Fed.R.Civ.P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."); ***251** *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) ("[T]he due process clause of course requires that the named plaintiff [in a class action] at all times adequately represent the interests of the absent class members."). *Cf. Joel A.,* 218 F.3d at 140 (holding objection to settlement on adequacy of representation grounds waived where the "perceived differences [among] subclass members were apparent when the subclasses were certified" and no objection was made at time of certification decision). However, in this specific and factually complex situation, we do not find a fundamental conflict between class members necessitating separate representation.

First, it is important to distinguish, as appellants for the most part do not, the RICO claims that were brought as part of this case from any potential rent overcharge claims under New York City rent stabilization law, which were not included in plaintiffs' complaint. Under New York City law, landlords of rent-regulated apartments must charge the correct rent under the complicated rent stabilization rules. *See, e.g.,* N.Y. Rent Stabilization Code §§ 2521–2522. Class members who were overcharged are entitled, like other regulated tenants, to reimbursement for such overcharges, regardless of whether the overcharge was intentional, negligent, or the product of reasonable mistake.

The complaint in this case does not allege individualized claims of erroneously charged rents in violation of the stabilization rules. Indeed, it is difficult to see how such claims could possibly be brought on a class basis, since the sole issue in each individual's claim would be the

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correctness of that tenant's rent, based on the specific rent history of that apartment and its conformance to the correct calculation under the rules. Instead, the complaint alleges that the entire class was victimized by defendants' conduct of a single RICO enterprise based on fraud and extortion. While the *damages* suffered by class members will vary, and will in many cases be based on the extent to which the relevant criminal conduct affected the rent paid by individual tenants, defendants' *liability* is based on fraudulent or other predicate criminal conduct.

Thus, in assessing the argument that various overcharged rent claims were excluded from the settlement, it is important to recognize that claims of rent overcharges *as such* were never part of the case in the first place. The claims that were addressed by the settlement are based on conscious wrongdoing by defendants themselves, including among other things *fraudulent* rent overcharges. To the extent that the settlement excludes overcharges resulting from rents erroneously set (whether fraudulently or otherwise) by prior landlords not affiliated with Pinnacle or the RICO enterprise alleged in the complaint, it excludes claims that are far more tenuous against defendants, and that (except to the extent defendants could be shown to have acted with fraudulent intent) were not part of the case at all.

Second, the settlement does not, by its terms, exclude any tenant, or type of tenant, from the claims process. It instead provides that *no* class member can bring Excluded Overcharge Claims through that process. Whether some members are wholly excluded from the claims process depends on how many members have *only* Excluded Overcharge Claims. Appellants have not been able to estimate with any reliability the number of class members, if any, who may be in that category. The fact that a large number of class members have leases that pre-date Pinnacle, or that pre-date the cutoff, does not answer that question. Those members may still be eligible for harassment or eviction-related ***252** damages against Pinnacle, or may have rent overcharge claims related to post–2004 illegal rent overcharges. [7]

Appellants have not demonstrated that a significant number of class members' claims were excluded from the settlement. While appellants argue that 77% of the class may have Excluded Overcharge Claims, based on a representative sampling done by defendants in 2012, that number does not suffice to distinguish the alleged subclasses. To the contrary, it suggests that the exclusion of these claims affects not a unique subclass of the certified damages class, but the vast majority of class members. Appellants were unable to quantify how many class members had rent overcharge claims that come within the claims process, how many had only Excluded Overcharge Claims but nonetheless could recover on other claims (such as harassment claims), and how many class members, if any, were left without any claims for damages that could be brought in the claims process. Given that the settlement provides the considerable benefit of a streamlined claims process that is open to all members of the class, and that it has not been shown that any significant number of class members are excluded from benefitting from that process by the exclusion of certain types of relatively weak claims, we cannot find that the exclusion of those claims creates a fundamental conflict among class members sufficient to require the creation of separate subclasses.

Third, while the settlement does not provide relief for the Excluded Overcharge Claims, it does not *extinguish* them, or release Pinnacle from liability for overcharge claims under New York City rent regulations. This case therefore does not present the situation the Supreme Court faced in *Amchem, Ortiz*, and *In re Literary Works,* where the defendants were released from liability on certain claims that the settlements disfavored. Here, appellants remain free to bring the Excluded Overcharge Claims against defendants in other fora, presumably New York state courts. [8] At the same time, all class members ***253** are entitled to bring post–2004 overcharge claims based on Pinnacle's conduct via the claims process established by the settlement, without bearing the burden of proving that any overcharge was based on fraud.

Fourth, unlike in *In Re Literary Works,* the exclusion of certain claims here does not "provide[ ] strong evidence ... of inadequate representation." 654 F.3d at 256. As discussed above, claims based on rents set by prior landlords do not easily fall within plaintiffs' core allegations of a RICO enterprise. Pinnacle's potential liability under New York law for prior landowners' overcharges on a "carryover liability" theory that sounds in negligence does not satisfy RICO's requirement of *conscious* wrongdoing. Similarly, while appellants argue that their pre–2004 claims would not be barred by RICO's or the NYCPA's statutes of limitations due to equitable tolling, the very need to litigate the applicability of

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equitable tolling make these claims weaker than post–2004 claims. [9]

Finally, all class members who presently reside in Pinnacle-owned housing benefit from the injunctive measures provided for in the settlement, which require Pinnacle to agree to maintain "best practices," enforced by a court-appointed claims administrator, with respect to setting initial rents, setting rent increases, eviction proceedings, repairs and other services, and staff training.

All class settlements value some claims more highly than others, based on their perceived merits, and strike compromises based on probabilistic assessments. *See, e.g., Weinberger v. Kendrick,* 698 F.2d 61, 78 (2d Cir.1982) (approving settlement that paid more for federal claims than for state law claims, finding that state law claims ***254** were less valuable because they would have been more difficult to prove in court, and "that it was not unfair for the settlement's distribution formula to reflect this"). If these types of compromises automatically created subclasses that required separate representation, the class action procedure would become even more cumbersome than it already is, and would create even more transaction costs in the form of legal fees. We find that given the increased difficulty of litigating the Excluded Overcharged Claims, their exclusion from the settlement was reasonable and does not create serious intra-class conflicts or indicate inadequate representation by Class Counsel.

In summary, we find that a fundamental conflict did not exist between the members of the class, and that the Class Counsel's representation was adequate under Rule 23(a)(4). It was therefore not necessary to divide the class into subclasses with separate representation.

C. *Objections by All Named Plaintiffs*

Finally, to the extent that appellants argue that the rejection of the settlement by all five remaining named class representatives requires its rejection by the Court, we cannot agree. As our sister circuits have noted, the assent of class representatives is not essential to the settlement, as long as the Rule 23 requirements are met. *See Elliott v. Sperry Rand Corp.,* 680 F.2d 1225, 1226, 1228 (8th Cir.1982); *Kincade v. Gen. Tire & Rubber Co.,* 635 F.2d 501, 508 (5th Cir.1981) ("[T]he assent of named plaintiffs is not a prerequisite to the approval of a settlement." (internal quotation marks omitted)); *Laskey v. Int'l Union,* 638 F.2d 954, 957 (6th Cir.1981) ("Accepting a settlement over the objections of the named representatives is not necessarily an abuse of discretion."); *Flinn v. FMC Corp.,* 528 F.2d 1169, 1174 n. 19 (4th Cir.1975). "Class counsel is supposed to represent the class, not the named parties: that the named parties objected does not prove the settlement was unfair or that the class counsel acted improperly." *Laskey,* 638 F.2d at 956. We believe those cases correctly state the law.

CONCLUSION

Plaintiffs' complaint represented a daring and unconventional effort to turn New York City rent violations into RICO claims that could be pursued on a class-wide basis. The ensuing litigation has achieved significant benefits for the class, particularly in its injunctive aspects, against significant odds. While the settlement has its own unconventional aspects, and leaves much to be desired from the standpoint of the more militant members of the class (including the named plaintiffs), those less favorable aspects of the settlement are largely attributable to the precariousness of plaintiffs' claims. The district court thoroughly and carefully reviewed the settlement and concluded that it was a fair and sensible way to resolve these claims. We cannot conclude that the district court exceeded its discretion when it did so. Nor can we conclude that the necessary compromise of some of the claims theoretically available to class members created a conflict of interest, or demonstrated inadequate representation, sufficient to require the creation of separately-represented subclasses.

For the foregoing reasons, we AFFIRM the judgment of the district court.

All Citations

731 F.3d 241, 86 Fed.R.Serv.3d 1001

Footnotes

* The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

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1 Only Pinnacle Group N.Y. LLC was named as an appellee.

2 Certain apartments in New York City are "rent-stabilized," meaning that New York City regulations define how much their rent can be raised upon renewal of a lease by a tenant, as well as how much their rent can be raised when a new tenant moves in. *See, e.g.,* N.Y. Rent Stabilization Code §§ 2521–22. Regulations also provide that where a prior landowner overcharged a tenant for rent, a subsequent landowner shall generally be responsible for all overcharge penalties. *See Gaines v. N.Y. State Div. of Hous. & Cmty. Renewal,* 90 N.Y.2d 545, 547, 664 N.Y.S.2d 249, 686 N.E.2d 1343 (1997). This "carryover liability" derives from the requirement that landlords "keep and preserve sufficient records to determine the legal rent at all times," which ensures that "a successor landlord would always be able to ascertain whether the previous owners had been guilty of overcharges and protect itself accordingly." *Id.* at 549, 664 N.Y.S.2d 249, 686 N.E.2d 1343 (citations omitted).

3 The district court rejected plaintiffs' proposed solution to divide the class into four subclasses, finding that such division would not resolve the predominance issue.

4 A rider later clarified that class members "are barred from seeking, through the claims process provided in the Agreement, money damages for individual rent overcharge claims based on" rent set before July 11, 2004. J. App'x at 425.

5 To the extent that appellants argue that notice was inadequate and that the district court therefore improperly weighed the reaction of the class to the settlement, the district court's opinion adequately explained why the notice provided to the class was sufficient. *Charron,* 874 F.Supp.2d at 192–94.

6 One further issue, raised by appellants not in connection with the overall fairness of the settlement but in the context of their claims of inadequate representation, bears on but does not ultimately affect our analysis of the fairness of the settlement. That issue, which concerns a possible error in calculating the statute of limitations applicable to the class's RICO claims, is discussed in note 9, below.

7 For example, tenants who were improperly overcharged for capital improvements after 2004, or as to whom Pinnacle engaged in other unlawful rent-setting practices during that period, may bring such overcharge claims through the claims process.

8 Appellants argue that their state rent overcharge claims may no longer be viable given the statute of limitations set forth in N.Y. C.P.L.R. § 213–a. Such statute of limitations issues, however, do not render the settlement unfair to class members. There may be many defenses to potential rent overcharge claims, but those defenses are independent of the settlement, which does not add to whatever burdens potential tenant-plaintiffs would otherwise have. Given that rent stabilization claims were not alleged in plaintiffs' complaint, it was a reasonable decision by class counsel to leave the resolution of those claims (and whatever defenses may be asserted against them) to whatever forum is appropriate to hear them.

Moreover, to the extent that rent claims are implicated in the class action, any applicable statute of limitations may have been tolled during the pendency of this case. *See Cullen v. Margiotta,* 811 F.2d 698, 719 (2d Cir.1987) ("New York courts have, in the interest of avoiding court congestion, wasted paperwork and expense, long embraced the [equitable tolling] principles of [*American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)]." (internal quotation marks omitted)), *overruled on other grounds by Agency Holding Corp. v. Malley–Duff & Assocs., Inc.,* 483 U.S. 143 [107 S.Ct. 2759, 97 L.Ed.2d 121] (1987). The excluded claims are, as a matter of law, either barred by the statute of limitations or not, and tenants wishing to bring those claims either did or did not act reasonably in failing to file rent overcharge claims on the assumption that the statute of limitations on such claims, which were not directly brought as part of the RICO class action complaint, was tolled by the pendency of that complaint. The settlement itself does not, and need not, resolve such issues, and the settlement itself does not release or otherwise impair those claims.

9 Appellants argue that if, by excluding pre–2004 claims, the settlement meant to exclude claims that were barred by the relevant statutes of limitations, it should have excluded pre-*2003* claims, as RICO's statute of limitations (unlike NYCPA's) is four years, not three. *See Agency Holding Corp.,* 483 U.S. at 156, 107 S.Ct. 2759. While any error is regrettable, we fail to see its relevance to the inquiry into adequacy of representation. As noted above, the exclusion of time-barred rent overcharges from the settlement did not provide strong evidence of inadequate representation because such claims were weaker than timely claims, given the necessity of arguing equitable tolling. Any error in determining the cut-off date does not change the analysis.

The July 2004 cutoff was predicated on the date chosen by plaintiffs for the beginning of the class period, which in turn was validated by the district court's earlier order denying defendants' motion to dismiss, which had ruled that "plaintiffs may not assert any claims which accrued prior to July 11, 2004." J. App'x at 148. As the district court recognized in its order approving the settlement, the cut-off date "was not determined in the context of the [s]ettlement negotiations; I fixed it [ ] back in 2010, before the [s]ettlement was on the table." J. App'x at 667. Counsel on both sides appear to have negotiated the settlement in the shadow of the district court's earlier rulings. Even if such rulings were erroneous,

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settlements may be based on the parties' expectations that stem from predicted, or prior, judicial rulings about the merits of the case. For the same reasons discussed above, therefore, any alleged subclass of post–2003, pre–2004 claims did not require separate representation.

This apparent error, however, does factor into our Rule 23(e) inquiry into the reasonableness of the settlement. While the possibility that some claims were erroneously excluded bears on *Grinnell* factor 8, the reasonableness of the settlement compared to what the parties could have received in litigation, the other *Grinnell* factors, especially the risk of decertification, still weigh heavily in favor of the settlement. Accordingly, any possible error in this regard does not undermine our conclusion that the district court's approval of the settlement was not an abuse of discretion.

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809 F.3d 78
United States Court of Appeals,
First Circuit.

Valerie BEZDEK, individually and on behalf of all others similarly situated, Plaintiff, Appellee,
v.
VIBRAM USA, INC.; Vibram Fivefingers, LLC, Defendants, Appellees,
Madeline Monti Cain; Justin Ference; Michael Narkin, Interested Parties, Appellants.
Brian DeFalco, Plaintiff, Appellee,
v.
Vibram USA, Inc.; Vibram Fivefingers, LLC, Defendants, Appellees,
Justin Ference, Interested Party, Appellant.

Nos. 15–1207, 15–1208, 15–1209.
|
Dec. 31, 2015.

Synopsis

Background: Massachusetts residents and nationwide class of consumers who purchased "barefoot" footwear directly from defendants or through their authorized retailers alleged that defendants misrepresented in their advertising and marketing that their product provided certain health benefits to wearers. The United States District Court for the District of Massachusetts, Douglas P. Woodlock, J., 79 F.Supp.3d 324, approved settlement and awarded attorneys' fees, and rejected objectors' claims. Objectors appealed.

Holdings: The Court of Appeals, Lynch, Circuit Judge, held that:

refund of $8.44 per pair of shoes was fair and reasonable settlement amount;

imposing proof of purchase requirement on objectors did not provide independent basis for invalidating settlement;

injunctive relief provided by settlement was meaningful concession, and not merely illusory; and

attorneys' fees provided by settlement were reasonable.

Affirmed.

Attorneys and Law Firms

***80** Christopher T. Cain, with whom Scott & Cain, David Aisenberg, and Looney Cohen & Aisenberg LLP were on brief, for Cain and Ference.

Christopher M. Morrison, with whom Dana Baiocco and Jones Day were on brief, for Vibram USA, Inc. and Vibram FiveFingers, LLC.

Janine L. Pollack, with whom Wolf Haldenstein Adler Freeman & Herz LLP was on brief, for Bezdek and DeFalco.

Before TORRUELLA, LYNCH, and BARRON, Circuit Judges.

Opinion

LYNCH, Circuit Judge.

Objectors to a class action settlement bring this appeal from a district court order approving settlement and awarding attorneys' fees. *Bezdek v. Vibram USA Inc.*, 79 F.Supp.3d 324 (D.Mass.2015). The underlying action concerned allegedly deceptive advertising and marketing claims made about the health benefits of certain "barefoot" running shoes. The objectors argued both to the district court and to us that the class notice was misleading, positing a higher potential recovery than the actual recovery; that it was unfair for objectors to be required to provide proofs of purchase; that the injunctive relief in the settlement had no value; and that class counsel was paid too much.

The district court carefully explained its reasons for rejecting the claims. The district court did not abuse its discretion in deciding that the settlement terms were fair, adequate, and reasonable. Nor did the district court abuse its discretion in awarding attorneys' fees. We affirm.

I.

Three putative class action complaints filed in 2012 alleged that Vibram USA, Inc., and Vibram FiveFingers, LLC (together, "Vibram") engaged in deceptive marketing of

FiveFingers "barefoot" footwear by making false claims about the footwear's health benefits.

The first complaint was filed in the District of Massachusetts by Valerie Bezdek on March 21, 2012. On July 18, 2012, Vibram moved to dismiss Bezdek's amended complaint for failure to state a claim. On February 20, 2013, the district court dismissed Bezdek's unjust enrichment claim but allowed the suit to proceed under various state consumer protection laws. *Bezdek v. Vibram USA Inc.,* No. 12–10513, 2013 WL 639145 (D.Mass. Feb. 20, 2013).

The second complaint was filed in the Central District of California by Ali Safavi on July 9, 2012. *Safavi v. Vibram USA Inc.,* No. 12–cv–05900 (C.D. Cal. filed July 9, 2012). On September 24, 2012, the *Safavi* action was stayed pending a class certification ruling in *Bezdek.* Safavi is not a party to this appeal. The parties have agreed that the *Safavi* action will be dismissed if this settlement is approved.

The third complaint was filed in Illinois state court by Brian DeFalco on August 8, 2012, and removed to the Northern District of Illinois on September 11, 2012. Notice of Removal at 1–2, *DeFalco v. Vibram USA, LLC,* No. 12–cv–07238 (N.D. Ill. Sept. 11, 2012). *DeFalco* was subsequently transferred to the District of Massachusetts, where it was consolidated with *Bezdek.*

Extensive written discovery ensued. On December 12, 2013, the parties reached a settlement agreement in principle. At that time, the plaintiffs had not motioned for class certification or identified experts on class issues, and neither party had taken depositions.

On April 30, 2014, the parties submitted a proposed settlement agreement, followed ***81** shortly after by a joint amended proposed settlement agreement. The proposed settlement agreement would establish a $3.75 million settlement fund to provide refunds to class members who submit claims. Refunds would be paid on a pro rata basis, up to a maximum of $94 per pair of shoes, the average retail price. The proposed settlement agreement suggested that "[b]ased on the experience of similar settlements of class actions, it is reasonable to expect that Class Members may receive payment in the range of $20.00 to $50.00 per pair." It is noteworthy that the language did not set a minimum floor for recovery.

Refunds for up to two pairs of shoes could be obtained by submitting only a valid Claim Form. Class members seeking a refund for more than two pairs of shoes would be required to submit a Claim Form plus proof of purchase.

Administrative and notice costs, attorneys' fees, and incentive awards for the named plaintiffs would be paid out of the settlement fund. Additionally, Vibram would promise to refrain from making representations of health benefits associated with FiveFingers footwear unless such statements could be supported by reliable evidence. Vibram also agreed not to oppose class counsel's application for an award of attorneys' fees not exceeding twenty-five percent of the settlement fund.

Any class member could object by submitting a written statement of objections and by providing a proof of purchase with the submission.

On May 12, 2014, the district court preliminarily approved the settlement. The district court also certified a class for settlement purposes only, approved Bezdek as the class representative and her counsel as lead class counsel, set a fairness hearing date, approved notice and claims procedures, set requirements and deadlines for exclusions and objections, and set deadlines for class counsel's application for attorneys' fees.

Notice was distributed to the class in various ways, including direct notice by email and postal mail, publication in various media outlets, and maintenance of a website and toll-free telephone number to provide settlement-related information to class members. The Class Notice (emailed to reasonably identifiable class members) stated that: "Based on experience from other similar settlements of class actions, it is reasonable to expect that Class Members may receive a payment in the range of $20.00 to $50.00 per pair." The Postcard Notice (mailed to identified class members unreachable by email) and the Summary Settlement Notice (published in various media outlets) had similar language but also noted that recovery "could ... decrease depending on various factors, including the number of valid claims." The proposed settlement agreement was also reported on by numerous news outlets and "went viral" on social media.

Some 154,927 timely claims were filed, representing 279,570 pairs of FiveFingers footwear. Objections were

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filed by three individuals: Madeline Cain,[1] Justin Ference, and Michael Narkin. None of the three complied with the requirement in the proposed settlement agreement that a proof of purchase must be submitted with an objection to establish class membership. Only one of the three objectors, Ference, submitted a Claim Form.

On October 29, 2014, the district court held a fairness hearing. At the fairness hearing, class counsel informed the district court that while the Settlement Administrator was still working through the ***82** claims, it was expected that because of a "higher than expected claim rate," claimants would receive "around $9 per pair." On November 12, 2014, class counsel informed the district court that the estimated refund was $8.44 per pair.

On January 16, 2015, the district court entered a memorandum and order granting plaintiffs' motion for final approval of the proposed settlement and motion for attorneys' fees and expenses. The district court began by noting that "there are genuine questions as to the status of the objectors as class members" but that it would "consider[ ] the merits of the objectors' assertions to the extent they raise questions [it] would ask independently in [its] own review of the proposed settlement." The district court found that notice was given to class members by the best means practicable under the circumstances; certified the settlement class; found the settlement to be fair, reasonable, and adequate; and awarded attorneys' fees and expenses to class counsel and incentive awards to the named plaintiffs.

On January 21, 2015, the district court entered a final order approving the settlement and issued final judgment. Cain, Ference, and Narkin have appealed.[2]

II.

Under Federal Rule of Civil Procedure 23(e)(2), a class action settlement must be "fair, reasonable, and adequate." The case law offers "laundry lists of factors" pertaining to reasonableness, but "the ultimate decision by the judge involves balancing the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement." *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund,* 582 F.3d 30, 44 (1st Cir.2009). "If the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable." *In re Pharm. Indus. Average Wholesale Price Litig.,* 588 F.3d 24, 32–33 (1st Cir.2009).

We review the district court's approval or disapproval of a settlement for abuse of discretion. *Nat'l Ass'n of Chain Drug Stores,* 582 F.3d at 45. Under that standard, embedded legal issues are reviewed de novo and factual findings are reviewed for clear error. *Id.* We review a district court's decision on attorneys' fees for abuse of discretion. *In re Volkswagen & Audi Warranty Extension Litig.,* 692 F.3d 4, 13 (1st Cir.2012).

While we agree with the district court that "there are genuine questions as to the status of the objectors as class members," we consider the merits of the objections and affirm notwithstanding those issues.

A. *Class Notice Disparity Between Estimated and Actual Refund*

The objectors argue that the district court failed to properly consider the fact that class members will receive an actual payment that is significantly less than what was estimated at the time the settlement was preliminarily approved. They argue that the settlement should not have received final approval where notices to the class estimated a refund of between $20 and $50 per pair of shoes, but it became known after the deadline to object that the fund would actually only permit a payment of $8.44 per pair of shoes.

***83** It is true that the district court's opinion did not deal directly with the arguments that the notices projected a much higher settlement payment than the $8.44 which ensued, and that this was a misrepresentation that voided the settlement. But the district court's order indirectly dealt with these claims.

Contrary to the objectors' claims, there was no misrepresentation in the notices sent to class members. The Summary Settlement Notice and the Postcard Notice both contained explicit language that recovery could "decrease depending on various factors, including the number of valid claims." Although the Class Notice did not contain such language, it did not misrepresent the situation. By stating that "[b]ased on experience from other similar settlements of class actions, it is reasonable

to expect ... $20.00 to $50.00 per pair," the Class Notice provided an estimated range of recovery but did not guarantee any amount of recovery.

The district court found that a refund of $8.44 per pair of shoes, even if lower than originally estimated, was a fair settlement amount given the uncertainty of success that the plaintiffs faced at trial. The district court found that the plaintiffs faced "two sizable hurdles as to injury and damages" and that even if the plaintiffs were able to prevail, it would only be after extended litigation, the costs of which would decrease the net benefit of any damages award at trial. There was no abuse of discretion in the district court's conclusion that a refund of $8.44 per pair, although modest, was a fair compromise that accounted for the risks faced by both parties if litigation had continued.

The objectors also suggest that class counsel should have anticipated that the number of claims actually filed would be higher, thus reducing the recovery amount. They argue that class counsel should have negotiated a minimum payment for class members at the outset, renegotiated the total settlement amount when a greater-than-expected number of claims were filed, or waived a portion of their attorneys' fees and paid out those extra funds to class members. The objectors cite no legal authority to show that it was an abuse of discretion for the district court to approve the settlement in the absence of such countermeasures. The fact that a better deal for class members is imaginable does not mean that such a deal would have been attainable in these negotiations, or that the deal that was actually obtained is not within the range of reasonable outcomes. The district court's conclusion that $8.44 per pair was fair and reasonable was not an abuse of discretion.

B. *Proof of Purchase Requirement for Filing an Objection*

The objectors take issue with the requirement that objectors file proofs of purchase, even though proof of purchase is not required of a class member filing a Claim Form for up to two pairs of shoes. They argue that the higher standard is imposed on objectors as a punitive measure intended to dissuade class members from objecting.

The ultimate question for the district court was whether the settlement was fair, reasonable, and adequate. The imposition of a harsher requirement on objectors than on claimants could bear on the fairness analysis by tipping a court off to the possibility of collusion or bad faith. But if the fairness of the settlement ultimately stands up to scrutiny, then the imposition of disparate requirements on objectors does not provide an independent basis for invalidating the settlement. That is the case here. The district court carefully scrutinized the refunds provided to class members under the settlement and ***84** concluded that the settlement was fair, and it did not abuse its discretion in doing so. [3]

C. *Injunctive Relief*

The objectors argue that the injunctive relief in the settlement is "illusory and amount[s] to no relief at all" because it obligates Vibram not to do things that Vibram is legally obligated not to do anyway.

The district court directly considered and rejected this objection. The settlement requires Vibram to discontinue its purportedly false advertising campaign unless Vibram obtains "competent and reliable scientific evidence to substantiate" such claims. This is a meaningful concession given that the falsity of the advertising was the central disputed issue in the suit. The district court did not abuse its discretion in concluding that injunctive relief against continuation of the allegedly false advertising was "a valuable contribution to this settlement agreement." The fact that changes in future Vibram marketing will not remedy past harm to consumers does not make such relief meaningless to those consumers.

D. *Attorneys' Fees*

The objectors contest the award of attorneys' fees for a number of different reasons.

First, the objectors contest the clear-sailing term in the settlement agreement, in which Vibram agreed not to oppose attorneys' fees that do not exceed twenty-five percent of the settlement fund. They argue that class counsel must have bargained away something of value to the class in exchange for the provision and that as a result, class counsel engaged in self-dealing behavior. However, we have recognized that a clear-sailing agreement is not per se unreasonable. *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir.1991). Rather, courts are directed to give extra scrutiny to such agreements. *Id.*

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Recognizing its duty to undertake such heightened scrutiny, the district court reviewed the amount of fees under each of the two methods recognized in our circuit. *See In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.,* 56 F.3d 295, 305 (1st Cir.1995) (describing two methods). Applying the percentage of the fund method, the district court found that twenty-five percent of the fund is consistent with what other district courts found to be reasonable. *See Latorraca v. Centennial Techs. Inc.,* 834 F.Supp.2d 25, 27–28 (D.Mass.2011). Applying the lodestar method, in which the number of hours expended is multiplied by a reasonable hourly rate for similarly situated attorneys, the district court found that the fees represented roughly sixty-eight percent of the lodestar. The district court did not abuse its discretion in concluding that, under ***85** either method of calculation, the attorneys' fee award was reasonable.

The objectors argue that class counsel's fee was nonetheless unreasonable given the amount of work they performed. They argue that the case never proceeded much past the pleading stage and that there was minimal briefing on dispositive motions, no class certification proceedings, few substantive motion hearings, no depositions, and no summary judgment or trial proceedings. But the district court, after requesting supplemental filings from parties in support of final approval of settlement, recognized that there was "extensive fact discovery," "some significant motion practice," and an attempt at mediation. There was no abuse of discretion in the district court's award of attorneys' fees.

III.

We *affirm.*

All Citations

809 F.3d 78

Footnotes

1 Cain is represented by her father, Christopher Cain.

2 Only Cain's and Ference's appeals are before this panel because Narkin's appeal has already been dismissed with prejudice. *Bezdek v. Vibram USA, Inc.,* No. 15–1219 (1st Cir. Sept. 22, 2015).

3 Although the fact that a disparate requirement was imposed on objectors does not change the result in this case, we do not rule out the possibility that it could ever be relevant in some other respect.
Because parties to a settlement have a shared incentive to impose burdensome requirements on objectors and smooth the way to approval of the settlement, district courts should be wary of possible efforts by settling parties to chill objections. By monitoring class counsel and providing courts with crucial information on which to evaluate proposed settlements, meritorious objectors can be of immense help to a district court in evaluating the fairness of a settlement. *See Redman v. RadioShack Corp.,* 768 F.3d 622, 629 (7th Cir.2014). Of course, it is also important for district courts to screen out improper objections because objectors can, by holding up a settlement for the rest of the class, essentially extort a settlement of even unmeritorious objections. *See* Newberg on Class Actions § 13:21 (5th ed.).

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KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by In re Cendant Corp. Litigation, 3rd Cir. (N.J.), August 28, 2001

243 F.3d 722
United States Court of Appeals,
Third Circuit.

In re CENDANT CORPORATION
PRIDES LITIGATION.
Welch & Forbes, Inc., an institutional
investment manager, individually and
on behalf of all others similarly situated,
v.
Cendant Corporation, Merrill Lynch & Co.;
Chase Securities, Inc.; Henry R. Silverman;
Walter A. Forbes; Cosmo Corigliano,
Joanne A. Aboff Family Trust, Appellant.
Pursuant to Rule 12a

No. 99–5555.
|
Argued Dec. 15, 2000.
|
Filed March 21, 2001.

Synopsis
Lead counsel for class of investors applied for attorney fees out of fund created through favorable settlement of securities fraud class action suit. The United States District Court for the District of New Jersey, William H. Walls, J., 51 F.Supp.2d 537, awarded fees, and objecting class member appealed. The Court of Appeals, Garth, Circuit Judge, held that: (1) class member had standing though it appeared that the settlement provided the class members with full recovery and though any reduction in the amount of attorneys' fees would not be distributed among the class members; (2) vacation of fee award was required because the district court's fee opinion was too cursory; and (3) the district court abused its discretion in granting a 5.7% attorneys' fee award, resulting in a fee of $19,329,463.

Vacated and remanded.

Attorneys and Law Firms

***725** Howard B. Sirota (argued), Sirota & Sirota LLP, New York, New York, Counsel for Appellant.

Roger Kirby (argued), Kirby McInerney & Squire LLP, New York, New York, Counsel for Plaintiffs–Appellees.

Samuel Kadet (argued), Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York, Counsel for Defendants–Appellees.

BEFORE: SCIRICA, FUENTES and GARTH, Circuit Judges.

OPINION OF THE COURT

GARTH, Circuit Judge:

This appeal arises out of a class action filed on behalf of investors in Cendant Corporation ("Cendant") after Cendant disclosed prior "accounting irregularities" on April 15, 1998. [1] Several actions were filed as a result of this disclosure, including an action commenced on June 15, 1998 on behalf of purchasers of Cendant's Feline PRIDES shares. The PRIDES litigation was subsequently consolidated with the other pending Cendant actions. However, on August 4, 1998, the District Court ruled that separate lead plaintiffs and lead counsel were to represent the interests of the PRIDES shareholders, as distinct from the rest of the Cendant class. (JA1300–01.)

The firm of Kirby, McInerney & Squire, formerly Kaufman, Malchman, Kirby & Squire, ("Kirby") was appointed as lead counsel of the Cendant PRIDES class. On November 12, 1998, Kirby filed a motion for class certification, for summary judgment on the claims under § 11 of the Securities Act, and for injunctive relief. On behalf of the PRIDES class, Kirby entered into a proposed settlement agreement with Cendant on March 17, 1999—three and a half months after Kirby's motions were filed and no more than nine months after the action had been started.

Under the settlement agreement, Cendant agreed to issue Rights to new PRIDES, with a stated value of $11.71. (JA576–79.) Those rights were in trade for existing PRIDES. The total possible number and amount of Rights to be distributed pursuant to the agreement

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was 29,161,474, with an approximate stated value of $341,500,000. (JA590.) Regarding Kirby's attorneys' fees, the settlement agreement provided: "Cendant ... will take no position on an application by Lead Counsel for an award of fees and expenses provided that such application shall not request fees in excess of 10% percent [sic] of the aggregate Stated Value of 29,161,474 Rights, which is approximately $341,500,000, plus reasonable expenses incurred by Lead Counsel in connection with this Action." (JA590.)

The Notice of Pendency of Class Action summarized the proposed settlement of the PRIDES litigation. (JA239–52.) In connection with "Lead Counsel's fees and expenses," the Notice stated: "Lead Counsel has notified the other signatories hereto that it intends to apply to the Court for an award of fees, in an amount not to exceed 10% of the aggregate Stated Value of 29,161,474 Rights, or approximately $34.1 million, plus reasonable expenses." (JA247.) The Notice went on to explain how the attorneys' fees would be paid, first out of "Unclaimed Rights," [2] then out of ***726** "Opt Out Rights," then out of the rights of class members with claims. [3]

The Notice also asserted:

> You also should know that the lead counsel appointment process included a court-mandated bidding process. This was intend to assure that the largest possible portion of any recovery remained with participating class members, or conversely that qualified lead counsel took the least possible sums from the benefits to be obtained by participating class members. In Lead Counsel's view, under the fee mechanism proposed by Lead Counsel and described herein, there is a substantial likelihood that a substantial part, if not all, of the fees sought will be obtained from Unclaimed Rights and Opt Out Rights. As a consequence, in Lead Counsel's view, those Class Members who become Authorized Claimants will not have to pay any of Lead Counsel's fees, or if they do, there is a substantial likelihood that it will be less than the amount otherwise payable under the bids approved by the Court in the process of appointing lead counsel.

(JA247.)

On May 4, 1999, the Joanne A. Aboff Trust ("Trust") filed several objections to the notice of settlement, all of which pertained to Kirby's representation and fee request, [4] as well as a notice of its intention to appear at the settlement hearing. (JA38–78.) At the settlement hearing on May 18, 1999, lead counsel stated that "[t]here is no objection to the settlement," (JA736), and the Trust's attorneys objected only to selection of class counsel and Kirby's request for attorneys' fees.

On June 15, 1999, the District Court signed an Opinion and Order approving the settlement, stating: "The Court considers the settlement to be eminently fair and reasonable. The class is made completely whole by such compensation. There are no objections voiced to the settlement—only to the request for attorney fees. The proposed settlement is approved subject to the following modifications to the attorneys' fees." *In re Cendant Corp. Prides Litig.*, 51 F.Supp.2d 537, 541 (D.N.J.1999).

The District Court granted Kirby's request for expenses, finding that the requested expenses of $2,367,493 were "reasonable and necessary to the prosecution of this litigation." 51 F.Supp.2d at 542. Then the Court found that, for attorneys' fees, Kirby should receive a number of Rights equivalent to 5.7% of the balance of Rights received by the Class. That percentage amounts to 1,650,680 Rights, valued at approximately $19,329,463. The District Court directed "Lead Counsel to seek to satisfy payment of these awards of expenses and fees from any unclaimed ***727** Rights. Then, and only then, to the extent that such fees and expenses have not been satisfied by unclaimed Rights, shall any deficiency be assessed against and borne by the class." 51 F.Supp.2d at 542. The Court went on to instruct that "[a]ny rights unclaimed after authorized class claimants and Lead Counsel have been issued their entitled Rights shall be canceled by Cendant Corporation." 51 F.Supp.2d at 542.

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On June 15, 1999, the District Court entered an Order and Judgment [5] certifying the PRIDES class for settlement, approving the settlement "and the distribution of Rights and New PRIDES to Authorized Claimants set forth therein," dismissing with prejudice all settled claims, and awarding Lead Counsel 1,650,680 Rights as reasonable attorneys' fees and 202,177 Rights as reimbursement of Lead Counsel's reasonable expenses. (JA728–30.) On the same date and as part of its opinion, the District Court denied the Trust's application for attorneys' fees. On July 22, 1999, the Trust timely appealed the District Court's June 15 Orders and Judgment.

We have jurisdiction over this appeal pursuant to the final order doctrine of 28 U.S.C. § 1291, and we review the District Court's award of attorneys' fees for an abuse of discretion, "which can occur 'if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous.' " *Zolfo, Cooper & Co. v. Sunbeam–Oster Co.,* 50 F.3d 253, 257 (3d Cir.1995) (quoting *Electro–Wire Prods., Inc. v. Sirote & Permutt, P.C. (In re Prince),* 40 F.3d 356, 359 (11th Cir.1994)).

On August 27, 1999, Kirby filed a Motion in this court to dismiss the Trust's appeal for lack of standing, as well as presenting the standing issue in its appellate brief.

I.

Before we consider the merits of the Trust's appeal, a threshold question must be answered: does the Trust have standing to challenge the District Court's award of attorneys' fees to Kirby? *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94–95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (stating that "[t]he requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and 'is inflexible and without exception' "). Because "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), we may not hear this appeal if the Trust does not have standing.

"Ordinarily, only a party *aggrieved* by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 333, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) (emphasis added). In *Ace Heating & Plumbing Co. v. Crane Co.,* the Third Circuit explicated the application of this principle to class actions, holding: "*aggrieved* class members may appeal any final order of a district court in proceedings held pursuant to Rule 23. This general proposition holds true even though such class members have the right to exclude themselves from the class." 453 F.2d 30, 32 (3d Cir.1971) (emphasis added).

The standing question in this case is troublesome, because it appears as if the PRIDES settlement has provided the class members with full recovery and because any reduction in the amount of attorneys' ***728** fees to Kirby will not be distributed among the class members, but instead those rights will be returned to and canceled by Cendant. Therefore, Kirby argues, the T rust is not aggrieved by the award of attorneys' fees and has no standing to appeal.

While this argument admittedly has a superficial attraction because the PRIDES class members will seemingly recover a "dollar-for-dollar" return for their claims and Kirby's fees will not reduce their recovery, we nevertheless hold that the Trust does have standing to appeal the award of attorneys' fees. [6] We base this holding on two related concepts: 1) the nature of the relationship between class plaintiffs, class counsel, and defendants in class actions requires that the "aggrieved" requirement be construed broadly in class action cases; and 2) the judiciary's independent authority over the appointment of class counsel, the grant of attorneys' fees, and the review of attorneys' fee awards in class actions. In connection with these two principles, we require that district courts conduct an extensive analysis and inquiry before determining the amount of fees, because we have an independent interest in monitoring district courts' fee awards, particularly those awards stemming from Rule 23 class actions. *See, e.g., Zucker v. Occidental Petroleum Corp.,* 192 F.3d 1323, 1328 (9th Cir.1999); *see generally* Advisory Committee's Notes on Fed.R.Civ.P. 23, 28 U.S.C., Notes following Rule 23 (addressing, *inter alia,* "the question of the measures that might be taken during

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the course of the action to assure procedural fairness"). Indeed, we are in effect third parties to the fee award process, albeit silent parties for the most part until the award is finalized and reviewed.

A.

Ostensibly, lead class counsel represents all class plaintiffs. However, in attempting to settle a large class action, class counsel must often spend more time negotiating with and interacting with the defendants than with their own clients. This situation presents several dangers. First, as we observed in *Prandini v. National Tea Co.,* "a defendant is interested only in disposing of the total claims asserted against it[, and] the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." 557 F.2d 1015, 1020 (3d Cir.1977). Moreover, the "divergence in [class members' and class counsel's] financial incentives ... creates the 'danger ... that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.' " *In re General Motors Corp. Pick–Up Truck Fuel Tank Prod. Liab. Litig. (*hereinafter *"In re GM Trucks"),* 55 F.3d 768, 820 (3d Cir.1995) (quoting *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518, 524 (1st Cir.1991)).

This unique relationship among plaintiffs' counsel, plaintiffs, and defendants in class actions imposes a special responsibility upon appellate courts to hear challenges to fee awards by class members whose claims may have been reduced or in some way affected in exchange for large fee awards. *See In re GM Trucks,* 55 F.3d at 819–21. This is so even in this case, where the Trust presumably will not benefit from a reduction in Kirby's attorneys' fees, because the PRIDES settlement was structured so that any remaining Rights will be returned to Cendant.

The Ninth Circuit addressed a similar situation in *Zucker v. Occidental Petroleum Corp.,* 192 F.3d 1323 (9th Cir.1999), pointing out in its discussion that, even where the plaintiff "gets the same money whether the fee is cut or not, ... a client whose attorney accepts payment, without his consent, from the defendants he is suing, may have a remedy, and this remedy may extend to a plaintiff class whose class attorneys accept payment from the ***729** defendants the class is suing." 192 F.3d at 1326.

The Ninth Circuit took this reasoning a step further in *Lobatz v. U.S. West Cellular of Calif.,* in which the court, holding that a class member had standing to appeal an attorneys' fee award "even though that award was payable independent of the class settlement," stated:

> If ... class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class[, and] any excessive award could be considered property of the class plaintiffs, and any injury they suffered could be at least partially redressed by allocating to them a portion of that award.

Lobatz, 222 F.3d 1142, 1147 (9th Cir.2000).

Under the Ninth Circuit's analysis, therefore, the Trust need not benefit from a reduction in Kirby's fee to have standing to appeal. Moreover, the Ninth Circuit suggested in *Zucker* that the requirement that class plaintiffs be aggrieved should be construed broadly, citing Judge Sneed's observation in his dissent in *In re First Capital Holdings* "that '[a]rguably, a class member always retains an interest in attorney fees, even when her claims have been met in full.' " *Zucker,* 192 F.3d at 1328 (quoting *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.,* 33 F.3d 29, 31 (9th Cir.1994) (Sneed, J., dissenting)).

As a class member, the Trust was eligible to receive "one Right, a marketable security freely tradeable until February 14, 2001, having the terms described herein for each Income PRIDES and Growth PRIDES ($50.00 face amount) beneficially owned by Class members at the close of business on April 15, 1998 if such Class member submits a valid and timely proof of claim form." (JA239.) The Notice of the Proposed Settlement stated that "[e]ach Right will be designed to have a stated or theoretical value of $11.71," but acknowledged that "the Rights may trade in the market at a price below their theoretical value." (JA239.) Moreover, the Notice stated that "Cendant believes that recoverable damages (if any) per share could be lower or higher than the

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per PRIDES damages estimated by lead counsel for the Class." (JA239.) [7]

Though Kirby asserts that each class member received full recovery from this settlement, in which case, it is contended, the Trust would not be aggrieved by the fee award, the description of the settlement in the Notice and its ultimate implementation by class members is uncertain as to class members' actual recovery. Because class members received rights which must be traded on the market to be liquidated, a number of factors could contribute to class members not receiving the theoretical $11.71 per Right. It is noteworthy that the settlement provided class members with no immediate cash payment, but rather left class members in the position of relying on the marketability of their new Rights for reimbursement of their claims. That reliance, apart from any other market risks, might itself be chancy in light of Cendant's history of "accounting irregularities" and in light of the recent market and economy slow down.

Nor does even a "dollar-for-dollar" recovery in cash undermine our power and jurisdiction and our special responsibility to review fee awards. Indeed, though the fact of market fluctuation and its effect on the value of class members' recovery influences our decision that the Trust has standing, we are equally convinced of our appellate jurisdiction over class settlements in which plaintiffs received a "dollar-for-dollar" recovery in cash. Indeed, it would be preposterous to hold that, even where a district court awarded a fee of ***730** 75% of the recovery to class counsel, we would have no power to review such an inappropriate and outrageous award in the absence of an objector whose claims had been directly reduced as a result of the award. Our oversight and supervisory function would necessarily come into play to correct such a decree. This duty of review with which we are vested will be discussed in more detail in the next section.

B.

As indicated above, we are convinced of our obligation to vacate the District Court's order awarding fees by the special position of the courts in connection with class action settlements and attorneys' fee awards. As we observed in *In re GM Trucks,* "a thorough review of fee applications is required in all class action settlements." 55 F.3d at 819. Specifically, the danger inherent in the relationship among the class, class counsel, and defendants "generates an especially acute need for close judicial scrutiny of fee arrangements" in class action settlements. [8] 55 F.3d at 820. In discussing this duty of district courts to oversee class settlements in *In re GM Trucks,* we explained:

> the court's oversight task is considerably complicated by the fact that these attorney-class conflicts are often difficult to discern in the class action context, "where full disclosure and consent are many times difficult and frequently impractical to obtain." Finally, we emphasize that the court's oversight function serves not only to detect instances of "the actual abuse [that potential attorney-class conflicts] may cause, but also [the] potential public misunderstandings they may cultivate in regard to the interests of class counsel." 55 F.3d at 820 (quoting *In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 216, 224, 225 (2d Cir.1987)). In other words, we indicated in *In re GM Trucks* the importance of the judicial role in finalizing class action settlements, and we suggested that this importance derived from general concerns about "potential public misunderstandings" as much as from a desire to protect the plaintiffs in the particular class.

In *Zucker,* in asserting that the district court was required to review the award of attorneys' fees regardless of whether anyone had standing to challenge the award, the Ninth Circuit stated:

> In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper. This duty of the court exists independently of any objection. Therefor e it exists, *a fortiori,* regardless of whether an objector has a remediable economic stake in the court's decision. Because the district court had the authority and duty to pass upon the fairness of the attorneys' fees settlement independently of whether there

> was objection, we need not decide whether the objector had standing.

192 F.3d at 1328–29.

The court in *Zucker* further explained that "[n]o Article III case or controversy is needed with regard to attorneys' fees as such, because they are but an ancillary matter over which the district court retains equitable jurisdiction." 192 F.3d at 1329. The Ninth Circuit found support for this proposition in the reasoning of the Eighth Circuit that "because 'the reasonableness ***731** of attorneys' fees is within the overall supervisory authority' of the court in a class action, the court did not need to reach the question of whether an objector has standing." *Zucker,* 192 F.3d at 1329 (quoting *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 127 n. 13 (8th Cir.1975)).

While the statements in *In re GM Trucks* and *Zucker* refer to the authority of district, not appellate, courts in connection with class action settlements, the cases make clear that reviewing courts retain an interest—a most special and predominant interest—in the fairness of class action settlements and attorneys' fee awards. Accordingly, our interest as a reviewing court in ensuring that district courts fulfill their obligations and comply with the instructions and guidelines in this area bolsters our determination that the Trust has standing to challenge Kirby's fee award.

Nor is our responsibility in connection with class action matters restricted to reviewing the final fee determination made by the District Court. Our interest and supervisory role is pervasive and extends not only to the final fee award but also to the manner by which class counsel is selected and the manner by which attorneys' fee conditions are established.

Here, the District Court employed a sealed-bid auction to select class counsel. That process, which occurred virtually at the inception of the instant class action, is itself fee-driven. As such, it invites, indeed requires, judicial examination and, hence, our jurisdiction. This is so both because of the unique relationship between class members, class counsel, and the defendants in class actions and because of our strong interest in the fair ness of class settlements and the cost of achieving such settlements. *See, e.g.*, John C. Coffee, Jr., National Law Journal, Sept. 14, 1998, at B6 (discussing selection of lead counsel through auctions and "bidding rules").

Because it is the district court's function to participate in the litigation process in this way, as the District Court did here, and because, as noted, our judicial scrutiny reaches to all corners of the class action process including the selection of class counsel—a selection which impacts on the final fee award and fairness of the settlement—we would be remiss if we failed to exercise our jurisdiction in this area.

An analogy, albeit one that is far a field from class action fees, is helpful to illustrate and emphasize the court's interest and the role that our interest plays in our decision to hear this appeal. In *Powers v. Ohio,* a post-*Batson* case,[9] the Supreme Court held that a white criminal defendant had standing to object to and appeal the exclusion of black jurors through peremptory challenges, even though the defendant and the potential jurors were of different races. 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). In its discussion of standing, the Court stated:

> The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process," and places the fair ness of a criminal proceeding in doubt.
> *Powers,* 499 U.S. at 411, 111 S.Ct. 1364 (internal citations omitted).

Likewise, just as discriminatory selection of jurors "casts doubt on the integrity of the judicial process" such that the ***732** defendant in *Powers* had standing to appeal, the integrity and fairness of class settlements is threatened by excessive attorneys' fee awards such that class plaintiffs have standing to challenge excessive fee awards, even when they have received dollar-for-dollar recovery in the class settlement.

Because of the possible injury to the Trust as well as other class members from the fee award in this case and, more importantly, because of our overarching interest in class

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fee awards, we therefore hold that the Trust has standing to appeal the fee award. Accordingly, we now turn to the fee award that the District Court granted to Kirby and review that award for an abuse of discretion. *See In re GM Trucks,* 55 F.3d 768, 782 (3d Cir.1995).

II.

There are two primary methods for calculating attorneys' fees: the percentage-of-recovery method [10] and the lodestar method. [11] "The percentage-of-recovery method is generally favored in cases involving a common fund, [12] and is designed to allow courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.' " *In re Prudential,* 148 F.3d at 333. "The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." 148 F.3d at 333.

The total settlement in this case was valued at $341,500,000, and the District Court granted attorneys' fees in the amount of $19,329,463. [13] As the District Court noted, this amount constitutes 5.7% of the class's total recovery. In connection with the lodestar calculation, the District Court observed that "Lead Counsel, through its principal partners, associates, and paralegals expended approximately 5,600 hours, and its senior partners have a regular hourly rate of $495." 51 F.Supp.2d at 542. Using the $495 hourly rate, the lodestar multiplier [14] for the District Court's fee award is 7. [15]

***733** Two primary principles govern our review of the District Court's fee award to Kirby: 1) did the District Court provide sufficient explanation for granting the fee award of $19.3 million?; and 2) was the award so unreasonably high that the District Court abused its discretion in granting that amount in attorneys' fees?

A.

In *Gunter v. Ridgewood Energy Corp.,* we considered a district court's award of attorneys' fees in a class action settlement. 223 F.3d 190 (3d Cir.2000). That case involved a $9.5 million settlement, out of which the district court allowed attorneys' fees amounting to 18% of the settlement fund, significantly less than the one-third requested by the attorneys. 223 F.3d at 191. The district court in *Gunter* explained its decision as follows: "The nature of this litigation, its resolution at this stage without the necessity of trial, the nature of the settlement, and its value, convince the court that it would place a reasonable burden on the class to award attorneys' fees of 18% of the Settlement Fund, or $1,700,000." 223 F.3d at 192 (citing *Gunter v. Ridgewood Energy Corp.,* Civ. No. 95–438(WHW), at 3 (D.N.J. Nov. 16, 1999)). The attorneys appealed the district court's reduction of their fee request.

In reviewing the district court's fee award in *Gunter,* we stated that "[w]e give [a] great deal of deference to a district court's decision to set fees." 223 F.3d at 195. However, we noted, "[n]otwithstanding our deferential standard of review, it is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion." 223 F.3d at 196. Therefore, "if the district court's fee-award opinion is so terse, vague, or conclusory that we have no basis to review it, we must vacate the fee-award order and remand for further proceedings." 223 F.3d at 196. In addition, "if a district court does not fulfill its duty to apply the relevant legal precepts to a fee application, it abuses its discretion by not exercising it." 223 F.3d at 196.

In *Gunter,* we vacated the district court's fee award because the district court "dealt with the fee-award issue in a cursory and conclusory fashion" and did not employ the factors which this Court has stated that district courts should consider in awarding fees using the percentage-of-recovery method in common-fund class actions. *See Gunter,* 223 F.3d at 196–97. These factors were set forth in *Gunter* in a footnote:

> Among other things, these factors include: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to

> the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter, 223 F.3d at 195 n. 1 (citing *In re Prudential,* 148 F.3d 283, 336–40 (3d Cir.1998); *In re GM Trucks,* 55 F.3d 768, 819–22 (3d Cir.1995)).

As in *Gunter,* the District Court's fee opinion in this case was too cursory for us to "have a sufficient basis to review for abuse of discretion." *Gunter,* 223 F.3d at 196. The District Court did not even specify whether it was using the percentage-of-recovery method or the lodestar method to set attorneys' fees. Nor, if the District Court intended to utilize the lodestar method, did it calculate the lodestar multiplier. Rather, the District Court, in a conclusory paragraph bereft of analysis, stated:

> This Court has examined the time expended by Lead Counsel and the regular hourly rates of its services. Lead ***734** Counsel, through its principal partners, associates, and paralegals expended approximately 5,600 hours, and its senior partners have a regular hourly rate of $495. This represents significant effort. But the Court is more impressed by the quality of result than the quantity of effort. The class will receive its full entitlement. And resolution of this matter was greatly accelerated by the creative dynamism of counsel. For this, counsel should not be penalized by a slavish application of the lodestar. We have seen the gifted execution of responsibilities by a lead counsel.

51 F.Supp.2d at 542. Despite the District Court's obvious dissatisfaction with the lodestar method, the court did not even address the percentage-of-recovery method, except to the extent that it calculated that the fee award constituted 5.7% of the total class recovery.

The percentage-of-recovery method has long been used in this Circuit in common-fund cases. Indeed, in the 1985 Third Circuit Task Force report entitled *Court Awarded Attorney Fees,* the Task Force discussed the problems with the lodestar method in detail. "Accordingly, the Task Force recommend[ed] that in the traditional common-fund situation ..., the district court ... should attempt to establish a percentage fee arrangement." *Task Force Report,* 108 F.R.D. 237, 255 (1985). Since that time, we have several times reaffirmed that application of a percentage-of-recovery method is appropriate in common-fund cases. *See, e.g., Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n. 1 (3d Cir.2000); *Brytus v. Spang & Co.,* 203 F.3d 238, 243 (3d Cir.2000); *In re Prudential,* 148 F.3d 283, 333–34 (3d Cir.1998); *In re GM Trucks,* 55 F.3d 768, 821 (3d Cir.1995).

Though this is not a traditional common-fund case, because the unclaimed portion of the settlement fund is returned to Cendant and because the plaintiffs who recover may not be affected by the attorneys' fee award (depending on the number of plaintiffs who recover rights from the fund), use of the percentage-of-recovery method is appropriate in this case. Since the District Court highlighted the inadequacy of the lodestar method, it can be assumed that that court also perceived that the percentage method was a better method of calculating attorneys' fees in this case. This is consistent with the District Court's opinion awarding attorneys' fees in the larger and separate *Cendant* settlement, in which it did declare, "[f]ollowing established Third Circuit law ..., the Court will award fees by a percentage-of-recovery method." *In re Cendant Corp. Litig.,* 109 F.Supp.2d 285, 298 (D.N.J.2000). [16]

As discussed above, we have articulated at least seven factors to be considered by district courts in setting percentage fee awards in common fund cases. *See Gunter,* 223 F.3d 190, 195 n. 1 (3d Cir.2000). The District Court, however, did not explicitly consider any of these factors. [17] In addition to rejecting the lodestar method, the District Court stated: "The Court appreciates Lead

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Counsel's verve and the eminently satisfactory results it obtained for the class. There are no objections to the settlement agreement." 51 F.Supp.2d at 541. In addition, ***735** the District Court mentioned the initial sealed bidding process and referred to the resulting bid to which Kirby agreed "as a benchmark of reasonableness." 51 F.Supp.2d at 542 (quoting *In re Cendant Corp.,* 182 F.R.D. 144, 152 (D.N.J.1998)). However, when it came to setting the fee award, the District Court said simply, "[t]he Court deter mines that counsel fees of 5.7% of this net balance [of the total award less Lead Counsel's expenses of $2,367,493] are reasonable." 51 F.Supp.2d at 542.

It could be argued that, in the few terse statements quoted above, the District Court took into account three of the seven *Gunter* factors: "the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel"; "the skill and efficiency of the attorneys involved"; and "the amount of time devoted to the case by plaintiffs' counsel." *Gunter,* 223 F.3d at 195 n. 1. However, the District Court brushed over our required analysis of those factors in setting the attorneys' fees.

Significantly, the District Court did not consider at all the other factors which we deem to be more important in this case, namely "the *complexity* and duration of the litigation" and "the [range of] awards in similar cases." 223 F.3d at 195 n. 1 (emphasis added). Nor does it appear that the District Court "cross-check[ed] the percentage award ... against the 'lodestar' award method," which is "suggested" practice for district courts setting fee awards by the percentage-of-recovery method. *Gunter,* 223 F.3d at 195 n. 1. Further, the District Court did not "make its reasoning and application of the fee-awards jurisprudence clear." *Gunter,* 223 F.3d at 196. [18]

B.

Because the District Court failed to consider the *Gunter* factors that we deem essential to a proper exercise of discretion and to an appropriate consideration of attorneys' fee awards, we will discuss those factors here.

1. *Complexity and Duration of Litigation*

In April 1998, Cendant announced past accounting irregularities and stated that its financial statements for certain past years would be restated. 51 F.Supp.2d at 539. On behalf of the Cendant PRIDES class, Kirby filed an Amended and Consolidated Class Action Complaint on November 11, 1998, accompanied by a motion for class certification, a motion for summary judgment, and a motion for preliminary injunctive relief. Less than two months later, on January 7, 1999, the parties announced that they had reached "an agreement in principal[sic]," and the parties presented a proposed settlement agreement to the District Court on March 17, 1999. 51 F.Supp.2d at 540.

As the District Court observed, "[t]his stage of the litigation, notwithstanding that Lead Counsel has moved for summary judgment, is what would be normally the discovery period, very early on in the litigation." 51 F.Supp.2d at 541. The District Court also noted that Kirby spent approximately 5,600 hours on this action.

In setting Kirby's fee award, the District Court apparently turned a blind eye to the following factors: 1) the case was relatively simple in terms of proof, in that Cendant had conceded liability and no risks pertaining to liability or collection were pertinent; 2) the case was settled at ***736** a very early stage of the litigation, with an agreement being announced two months after Kirby filed for class certification and a proposed settlement being submitted to the District Court two months after that; 3) there was a minimal amount of motion practice in this case—before settlement, Kirby submitted only the Complaint and three motions, all on the same day; 4) discovery was virtually nonexistent—indeed the District Court did not mention any depositions taken or document review conducted by Kirby; and 5) Kirby spent a relatively small amount of time on this case compared to the amount of time expended in most other large class actions.

2. *Range of Awards*

Before reviewing specific awards in other large class settlements, we will review generally the range of attorneys' fee awards in common fund settlements of class actions. In *In re GM Trucks,* we observed that "[o]ne court has noted that the fee awards have ranged from nineteen percent to forty-five percent of the settlement fund." 55 F.3d 768, 822 (3d Cir.1995) (citing *In re*

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SmithKline Beckman Corp. Sec. Litig., 751 F.Supp. 525, 533 (E.D.Pa.1990)). We also noted in *In re Prudential* that "[t]he district court ... examined the fee awards in class actions with recoveries exceeding $100 million and found the fee percentages ranged from 4.1% to 17.92%." 148 F.3d 283, 339 (3d Cir.1998).

However, recently two district courts in this Circuit have declined to follow this court's statement of the range in *In re Prudential,* stating that "the cases cited in [*In re Prudential*] were all decided at least thirteen years ago." *In re Ikon Office Solutions, Inc. Sec. Litig.,* 194 F.R.D. 166, 196 (E.D.Pa.2000); *In re Orthopedic Bone Screw Prod. Liab. Litig.,* 2000 WL 1622741, at 7 (E.D.Pa. Oct.23, 2000). Indeed, in another *Cendant* opinion dealing with attorneys' fees, this same District Court stated that, in cases surveyed by lead counsel, "[a]wards ... ranged from a low of 20% in the case with a $200 million recovery to a high of 33.3% for cases with recoveries of $77.5 million and $110 million." *In re Cendant Corp. Sec. Litig.,* 109 F.Supp.2d 285, 290 (D.N.J.2000). These varying ranges of attorneys' fees confirm that a district court may not rely on a formulaic application of the appropriate range in awarding fees but must consider the relevant circumstances of the particular case.

One important consideration is the size of the settlement. The Task Force Report stated, with reference to fee awards in common fund cases: "The negotiated fee, and the procedure for arriving at it, should be left to the court's discretion. In most instances, it will involve a sliding scale dependent upon the ultimate recovery, the expectation being that, absent unusual circumstances, the percentage will decrease as the size of the fund increases." 108 F.R.D. 237, 256 (1985). We called attention to this statement in *In re Prudential,* explaining that "[t]he basis for this inverse relationship is the belief that '[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel.' " *In re Prudential,* 148 F.3d at 339 (quoting *In re First Fidelity Bancorporation Sec. Litig.,* 750 F.Supp. 160, 164 n. 1 (D.N.J.1990)). Accordingly, district courts setting attorneys' fees in cases involving large settlements must avoid basing their awards on percentages derived from cases where the settlement amounts were much smaller.

3. *Other Awards*

The District Court did not undertake to review the fees granted in other class action settlement cases, particularly in other large settlement cases, *i.e.*, cases in which the common fund exceeded $100 million.[19] ***737** Had it conducted such a review, the District Court should have looked specifically at cases in which the percentage-of-recovery method, not the lodestar method, was employed to set the fee award, and it should have examined the reasoning behind the district courts' fee awards in cases of similar size.

Below, we have set forth a chart of fee awards given in federal courts since 1985[20] in class actions in which the settlement fund exceeded $100 million[21] and in which the percentage of recovery method was used.[22] We have outlined the amount of settlement, the percentage of the settlement that made up the attorneys' fee award and the lodestar multiplier.

***738** In the charted cases, the attorneys' fee awards ranged from 2.8% to 36% of the total settlement fund. Looking at the percentage of recovery in this case (5.7%), it appears that it is in line with the other cases and even at the low end of the range. However, a brief review of the facts and posture of these other cases makes clear that, when examined through the seven-factor lens of *Gunter,* the higher fees awarded in the other cases were far more justified than the high award in this case. Accordingly, the District Court should have learned from those cases that extensive time and effort exerted by the attorneys and the existence of complex legal and factual issues warranted higher fee awards than the fee award that would have been appropriate for Kirby.

The district court in *In re Auction Houses* relied on a pre-settlement bidding process in awarding attorneys' fees. The bidding process in that case differed from ***739** the process employed by the District Court in this case, but it raised similar problems. However, regardless of the arguable flaws in the method by which the district court awarded fees in *In re Auction Houses,* that case was far more complex than the instant case and, as such, is distinguishable. Indeed, the comments of interim lead counsel, excerpted in the district court's opinion, are telling:

> Mr. Furth, on behalf of all of the interim lead counsel, said that he "never in [his] fondest dreams ... believed that these defendants would pay $512 million" and

> that this settlement "is the most outstanding result I have ever heard of in the history of the antitrust laws." Another of the interim lead counsel noted that he and his colleagues had been negotiating with defendants prior to the appointment of plaintiffs' lead counsel, that they "had really good hard solid numbers from [defendants], and we didn't think we could have accomplished what Mr. Boies did."

In re Auction Houses Antitrust Litig., 2001 WL 170792, at 6 (S.D.N.Y. Feb.22, 2001).

In *In re Orthopedic Bone Screw,* the district court described the case as "nothing less than an uninterrupted, hard-fought, 'antagonistic' legal battle," in which the attorneys seeking fees had "conducted substantial, widespread and extensive discovery" including reviewing more than 1,500,000 pages of documents, and had "defended a variety of pleadings and discovery matters and 'litigated a plethora of motions,' " which resulted in the court issuing nearly 2,000 Pretrial Orders. 2000 WL 1622741, at *6.

In *In re Ikon Office Solutions,* the district court granted the 30% fee request because, *inter alia,* "Counsel expended more than 45,000 hours on this case and paid out expenses of more than $3 million with no guarantee of recovery," the case presented "the legal obstacles of establishing scienter, damages, causation, and the like," and "derivative counsel fees will be taken from this amount." 194 F.R.D. at 194.

In *Shaw v. Toshiba,* the district court noted the protracted schedule of the case, because of which "it has been necessary to prosecute this action continuously, around the clock, seven days a week, workdays and holidays alike." 91 F.Supp.2d at 969. Other factors that made litigation of *Shaw* difficult included the two million pages of documents reviewed by class counsel, the fact that defendant's corporate headquarters were located in Tokyo, Japan, as well as the additional burden of having to translate many documents and much of the testimony from Japanese to English. Even with these numerous procedural difficulties, the district court only awarded 7% of the settlement in attorneys' fees.

The attorneys in *Sumitomo* spent more than 43,000 hours on the case and inspected 11 million pages of documents, and the case had legal and factual complexities including "the existence and analysis of the relationships between and among more than thirty Comex futures contracts, more than 500 LME contracts, literally hundreds of physical contracts, and millions of tons involved in the copper futures, the copper options and the copper derivative contracts." *Sumitomo,* 74 F.Supp.2d at 398.

In *Kurzweil,* the district court noted that, before the settlement, "[t]here had been no large settlements in tobacco litigation generally, and no successful action had yet been brought against a tobacco company based on allegations of addictiveness of nicotine." 1999 WL 1076105, at *1. In addition, the attorneys encountered several obstacles, including that the action was originally dismissed, and the attorneys reviewed millions of documents and tens of thousands of deposition and trial transcripts and conducted numerous depositions. 1999 WL 1076105, at *1.

In *In re Lease Oil,* the district court explained:

> ***740** As well as being novel, this litigation was highly complex and thus required a great deal of lawyering skill. As just explained, the task of simply compiling the evidence was an unusually difficult task, requiring the assistance of experts and the investment of many hours.[24] Also, being novel, the legal issues raised in the litigation required skilled attorneys to handle them.

186 F.R.D. at 445.

The district court in *Copley,* in granting the 13% fee award, observed that, "[d]uring expedited discovery, class counsel reviewed and analyzed more than 125,000 pages of documents and deposed roughly one hundred witnesses." 1 F.Supp.2d at 1408. The case also included 42 days of trial, and class counsel spent 48,794 hours on the case. Finally, the legal questions involved in *Copley* were both novel and complex. As the court explained: "not only was the certification of this class a complex question, but this was also the first and only mass tort class action to go to trial, and the case presented complex medical and scientific issues of causation." 1 F.Supp.2d at 1413.

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PaineWebber too had many features that would dictate a high fee award. Class counsel conducted "extensive, coordinated discovery," including "coordinating discovery of hundreds of boxes of documents through the use of sophisticated computer databases, and deposing many key witnesses." 999 F.Supp. at 722. In more than two years of litigation, counsel spent "approximately 70,000 hours in heretofore uncompensated legal work in pursuit of factual investigation, drafting of documents, brief writing, document analysis, depositions, trial preparation, settlement negotiation and other tasks." 999 F.Supp. at 723. Finally, the legal issues in *PaineWebber* were complex, and class counsel "faced significant substantive and procedural defenses." 999 F.Supp. at 724.

Walco Investments was described by the district court as comprising "four years of bitterly-contested litigation." 975 F.Supp. at 1470. The case involved multiple defendants, and the claims were only loosely related, making class litigation exceedingly complicated, because "claims raised against each category of defendants presented separate issues of fact and law and involved differing theories of recovery." 975 F.Supp. at 1471. These circumstances encouraged the court to award 15% in attorneys' fees to attorneys from fourteen different firms representing class plaintiffs.

The action in *In re Combustion* was eleven years old at the time of settlement and the attorneys had spent over 50,000 hours on the case. In the litigation, there had been "roughly 160 complaints filed, 1140 answers, 1922 motions, with almost 1000 memoranda in support of or in opposition to these motions, 285 depositions ..., 90 hearings, at least one oral argument per month since the case was removed to federal court, and endless numbers of settlement conferences," as well as "three fairness hearings, the first one lasting one week, and the other two lasting approximately one day each" and "one *Daubert* hearing lasting a total of two weeks." *In re Combustion,* 968 F.Supp. at 1136.

In *Local 56,* the court acknowledged "the complexity of the issues in this case, the significant attendant risks of proceeding with litigation, and the tenacity and vigor with which all counsel represented their clients' interests," in this class action which lasted for four years. 954 F.Supp. at 1005. Even so, class counsel's fees amounted to only 2.8% of the total settlement, a far smaller percentage than the ***741** fee awarded to Kirby by the District Court.

In *Bowling,* the district court averred that "[t]he Court's choice of a percentage ... will be heavily informed by the value of the services rendered by Counsel." 922 F.Supp. at 1280. The court observed that "Counsel were confronted with myriad complex legal and factual questions in bringing this action and in negotiating the settlement." 922 F.Supp. at 1280.

Domestic Air involved a class action against several airline companies claiming a conspiracy to fix prices. The court observed:

> Counsel negotiated a significant settlement for the class in light of the precarious financial position of most of the defendants and over defendants' insistence that they could not provide a larger cash settlement. Were it not for the considerable skill and effort of plaintiffs' counsel, the action would never have been certified as a class action and members of the class would receive nothing in return for their claims against defendants.

148 F.R.D. 297, 351–52 (N.D.Ga.1993). In other words, the action in *Domestic Air* involved fundamental procedural obstacles that could easily have resulted in no recovery at all. Accordingly, class counsel was rewarded significantly for negotiating such a large settlement.

Finally, in *In re MGM Grand Hotel,* the court considered "the particular and unique circumstances of this case," including the fact that the attorneys had recovered over 6,000 objects from the fire site and had conducted over 1,400 depositions, in granting the 7% fee award. 660 F.Supp. at 526.

Indeed, in case after case, the same factors recur: complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel. Because none of these factors which increase the complexity of class litigation was present here,

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it makes sense that the fee awarded in this case should be far lower than those awarded in the charted cases, which fees ranged from 2.8% to 36% of the total settlement.

Also relevant to the District Court's analysis in this case is our holding in *In re Prudential* remanding the case to the district court. In that case, we rejected an award of 6.7% of the settlement fund in a case with a fund of $1 billion to $2 billion because the district court had failed to explain adequately why it had applied such a high percentage to the settlement figure and because the court had not explained why the 5.1 lodestar multiplier was justified. We also warned in *In re Prudential* against overemphasizing counsel's role in recovery, in the context of our criticism of the district court's assumption that counsel had been a catalyst for a plan authored by the Multi State Life Insurance Task Force, which facilitated the class action settlement in that it established Prudential's liability. We explained that "[a]llowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs attorneys to 'minimize the costs of failure ... by free riding on the monitoring efforts of others.' " *In re Prudential,* 148 F.3d at 337. Similarly, as we have consistently observed, Cendant's liability and consequent collectability had been conceded at the outset of the PRIDES controversy, and that fact should have been given major consideration by the District Court when setting Kirby's attorneys' fees.

Our review of the lack of complexity of this case and of awards in other large class action settlements, all of which involved more complex issues, more time invested by the attorneys, and, with only a few exceptions, smaller total settlements, leads us to the conclusion that the District Court abused its discretion in granting a 5.7% attorneys' fee award in this case. [25]

***742** 4. *Checking Against Lodestar*

The District Court's abuse of discretion in this case is magnified when one looks at the lodestar multiplier. As we stated above, "we have ... suggested that district courts cross-check the percentage award at which they arrive against the 'lodestar' award method." *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n. 1 (3d Cir.2000); *see also In re Prudential,* 148 F.3d at 333 (stating that " 'it is sensible for a court to use a second method of fee approval to cross check' its initial fee calculation"). Even when the lodestar method is used only as a cross-check, "courts must take care to explain how the application of a multiplier is justified by the facts of a particular case." [26] *In re Prudential,* 148 F.3d at 340–41.

In this case, the lodestar multiplier is 7 at a minimum (using Kirby's senior partner rate as the rate for all hours), and the Trust calculates the lodestar multiplier as 10. [27] Either of these multipliers (Kirby's multiplier of 7 or the Trust's multiplier of 10) is substantially higher than any of the multipliers in the cases charted above, which range from 1.35 to 2.99, and is also significantly higher than the "large" 5.1 multiplier in *In re Prudential,* which we questioned because "the court offer[ed] little explanation as to why a multiplier was necessary or appropriate." 148 F.3d at 340–41. In allowing such a high multiplier in this case without even calculating it, much less explaining how it is justified, the District Court strayed from all responsible discretionary parameters in the awarding of Kirby's attorneys' fees.

In all the cases in which high percentages were applied to arrive at attorneys' fees, the courts explained the extensive amount of work that the attorneys had put into the case, and appropriately the lodestar multiplier in those cases never exceeded 2.99. This range is consistent with the principle that " '[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.' " *In re Prudential,* 148 F.3d 283, 341 (3d Cir.1998) (quoting 3 Herbert Newberg & Alba Conte, Newberg on Class Actions, S 14.03 at 14–5 (3d ed.1992)). In this case, the District Court judge made clear that he wanted to reward Kirby for Kirby's quick and beneficial settlement of the case, and that may be a good reason for the fee award to exceed the lodestar, but not to the exclusion of all other factors. On remand of this case to the District Court, we strongly suggest that a lodestar multiplier of 3 (the highest multiplier of the cases reviewed above) is the appropriate ceiling for a fee award, although a lower multiplier may be applied in the District Court's discretion. The 3 multiplier would result in an award of no more than $8.3 million for Kirby (calculating the lodestar at $495/hour).

5.

We are seriously troubled by the District Court's award of attorneys' fees constituting 5.7% to 7.3% of the total settlement. As discussed above, this case was neither legally nor factually complex and did not require significant motion practice or discovery by Kirby, and the entire duration of the case from the filing of the Amended Complaint to the submission of a ***743** Settlement Agreement to the District Court was only four months. Other cases in which higher percentages were awarded are so dissimilar factually and legally from this case that they cannot be relied upon to support the 5.7% award made in this case. In addition, our discussion and holding in *In re Prudential* requires a holding here that the District Court's award was an abuse of its discretion, particularly where the District Court appeared to be attributing more responsibility to Kirby for the quality of the settlement than may legitimately be warranted. Accordingly, we will vacate the District Court's fee award to Kirby and remand the issue of Kirby's attorneys' fees to the District Court for a more thorough and thoughtful evaluation, including an analysis of, and compliance with, the factors enunciated by us in *Gunter* and in this opinion.

III.

Finally, the Trust argues that the District Court erred in not granting attorneys' fees to the Trust's attorneys for suggesting a bidding process to choose Lead Counsel and for objecting to Lead Counsel's fee application.

The Second Circuit stated in *White v. Auerbach:*

> it is well settled that objectors have a valuable and important role to perform in preventing collusive or otherwise unfavorable settlements, and that, as the district court recognized, they are entitled to an allowance as compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts.
>
> Ordinarily the trial judge has broad discretion in deciding whether, and in what amount, attorneys' fees should be awarded, since he is in the best position to determine whether the participation of objectors assisted the court and enhanced the recovery.

500 F.2d 822, 828 (2d Cir.1974).

In this case, the District Court judge exercised his "broad discretion" in finding that the Trust's attorneys had not made the "proper showing ... that the settlement was improved as a result of their efforts." The District Court judge made clear that he had considered the idea of a bidding process before the Trust's attorneys suggested that procedure, stating: "Walker's opinions have been out there since 1993 at least [28] ... Why do you think that the door was only opened by your key?" (JA766.) He also asserted that "my last year's clerk and I actually had brooded this idea of an auction long before you came down the pike." (JA767.)

With respect to the Trust's claim that its attorneys' objections to the fee application resulted in a reduction of the fee award from $34.15 million to approximately $19 million, the District Court gave no indication that the objections were the reason for the reduction and even stated, "if I find that what Mr. Kirby wants is excessive, I'm not dependent upon you ..." (JA765.) Hence, because the Trust had not demonstrated that it had been responsible for the procedure utilized by the District Court or that its actions had resulted in a reduction of Kirby's fees from $34 million to $19 million—findings which are not clearly erroneous—we will sustain the District Court in its rulings on these points.

However, our review of the District Court's attorneys' fee award to Kirby would not have come about had it not been for the Trust's appeal. As the Ninth Circuit observed in *Zucker v. Occidental Petroleum Corp.,* to which we have earlier adverted, "[t]he contribution [a particular class member's] attorney made, by providing an adversarial context in which the ***744** district court could evaluate the fairness of attorneys' fees, was substantial." 192 F.3d 1323, 1329 (9th Cir.1999).

Recognizing this fact, that it was the Trust which called our attention to the many aspects of Kirby's fee award which we have discussed and which we have found requires reconsideration by the District Court, we would be remiss if we did not acknowledge this benefit [29] and remand the Trust's claims for its own attorneys' fees to the District Court for reconsideration together with Kirby's fee application. Of course, this will require the necessary submissions by the Trust's attorneys to comply with normal fee procedures. Under these circumstances, we think it appropriate for the District Court to evaluate the value of the benefit of the Trust's contribution to

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the ultimate fee (to be decided by the District Court on remand) and to compensate the Trust to that extent. [30]

In so holding, we are fully aware that Cendant had agreed not to contest the award of fees as part of its settlement agreement. We also acknowledge that the return to Cendant of any unclaimed rights may well enhance the value of Cendant's rights to its shareholders and rights beneficiaries.

IV.

Although we will not disturb the settlement itself which has not been challenged on appeal, we will vacate the award of attorneys' fees to Kirby and remand this case to the District Court for a reevaluation of the amount of attorneys' fees, both because the District Court did not adequately explain its reason for the fee award and because the fee award does not comply with the requirements of our jurisprudence. We will also vacate the District Court's order denying attorneys' fees to the Trust and remand for reconsideration in light of the foregoing discussion and opinion.

All Citations

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Footnotes

1 Although there are other defendants, we refer to all the defendants as Cendant.

2 "Unclaimed Rights" are defined in the Stipulation and Agreement of Compromise and Settlement as "Rights as to which a timely and valid Proof of Claim has not been filed by a Holder." (JA576.) All Unclaimed Rights "shall be cancelled and Cendant shall not issue, sell, or distribute any further Rights to any other person." (Notice of Proposed Settlement, JA248.) In addition, the Settlement provided that, though "Merrill Lynch beneficially owned 738,526 PRIDES as of the close of business on April 15, 1998, Merrill Lynch nevertheless is not a class member and cannot recover new PRIDES in connection with the Settlement." (JA577.)

3 The settlement consisted of 29,161,474 Rights. After subtracting the attorneys' fees and expenses for Lead Counsel, 27,308,617 Rights remained. Proofs of Claim were filed with respect to 26,606,422 Rights, of which 22,502,782 Rights were validated by the claims administrator as of August 18, 1999. (Kirby Aff., Ex. L, at ¶ 2.) Pursuant to the settlement agreement, the unclaimed Rights that were not used to pay Kirby for its fees and expenses were to be canceled by Cendant. Because the total amount of Rights requested in the Proofs of Claim (26,606,422 Rights) was less than the amount of the settlement, after subtracting the amount to be given to Kirby (1,650,680 Rights, valued at $19,329,463), no claiming class members have had or will have their recovery reduced by the fees and expenses taken by Kirby.

4 The Trust's objections concerned: 1) a "confidential Supplemental Agreement" between lead plaintiff and Cendant which was included in the Settlement but not published and apparently contained information about Cendant's and Lead Plaintiff's obligations under the Settlement; and 2) "lead counsel's excessive fee request." (JA39–40.) The Trust argued, *inter alia*, that "[t]he combination of this unusual confidential agreement with Lead Counsel's excessive fee request ... multiplies the potential that the class and the public will suspect that the settlement contains a collusive or improper provision by which Lead Plaintiff, Lead Counsel, and/or Cendant will benefit at the expense of the class." (JA46.) The text of this "Supplemental Agreement" does not appear in the record, nor can we tell if it was discussed in the Notice.

5 The District Court judge signed both the Opinion and the Order and Judgment on June 15, 1999, but the Opinion was filed on June 16, 1999 and the Order and Judgment was filed on June 24, 1999.

6 Our holding that the Trust has standing to appeal disposes of the motion made by Kirby on August 27, 1999 to dismiss the Trust's appeal. We will deny that motion.

7 The settlement, as noted above, provides for Rights which are "freely tradeable until February 14, 2001," which date has passed. The record does not disclose whether all the claimed Rights have been traded or the actual value of those Rights. Hence, because the record is silent and the settlement itself has not been challenged on this appeal, we do no more than call attention to that aspect of the settlement.

8 We should make clear that we do not attribute any motives or designs to Kirby that would indicate any conflict by Kirby with its responsibility to the class, nor do we mean to intimate that Kirby acted improperly. Indeed, as the District Court found and we have no reason to dispute, Kirby discharged its function as lead counsel in exemplary fashion. The cautions we express, which are present in the unique context of class actions and the fee awards which arise in this context,

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pertain solely to the issue of whether, where class members have apparently received dollar-for-dollar recovery, standing is available for an objector to a fee award. For all the reasons we express here, we are satisfied that it is.

9 In *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court "held that a [black] defendant can raise an equal protection challenge to the use of peremptories at his own trial by showing that the prosecutor used them for the purpose of excluding members of the defendant's race." *Powers v. Ohio,* 499 U.S. at 405, 111 S.Ct. 1364 (citing *Batson,* 476 U.S. at 96, 106 S.Ct. 1712).

10 This method has been described as follows: "The percentage of recovery method resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class." *In re GM Trucks,* 55 F.3d 768, 819 n. 38 (3d Cir.1995).

11 The lodestar method was initially set forth in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.,* 487 F.2d 161 (3d Cir.1973), *appeal following remand,* 540 F.2d 102 (3d Cir.1976). As this court explained in *Gunter v. Ridgewood Energy Corp.,* "[a] court determines an attorney's lodestar by multiplying the number of hours he or she reasonably worked on a client's case by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer." 223 F.3d 190, 195 n. 1 (3d Cir.2000).

12 "[T]he common-fund doctrine ... allows a person who maintains a lawsuit that results in the creation, preservation, or increase of a fund in which others have a common interest, to be reimbursed from that fund for litigation expenses incurred." *Court Awarded Attorney Fees, Report of the Third Circuit Task Force,* 108 F.R.D. 237, 241 (1985) (hereinafter "*Task Force Report*").

13 Kirby's ceiling for fees, as explained in the Notice of Settlement, was ten percent of the total settlement. The settlement was calculated at $341.5 million, ten percent of which would be $34,150,000. That figure was reduced by the District Court to $19,329,463.

14 The Task Force Report explained that, after the lodestar is calculated, "[t]he 'lodestar' then could be increased or decreased based upon the contingent nature or risk in the particular case involved and the quality of the attorney's work. An increase or decrease of the lodestar amount is referred to as a 'multiplier.' " *Task Force Report,* 108 F.R.D. 237, 243.

15 5,600 hours x $495 = 2,772,000. $19,329,463 divided by 2,772,000 = 6.97. This multiplier of 7 essentially comports with the information provided by Kirby after oral argument. In that letter, Kirby stated that "the blended hourly compensation to ourselves and those law firms who were working with us was approximately $3,300." (Dec. 19, 2000 Kirby Letter, at 2.) $3,300 divided by $495 = 6.67, only slightly less than the 6.97 multiplier calculated from the figures provided by the District Court.

16 By referring to the District Court's method of calculating attorneys' fees in the separate *Cendant* case (*see* text at p. 725, supra, where we noted that the PRIDES shareholders were to be represented separately from the primary Cendant class), we by no means indicate that the fees awarded to the primary Cendant class were a proper exercise of the District Court's discretion. We leave that determination to the panel of this court assigned to review that fee award.

17 We recognize that our decision in *Gunter* was issued after the District Court ruled on the settlement and fee application in this case and that, therefore, the District Court could not have been informed in its decision by our holding in *Gunter.* However, all of the principles enunciated in *Gunter* have been announced by this court before, in cases predating the District Court's decision on appeal here. *See, e.g., In re Prudential,* 148 F.3d 283, 336–40 (3d Cir.1998); *In re GM Trucks,* 55 F.3d 768, 819–22 (3d Cir.1995)

18 The District Court did indicate in its opinion that it was using the bid to which Kirby had agreed "as a benchmark of reasonableness" in setting the fee. 51 F.Supp.2d at 541. However, a preliminary bidding process cannot replace subsequent analysis of the factors listed in *Gunter.* The circumstances and progression of every case are different, and these unique factors must be taken into account by district courts awarding attorneys' fees. Therefore, though the result of a bidding process may be of use to a district court in awarding fees at the end of the case, it cannot supplant post-settlement analysis to determine a reasonable fee.

19 A district court in this Circuit noted that "[c]ourts have generally decreased the percentage awarded as the amount recovered increases, and $100 million seems to be the informal marker of a 'very large' settlement." *In re Orthopedic Bone Screw Prod. Liab. Litig.,* 2000 WL 1622741, at 7 (E.D.Pa. Oct.23, 2000).

20 In 1984, the Supreme Court observed in *Blum v. Stenson* that "[in] the calculation of attorney's fees under the 'common fund doctrine,' ... a reasonable fee is based on a percentage of the fund bestowed on the class." 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Subsequently, the Third Circuit Task Force Report in 1985 outlined the problems with the lodestar method and recommended that courts use the percentage-of-recovery method instead of the lodestar method in common fund cases. After this instruction from the Supreme Court and the release of the Task Force Report, courts across the country regularly employed the percentage method to set fees in common fund cases.

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21 Although we have emphasized the seven-factor analysis required in class action fee cases set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n. 1 (3d Cir.2000), Gunter is not listed in this chart because the settlement in that case was less than $100 million.

22 In several cases, the class settlement exceeded $100 million but the lodestar method was used to determine attorneys' fees. *See, e.g., McLendon v. Continental Group, Inc.*, 872 F.Supp. 142 (D.N.J.1994) (settlement was for more than $400 million, and lodestar multiplier of 1.5 was used to award attorneys' fees); *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D.La.1993) ($170 million settlement and $31.8 million in fees, which represented a 3.25 lodestar multiplier and approximately 18% of the total settlement); *In re Washington Public Power Supply Sys. Sec. Litig.*, 779 F.Supp. 1056 (D.Ariz.1991) ($687 million settlement, $32 million in attorneys' fees, 1.2 lodestar multiplier, and attorneys' fees were 4.7% of total settlement); *In re Baldwin–United Corp. Litig.*, 1986 WL 12195 (S.D.N.Y. June 27, 1986) ($183.8 million settlement, $7.5 million in attorneys' fees, lodestar multiplier of 2, and fees were 4.1% of total settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1296 (E.D.N.Y.1985), *aff'd. in part* 818 F.2d 226 (2d Cir.1987) ($180 million settlement, $10.7 million in attorneys' fees, lodestar multiplier of 1.25 to 1.75, and fees were 6% of settlement).

Additionally, it should be noted that the chart includes a substantial number of the post 1985 cases involving large settlements and fees granted as a percentage of the total settlement, but the chart is not comprehensive. We feel that the selection of cases in the chart are representative of the range of cases relevant to the District Court's analysis of Kirby's fee application in this case.

Case	Settlement	Fees as % of Recovery	Lodestar Multiplier
In re Cendant Corp. PRIDES Litig., 51 F.Supp.2d 537 (D.N.J.1999)	$341.5 million	5.7% ($19.3 mil.)	7–10
The instant case under review here.			
In re Cendant Corp. Litig., 109 F.Supp.2d 285 (D.N.J.2000)	$3.16 billion	8.275% ($262 mil.)	32.7
In re Auction Houses Antitrust Litig., 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001)	$512 million	5.2% ($27 mil.)	Inf. not available
In re Orthopedic Bone Screw Prod. Liab. Litig., 2000 WL 1622741 (E.D.Pa. Oct. 23, 2000)	$100 million	12%	Inf. not available
In re Prudential, 106 F.Supp.2d 721 (D.N.J.2000) [23]	$1.8 billion	5% ($90 mil.)	2.13
In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166 (E.D.Pa.2000)	$111 million	30%	2.7
Shaw v. Toshiba America Inf. Sys., Inc., 91 F.Supp.2d 942 (E.D.Tex.2000)	$2.1 billion	7% ($*147*l *Imil*.)	Inf. not available
In re Sumitomo Copper Litig., 74 F.Supp.2d 393 (S.D.N.Y.1999)	$116 million	27.5% ($32 mil.)	2.5
Kurzweil v. Philip Morris Co., 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$123.8 million	30% ($37.1 mil.)	2.46
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D.Tex.1999)	$190 million	25%	1.35
In re Copley Pharm., Inc., 1 F.Supp.2d 1407 (D.Wyo.1998)	$150 million	13% ($19.5 mil.)	2
In re PaineWebber Ltd. P'ships Litig., 999 F.Supp. 719 (S.D.N.Y.1998)	$200 million	13% ($25.9 mil.)	1.4
Walco Investments, Inc. v. Thenen, 975 F.Supp. 1468 (S.D.Fla.1997)	$141 million	15% ($21 mil.)	1.8
In re Combustion Inc., 968 F.Supp. 1116 (W.D.La.1997)	$127 million	36%	2.99
Local 56, United Food & Commercial Workers Union v. Campbell Soup Co., 954 F.Supp. 1000 (D.N.J.1997)	$114.5 million	2.8% ($3 mil.)	2.39
Bowling v. Pfizer, Inc., 922 F.Supp. 1261 (S.D.Ohio 1996), *aff'd*	$102.5 million	10% ($10.2 mil.)	Inf. not available

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102 F.3d 777 (6th Cir.1996)			
In re Domestic Air Transportation Antitrust Litig., 148 F.R.D. 297 (N.D.Ga.1993)	$305 million	5.25% ($14.3 mil.)	Inf. not available
In re MGM Grand Hotel Fire Litig., 660 F.Supp. 522 (D.Nev.1987)	$205 million	7%	1–2.95

23 The district court originally awarded attorneys' fees in this case in 1997, *see* *In re Prudential,* 962 F.Supp. 572 (D.N.J.1997), which decision was vacated and remanded by the Third Circuit. *See* *In re Prudential,* 148 F.3d 283 (3d Cir.1998). Those decisions are discussed *infra*.

24 With respect to gathering evidence, the court asserted:

> Godfrey and others had to create their own databases, compiling posted prices, NYMEX prices, transportation costs, grade and weight differentials and so forth simply to determine whether or not a cause of action might exist. And, in order to first articulate their claims, class counsel had to hire experts to research their allegation that the NYMEX trading center method is a reasonable way of determining market price at the lease.

In re Lease Oil, 186 F.R.D. at 445.

25 We should note that the award actually amounted to more than 5.7% of the total recovery. The fund had a value of $341.5 million, but any unclaimed portion of the fund returned to Cendant. As of August 1999, only 22,502,782 Rights, with a monetary value of $263.5 million, were claimed. Taking this amount as the total recovery, Kirby's attorneys' fees constituted 7.3% of the total fund.

26 We observed in *In re GM Trucks* that "[t]he Supreme Court ... has rejected the use of multipliers to enhance the lodestar's hourly rate amount." 55 F.3d 768, 822 (3d Cir.1995) (citing *City of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992)). However, as stated above, calculation of the lodestar multiplier is still appropriate when used to cross-check the reasonableness of a percentage-of-recovery fee award.

27 The Trust calculates the lodestar multiplier as 10 because it assesses the appropriate lodestar fee as $1.9 million, $^{1}/_{10}$ of the $19.3 million awarded. (*See* Trust's Brief at 25–26.)

28 Judge Vaughn Walker actually implemented the bidding process in *In re Oracle Sec. Litig.*, 131 F.R.D. 688 (N.D.Cal.1990). Judge Walker's process differed significantly from the bidding process here in that it was not a *sealed*-bid process.

29 It bears mention that the Trust's appellate brief urged that Kirby's fees be reduced from $19 million to $7.6 million, (*see* Appellant's Brief, at 30), a similar figure to the one at which we arrived independently.

30 In its appellate brief, Kirby suggests that the Trust may not have standing to appeal the District Court's denial of the fee request because it was the Trust's counsel, not the Trust itself, that made that request in the District Court. This jurisdictional argument, though not without merit, need not concern us for two reasons. First, the District Court's decision denying fees to the Trust's counsel stands insofar as it related to the argument raised by counsel before the District Court. We remand the issue of the Trust's counsel's fee request to the District Court only with respect to the Trust's effect on the settlement through this appeal. Second, we have repeatedly emphasized in this opinion the importance of the court's role in reviewing counsel's fees in class actions, and we believe this role extends to the District Court hearing a fee application by the Trust's counsel at this point.

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- *J.G. Goodman, et al. v. American Express Travel Related Services Co., Inc.*, 2017 WL 6044109, at *9 (7th Cir. Dec. 7, 2017) (*de novo*); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 9

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Magsafe Apple Power Adapter Litigation, 9th Cir.(Cal.), April 24, 2014

645 F.3d 1084
United States Court of Appeals,
Ninth Circuit.

Jacob GLASSER, on behalf of himself and all others similarly situated and on behalf of the General Public, Plaintiff–Appellee,
v.
VOLKSWAGEN OF AMERICA, INC., Defendant,
and
David T. Murray, Objector–Appellant,
and
Kimberly A. Carr, Objector.

No. 09–56618.
|
Argued and Submitted May 3, 2011.
|
Filed May 17, 2011.

Synopsis
Background: Following approval of settlement of class action against automobile manufacturer for limiting availability of replacement vehicle keys and failing to sufficiently disclose information about the potential difficulty and expense of obtaining such replacements, the United States District Court for the Central District of California, Audrey B. Collins, Chief Judge, awarded attorney fees and costs to plaintiff, and objecting class member appealed.

The Court of Appeals, Silverman, Circuit Judge, held that class member lacked standing to challenge award of attorney fees and costs to plaintiff following approval of settlement since there was no common-fund created by the settlement.

Appeal dismissed.

Attorneys and Law Firms

***1085** C. Benjamin Nutley (argued), J. Garrett Kendrick, Kendrick & Nutley, Pasadena, CA, for the appellant.

Jordan L. Lurie (argued), Leigh A. Parker, Joel E. Elkins, Weiss & Lurie, Los Angeles, CA, for the appellee.

Appeal from the United States District Court for the Central District of California, Audrey B. Collins, Chief District Judge, Presiding. D.C. No. 2:06–cv–02562–ABC–JTL.

Before: BARRY G. SILVERMAN, RICHARD C. TALLMAN, and RICHARD R. CLIFTON, Circuit Judges.

***1086 OPINION**

SILVERMAN, Circuit Judge:

Objector-appellant David Murray appeals from the district court's order awarding attorneys' fees and costs to Plaintiff-appellee Jacob Glasser. Murray, who expressly disavows any financial interest in the fee the defendant was ordered to pay to Plaintiff's counsel, has failed to demonstrate how he has suffered injury as a result of the fee order. We therefore dismiss his appeal for lack of standing.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Class Complaint Against Volkswagen

This case was filed in April 2006 in Los Angeles County Superior Court. Plaintiff, on behalf of himself and a class of owners and lessors of 2007 model year and older VW and Audi vehicles, alleged that VW limited the availability of replacement vehicle keys and failed to sufficiently disclose information about the potential difficulty and expense of obtaining such replacements. The complaint alleged that replacement keys are difficult to obtain in part because, as a security measure, these "smart keys" must be programmed by computer to match the individual code for a particular vehicle. Plaintiff contended that VW refused to give to independent locksmiths the technological information necessary to reproduce VW smart keys, thereby restricting the market for VW smart keys to franchised dealers and facilities

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and fixing prices for keys at an artificially high level. Plaintiff alleged several California law unfair competition and misrepresentation claims against VW and sought injunctive relief, a variety of damages, and attorneys' fees under California Code of Civil Procedure section 1021.5 and California Civil Code section 1780(d). The action was removed to the district court under the Class Action Fairness Act, Pub.L. No. 109–2, 119 Stat. 4 (2005).

II. The Terms of the Settlement Agreement

The parties began settlement discussions almost immediately, representing to the district court that settlement discussions were underway within three months of the complaint's filing. In April 2008, a settlement agreement was submitted to the district court for preliminary approval. Under the terms of the settlement agreement, Plaintiff released his claims against VW, and VW denied all wrongdoing and liability. The agreement also confirmed the parties' understanding that (1) VW had, in fact, made smart-key replacement technology available to independent sources, as well as franchised VW and Audi dealers; (2) VW had not fixed prices for the keys; and (3) franchised dealer prices are competitive with those charged by independent sources. VW also agreed to make a series of new disclosures regarding the cost, availability, and operation of smart keys. The class received no monetary relief whatsoever.

On the issue of fees and costs, the settlement agreement expressed the parties' intent to negotiate in good faith; however, in the event that an agreement could not be reached, Plaintiff could submit an application for fees to the court, and VW would neither dispute Plaintiff's status as a "prevailing party" nor "take the position that Plaintiff's Counsel is entitled to no fee."

III. Proceedings Regarding the Settlement Agreement

In May 2008, the district court signed the stipulated proposed order submitted by the parties, which preliminarily approved the settlement, and set a fairness hearing regarding the settlement. The order indicated that the settlement was not ***1087** entirely complete, as the parties had not reached agreement on the issue of attorneys' fees and costs; accordingly, Plaintiff's counsel was ordered to submit papers in support of an award of fees and costs. The order also required that "[a]ny objections to the proposed settlement, or to any request or application for attorneys' fees and reimbursement of litigation costs and expenses, shall be filed and served twenty-one (21) days or more prior to the fairness hearing.... Any objection must be made in writing and include a statement of the position to be asserted, [and] the grounds therefore...." Notice of the settlement was mailed out to the proposed class, and advised class members of the terms of the settlement, including that VW agreed to pay Plaintiff attorneys' fees, costs and an incentive award; the parties would attempt to negotiate the amount of fees and costs; and, if those negotiations failed, the issue of fees and costs would be submitted to the court. The Notice also advised proposed class members of their options, including remaining in the settlement class without objection or either of the following:

> You may request exclusion from the Settlement Class. If you elect to be excluded from the Settlement Class, you will not be bound by any judgment, disposition, or settlement of the class action, and you may not participate in the settlement of this class action in any fashion. You will retain, and will be free to pursue, any claims you may have on your own behalf....
>
> You may object to the Settlement.... Any Settlement Class member who objects to all or part of the Settlement will be bound by the Settlement regardless of whether such Settlement Class member's objections are sustained by the Court.

Murray did not opt out of the class; instead, he timely served a set of objections upon the parties. Murray argued that the settlement should not be approved and Plaintiff should not receive any award of fees because (1) Plaintiff's claims lacked merit; (2) the settlement provided only illusory benefits to the class; and (3) to the extent Plaintiff's claims had any monetary value at all, that value should accrue, at least in part, to the class, rather than entirely to counsel in the form of fees.

On October 6, 2008, the district court issued its Order and Final Judgment, in which it "approve[d] the terms of [settlement agreement] ... as fair, reasonable, and adequate, with the exception of attorneys' fees, costs, interest, and expenses and incentive payment issues reserved for later decision." The order stated that twenty-nine class members had filed objections and "[t]hese objections to the [settlement agreement] have been considered and overruled."

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Murray filed a notice of appeal from the Order and Final Judgment, proposing three issues to be raised on appeal, including whether the district court abused its discretion in approving the settlement and whether Plaintiff's counsel was entitled to any fees. We later granted Murray's motion to voluntarily dismiss that appeal with prejudice.

IV. Proceedings Regarding Attorneys' Fees

Returning to the motion for fees, Murray timely filed objections, arguing that Plaintiff's counsel should not receive an award of fees under California Code of Civil Procedure section 1021.5 because the settlement (1) places no new obligations on VW that could be considered a "significant benefit" to the class or public, and (2) potentially affects only a small subset of the class. Murray also argued in the alternative ***1088** that any award of fees should be significantly reduced below the lodestar amount. Notably, Murray did not claim in his objection to the fee application that any reduction in fees could or should benefit the class in any way.

On September 11, 2009, the district court awarded Plaintiff attorneys' fees in the amount of $417,663.75, costs and expenses in the amount of $16,614.40, and an incentive award to Plaintiff in the amount of $2,500. This appeal from Murray followed.

DISCUSSION

"[Article III] limits are jurisdictional: they cannot be waived by any party, and there is no question that a court can, and indeed must, resolve any doubts about this constitutional issue." *City of Los Angeles v. County of Kern,* 581 F.3d 841, 845 (9th Cir.2009). To establish Article III standing on appeal, "an appellant must establish that she has suffered an injury, caused by the appellee, that is redressable." *Lobatz v. U.S. W. Cellular of Cal., Inc.,* 222 F.3d 1142, 1146 (9th Cir.2000). In the class action context, simply being a member of the class does not automatically confer standing to challenge a fee award to class counsel—the objecting class member must be "aggrieved" by the fee award. *In re First Capital Holdings Corp. Financial Prods. Sec. Litig.,* 33 F.3d 29, 30 (9th Cir.1994). If modifying the fee award would not "actually benefit the objecting class member," the class member lacks standing because his challenge to the fee award cannot result in redressing any injury. *Knisley v. Network Assocs., Inc.,* 312 F.3d 1123, 1126 (9th Cir.2002).

When attorneys' fees are paid out of a common fund, from which both the class recovery and the fee award are paid, a class member who participates in the settlement generally has standing to challenge the fee award because any reduction in the fee award results in an increase to the class recovery. *Knisley,* 312 F.3d at 1126. However, there is no common-fund settlement in this case. Instead, Volkswagen is liable for Plaintiff's attorneys' fees pursuant to a fee order that is independent of the settlement agreement and the class recovery. *See, e.g., Lobatz,* 222 F.3d at 1144, 1146. In *Lobatz,* we held that class members may have standing to challenge a fee award if the award negatively affects the class recovery, that is, where "class counsel might obtain an excessive attorney fee award as part of a deal to accept an inadequate settlement for the class." *Id.* at 1146–47; *accord In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768 (3d Cir.1995); *Rosenbaum v. MacAllister,* 64 F.3d 1439, 1442 (10th Cir.1995). In such circumstances, we consider the independent fee award and class recovery as a "constructive common fund." *Lobatz,* 222 F.3d at 1147; *see also Zucker v. Occidental Petroleum Corp.,* 192 F.3d 1323, 1327 (9th Cir.1999) (dicta). In this scenario, class counsel have breached their fiduciary duty to the class by agreeing to an unfair settlement offer, so the excessive fee award "could be considered the property of the class." *Id.*

However, the rule announced in *Lobatz* does not change the underlying Article III requirement that a class member must be "aggrieved" by the fee award to have standing to challenge it. *See First Capital,* 33 F.3d at 30 n. 1. Whether a fee award is independent of the settlement agreement is an issue distinct from whether an objecting class member was injured by the fee award. *Id.* ("The fact that the attorney fees were separately negotiated and funded has nothing to do with the outcome of this case. It is [the objecting class member's] *particular lack of injury* ***1089** that is unique and it is this fact which precludes her from having standing to appeal [the fee award]." (emphasis added)).

Murray does not contend that Plaintiff's counsel colluded with VW to orchestrate an excessively high fee award in exchange for an unfair settlement for the class. Had he alleged as much, he may have been able to meet the requirements of Article III standing under a "constructive common fund theory." *See Lobatz,* 222 F.3d at 1147.

However, Murray has expressly disclaimed recovery under a "constructive common fund" theory. Instead, he argues Plaintiff's claims were entirely meritless from the beginning of the lawsuit. Further, he claims only that an excess fee award will cause VW to pass along the cost to its shareholders and customers, and that he may somehow benefit as a consumer from any savings that may result from the denial or reduction of the award. These allegations fail to satisfy "the irreducible constitutional minimum of standing" because they are insufficient to demonstrate either an injury that "is ... concrete and particularized and ... actual or imminent, not conjectural or hypothetical" or that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations, quotation marks and alterations omitted). We therefore dismiss Murray's appeal for lack of standing.

DISMISSED.

All Citations

645 F.3d 1084, 11 Cal. Daily Op. Serv. 5859, 2011 Daily Journal D.A.R. 7042

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542 Fed.Appx. 594 (Mem)
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

Chad M. CARLSEN; Shasta L. Carlsen; Carl Popham; Mary Popham, husbands and wives, individually and on behalf of a class of similarly situated Washington families, Plaintiffs–Appellees,
v.
GLOBAL CLIENT SOLUTIONS, LLC, an Oklahoma limited liability company; Rocky Mountain Bank & Trust, a Colorado financial institution, Defendants–Appellants.

No. 12–35571.
|
Submitted Oct. 9, 2013. [*]
|
Filed Oct. 16, 2013.

Attorneys and Law Firms

Andrew Sean Biviano, Esquire, Darrell William Scott, Matthew John Zuchetto, The Scott Law Group, P.S., Timothy W. Durkop, Durkop Law Office, Spokane, WA, for Plaintiffs–Appellees.

Richard Wayne Epstein, Esquire, Rebecca F. Bratter, John H. Pelzer, Greenspoon Marder PA, Fort Lauderdale, FL, Gregory E. Jackson, Freimund Jackson Tardif & Benedict Garratt, PLLC, Olympia, WA, for Defendants–Appellants.

Appeal from the United States District Court for the Eastern District of Washington, Honorable Lonny R. Suko, District Judge, Presiding. D.C. No. 2:09–cv–00246–LRS.

Before: GRABER and MURGUIA, Circuit Judges, and BURY, District Judge. [**]

MEMORANDUM [***]

Global Client Solutions, LLC, and Rocky Mountain Bank & Trust (Appellants) appeal the district court's order granting the Class (Appellees) motion for approval of attorney fees and costs pursuant to the terms of the Settlement Agreement. We affirm.

On August 2, 2009, Appellees filed a class action alleging violations of Washington's Debt Adjusting Act, Wash. Rev.Code ch. 18.28, and Washington's Consumer Protection Act, Wash. Rev.Code ch. 19.86. On January 31, 2012, a Class Action Settlement Agreement and Release was filed. Appellees filed a Motion for Preliminary Approval of Class Action Settlement. The parties negotiated a Settlement Agreement on the merits which involved a full refund of all fees collected by Appellants to the members of the Appellee class, as well as payment of the class administration expenses. Appellees also filed a Motion to Appoint Special Master to Determine Reasonable Attorney Fees under Rule 54(d)(2)(D). The court entered an Order preliminarily approving the class settlement, issued a class notice, set a fairness hearing, and entered an Order appointing a special master to determine reasonable attorney fees. The Special Master entered a fee award based on the Appellees' lodestar calculation of $1,092,098.10. The Special Master recommended a multiplier of 1.65, resulting in a final award of $1,831.015.04. Appellants filed objections to the Special Master's report (Report). Based on the Report and the Settlement Agreement, Appellees filed a motion for attorney fees and costs. The court entered ***595** a final order and judgment approving the class settlement. The court also entered an order granting and approving attorney fees as recommended by the Report.

The district court properly conducted a de novo review of the Appellants' objections to the conclusions of law derived from the factual findings in the Report. Fed.R.Civ.P. 53(f)(4). The objections preserved Appellants' right to appeal.

The district court did not abuse its discretion when it determined that the application of the 1.65 multiplier was warranted under Washington law because of the unusually high risks of the case and the quality of work in an exceptional case.

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Finally, the district court did not abuse its discretion in determining that the risk was not eliminated until the Settlement Agreement was signed and approved by the court.

AFFIRMED.

All Citations

542 Fed.Appx. 594 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. Fed. R.App. P. 34(a)(2).

** The Honorable David C. Bury, United States Senior District Judge for the District of Arizona, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by In re BioScrip, Inc. Securities Litigation, S.D.N.Y., July 26, 2017

503 Fed.Appx. 55
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals, Second Circuit.

Denise CASSESE, individually and on behalf of all others similarly situated, fka Denise Caliguiri, George Scott Rush, Richard Schroer, William Bloom, Plaintiffs–Appellees–Cross–Appellants,
Richard Melichar, Plaintiff,
Washington Mutual, Incorporated, Defendant–Appellee,
The Federal Deposit Insurance Company, in its capacity as receiver for Washington Mutual Bank, such entity having incorporated former defendants Washington Mutual Bank, FA and Washington Mututal Home Loans, Inc., Washington Mutual Bank, FA, Washington Mutual Bank, FSB, Washington Mutual Bank, Washington Mutual Home Loans, Incorporated, Defendants,
v.
John Henry WILLIAMS, Brenda S. Komar, Kearney Dee Hutsler, Objectors–Appellants–Cross–Appellees,
Christopher Batman, Jo Batman, Sidney Scholl, Interested Parties.

Nos. 11–4333–cv (L), 11–4426–cv, 11–4429–cv, 11–4452–cv, 11–4840–cv, 11–5091–cv.
|
Nov. 20, 2012.

Synopsis

Background: Borrowers brought class action, challenging lender's practice of charging pre-payment fees for residential mortgage and home equity loans. the United States District Court for the Eastern District of New York, Arthur D. Spatt, J., approved settlement. Various non-party class members and class counsel cross-appealed from award of attorney fees.

Holdings: The Court of Appeals held that:

notice of class counsel's fee request was reasonable under the circumstances, and

award of $1.7 million fee to class counsel was not abuse of discretion.

Affirmed.

***56** Cross-appeals from a judgment and order of the United States District Court for the Eastern District of New York (Arthur D. Spatt, Judge).
UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on September 23, 2011, and the order entered on November 10, 2011, are both AFFIRMED.

Attorneys and Law Firms

Irwin B. Schwartz, BLA Schwartz, PC, New York, NY, for Objector–Appellant–Cross–Appellee Brenda Komar.

Steve A. Miller, Esq., Denver, CO, for Objector–Appellant–Cross–Appellee John Henry Williams.

John J. Pentz, Esq., Maynard, MA, for Objector–Appellant–Cross–Appellee Kearney Dee Hustler.

Joseph C. Tusa, Esq., Lake Success, N.Y. (Peter D. St. Phillip, Jr., Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY, on the brief), for Plaintiffs –Appellees–Cross–Appellants Denise Cassese, George Scott Rush, Richard Schroer, William Bloom.

John P. Mastando III (Gregory Silbert, Vanessa W. Chandis, on the brief), Weil, Gotshal & Manges LLP, New York, NY, for Defendant–Appellee Washington Mutual, Inc.

***57** PRESENT: BARRINGTON D. PARKER, REENA RAGGI, GERARD E. LYNCH, Circuit Judges.

SUMMARY ORDER

****1** These cross-appeals arise from approval of a settlement ending over six years of class action litigation

against defendant Washington Mutual, Inc. ("WMI"), for alleged violations of federal and state law in charging pre-payment fees relating to residential mortgage and home equity loans. No party to this appeal challenges the terms of the settlement itself. Rather, various non-party class members ("objectors") appeal from the denial of their challenges to the award of $1,705,000 in costs, of which $1.7 million represents attorney's fees, to class counsel Lowey Dannenberg Cohen & Hart, P.C., and Joseph C. Tusa ("class counsel"). Specifically, the objectors contend that the district court erred by (1) requiring them to file objections to class counsel's request for fees before the fee motion was due, (2) denying their request for discovery of class counsel's billing records, (3) awarding an unreasonably high fee, and (4) failing to make the requisite findings in connection with the fee award. On cross-appeal, class counsel submits that (1) the $1.7 million fee award was unreasonably low; and (2) a separate award of $18,978 in attorney's fees to objector Brenda Komar, for her efforts in resisting deposition discovery, was unwarranted. Komar insists that the fee award to her was proper and seeks further reimbursement of all fees she incurred in objecting to the settlement, a request that the district court denied.

We review the form and content of notice to class members, *see Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 438 (2d Cir.2007), as well as the fee award itself, *see Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47–48 (2d Cir.2000), for abuse of discretion, which we will not identify absent "a mistake of law or a clearly erroneous factual finding," *id.* at 47. We assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm the challenged fee awards in all respects.

1. *Notice of Fee Motion*

The objectors argue that the district court violated Fed.R.Civ.P. 23(h) and their due process rights by scheduling objections to the settlement, including to class counsel's request for attorney's fees and expenses, to be due before the fee motion. We construe this argument as a challenge to the reasonableness of the notice of class counsel's fee motion, see Fed.R.Civ.P. 23(h)(1) (requiring that such notice be "directed to class members in a reasonable manner"), which we review only for abuse of discretion, *see Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d at 438. We identify none.

**2 We recognize that at least one court has accepted the due process argument advanced by the objectors here. *See In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d 988, 995 (9th Cir.2010) ("[A] schedule that requires objections to be filed before the fee motion itself is filed denies the class the full and fair opportunity to examine and oppose the motion that Rule 23(h) contemplates."). We need not decide whether requiring objections to be filed in advance of a fee motion might raise due process concerns in some cases. We conclude only that notice of class counsel's fee request was reasonable here under the circumstances and sufficient to satisfy due process. [1]

The Notice of Class Action and Proposed Settlement, dated June 27, 2011, ***58** stated that (1) "WMI has agreed to pay Thirteen Million Dollars ($13,000,000.00) (the 'Gross Settlement Fund') into the Cassese/WMI Settlement Account"; (2) class counsel would apply for "attorneys' fees not to exceed Three Million Nine Hundred Thousand Dollars ($3,900,000.00)" and "reimbursement of unpaid expenses ... not to exceed Fifty Thousand Dollars ($50,000.00)"; (3) class members could object to any aspect of the proposed settlement by August 31, 2011; and (4) a fairness hearing would be held on September 15, 2011, in the Eastern District federal courthouse. June 27, 2011 Class Action Settlement Notice 1–2. In its ensuing fee motion, class counsel requested fees and costs in the precise amounts specified in the settlement notice and divulged additional information regarding counsel's billing rates, hours worked, and tasks performed. Any objectors then had two weeks to crystallize their objections and request further information before attending the fairness hearing. With the objectors here having availed themselves of those opportunities, we identify no abuse of discretion or due process denial in that portion of the district court's scheduling order relating to the fee motion. *See Carlson v. Xerox Corp.,* 355 Fed.Appx. 523, 525 (2d Cir.2009) (summary order) (concluding under similar circumstances that notice of class counsel's fee motion "was reasonably directed to class members as required by Rule 23").

Nor do we identify error in the district court's failure to order disclosure of class counsel's contemporaneous time records, appended to the fee request and filed under seal. While "applications for attorney's fees [must] be supported by contemporaneous [billing] records," *Scott v. City of New York,* 626 F.3d 130, 132 (2d Cir.2010),

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we are aware of no authority holding that class counsel must open its books to objectors for inspection by virtue of filing a fee motion. To the contrary, whether to grant objectors access to billing records is a matter within the district court's discretion. *See Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 120 (2d Cir.2005); *see also In re Agent Orange Prod. Liab. Litig.,* 517 F.3d 76, 102 (2d Cir.2008) ("We review discovery rulings for abuse of discretion.").

****3** No objector specifies how access to class counsel's billing records would have affected her objections to the fee request. Indeed, at the fairness hearing as well as in her pre-hearing submission, objector Komar complained almost exclusively about the lack of time records, expressing no view as to what percentage of the common fund would be a reasonable fee under the circumstances or what an appropriate blended hourly rate might be in the relevant locality. *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d 182, 191 (2d Cir.2008). Thus, we do not disturb the district court's conclusion that it had "enough material" before it to decide the fee award without further input from the objectors. Sept. 15, 2011 Hearing Tr. ("Tr.") 37–38.

2. *Fee Award to Class Counsel*

For differing reasons, both sides charge the district court with abuse of discretion for failing properly to apply the *Goldberger* factors. In addition, the objectors argue that the district court inadequately ***59** explained its award of fees and expenses. *See generally* Fed.R.Civ.P. 23(h)(3) (requiring court to state factual findings and legal conclusions relating to fee award); *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 130 S.Ct. 1662, 1676, 176 L.Ed.2d 494 (2010) (requiring "reasonably specific explanation for all aspects of a fee determination"). The record defeats these arguments.

The fairness hearing transcript reveals that the district court employed a "percentage of the recovery" approach as a starting point in calculating the fee award. *Goldberger v. Integrated Res., Inc.,* 209 F.3d at 45. The court stated that the requested $3.9 million in fees represented "30.4 percent of the settlement fund." Tr. 30. It then referenced the lodestar calculation of $1,644,000 submitted by class counsel, and concluded that the fee award "should be somewhere around [that] amount." *Id.* at 29. Its statement that the "need for exact records [wa]s not ... imperative," *id.* at 38, is consistent with our recognition that "where used as a mere cross-check" to a percentage fee calculation, the "hours documented by counsel need not be exhaustively scrutinized by the district court," *Goldberger v. Integrated Res., Inc.,* 209 F.3d at 50.

The court's ultimate award of $1,705,000 thus did not spring "from a black box." Hutsler Br. 7. To the contrary, the district court's discussion of counsel's fee award closely tracks the factors enumerated in *Goldberger,* 209 F.3d at 50 (instructing courts to consider such "traditional criteria" as "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations" (internal quotation marks omitted)). Having presided over the case for nearly six years and issued numerous opinions resolving various motions, the trial court relayed its view that the case was not "the average class action where there is a complaint served, a few things occur, and then there is a settlement." Tr. 38. Rather, the work "was difficult," *id.* at 31, the litigation was protracted and "vicious," *id.* at 37, and class counsel's performance was "outstanding," *id.* at 40. These concise findings are sufficient for us to conclude that the $1.7 million fee award fell comfortably within the trial court's broad discretion and that the objectors' challenge is meritless.

****4** Having been awarded 13% of the common settlement fund and the entirety of its "presumptively reasonable" lodestar, *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d at 190, class counsel nevertheless contends that the district court erred in failing to award the entire amount of fees requested. To the extent counsel argues that the fee award did not incorporate "the risk, complexity, and efficiency with which the work Class Counsel performed in this case," Class Counsel Br. 46, we note that similar arguments were advanced to the district court, which was in the best position "to assess the skill of the attorneys and the amount of time reasonably needed to litigate [the] case," *Chambless v. Masters, Mates & Pilots Pension Plan,* 885 F.2d 1053, 1057–58 (2d Cir.1989), and which did not exceed its "wide discretion" in rejecting these arguments, *Victor v. Argent Classic Convertible Arbitrage Fund L.P.,* 623 F.3d 82, 88 (2d Cir.2010) (calling *Goldberger* factors "flexible"). [2] Moreover, we are instructed by the Supreme Court that the determination of attorney's fees " 'should not result in a second major litigation,' " that "trial

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courts need not, and indeed should not, become green-eyeshade accountants," and that "appellate courts ***60** must give substantial deference to these determinations, in light of 'the district court's superior understanding of the litigation.' " *Fox v. Vice,* —— U.S. ——, 131 S.Ct. 2205, 2216, 180 L.Ed.2d 45 (2011) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

Finally, we identify no legal error in the district court's statement that it was reducing the fee "from what it really should be, because the claimants are paying for it." Tr. 38. We take the experienced and able trial judge's statement that "[t]he fee would be justified" if it were not "being paid out of the claimants' share," *id.* at 37, to evince not, as class counsel submits, an unconsidered preference for separately negotiated fee arrangements, but rather its view that the fee request was inappropriate in light of the total amount in the settlement fund. Given our exceedingly deferential review, we have no reason on this record to question the district court's "jealous regard to the rights of" the same claimants whom class counsel represents. *Goldberger v. Integrated Res., Inc.,* 209 F.3d at 53 (internal quotation marks omitted). No different conclusion is warranted by *Perdue v. Kenny A. ex rel. Winn,* wherein the Supreme Court indicated that it would be error for a district court to "award[ ] an enhancement on an impressionistic basis." 130 S.Ct. at 1676. Here, the district court did no such thing. Rather, it declined to award an enhancement that it thought was greater than necessary to do justice to all parties in the case. We identify no abuse of discretion in its actions.

3. *Fee Award to Komar*

Nor do we identify abuse of discretion with respect to the award of $18,978 in counsel fees to objector Komar based on the finding that class counsel's repeated, unsuccessful efforts to compel her testimony were unreasonable. *See* Fed.R.Civ.P. 37(a)(5)(B). The court also acted within its discretion to deny further reimbursement to Komar of attorney's fees incurred in objecting to the settlement on the ground that those objections did not influence the court's decision or otherwise "confer substantial benefits on the class." *Victor v. Argent Classic Convertible Arbitrage Fund L.P.,* 623 F.3d at 87. These conclusions locate ample record support.

****5** The judgment and order of the district court are AFFIRMED.

All Citations

503 Fed.Appx. 55, 2012 WL 5861804

Footnotes

1 That the objectors' due process claim fails on the merits does not, as class counsel urges, defeat their Article III standing to pursue this claim on appeal, insofar as they assert that Rule 23(h) entitles them to notice of a different kind and degree from what they received and that, as a result, they could not challenge the fee award to a proper extent. *See Summers v. Earth Island Inst.,* 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (noting that asserted deprivation of procedural right affecting concrete interests suffices for standing); *cf. Lerner v. Fleet Bank, N.A.,* 318 F.3d 113, 127 (2d Cir.2003) ("Issues relating to the merits of an action, almost by definition, are not jurisdictional.").

2 Insofar as counsel assails a 1.022 lodestar multiplier as impermissibly low, we observe that the actual multiplier is in all likelihood higher, given that counsel's suggested blended rate of $566 for attorney and paralegal work exceeds the rates the district court viewed as reasonable in the locality for attorneys alone.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Morse v. Specialized Loan Servicing, LLC, S.D.Ohio, April 10, 2018

436 Fed.Appx. 496
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals, Sixth Circuit.

Shannon VAN HORN, et al., Individually and on behalf of all others similarly situated, Plaintiffs, Kabatek Brown Kellner, LLP; Feazell & Tighe; Kisling, Nestico & Redick–Akron, as counsel for all class members and plaintiffs in the above captioned matter, Appellants,
v.
NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY; Nationwide Insurance Company of America; Nationwide Mutual Fire Insurance Company; Nationwide Mutual Insurance Company; Does 1 Through 250, Inclusive, Defendants–Appellees.

No. 10–3643.
|
Aug. 26, 2011.

Synopsis

Background: After approving settlement in insureds' class action against insurers for allegedly failing to provide insureds with the full rental car benefits required under the insurers' policies, the United States District Court for the Northern District of Ohio, 2010 WL 1751995, approved only $3,179,107.20 of the $5,873,716.01 in attorneys' fees requested by class counsel. Class counsel appealed.

Holdings: The Court of Appeals, Alice M. Batchelder, Chief Judge, held that:

district court did not abuse its discretion in approving rates ranging from $250 to $450 per hour;

district court did not abuse its discretion by using northeast Ohio as the relevant market for determining a reasonable hourly rate; and

district court did not abuse its discretion by enhancing the lodestar by a multiplier of 1.2.

Affirmed.

***497** On Appeal from the United States District Court for the Northern District of Ohio.

BEFORE: BATCHELDER, Chief Judge; SUHRHEINRICH and GRIFFIN, Circuit Judges.

Opinion

ALICE M. BATCHELDER, Chief Judge.

****1** The Appellants in this case served as Class Counsel in a class action lawsuit against Nationwide Property and Insurance, Nationwide Insurance Company of America, Nationwide Mutual Fire Insurance Company, and Nationwide Mutual Insurance Company (collectively, "the Defendants"). Generally, the Plaintiffs claimed that the Defendants failed to provide them ***498** with the full rental car benefits required under their insurance policies.

While the case was pending in district court, the parties reached a settlement agreement providing for a common fund, a portion of which would be paid to Class Counsel as attorneys' fees. The district court held a fairness hearing and approved the parties' settlement in a final order. The settlement agreement awarded each class member a maximum of $199.44 (approximately 50% of the average class member's damages). The district court issued a separate opinion and order regarding Class Counsel's motion for attorneys' fees and costs. Class Counsel had requested $5,873,716.02 in attorneys' fees and $226,283.98 in costs, for a total of approximately $6.1 million. The district court awarded the full amount of costs, but approved only $3,179,107.20 in attorneys' fees.

Class Counsel filed this timely appeal, alleging that the district court abused its discretion in determining the fee award. We disagree and AFFIRM the district court's decision.

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I.

We review a district court's award of attorneys' fees for abuse of discretion. *Bowling v. Pfizer, Inc.,* 102 F.3d 777, 779 (6th Cir.1996). A district court abuses its discretion when it "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Gonter v. Hunt Valve Co., Inc.,* 510 F.3d 610, 616 (6th Cir.2007).

In general, there are two methods for calculating attorney's fees: the lodestar and the percentage-of-the-fund. District courts have discretion "to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings v. Prudential–Bache Props., Inc.,* 9 F.3d 513, 516 (6th Cir.1993). In common fund cases, the award of attorneys' fees need only "be reasonable under the circumstances." *Id.* However, a district court generally must explain its "reasons for adopting a particular methodology and the factors considered in arriving at the fee." *Moulton v. U.S. Steel Corp.,* 581 F.3d 344, 352 (6th Cir.2009) (internal quotation marks omitted).

In this case, the district court used the lodestar method and then cross-checked its fee determination with the percentage-of-the-fund method to support the reasonableness of its lodestar calculation. It chose this approach at Class Counsel's request. [1] On appeal, Class Counsel advance several reasons to support their claim that the district court abused its discretion.

A.

****2** Class Counsel first argue that the district court abused its discretion when determining a reasonable hourly rate. Counsel requested rates ranging from $250 per hour (for first-year associates) to $690 per hour (for partners). They supported these requests with affidavits detailing their skill and experience, as well as with affidavits from expert witnesses stating that the hourly rates were reasonable.

The party seeking attorneys' fees bears the burden of proving the reasonableness of the hourly rates claimed. *Granzeier v. Middleton,* 173 F.3d 568, 577 (6th Cir.1999). When determining a reasonable hourly rate, "courts use as a guideline the prevailing market rate ... that lawyers of ***499** comparable skill and experience can reasonably expect to command within the venue of the court of record." *Gonter,* 510 F.3d at 618. A district court may rely on a party's submissions, awards in analogous cases, state bar association guidelines, and its own knowledge and experience in handling similar fee requests. *See B & G Mining, Inc. v. Dir., Office of Workers' Comp. Programs,* 522 F.3d 657, 664 (6th Cir.2008); *Geier v. Sundquist,* 372 F.3d 784, 791 (6th Cir.2004). "The appropriate rate, therefore, is not necessarily the exact value sought by a particular firm, but is rather the market rate in the venue sufficient to encourage competent representation." *Gonter,* 510 F.3d at 618.

The district court acknowledged Class Counsel's evidence but concluded that lower hourly rates were appropriate. It approved rates ranging from $250 to $450 per hour, depending on each attorney's experience. To support its determination, the court discussed several different cases involving class action fee awards and also referenced its own experience with similar cases. This explanation was sufficiently thorough, and was not so inadequate as to constitute an abuse of discretion. *Cf. Moulton,* 581 F.3d at 352 (finding explanation inadequate when district said only that "attorney fee percentage is fair and reasonable considering the several years of litigation" (alterations and quotation marks omitted)).

Class Counsel also argue that the district court should have analyzed the propriety of a higher fee award for out-of-town counsel. Given that Class Counsel always couched their rate request in terms of the *Ohio* legal market and produced no evidence regarding other markets, the district court's failure to assess whether a different market's rates should apply is hardly surprising. Further, Class Counsel bore the burden of establishing the need to seek out-of-town counsel, *see Hadix v. Johnson,* 65 F.3d 532, 535 (6th Cir.1995), and it does not appear that they met that burden here. They point to the out-of-town firm's success, but "[p]roof that [a firm] has a national reputation for expertise in [a specific] kind of litigation does not constitute proof that [its] expertise was necessary in this phase of the present litigation," *see id.* Accordingly, the district court did not abuse its discretion by using northeast Ohio as the relevant market for determining a reasonable hourly rate.

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B.

****3** Class Counsel next claim that the district court abused its discretion by enhancing the lodestar by a multiplier of 1.2, rather than by the requested multiplier of 1.78. They claim that the district court abused its discretion by (1) stating that multipliers are appropriate only in "rare" and "exceptional" circumstances, and (2) focusing on "phantom" claims that Class Counsel did not pursue.

Upon determining the lodestar, a district court also has discretion to decide whether an upward or downward adjustment is warranted in order to reach a reasonable fee award. *Geier,* 372 F.3d at 792. In considering any adjustment, the Supreme Court has cited with approval twelve factors listed in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717–19 (5th Cir.1974). *Hensley v. Eckerhart,* 461 U.S. 424, 430 n. 3, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Those factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) ***500** the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. (citing *Johnson,* 488 F.2d at 717–19). The Supreme Court has noted, however, that "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Id.* at 434 n. 9, 103 S.Ct. 1933. Accordingly, we need not "double count" factors when determining whether a multiplier is appropriate. *Cf. Geier,* 372 F.3d at 792.

On appeal, Class Counsel focus on the district court's statement that multipliers should be used only in "rare" and "exceptional" circumstances pursuant to *Perdue v. Kenny A. ex rel. Winn,* —– U.S. ——–, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010). Class Counsel argue that *Perdue,* which involved a statutory fee-shifting provision, is irrelevant to fee awards arising from settlements creating a common fund. But this argument is inapposite because the district court *did* award a multiplier. The court did not interpret *Perdue* as "prohibit[ing] the use of multipliers in class actions." Rather, it appears to have relied on *Perdue* only to the extent that it "suggest[s] that enhancements are atypical and should not duplicate the same considerations affecting the lodestar rate." The district court read *Perdue* as an instruction to approach multipliers carefully. That hardly amounts to an abuse of discretion.

Moreover, notwithstanding its comments about *Perdue,* the district court fully considered the other relevant factors for fee determinations and awarded a multiplier. Finding that it had already considered some factors when calculating the lodestar, the court focused on the value of the benefit rendered to the class, whether the services were undertaken on a contingent basis, and the complexity of the litigation. The court explained that it did not believe that the class members received an especially good benefit, given that Class Counsel chose to pursue a relatively insignificant claim (compared to other potential claims) and that Class Counsel agreed to a settlement mechanism which yielded a low claims rate. Nevertheless, the court determined that a multiplier was appropriate given the contingent nature of the case and the complexity of a class action. With regard to complexity, however, the district court noted that the case was "not one based on a 'novel' legal theory or unproven grounds for recovery" but was "only a breach of contract claim." Based on those considerations, the court determined that a multiplier of 1.2 was appropriate.

****4** "The decision to enhance the lodestar calculation is in the discretion of the district court, and we will reverse only if the district court abused that discretion." *Wells v. U.S. Steel,* 76 F.3d 731, 737 (6th Cir.1996). The district court considered the relevant factors and explained its reasons for utilizing a multiplier of 1.2.

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We cannot conclude that the district court abused its discretion.

C.

Finally, Class Counsel argue that the district court abused its discretion when performing its cross-check using the percentage-of-the-fund method. They claim that the district court was required to use the percentage of the amount of funds *available,* rather than the amount of funds actually claimed or any other amount. In the alternative, they argue that the figure the district court did employ—a midpoint between the funds available and the funds actually claimed (borrowed from *Lonardo v. Travelers Indem.* ***501** *Co.,* 706 F.Supp.2d 766, 796–802 (N.D.Ohio 2010))—was calculated incorrectly.

Neither of these alleged errors amounts to an abuse of discretion. It is true that the district court misapplied *Lonardo* because it failed to add the attorneys' fees and costs to the class benefit. *See id.* at 796–803. However, that mistake is irrelevant for the simple reason that the cross-check was *optional.* The district court would have been perfectly justified in awarding a fee based on the lodestar analysis alone. *See Rawlings,* 9 F.3d at 516. We therefore need not review its cross-check analysis. *Cf. Bowling,* 102 F.3d at 779–81 (affirming district court's fee award, which was based on the percentage-of-the-fund and cross-checked according to the lodestar, without reviewing its lodestar analysis).

II.

For the foregoing reasons, we **AFFIRM** the decision of the district court.

All Citations

436 Fed.Appx. 496, 2011 WL 3792362

Footnotes

1 Class Counsel initially requested that the court use the lodestar calculation to determine the fee award. Later, in a supplemental brief, Class Counsel argued that the percentage-of-the-fund method would also award fair compensation.

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837 F.3d 97
United States Court of Appeals, First Circuit.

Christopher HEIEN, individually and on behalf of all others similarly situated; Anna Nguyen, individually and on behalf of all others similarly situated; Anna Miniutti, individually and on behalf of all others similarly situated; Benjamin Spiller, individually and on behalf of all others similarly situated; Antonia Peabody, individually and on behalf of all others similarly situated; Endicott Peabody, individually and on behalf of all others similarly situated; Humoud Al Sabah, individually and on behalf of all others similarly situated; Brian Epstein, individually and on behalf of all others similarly situated; Laura Nesci, individually and on behalf of all others similarly situated; Ron Levy, individually and on behalf of all others similarly situated; Andrea Mangone, individually and on behalf of all others similarly situated; Nicolai Jakobsen, individually and on behalf of all others similarly situated, Plaintiffs, Appellants,

v.

ARCHSTONE; Archstone Communities, LLC; ASN Park Essex, LLC; ASN Quincy, LLC; ASN Quarry Hills, LLC; ASN North Point I, LLC; Archstone North Point, LLC; Archstone Cronin's Landing; ASN Watertown, LLC; ASN Kendall Square, LLC; Archstone Avenir, LP; ASN Bear Hill, LLC, Defendants, Appellees.

No. 15-2299
|
September 14, 2016

Synopsis

Background: Former and current tenants brought class action against landlord and related entities, alleging certain amenity use fees violated state law. Following settlement, the United States District Court for the District of Massachusetts, William G. Young, J., awarded attorney fees to class counsel. Counsel appealed.

The Court of Appeals, Lisi, District Judge, sitting by designation, held that district court did not abuse its discretion in awarding class counsel attorney fees of $29,250, after attorneys requested $429,000.

Affirmed.

***98** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. William G. Young, U.S. District Judge]

Attorneys and Law Firms

Edward Foye, with whom Michael Brier, Kevin Thomas Peters, Arrowood Peters LLP, Matthew J. Fogelman, Fogelman & Fogelman LLC, Newton, MA, Joshua N. Garick, Woburn, MA, and Law Offices of Joshua N. Garick were on brief, for appellants.

Craig M. White, with whom Baker & Hostetler LLP, Thomas H. Wintner and Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, MA, were on brief, for appellees.

Before Torruella and Barron, Circuit Judges, and Lisi, [*] District Judge.

Opinion

LISI, District Judge.

The Plaintiffs in this class action are former and current tenants of residential property in Massachusetts leased to them by Defendants Archstone and several related entities. In their suit, the Plaintiffs challenged certain "amenity use fees," which, they alleged, were imposed by the Defendants in violation of the Massachusetts Security Deposit Statute, Mass. Gen. Laws ch. 186, § 15B, and Chapter 93A of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, § 1 *et seq.* The underlying litigation having long been resolved with a complete settlement between the parties, this appeal springs solely from class counsel's dissatisfaction with the amount of attorneys' fees awarded to them by the district court. Because the district court did not abuse its discretion in fashioning the fee award, we affirm.

A. Background

1. The Hermida Litigation

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In the related case of Hermida v. Archstone et. al, C.A. No. 10–12083–WGY (D. Mass., U.S. District Judge William G. Young presiding), other Archstone tenants had previously brought identical claims against one of the Defendants' corporate affiliates. The Hermida plaintiffs were represented by the same law firms as in the instant case.

On November 29, 2011, the district court granted summary judgment on liability in favor of the Hermidas, determining that the amenity use fees charged by the Defendants violated the Massachusetts Security Deposit Statute. ***99** Hermida v. Archstone et. al., 826 F.Supp.2d 380 (D.Mass. 2011). Eventually, the Hermida case was settled and the district judge awarded attorneys' fees and costs of $62,714.38, which was less than half of the lodestar amount requested by counsel. Hermida v. Archstone et. al., 950 F.Supp.2d 298 (D.Mass. 2013). In a detailed Memorandum and Order, the district judge explained the reduction in fees for time spent by counsel on travel, on performing clerical and administrative tasks, and for the practice of block billing. Id. at 311–315.

2. The Heien Litigation

On May 17, 2012, after the question of liability had already been decided in Hermida, the Plaintiffs filed a class action suit against Archstone and eleven other related entities. In their complaint, the Plaintiffs stated that "the principal common issues with respect to the class are whether Archstone's charging of the amenity fee violated the Security Deposit statute and chapter 93A." Complaint at ¶ 71 (ECF No. 2-1) The Plaintiffs acknowledged that "Judge Young's decision in the Hermida v. ASN Reading case, Docket No. 1:10-CV-12083-WGY, is precisely on point." Id.

On August 23, 2012, the district court stayed the instant class action, pending waiver or resolution of all appeals of the judgment entered in Hermida. Electronic Order (ECF No. 41). In a September 30, 2012 status report, the Plaintiffs informed the district court that the parties were in settlement discussions. Status Report (ECF No. 43).

On March 13, 2014, the Plaintiffs filed an unopposed motion in which they requested, *inter alia*, preliminary approval of a proposed settlement. Pltfs.' Mot. for Settlement (ECF No. 47). The settlement agreement reflects that the case was being settled simultaneously with Hermida and that "by virtue of the settlement in Hermida there will be no appeals and therefore there is no longer a reason to stay the Action." Class Action Settlement Agreement (ECF No. 49 at Page 2 of 29). The settlement fund was capped at $1,300,000 for payment of individual claims and attorneys' fees and costs. Id. at Page 3 of 29. Under the terms of the settlement agreement, the Defendants agreed "[t]o not object to the payment of attorneys' fees and expenses from the Class Settlement Fund in an amount up to 15% of the total Fund amount ($1,300,000.00)." Id. at Page 5 of 29. Any sums remaining in the settlement fund after payment of all individual claims, administration expenses, and attorneys' fees were to be returned to the Defendants. Id. at Page 8 of 29. The district court granted the Plaintiffs' motion to approve the settlement on March 27, 2014. Electronic Order (ECF No. 50).

On June 3, 2014, Plaintiffs' counsel filed a motion for attorneys' fees and costs, in which they requested payment of $429,000 (33% of the maximum settlement fund) for their services in this case. Pltfs.' Mot. for Attorneys' Fees and Costs (ECF No. 53). In their motion, the Plaintiffs acknowledged that the case "by itself did not involve intense litigation, given the imposition of the stay," and they conceded that the case "only was filed because Judge Young concluded that the Hermidas did not have standing to assert claims against the defendants in this action." Id. at 7. Counsel's submissions in support of the fee motion included billing records that showed lodestar attorneys' fees of $58,693. Exhibits A–F to Pltfs.' Mot. for Attorneys' Fees and Costs (ECF Nos. 53-1, 53-2, 53-3). The Defendants responded with an objection to the motion, suggesting that the district court consider the effect of Hermida on the case, as well as the significantly lower lodestar amount submitted by Plaintiffs' counsel. Defs.' Obj. to Class Counsel's ***100** Petition for Attorneys' Fees (ECF No. 54 at 1-2).

3. The Order

On October 2, 2014, the district judge entered an electronic order awarding, without further explanation or analysis, attorneys' fees in the sum of $29,250. Electronic Order (ECF No. 66). Plaintiffs' counsel promptly filed a Motion for Written Findings of Fact and Rulings of Law (ECF No. 67), in response to which the district court issued a written order on October 15, 2015. Order (ECF No. 73). The order states as follows:

ORDER

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In response to Class Counsel's Motion for Written Findings of Fact and Rulings of Law, ECF No. 67, this Court clarifies its order awarding the attorneys' fees in the sum of $29,250.00. Order, ECF. No. 66.

The attorneys' fees in the awarded amount are appropriate because this Court resolved the issues of law relevant for this case in a related action Hermida v. Archstone, 826 F.Supp.2d 380 (D. Mass. 2011). Moreover, this Court stayed this class action pending waiver or resolution of all appeals of the judgment entered in Hermida. Order, ECF No. 41. This case, therefore, did not proceed to the discovery stage and the parties did not engage in significant motion practice. This Court also considered the actual benefit recovered for the class members, Joint Report Status 3, ECF No. 60, and took into account that the Defendants promptly agreed to settle the dispute.

SO ORDERED.

B. Standard of Review

This Court reviews a district court's determination regarding attorneys' fees only for a mistake of law or abuse of discretion. In re Volkswagen and Audi Warranty Extension Litigation, 692 F.3d 4, 13 (1st. Cir. 2012); United States v. Metropolitan Dist. Com'n, 847 F.2d 12, 14 (1st Cir. 1988) (citing Wojtkowski v. Cade, 725 F.2d 127, 130 (1st Cir.1984)); Maceira v. Pagan, 698 F.2d 38, 39 (1st Cir.1983). While mistakes of law "always constitute abuses of a court's discretion," Airframe Sys., Inc. v. L–3 Commc'ns Corp., 658 F.3d 100, 108 (1st Cir.2011), a fee determination will be set aside only "if it clearly appears that the trial court ignored a factor deserving significant weight, relied upon an improper factor, or evaluated all the proper factors (and no improper ones), but made a serious mistake in weighing them." Id. (quoting Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 292–93 (1st Cir.2001)).

As this Court has previously explained, "in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar." In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation, 56 F.3d 295, 307 (1st Cir.1995). The Court recognized that the percentage-of-fund method "in common fund cases is the prevailing praxis" and acknowledged the "distinct advantages that the POF method can bring to bear in such cases." Id. However, the Court has also noted that the percentage-of-fund approach "may result in the overcompensation of lawyers in situations where actions are resolved before counsel has invested significant time or resources." Id. If the fee is determined according to the lodestar approach, "it is the court's prerogative (indeed, its duty) to winnow out excessive hours, time spent tilting at windmills, and the like." Gay Officers Action League v. Puerto Rico, 247 F.3d at 296 (citing ***101** Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331, 337 (1st Cir.1997)).

Finally, the Court is mindful of the Supreme Court's admonition that "fee litigation can, but should not, transform into the tail that wags the dog." Victor Corp. v. Vigilant Ins. Co., 674 F.3d 1, 20 (1st Cir.2012) (citing City of Burlington v. Dague, 505 U.S. 557, 566, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992)). As long as there is a basis for understanding the district court's reasoning, the findings " 'need not be infinitely precise, deluged with details, or even fully articulated.' " Victor Corp. v. Vigilant Ins. Co., 674 F.3d at 20 (quoting Foley v. City of Lowell, 948 F.2d 10, 20 (1st Cir.1991)).

C. The Parties' Positions

The Plaintiffs make two arguments on appeal. They assert that in considering the actual benefit recovered for the class members, the district court committed legal error under Boeing Co. v. Van Gemert, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (affirming attorney award from total amount of class action judgment, including unclaimed portion, on the basis that the class action bestowed a benefit even on class members who did not file a claim). In the alternative, the Plaintiffs contend that when viewed against other cases in which attorney awards ranged between 20 and 30 percent of the total common fund, it was abuse of discretion by the district court to award to class counsel what amounts to 2.25 percent of the common fund in this case.

On their part, the Defendants contend that the attorneys' fees awarded in this case are tied to the lodestar award in Hermida, and they suggest that the rationale for the reduced award in the instant case is implied in the district judge's reasoning in Hermida.

D. Discussion

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It is undisputed that the relevant legal issues in this case were decided in Hermida before this case was even filed; that the case was stayed shortly after its commencement until final settlement; and that the parties did not engage in any discovery or motion practice. Moreover, although the common benefit fund amounted to $1,300,000, only a small portion, $180,480, was paid out to the individual claimants. Joint Status Report (ECF No. 60 at Page 3 of 4). Following settlement of the case, class counsel sought $429,000 in attorneys' fees, more than seven times counsel's asserted lodestar amount of $58,693.

In the October 15, 2015 order, the district court gave several reasons why the court deemed the amount of the award appropriate. First, the court pointed out that the relevant legal issues had already been resolved in Hermida. Order ECF No. 73 at 1. "Moreover," the court pointed out that the Heien case had been stayed pending waiver or resolution of all appeals in Hermida and that, as a result, the Heien case had not proceeded to discovery, nor had the parties engaged in any significant motion practice. Id. at 2. Further, the court took into account the fact that the Defendants agreed to settle this matter "promptly." Id. Finally, the court stated that it had "also considered" the actual benefit recovered for the class members in Heien. Id.

The Plaintiffs have focused on the single reference to the claimed portion of the common benefit fund to arrive at the conclusion that the court impermissibly based the fee award on only that consideration. However, the order as a whole, especially when viewed against the procedural history of this case and the close connection to Hermida, makes clear that this consideration was only one of the factors the district ***102** court included. The primary reason given for the size of the award is that the case had required little, if any, legal work. As the Plaintiffs had repeatedly conceded, the legal issues in this case had already been resolved in Hermida. The fee award in this case, set at almost exactly half of the lodestar amount submitted by the Plaintiffs, was entirely consistent with the lodestar-based attorneys' fee award in Hermida, where counsel had already been provided with detailed reasoning and precise calculations by the court. The order in this case makes two separate references to Hermida, indicating that, just like in Hermida, the award for attorney's fees was based on the lodestar method and then reduced to what the district court considered an appropriate award. Boeing, which affirmed a fee award based on the total amount of a class action judgment, does not render a consideration of the claimed benefits as one of the factors in awarding attorney's fees legal error in a lodestar calculation. Such consideration is not impermissible under the lodestar method because it clearly relates to one of the twelve factors enunciated in Hensley v. Eckerhart, 461 U.S. 424, 430, 103 S.Ct. 1933, 76 Ed.2d 40 (1983) (listing among the factors "the amount involved and the results obtained" and confirming that "the level of a plaintiff's success is relevant to the amount of fees to be awarded.").

The Plaintiffs' alternative suggestion that the fee award constitutes an impermissibly low percentage of the total common fund may be dealt with in short order. As stated by the district court, it reflects the court's effort to fashion a reasonable and appropriate fee award in consideration of the unique procedural history of this case and its close connection to Hermida. The court gave several reasons for awarding $29,250 to class counsel, none of which are the subject of factual dispute. In addition, the district judge detailed in the fee memorandum and order in Hermida his rationale for reducing attorneys' fees for block billing and for time spent on travel and administrative tasks.

The order in this case left room for speculation by the parties as to the method utilized by the district court to arrive at the fee award. While the inclusion of an explanation as to the district court's elected method or of the court's calculation of the award might have foreclosed such speculation—and, we think it to be the better practice—neither the absence of such mathematical analysis nor the amount of the award itself constitute an abuse of discretion.

Affirmed.

Each side to bear its own costs.

All Citations

837 F.3d 97

Footnotes

* Of the District of Rhode Island, sitting by designation.

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877 F.3d 276
United States Court of Appeals, Seventh Circuit.

Saul M. KAUFMAN, individually and on behalf of all others similarly situated, et al., Plaintiffs–Appellees,
and
J.G. Goodman, also known as J.L. Goodman, Objector, et al., Intervening Plaintiffs–Appellants,
v.
AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., Defendant–Appellee.

No. 16-1691
|
Argued September 28, 2017
|
Decided December 7, 2017

Synopsis

Background: Consumer brought putative class action in state court against seller of general-use prepaid gift cards, alleging breach of contract, unjust enrichment, and statutory fraud, alleging cards were worth less than their stated value and that they were not good all over the place, as advertised. Seller removed action to federal court. Other consumers intervened. The United States District Court for the Northern District of Illinois, Joan B. Gottschall, J., 2016 WL 806546, approved settlement agreement and awarded attorney fees to class counsel and intervenors' counsel. Intervenors appealed.

Holdings: The Court of Appeals, Manion, Circuit Judge, held that:

district court did not err by not requiring briefs in support of settlement agreement to be filed prior to deadline to object to settlement;

district court did not abuse its discretion in concluding that pending appeal of its decision finding arbitration clause to not be a term of the contract between consumers and the seller was a significant bar to consumer class's success;

district court did not abuse its discretion in approving settlement agreement despite its recognition that the breadth of the release was a problem with the settlement; and

award of $700,000 in attorney fees to intervenors' counsel was appropriate.

Affirmed.

***278** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:07-cv-01707—**Joan B. Gottschall**, *Judge*.

Attorneys and Law Firms

Phillip Andrew Bock, James Michael Smith, Attorneys, Bock, Hatch, Lewis & Oppenheim, LLC, Chicago, IL, for Plaintiffs–Appellees Saul M. Kaufman, Kimberly Stegich.

Richard David Greenfield, Attorney, New York, NY, for Plaintiffs–Appellees J.G. Goodman, Carla Santsche.

***279** Daniel K. Ryan, Attorney, Hinshaw & Culbertson LLP, Chicago, IL, James L. Bernard, Attorney, Stroock & Stroock & Lavan LLP, New York, NY, for Defendant–Appellee.

Before Bauer, Manion, and Hamilton, Circuit Judges.

Opinion

MANION, Circuit Judge.

****1** Saul Kaufman, as lead plaintiff in a class action, sued American Express Travel Related Services Company, Inc. ("Amex"), alleging claims for breach of contract, unjust enrichment, and statutory fraud related to Amex's general-use, prepaid gift cards. Just over two years after Kaufman filed the class action, Kaufman (on behalf of the class) and Amex sought approval from the district court of a settlement agreement that would resolve the action. Almost seven years later, after multiple amended motions for approval and three rounds of notice to the class, the district court granted final approval of the settlement. J.G. Goodman and Carla Santsche ("Intervenors"), who had intervened in the class action, appeal the approval of the settlement. While we recognize this settlement is not without issues, we conclude the district court did not abuse its discretion in approving it.

I. Background

The protracted history of this case began on February 14, 2007, when Kaufman filed a class-action lawsuit in the Superior Court of Cook County, Illinois, against Amex. The claims arose out of Amex's sale of general-use, prepaid gift cards. A customer could buy a gift card by paying the amount to be loaded on the card (e.g., $25, $50, or $100) and a purchase fee of less than $5. The packaging in which the gift cards came declared they were "good all over the place."

Kaufman alleges, however, that these gift cards were not worth their stated value (e.g., a $25 card was not actually worth $25) and that they were not "good all over the place." This is because merchants were ill-equipped to process "split-tender" transactions, which occurred when a gift-card holder attempted to use his gift card to purchase an item that cost more than the value remaining on his card, necessitating the use of two forms of tender. The inability to process those sorts of transactions led to rejected cards and languishing balances, as gift-card holders could not use the relatively small amounts remaining on their cards.

Those balances did not have to languish for long, though, because after twelve months Amex automatically began charging a $2 "monthly service fee" against balances on the cards. If a holder wanted to recover the balance of his card from Amex, he could request a check, but only if he paid a $10 check-issuance fee. Because of these service and check-issuance fees, which resulted in remaining funds on the cards going to Amex, Kaufman alleged Amex had purposely designed its gift-card program to make it difficult for people to exhaust the balances on their cards, thus lowering their value.

On March 27, 2007, Amex removed the class action to the District Court for the Northern District of Illinois pursuant to the Class Action Fairness Act. 28 U.S.C. § 1332(d)(2). Once in federal court, Amex moved to compel arbitration, citing the arbitration provision in the "American Express Gift Card Cardholder Agreement" that was included with the gift cards. For cards purchased from stores, this agreement was only accessible after purchasing the gift card and opening its packaging.

**2 The district court denied the motion, concluding the provision was not part of the contract between Amex and Kaufman. *280 Amex appealed that decision to this court. Shortly thereafter, Amex and Kaufman engaged in settlement negotiations through this court's Mediation Program. As a result of those negotiations, the parties sought a limited remand of Amex's appeal for the purpose of presenting their settlement to the district court for approval. On February 4, 2009, we granted that request.

After remand, the Intervenors sought entry into the action. [1] Intervenor Goodman was the lead plaintiff in a class action in the Eastern District of New York that made similar complaints against Amex arising from issues with split-tender transactions and Amex's fee policies. In the briefs filed in this appeal, the Intervenors explain that intervenor Santsche's interest in this case arises from her alleged purchase of a $100 gift card that had no value when she attempted to use it. On July 15, 2009, the district court granted the motion to intervene.

Two days before the grant of that motion, Kaufman, joined by a new co-plaintiff, Kimberly Stegich, individually and on behalf of all others similarly situated ("Plaintiffs"), filed an amended class-action complaint and a motion for preliminary approval of a settlement of the action. But before the district court addressed that motion, the Plaintiffs amended it. According to the amended motion, the settlement called for a $3,000,000 fund. From that fund, class members could receive, in exchange for their release of all claims related to Amex's gift cards, the following payments: (1) up to $20 in reimbursement for monthly fees actually paid due to refused split-tender transactions; (2) up to $8 for monthly fees paid; (3) up to $5 in reimbursement of any check-issuance fee paid; and (4) up to $5 in reimbursement for monthly fees paid simply by attesting to the fact that the fees were paid. [2] If any of the $3,000,000 remained after paying claims, up to $200,000 would go to a charitable organization as *cy pres*. If more than that remained, up to $650,000 would go to Amex as reimbursement for the costs of notice and administration. If still more remained, that too would go to the *cy pres*.

In addition to payments from the fund, class members could also take part in two supplemental programs: (1) the "Balance Refund Program," which allowed class members with less than $25 remaining on their gift cards to request a refund of their balance without paying the check-issuance

fee; and (2) the "Purchase Fee and Shipping/Handling Fee Waiver" program, through which class members could purchase a new $100 Amex gift card without paying the purchase fee or shipping and handling fee (a savings of approximately $10).

The district court entered its order on the Plaintiffs' motion on December 22, 2009. After concluding that the class was certifiable pursuant to Federal Rule of Civil Procedure 23, the court certified the class for settlement purposes, defining the class as

> All purchasers, recipients, holders and users of any and all gift cards issued by American Express from January 1, 2002 through the date of preliminary approval of the settlement, including, without limitation, gift cards sold at physical retail locations, via the Internet, or ***281** through mall cobranded programs. Notwithstanding the foregoing, 'Be My Guest' dining cards are not included within the settlement.

****3** *Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438, 444 (N.D. Ill. 2009).

Despite certifying the class, the court denied preliminary approval of the settlement. Of particular concern to the court was the inadequacy of the proposed notice, both in form (the Plaintiffs had proposed notice by publication, but the court did not accept the proposition that Amex had no personal-identifying data with which to provide individualized notice) and substance (the notice failed "to satisfy the requirements of Rule 23(c)(2)(B)"). *Id.* at 445–46.

The district court addressed the proposed settlement again in an order on August 19, 2010. The court observed that the parties had improved the proposed notice, but now it was too complicated—the court ordered that it should include a concise summary. Additionally, the court noted that, since the initial denial of preliminary approval, Amex had revealed that it *did* have some personal-identifying information for gift-card holders, so the court declined to excuse individual notice.

Over a year later, the Plaintiffs filed their Second Amended Motion for Preliminary Approval. The settlement now proposed a fund of $6,753,269.50. While this fund was considerably larger than the $3,000,000 initially proposed, it would be drawn against for the costs of notice and administration, as well as approved attorneys' fees and lead-plaintiff incentive awards. The benefits available to the class (the four types of refunds and the supplemental programs) and the release remained substantially the same. This version of the settlement maintained the *cy pres* but removed the $650,000 reimbursement for Amex. It also called for notice by publication and by direct mail to every class member for which Amex had information.

On September 21, 2011, the district court granted preliminary approval of the settlement, appointed the Plaintiffs' counsel as lead class counsel and counsel for two intervening parties as additional class counsel, and again certified the class for purposes of the settlement. [3]

After providing notice and receiving responses from class members, the Plaintiffs and Amex sought final approval of the settlement on February 16, 2012. However, response to the notice had been "abysmal." Of the approximately 70,000,000 gift cards sold, only 3,456 benefits had been requested, amounting to $41,510.35. [4] As class counsel was requesting $1,525,000 in fees, the fee-to-claims ratio was woefully imbalanced. The district court decided that issues with notice needed to be addressed, and so determined to hire a notice expert. After the Intervenors objected to the appointment of the court's recommended expert due to her affiliation with the firm serving as the settlement administrator, the district court appointed Todd Hilsee, whom the Intervenors had recommended.

****4** The parties worked with Hilsee to create a supplemental notice program, and after its implementation the Plaintiffs once again moved for final approval of the settlement ***282** on May 28, 2014. The supplemental notice plan had provided notice to approximately 70% of the class, and over 32,500 claims were filed. While these numbers were not ideal, they represented an astronomical improvement over the results of the first round of notice. There were only five objections, and eighty class members chose to opt out.

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Despite this solid improvement in the response to the notice, the district court again denied final approval. The court did so for two reasons: (1) though no longer as blatant as the first proposal, the settlement still provided for Amex to be reimbursed for the costs of providing the first, unsuccessful notice; and (2) the court felt bound by our decision in *Redman v. RadioShack Corp.*, 768 F.3d 622, 637–38 (7th Cir. 2014), which was decided after the Plaintiffs filed their motion for final approval but before the district court issued its order, to command yet another round of notice concerning motions for attorneys' fees.

After this third round of notice, the district court granted final approval of the settlement on March 2, 2016. The greater part of a decade had elapsed since Kaufman filed his complaint in the Superior Court of Cook County, Illinois, and nearly seven years had passed since the first motion for preliminary approval of the settlement. The district court determined that the settlement was fair, reasonable, and adequate, but referred to final approval as the "least bad option." *Kaufman v. Am. Express Travel Related Servs. Co.*, No. 07-cv-1707, 2016 WL 806546, at *1 (N.D. Ill. Mar. 2, 2016). Based on the affidavit of an Amex employee, the court concluded the total value of the claims at issue was approximately $9.6 million. It then calculated that, considering the total number of claims received and the value of the supplemental programs (the waived purchase, shipping and handling, and check-issuance fees), the total benefit to the class from the settlement was $1.8 million. The court determined that this was within the range of a reasonable settlement given the class's likelihood of not recovering the full $9.6 million. In reaching that decision, the district court considered Amex's defenses, most notably its still-pending appeal of the denial of its motion to compel arbitration.

The district court also remarked that if the case continued, it would be extremely costly and difficult, and that there was, even considering the fact that notice was not perfect, a small rate of opt-outs and objectors. After addressing the objections that had been filed, the court observed that this settlement was seven years in the making and had involved the participation of four mediators and a notice expert. In light of all of those considerations, the court found that the parties had negotiated the settlement in good faith, and it approved the settlement.

Having approved the settlement, the court turned to attorneys' fees. The Plaintiffs' counsel had requested $1,235,000 in fees and another $40,000 in expenses, which they claimed amounted to 30.7% of the settlement. Additional class counsel requested $250,000 in fees. Counsel for the Intervenors requested $1,500,000 in fees. The district court ultimately awarded $1,000,000 in fees and $40,000 in expenses to the Plaintiffs' counsel, $250,000 in fees to additional class counsel, and $700,000 in fees to counsel for the Intervenors.

****5** In the final tally, attorneys would be receiving $1,950,000 from the settlement, while class members would receive approximately $1,800,000. The district court did not like this, but found it acceptable as any reduction in fees would not go to the benefit of the class. Any excess would go either to the *cy pres* or to Amex.

***283** The Intervenors appeal the approval of the settlement and the awards of attorneys' fees.

II. Analysis

A district court may approve a settlement of a class action if it concludes that it "is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); see also *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). We review a district court's approval of a class-action settlement only for abuse of discretion. *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 711 (7th Cir. 2015). That said, we "require[ ] district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions," due to the risk that attorneys for the class will "place their pecuniary self-interest ahead of that of the class." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002). Indeed, we have repeatedly stated that district courts should act as the "fiduciary of the class," subject "to the high duty of care that the law requires of fiduciaries." *Id.* at 279–80; *accord Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652–53 (7th Cir. 2006).

On appeal, the Intervenors challenge four decisions of the district court: (A) the district court erred by not requiring the filing of briefs in support of the settlement prior to the deadline to object to the settlement; (B) the district court erred in determining that Amex's arbitration appeal posed a risk to the class's success; (C) the district court erred in approving the settlement given the breadth of the release;

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and (D) the district court erred in not awarding most, if not all, of the attorneys' fees to the Intervenors' counsel. We address each in turn.

A. The Filing of Briefs

The Intervenors acknowledge that there is no express requirement in the Federal Rules or in the case law requiring the proponents of a class-action settlement to file their briefs in support of the settlement prior to the expiration of the time to object to the settlement. However, they argue that this procedure is compelled as a matter of due process and that it is a natural extension of our decision in *Redman* and the Ninth Circuit's decision in *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988 (9th Cir. 2010), upon which *Redman* relied. We disagree.

In *Mercury Interactive Corp.*, the Ninth Circuit held that a district court must "set the deadline for objections to counsel's fee request on a date *after* the motion and documents supporting it have been filed." *Id.* at 993. The court so held based on "[t]he plain text of [Rule 23(h)]," which provides that requests for attorneys' fees must be made by motion and that class members "may object to the motion." *Id.* (quoting Fed. R. Civ. P. 23(h)). This language implied that class members must "be allowed an opportunity to object to the fee 'motion' itself, not merely to the preliminary notice that such a motion will be filed." *Id.* at 993–94. Without the details provided by a motion (such as the amount of hours worked and the tasks completed), a potential objector "could make only generalized arguments about the size of the total fee." See *id.* at 994.

****6** In *Redman*, we adopted the Ninth Circuit's reasoning and reversed the approval of a class-action settlement in part because the district court had provided for the filing of motions seeking attorneys' fees after the deadline for class members to object to the settlement. See 768 F.3d at 637–38. We concluded that the scheduling violated Rule 23(h) by handicapping those who wished to object to the fee motions. *Id.*

***284** The Intervenors urge us to extend *Redman*'s reach to apply to the filing of briefs in support of settlement before the deadline to object. But, as the Ninth Circuit made clear, the plain text of Rule 23(h), which deals exclusively with attorneys' fees and costs, is what requires parties to file motions for attorneys' fees before the deadline to object to the settlement. There is no such requirement for the filing of briefs in support of a settlement agreement. On the contrary, Rule 23(e), which governs the approval of class-action settlements, only requires that notice of the proposed settlement be directed "in a reasonable manner to all class members who would be bound by the proposal," and that "[a]ny class member may object to the proposal if it requires court approval under this subdivision (e)." Fed. R. Civ. P. 23(e)(1), (5). Rule 23(e) thus only requires that class members be given an opportunity to object to the proposed settlement—the Rule has no provision that would require parties to file briefs in support of the settlement prior to the deadline to file objections.

The differing procedures make sense. In the fee-request context, the general notice may give parties information concerning the total amount of fees requested, but no details. To require a party to object based on an aggregate number alone would be fruitless, as there would be no specifics to dispute. See *In re Mercury Interactive Corp.*, 618 F.3d at 994 (requiring the filing of fee motions before the deadline for objections because "[i]t ensures that the district court, acting as a fiduciary for the class, is presented with adequate, and adequately-tested, information to evaluate the reasonableness of a proposed fee"). On the other hand, the notice of a proposed settlement should provide class members with all the information they need to make an informed decision to file a claim, opt out, or object. See generally *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) ("[A] fully descriptive notice ... sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process."). There is no need for the briefs of the parties in favor of settlement to be filed first. In addition, we have repeatedly told district courts to consider the amount of opposition to a proposed settlement in deciding whether to approve it. E.g., *Synfuel Techs., Inc.*, 463 F.3d at 653; *Isby*, 75 F.3d at 1199. Briefs in support of a proposed settlement thus routinely address the subject, which they could not do if the deadline for objections had not already passed. Accordingly, we conclude that our holding in *Redman* does not compel the procedure the Intervenors propose, and the district court did not err in declining to employ that procedure.

B. The Arbitration Defense

Though we have elucidated several factors to guide a district court's analysis of whether a proposed settlement

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is fair, reasonable, and adequate, we have repeatedly stated that "[t]he 'most important factor relevant to the fairness of a class action settlement' is ... 'the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.' " *Synfuel Techs., Inc.*, 463 F.3d at 653 (quoting *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979)); accord *Isby*, 75 F.3d at 1199. In analyzing this factor, the district court should consider "the range of possible outcomes and ascrib[e] a probability to each point on the range." *Synfuel Techs., Inc.*, 463 F.3d at 653 (alteration in original) (quoting *Reynolds*, 288 F.3d at 285). This requires acknowledgment of potential defenses and the risk of failure for the class. See ***285** *Williams v. Rohm and Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011). However, we have instructed the district courts "to refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." *Isby*, 75 F.3d at 1196–97 (quoting *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985)). We have also taught that the *Synfuel*/*Reynolds* evaluation of potential outcomes need not always be quantified, particularly where there are other reliable indications that the settlement reasonably reflects the relative merits of the case. See *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 864 (7th Cir. 2014).

****7** The Intervenors argue that the district court improperly analyzed this factor by giving too much weight to Amex's potential arbitration defense. The district court concluded there was a significant risk that this court would reverse the district court's decision and send the action to arbitration, where the Plaintiffs would likely receive nothing. Because of that risk, the district court concluded that the approximately $1.8 million the class would receive from the settlement was a reasonable recovery. To support that conclusion, the district court cited two recent decisions of the Supreme Court and a recent decision of this court enforcing arbitration provisions in contracts: *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 133 S.Ct. 2304, 2307, 2312, 186 L.Ed.2d 417 (2013), which required enforcement of an arbitration provision despite the fact that "the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336, 348, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), which held that a state rule "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" was preempted by the Federal Arbitration Act, and *Gore v. Alltel Communications, LLC*, 666 F.3d 1027, 1030 (7th Cir. 2012), which determined that the arbitration provision in one contract between the parties compelled arbitration of a claim arising under a different contract between the parties.

The Intervenors maintain that these cases are inapposite to the consideration of the effect of Amex's arbitration defense in this case. They point out that the cited cases all deal with the enforceability of arbitration provisions contained in contracts between the parties, and that, they claim, is not the situation here. Here, the district court denied Amex's motion to compel arbitration not because it concluded that the provision was unconscionable or otherwise unenforceable, but because it determined that the provision was not a part of the contract between Amex and Kaufman.

It did so in reliance on our decisions in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). In those cases, we concluded that contract terms contained on the inside of a product's packaging (and thus only discoverable after purchase) become part of the contract between the purchaser and the seller so long as the purchaser had "an opportunity to read the terms and to reject them by returning the product." *Gateway 2000, Inc.*, 105 F.3d at 1148. The district court applied this rule to the Cardholder Agreement and concluded that there was not a sufficient opportunity to reject the terms of the agreement by returning the card, so the terms contained inside the packaging were not terms of the contract between Kaufman and Amex. *Kaufman v. Am. Express Travel Related Servs. Co.*, No. 07-C-1707, 2008 WL 687224, at *8 (N.D. Ill. Mar. 7, 2008). Having resolved the motion in that way, the district court did not reach the question of enforceability. *Id.*; see also ***286** *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) ("[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). Because the district court did not address the contract-formation issue in its order approving the settlement, the Intervenors believe the court abused its discretion.

The court's reasoning in its order on final approval of the settlement certainly puts the enforceability cart before the contractual horse. Still, we do not believe that the district

court abused its discretion in concluding that the pending appeal concerning the arbitration provision is a significant potential bar to the class's success in this action.

To begin with, our review of the district court's decision to deny arbitration would be de novo. *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033 (7th Cir. 2016) (noting de novo review of contract-formation and arbitration-enforceability questions). Thus, the inquiry into whether the terms included in the gift-card packaging became part of the contract between the parties would be a question for this court to decide without deference to the district court's conclusions. That adds to the uncertainty surrounding the outcome, and increases the risk to the class. See *Williams*, 658 F.3d at 634–35 ("The prospect of appellate review affects the risk and costs (in time and money) of the litigation.").

****8** And if we were to conclude that the arbitration provision was part of the contract between the parties, then there is little doubt we would enforce it. The parties do not dispute that the claims at issue in this case fall within the scope of the provision, and the law clearly favors enforcement of arbitration provisions in contracts, as the district court noted. See, e.g., *AT&T Mobility LLC*, 563 U.S. at 339, 131 S.Ct. 1740. In light of those considerations, the district court's conclusion was not an abuse of discretion.

C. Overbreadth

The settlement class is defined to include, with only a few exceptions, all those who held Amex gift cards from January 2002 through September 21, 2011. Per the terms of the settlement, the members of the class are releasing "any and all rights, duties, obligations, claims, actions, causes of action or liabilities ... that relate to any and all Gift Cards issued by American Express (or any affiliate thereof) from January 1, 2002 through [September 21, 2011]."

The Intervenors believe this release is overbroad. They contend it releases claims that are not receiving compensation from the settlement. Specifically, the Intervenors highlight the alleged claim of intervenor Santsche, who alleges she purchased a $100 gift card by paying the purchase fee, but then the gift card was literally unusable because it had no value. The Intervenors maintain that Santsche's case is one of many, constituting "hundreds of millions of dollars of unjustified 'up-front' fees." As the settlement only proposes compensation for the payment of the $2 per month maintenance fees and the check-issuance fees, the Intervenors say that class members with claims like Santsche's are giving up their claims while receiving nothing in return.

The district court acknowledged that the release would cover the Intervenors' alleged $0–balance claims and that "the breadth of the release is one of the problems with the settlement." *Kaufman*, 2016 WL 806546, at *9. "[B]ut," the court concluded, "on balance, the court does not believe the breadth of the release justifies rejecting the settlement." *Id.*

***287** "A settlement offer is a compromise and may include a release of claims not before the court." *Oswald v. McGarr*, 620 F.2d 1190, 1198 (7th Cir. 1980). Nevertheless, because of the unique situation posed by a class action—whereby attorneys for the class may be incentivized to accept inadequate settlement terms so long as they receive their fees—it is necessary for a court to scrutinize what claims the class is giving up and what the class is receiving in exchange. See *Reynolds*, 288 F.3d at 283–84.

Here, the district court's conclusion was not an abuse of discretion because there was no admissible evidence that the purported claims existed. The total size of the class in this case is not known, but the district court referred to an estimated range of 17.7 to 36.9 million people. Thanks to the district court's decision to appoint a notice expert, notice was provided to this massive class in a reasonable and effective manner, reaching approximately 70% of the members. Assuming the veracity of the Intervenors' allegations, it is probable that at least some of the persons with $0–balance claims received notice. However, no party submitted any admissible evidence of those claims—not even an affidavit or declaration from Santsche herself. Granted, it is not an objector's duty to show that the settlement is inadequate. See *Gautreaux v. Pierce*, 690 F.2d 616, 630 (7th Cir. 1982). But the burden on the proponents to support the settlement should not extend to an affirmative duty to rebut every allegation an objector makes. See *id.* at 631. In the absence of any admissible evidence that the purported claims even exist, the district court's conclusion that the release of these claims was not a sufficient reason to deny approval of the settlement was not an abuse of discretion.

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D. Attorneys' Fees

****9** In reviewing the award of attorneys' fees, " '[w]e review the district court's methodology de novo to determine whether it reflects procedure approved for calculating awards,' and we review the reasonableness of the award for abuse of discretion." *Williams*, 658 F.3d at 635–36 (quoting *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007)).

The district court awarded the Plaintiffs' counsel $1,000,000 in fees, additional class counsel $250,000 in fees, and the Intervenors' counsel $700,000 in fees. The Intervenors do not challenge the methodology used to determine these fee awards, instead focusing on the amounts of the awards themselves. The Intervenors (or, perhaps more accurately, their counsel) maintain the district court erred in failing to award them most, if not all, of the attorneys' fees in this case. [5] They argue that while they were working to further the interests of the class, the Plaintiffs' counsel were colluding with Amex.

"The law generally does not allow good Samaritans to claim a legally enforceable ***288** reward for their deeds." *Reynolds*, 288 F.3d at 288. But, if a professional "render[s] valuable albeit not bargained-for services in circumstances in which high transaction costs prevent negotiation and voluntary agreement, the law does allow them to claim a reasonable professional fee from the recipient of their services." *Id.* In order to claim that fee, the value provided by the professional must "be worth more than the fee [he is] seeking." *Id.*

Here, the district court acknowledged that the Intervenors were important to getting Amex to divulge its information on class members, that they suggested the notice expert the court ultimately appointed, and that they anticipated the attorneys'-fee-notice requirement we announced in *Redman* in their objections. Indeed, the court went so far as to say that it is "undeniable" that the settlement would never have been approved without the Intervenors.

The Intervenors take these acknowledgments and run with them, claiming responsibility for all the good in the case. However, the Intervenors ignore that the district court also observed that they filed "a number of repetitive and meritless objections." Additionally, the court considered it "disingenuous" to attribute the increase in claims due to the second notice program (crafted with the assistance of the notice expert and using the information obtained from Amex) entirely to them. Finally, it noted that it was unclear to what extent the Intervenors could claim responsibility for the supplemental programs. Considering the full impact the Intervenors had on the case, the district court awarded counsel for the Intervenors $700,000 in fees, representing what the court calculated to be approximately 34% of the value they added to the class.

****10** We conclude there was no abuse of discretion in awarding the attorneys' fees. Having dealt with the parties and their counsel for nearly seven years, the district court was easily in the best position to determine which parties (and which attorneys) had contributed to the settlement and in what proportions. See *Williams*, 658 F.3d at 637 (seeing "no reason to disturb the district court's assessment of fees" where the judge "became intimately familiar with [the] litigation over the past eight years"); see also *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687–88 (7th Cir. 2008) (affirming the district court's 50% reduction to the objectors' fee based on their "irresponsible litigation tactics").

III. Conclusion

The decision we affirm today did not approve a perfect settlement. The individual class members (those who bothered to submit claims) will receive very little, while attorneys will receive more than all of the class members combined. But even the attorneys have not come out as well as they had hoped.

The district court, throughout this case, properly exercised its responsibility to look out for the class by consistently denying inadequate proposals and working with the parties to overcome the challenges associated with notice to get this settlement into an approvable posture. In the end, the court found itself in an unenviable position: it could either approve the adequate—albeit flawed—settlement and allow the class members to get their meager recoveries, or reject it and have the parties further exhaust their resources (and the settlement fund) on notice or discovery or have them turn to litigation where the class ran the risk of recovering nothing. It chose the former course, and that was not an abuse of discretion. We AFFIRM.

All Citations

877 F.3d 276, 2017 WL 6044109, 99 Fed.R.Serv.3d 667

Footnotes

1 Four other parties also intervened in the action: Gordon Jarratt and Amanda Rudd, who eventually became co-plaintiffs and whose counsel became additional class counsel, and Kambiz and Katayoun Kazemi, who eventually reached a separate settlement of their California class action against Amex and were excluded from the class in this case.

2 To recover the other benefits, a class member had to provide proof, including a gift-card number.

3 The class definition was amended to exclude "Westfield" branded gift cards due to the Kazemi intervenors pursuing their own relief in California. See *supra*, note 1.

4 This is the number given by the district court in its order denying final approval. Later in the litigation, the district court was provided with information suggesting that the actual claims rate was much lower even than that—amounting to a paltry $11,377.

5 In many ways, this argument is emblematic of what is wrong with class actions. The Intervenors spend a vast majority of their 49–page brief to this court attacking the settlement as unfair, unreasonable, and inadequate. They claim it releases hundreds of millions of dollars' worth of claims without receiving anything for those claims. Yet, when it comes time to divvy up the money, their counsel is right there with open hands, claiming not only that they helped make the settlement better than it could have been, but that they are *solely* responsible for the settlement's success. We do not mention this *chutzpah*, as similar conduct has been called in the past, see *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687 (7th Cir. 2008), to criticize counsel for the Intervenors—they are just looking out for their interests. We merely remark that it is unfortunate that this is the way the game is played.

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Tyler v. Michaels Stores, Inc., D.Mass., December 9, 2015

779 F.3d 934
United States Court of Appeals,
Ninth Circuit.

In re ONLINE DVD–RENTAL ANTITRUST LITIGATION.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
Theodore H. Frank, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.
In re Online DVD–Rental Antitrust Litigation.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
Jon M. Zimmerman, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.
In re Online DVD–Rental Antitrust Litigation.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
Edmund F. Bandas, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.
In re Online DVD–Rental Antitrust Litigation.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
Maria Cope, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.
In re Online DVD–Rental Antitrust Litigation.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
John Sullivan, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.
In re Online DVD–Rental Antitrust Litigation.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
Tracey Klinge Cox, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.

Nos. 12–15705, 12–15889, 12–15957, 12–15996, 12–16010, 12–16038.
|
Argued and Submitted Feb. 13, 2014.
|
Filed Feb. 27, 2015.

Synopsis

Background: Individuals representing putative class of subscribers to internet-based DVD rental service filed antitrust action against internet-based DVD-rental service and large discount retailer, challenging as anticompetitive promotion agreement that divided up DVD-related businesses between the two companies. Plaintiffs moved for certification of litigation class of subscribers to internet-based DVD-rental service. The United States District Court for the Northern District of California, Phyllis J. Hamilton, J., 2010 WL 5396064, granted motion, then later denied approval of initial settlement agreement between retailer and global class of those subscribers and subscribers to another competing online DVD rental service, but conditionally approved settlement agreement between retailer and class of subscribers to internet-based DVD-rental service, gave preliminary approval of settlement and form and plan of notice, and denied renewed motion to decertify litigation class. Class members appealed.

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Holdings: The Court of Appeals, Sidney R. Thomas, Chief Judge, held that:

district court did not abuse its discretion in certifying the settlement class, despite objector's contention that class representatives were inadequate because their incentive awards were much larger than average settlement payout;

district court did not abuse its discretion in approving claimant-fund-sharing mechanism;

district court's notice of settlement did not violate either class action rule or due process;

district court did not err in approving settlement as fair, reasonable, and adequate, based on consideration of *Churchill* factors;

portion of settlement that would be paid in gift cards to discount retailer was not a "coupon settlement" within meaning of Class Action Fairness Act (CAFA);

district court did not err in calculating attorney fee award as percentage of total settlement fund, including notice and administrative costs;

district court provided adequate notice to class of attorney fee provision; and

district court provided an adequate explanation of its rationale for fee award.

Affirmed.

See, also, 779 F.3d 914, 2015 WL 845842.

Attorneys and Law Firms

***939** Theodore H. Frank (argued), Center for Class Action Fairness, WA, D.C.; Gary Sibley, Dallas, TX; Joseph Darrell Palmer, Law Offices of Darrell Palmer PC, Solana Beach, CA; Christopher A. Bandas, Bandas Law Firm, P.C., Corpus Christi, TX; Christopher V. Langone and Grenville Pridham, Law Office of Christopher Langone, Ithaca, NY; Joshua R. Furman (argued), Joshua R. Furman Law Corp., Los Angeles, CA, for Objector–Appellants Frank, Cope, Cox, Bandas, Sullivan, and Zimmerman.

Todd A. Seaver, (argued), Joseph J. Tabacco, Jr., and Christopher T. Heffelfinger, Berman DeValerio, San Francisco, CA, for Plaintiffs–Appellees.

Appeal from the United States District Court for the Northern District of California, Phyllis J. Hamilton, District Judge, Presiding. D.C. No. 4:09–md–02029–PJH.

Before: SIDNEY R. THOMAS, Chief Judge, STEPHEN REINHARDT, Circuit Judge, and LLOYD D. GEORGE, Senior District Judge. [*]

***940 OPINION**

THOMAS, Chief Judge:

In this appeal, class members challenge the district court's approval of a settlement between Walmart [1] and a class of Netflix DVD subscribers arguing, among other matters, that the gift card portion of the settlement constituted a coupon settlement within the meaning of the Class Action Fairness Act ("CAFA"), Pub.L. No. 109–2, 119 Stat. 4 (2005). We hold that the settlement was fair and that the fee award was proper, and we affirm the district court.

I

Before its focus changed to streaming video, Netflix's primary business was renting DVDs to subscribers online and shipping them out by mail. Other companies, including retail giant Walmart, tried to compete. Netflix reached an agreement with Walmart that divided up DVD-related business between the two companies. Under the agreement, Netflix stopped selling DVDs, and focused solely on its DVD rental business. In return, Walmart wound down its own burgeoning online rental service, but continued to act as a major DVD seller.

In 2009, Andrea Resnick and seven other class representatives ("plaintiffs") filed a consolidated amended class action complaint against Netflix and Walmart, challenging the agreement as anti-competitive. Plaintiffs assert that as a result of the agreement and Walmart's subsequent departure from the rental business, Netflix

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charged its customers unfairly high monthly subscription prices.

The district court granted plaintiffs' motion for certification of a litigation class of Netflix subscribers. The court denied approval of an initial settlement agreement between Walmart and a global class of both Netflix subscribers and subscribers to Blockbuster's online DVD rental service. However, a class of just Netflix subscribers then reached a settlement agreement with Walmart. The court conditionally approved the Netflix settlement class and also gave preliminary approval of the settlement, and the form and plan of notice. The court denied a renewed motion by Netflix to decertify the Netflix litigation class. [2]

In the settlement agreement, Walmart agreed to pay a total amount of $27,250,000, comprising both a "Cash Component" and a "Gift Card Component," in exchange for dismissal with prejudice of all claims asserted in the complaint. The class consists of:

> any person or entity residing in the United States or Puerto Rico that paid a subscription fee to rent DVDs online from Netflix on or after May 19, 2005, up to and including the date the Court grants Preliminary Approval of the Settlement, or some other date to be agreed to by the parties to this Agreement. [3]

The Cash Component funded attorneys' fees and expenses, costs of notice and administration, and incentive payments to class representatives. The amount remaining constituted the Gift Card Component and was used to provide class members ***941** with either gift cards or, if they so chose, the cash equivalent of a gift card. The gift card could only be used at the Walmart website and was freely transferrable, although it could not be resold. To receive payment, a class member was required to submit a claim form. A claimant could submit a claim for a gift card via e-mail, the class action website, or regular mail. A claimant could submit a claim for cash by regular mail only, and had to include the last four digits of his or her Social Security Number. Each claimant received an equal share of the Gift Card Component. In other words, the Gift Card Component (the amount remaining after subtracting attorneys' fees and expenses, notice and administration costs, and incentive payments) was split evenly among all valid claimants, regardless of the specific damages each individual claimant incurred.

Initial e-mail notice of the settlement was provided to some 35 million class members. Notice was mailed to more than 9 million class members whose email addresses were invalid such that the email notice "bounced back." The notice informed class members about the settlement and claims-submission process; stated that class counsel would seek $1.7 million in reimbursement of litigation expenses and fees of 25% of the total settlement fund of $27,250,000 and that Class Representatives would receive $5,000 each in incentive payments; it also set a deadline for filing a claim, leaving the class, or objecting to the settlement of February 14, 2012. The notice encouraged class members to visit the class website for more details. In response to the notice, 1,183,444 claims were submitted. 744,202 requests were for gift cards and 434,253 were for the equivalent value in cash. 722 class members opted out of the class and 30 lodged objections.

The appellants in this consolidated appeal, members of the proposed class, all objected to the settlement. At a March 14, 2012 fairness hearing and in the accompanying March 29, 2012 orders, the court gave final approval to the settlement and settlement class and awarded attorneys' fees. The judge rejected all objections, concluding that not "one objection was sufficient [ ] —singular or in the aggregate—to preclude [her] from approving this settlement." The court determined that CAFA's coupon—settlement provisions should not apply because the Walmart gift cards were sufficiently different from coupons—especially given the fact that claimants could choose between gift cards and cash, the gift cards were freely transferrable, and they had no expiration date.

The court concluded the attorneys' fees were properly calculated as 25% of the settlement fund, including administration and notice costs. It decided the percentage amount was fair, especially given that the alternative lodestar calculation would have resulted in attorneys' fees three times larger than the amount class counsel requested. The court approved attorneys' fees of $6,812,500 (25% of the total fund of $27,250,000), reimbursement of some litigation expenses totaling $1,700,000, incentive awards

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of $5,000 each for nine class representatives (totaling $45,000), and payment of notice and administration costs out of the fund. Administration and notice costs totaled roughly $4.5 million, leaving roughly $14.1 million in the settlement fund for the Gift Card Component. Divided among almost 1.2 million claims, the Gift Card Component will provide claimants with roughly $12 each. [4]

***942** Following the court's approval of the settlement, six objectors, Theodore Frank, Tracey Klinge Cox, Maria Cope, Edmund F. Bandas, John Sullivan, and Jon M. Zimmerman ("Objectors"), timely appealed and their cases were consolidated.

We have jurisdiction under 28 U.S.C. § 1291. We review a district court's decision to approve a class action settlement "for clear abuse of discretion." *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d 935, 940 (9th Cir.2011) (citing *Rodriguez v. W. Publ'g Corp.,* 563 F.3d 948, 963 (9th Cir.2009)). Similarly, we review a court's "award of fees and costs to class counsel, as well as its method of calculation" for abuse of discretion. *Id.* (citing *Lobatz v. U.S. W. Cellular of Cal., Inc.,* 222 F.3d 1142, 1148–49 (9th Cir.2000)). We review a court's "order on class certification for an abuse of discretion," as well. *Parra v. Bashas', Inc.,* 536 F.3d 975, 977 (9th Cir.2008).

II

The district court did not abuse its discretion in certifying the settlement class. In *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 620–21, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), the Supreme Court clarified the difference between certifying a litigation class under Federal Rule of Civil Procedure 23(a) and (b) and certifying a settlement class under Rule 23(e). The Court noted that Rule 23(e) "was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)." *Id.* Thus, just because a settlement appears to be fair, reasonable, and adequate under Rule 23(e) does not mean a class has met the certification requirements of Rule 23(a) and (b). *Id.* at 621, 117 S.Ct. 2231 ("[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rules 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed."). Here, the district court certified the settlement class of Netflix subscribers pursuant to Rules 23(a) and (b)(3).

We have observed that "[e]xamination of potential conflicts of interest has long been an important prerequisite to class certification" and "is especially critical when the a[sic] class settlement is tendered along with a motion for class certification." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir.1998). However, we do not "favor denial of class certification on the basis of speculative conflicts." *Cummings v. Connell,* 316 F.3d 886, 896 (9th Cir.2003). Nor does a district court abuse its discretion when conflicts are trivial. *Abbott v. Lockheed Martin Corp.,* 725 F.3d 803, 813 (7th Cir.2013). "Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement." 1 William B. Rubenstein et al., *Newberg on Class Actions* § 3.58 (5th ed.2011). A conflict is fundamental when it goes to the specific issues in controversy. *Id.*

Cox argues the district court certified a class in violation of Rule 23(a), because the class representatives are not able to adequately represent the class. Relying on *Dewey v. Volkswagen Aktiengesellschaft,* 681 F.3d 170, 187–89 (3d Cir.2012), Cox argues the representatives are not capable of adequately representing the class because the nine class representatives' awards under the settlement, at $5,000 each, are significantly larger than the $12 each unnamed class member will receive. Cox argues that, like in *Dewey,* there is an arbitrary line drawn in this ***943** case between class representatives and all other class members.

However, incentive awards that are intended to compensate class representatives for work undertaken on behalf of a class "are fairly typical in class action cases." *Rodriguez,* 563 F.3d at 958. Incentive payments to class representatives do not, by themselves, create an impermissible conflict between class members and their representatives. *Cobell v. Salazar,* 679 F.3d 909, 922 (D.C.Cir.2012); *White v. Nat'l Football League,* 41 F.3d 402, 408 (8th Cir.1994), *abrogated on other grounds by Amchem Prods. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Rather, "[r]esolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon,* 150 F.3d at 1020. As to

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the latter question, "[t]he relevant inquiry is whether the plaintiffs maintain a sufficient interest in, and nexus with, the class so as to ensure vigorous representation." *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1112 (5th Cir.1978).

Here, as in *Hanlon,* there were no structural differences in the claims of the class representatives and the other class members. *Hanlon,* 150 F.3d at 1021. This case does not involve an *ex ante* incentive agreement between the class representatives and class counsel, which we criticized in *Rodriguez,* 563 F.3d at 958–60. Nor does it involve a settlement which explicitly conditioned the incentive awards on the class representatives' support for the settlement, as was the case in *Radcliffe v. Experian Information Solutions Inc.*, 715 F.3d 1157, 1164 (9th Cir.2013). In this case, as in *Cobell,* the class settlement agreement provided no guarantee that the class representatives would receive incentive payments, leaving that decision to later discretion of the district court. *Cobell,* 679 F.3d at 922. The amount sought and awarded was relatively small, well within the usual norms of "modest compensation" paid to class representatives for services performed in the class action. *Phillips v. Asset Acceptance, LLC,* 736 F.3d 1076, 1080 (7th Cir.2013). Indeed, we approved an identical incentive fee in *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir.2000). Thus, the district court did not abuse its discretion in certifying the settlement class.

Dewey is not to the contrary. The settlement in that case was structured far differently than in this case. *Id.* at 187. The class in Dewey was split up into two groups: a reimbursement group and a residual group. *Id.* All of the class representatives were in the reimbursement group. As a result, the class representatives were apt to favor the reimbursement group's interests over the residual group's, which the court held was an impermissible conflict under Rule 23(a). *Id.* This case involved only one settlement class, with no subclasses. Each class member was entitled to the same distribution, so the class representatives had no incentive to favor one subclass over another. In short, this case does not involve the intra-class structural conflict that concerned the court in *Dewey.* Indeed, read properly, in its extensive discussion of what conflicts are "fundamental," Dewey supports our conclusion that there was no fundamental conflict between the class representatives and class members that would prevent settlement class certification. Therefore, the district court did not abuse its discretion in certifying the settlement class. [5]

***944** III

The district court did not err in approving the settlement. We have previously recognized that settlements in class actions "present unique due process concerns for absent class members," including the risk that class counsel "may collude with the defendants." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 946 (internal quotation marks omitted).

To guard against these dangers, Federal Rule of Civil Procedure 23(e) "requires court approval of all class action settlements, which may be granted only after a fairness hearing and a determination that the settlement taken as a whole is fair, reasonable, and adequate." *Id.* at 946. To assess the fairness of a settlement, we look to the eight *Churchill* factors, including:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and view of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

Id. (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.2004)); *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.1993). [6] "Our review of the district court's decision to approve a class action settlement is extremely limited. It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon,* 150 F.3d at 1026 (internal citation omitted). Keeping this standard in mind, we review Objectors' various challenges

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to the district court's decision to approve the settlement agreement.

A

The district court did not err in using the claimant fund mechanism. Zimmerman argues that because so few class members actually filed claims, the settlement should not have used the claimant fund sharing approach—whereby each class member who submits a claim receives ***945** an equal share of the settlement fund, regardless of the harm he or she suffered. Labeling claimant fund sharing a type of fluid recovery, Zimmerman argues that both state and federal courts disfavor fluid recovery distribution methods, especially when only a small proportion of class members participate. *See Democratic Cent. Comm. of the Dist. of Columbia v. Washington Metro. Area Transit Comm'n,* 84 F.3d 451, 455 n. 2 (D.C.Cir.1996) ("Implementing fluid recovery ... in federal class actions is controversial."); *see also State v. Levi Strauss & Co.,* 41 Cal.3d 460, 476, 224 Cal.Rptr. 605, 715 P.2d 564 (Cal.1986) ("Hence, the advantages of claimant fund sharing can only be realized where a large proportion of class members participate and submit accurate claims.").

The district court did not abuse its discretion in approving this claimant-fund-sharing settlement. First, we are careful not to conflate the concepts of "claimant fund approach" and "fluid recovery." Indeed, we have previously used "fluid recovery" interchangeably with "cy pres" distributions to describe a distribution that confers an indirect benefit on class members. *Lane v. Facebook, Inc.,* 696 F.3d 811, 819 (9th Cir.2012) ("A *cy pres* remedy, sometimes called 'fluid recovery,' is a settlement structure wherein class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment." (internal citation omitted)). The claimant fund approach in this case, however, provides direct compensation to class members.

Zimmerman cites the California Supreme Court, which has called claimant fund sharing one "method[ ] of fluid recovery" and has noted that claimant fund sharing is unique among fluid recovery methods because it provides actual compensatory benefits to class members. *Levi Strauss & Co.,* 41 Cal.3d at 476, 224 Cal.Rptr. 605, 715 P.2d 564 (explaining that claimant fund sharing "uses the entire class recovery to provide monetary compensation to individual class members"). Nevertheless, Zimmerman does not cite any binding or persuasive federal authority for the proposition that claimant fund sharing is prohibited when only a small number of class members file settlement claims. In *Six (6) Mexican Workers v. Arizona Citrus Growers,* we noted that settlements have been approved where less than five percent of class members file claims. 904 F.2d 1301, 1306 (9th Cir.1990).

Moreover, we have employed similar methodology in other cases. *See, e.g., Dennis v. Kellogg Co.,* 697 F.3d 858, 862–63, 868 (9th Cir.2012) (rejecting a settlement because the cy pres portion of the award lacked specificity; another part of the settlement fund was distributed to claimants who submitted claims and not to silent class members). Finally, because this case involves a settlement agreement with a class of plaintiffs who were allegedly harmed by paying excessively high Netflix subscription prices, the concerns we have raised before regarding fluid recovery are not implicated here. *See Six (6) Mexican Workers,* 904 F.2d at 1306 (noting, following a class action antitrust case tried to a judge, that the Second and Ninth Circuit's concerns over fluid recovery involve "the impermissible circumvention of individual proof requirements" rather than the allocation of unclaimed damages). The district court did not abuse its discretion in employing the claimant fund mechanism.

B

The district court's notice of the settlement did not violate either Federal Rule of Civil Procedure 23 or due process. Federal Rule of Civil Procedure 23(e)(1) requires a court to "direct notice [of a proposed ***946** settlement] in a reasonable manner to all [settlement] class members who would be bound by the proposal." Rule 23(e) requires notice that describes "the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Lane,* 696 F.3d at 826 (internal quotation marks omitted). However, Rule 23(e) "does not require detailed analysis of the statutes or causes of action forming the basis for the plaintiff class's claims, and it does not require an estimate of the potential value of those claims." *Id.*

Objectors argue that the notice provided in this settlement to class members violated Rule 23 and class members' due process rights. *See Mendoza v. Tucson School Dist. No. 1,*

623 F.2d 1338, 1350–51 (9th Cir.1980) ("Although [Rule 23(e)] accords a wide discretion to the District Court as to the form and content of the notice, due process requires its presence and constitutional adequacy."). We review "de novo whether notice of a proposed settlement satisfies due process." *Torrisi,* 8 F.3d at 1374.

Cope and Bandas argue that the notice was deficient for failing to provide an estimate as to how much of an award each claimant would receive, not disclosing what cost an average claimant had incurred due to the anti-competitive conduct at issue, neglecting to state the fact that administration costs would be deducted from the settlement fund, and not revealing that, according to Cope and Bandas, state class attorneys could claim fees from the settlement fund that would further reduce the amount available to class members and drive the attorneys' fees request over 25%. Sullivan contends that the dual notice provided to class members—including both information regarding the ongoing Netflix litigation and the settlement with Walmart—was misleading and constitutionally and statutorily deficient.

The notice provided in this settlement, in both mail and email form, was sufficient under the Constitution and Rule 23(e). First, none of the cases Objectors cite require the level of specificity they claim is needed. Indeed, as we made clear in *Lane,*Rule 23(e) requires sufficient detail simply "to alert those with adverse viewpoints to investigate and to come forward and be heard." *Lane,* 696 F.3d at 826 (internal quotation marks omitted); *see also Rodriguez,* 563 F.3d at 962 (holding that a notice contained "adequate information" when it did not exaggerate class representative support for the settlement and described "the aggregate amount of the settlement fund and the plan for allocation"). Here, the notice meets the requirements articulated in *Lane* and *Rodriguez.* The email notice provides simple and straightforward information about the class action, about the status of the cases against both Netflix and Walmart, about what action class members may take in either case, and about the uncertain nature of the Netflix litigation and the need to check the website for more detail. Most importantly, the notice states the amount of the settlement fund with Walmart, the amount class counsel will seek in fees, litigation expenses, and incentive awards, the fact that class counsel will seek payment for other costs from the fund, the fact that class members will need to submit a claim to obtain relief, an internet link and phone number to obtain a claim form, and the deadline for objecting or submitting a claim. The mail form is substantially the same. The e-mail and mail notices, which did not need to and could not provide an exact forecast of how much each class member would receive, gave class members enough information so that those with "adverse viewpoints" could investigate and "come forward and be heard." *Lane,* 696 F.3d at 826.

***947** To the extent Cope and Bandas argue the notice fails to inform class members of the possibility that state class counsel will request attorneys' fees, in addition to the 25% in the fee request in this case, the district court was within its discretion to reject that argument. Paragraph 13.2 of the Settlement Agreement clarifies that state attorneys' fees and other costs will come from the fees requested pursuant to Paragraph 6.1.1.1. And, pursuant to Paragraph 6.1.1.1, class counsel requested attorneys' fees totaling 25% of the settlement fund. Class counsel made clear at the fairness hearing that any fee request from state class counsel would come from the fee award granted in this case. The court did not abuse its discretion in interpreting Paragraph 13.2 as class counsel recommended.

Finally, we disagree with Sullivan that notice was deficient because class members received information about both the Netflix and Walmart cases in one notice and because the e-mail did not include information about the district court's decision to grant summary judgment for the defendant in the Netflix case. While it is true that the initial e-mail notice came out shortly before the summary judgment decision but did not forecast it, the notice sent by regular mail was promptly updated, and the website was too. The notice in this case was not perfect, but the court did not abuse its discretion in approving the notice plan and ultimately approving the settlement.

C

The district court did not err in approving the settlement as fair, reasonable, and adequate. As noted above, we consider the eight *Churchill* factors when assessing whether a settlement is fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e). *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 946. Cox points to specific provisions in the agreement to argue that the settlement was not fair, reasonable, and

adequate, and she contends that the district court failed to adequately explain its decision. We consider each argument in turn.

1

Cox argues the incentive awards in this case—$5,000 for each of nine class representatives—were unreasonably large and thus unfair. Cox cites to *Staton v. Boeing, Co.,* 327 F.3d 938 (9th Cir.2003), with the $12 each claimant will receive. But *Staton* does not support her argument. In *Staton,* we reversed in part due to incentive awards that averaged $30,000 for 29 class representatives, totaling $890,000. *Staton,* 327 F.3d at 976–77. Thus, the average incentive award was 30 times the $1000 that unnamed class members received. *Id.* at 948–49, 976–77. More importantly, the incentive payments as a whole made up roughly 6% of the total settlement (estimated, on the large end, to be $14.8 million). *Id.* In contrasting the *Staton* facts with other cases and reversing because the *Staton* incentive awards were too large, we looked to "the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." *Id.* at 977. In this case, nine class representatives receive $5,000, totaling $45,000, while unnamed class members receive $12. While it is true that a $5,000 incentive award is roughly 417 times larger than the $12 individual award, we focused less on that fact in *Staton* and more on the number of class representatives, the average incentive award amount, and the proportion of the total settlement that is spent on incentive awards. *Id.* at 977. Here, incentive awards are $5,000, an amount we said was reasonable in *Staton. Id.* at 976–77. $5,000 is considerably less than the average ***948** of $30,000 in *Staton.* There are nine class representatives, compared with the 29 in *Staton. Id.* Finally, the $45,000 in incentive awards makes up a mere .17% of the total settlement fund of $27,250,000, which is far less than the 6% of the settlement fund in *Staton* that went to incentive awards. *Id.* at 948–49, 976–77. Thus, under *Staton,* the district court did not abuse its discretion in approving the settlement awards, especially considering its conclusion that the litigation was "complicated" and took up quite a bit of the class representatives' time. Further, as we noted previously, we approved an identical incentive fee in *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d at 463.

2

Cox also argues that two provisions in the settlement agreement, a reverter provision that she alleges allows Walmart to keep excess settlement funds and a confidential opt-out provision that allows Walmart to leave the settlement agreement at any time, make the agreement unfair. We disagree. One clause of the reverter provision, Paragraph 11.1.1, applies only if the settlement is not approved, so any argument regarding that clause is moot. The other relevant clause, Paragraph 11.1.4, allows a return of funds to Walmart only if "Wal–Mart has transferred monies in excess of the amount needed to pay" all costs and claims under the settlement. The district court did not abuse its discretion in deciding that these provisions do not allow for any improper reversion of allocated settlement funds to Walmart. The opt-out provision, Paragraph 9.4, allows Walmart to opt out if a certain percentage of class members opt out of the settlement.[7] Only the exact threshold, for practical reasons, was kept confidential. And because the court has granted final approval of the settlement, that threshold necessarily has not been met and the court therefore did not abuse its discretion in holding this issue was moot.

3

Finally, Cox argues the court abused its discretion by failing to fully explain its decision under the *Churchill* factors. Cox cites *Linney v. Cellular Alaska Partnership,* 151 F.3d 1234, 1242–43 (9th Cir.1998) for the proposition that the district court needed to provide a detailed explanation of its decision to approve the settlement, along with a response to objections, in a written order. Cox misreads *Linney.* In that case, we stated instead that a court needs to provide a reasoned explanation, along with a response to objections, either in an order or somewhere else in the record. *Linney,* 151 F.3d at 1242–43. Moreover, it is important to remember that our review of a fairness determination is " 'extremely limited,' and we will set aside that determination only upon a 'strong showing that the district court's decision was a clear abuse of discretion.' " *Lane,* 696 F.3d at 818 (quoting *Hanlon,* 150 F.3d at 1026–27).

Here, the district court did not abuse its discretion. At the March 14, 2012 hearing, the judge considered many of the

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objections to the settlement and explained her decision to reject each of them. The record reflects that she considered the *Churchill* factors, most importantly the class's chance of success if it continued to pursue litigation. Given her decision in the corresponding Netflix case and the length and complexity of the case thus far, she reasoned that the settlement was fair ***949** in large part because it would provide class members with their only chance at relief. In her March 29, 2012 written order, she provided additional reasoning, explaining that the settlement was in the public interest and followed vigorous arm's length negotiation between both sides of the litigation. She also listed the *Churchill* factors, noting briefly that she had considered each, as is reflected in the record. Between the order and the fairness hearing, the court provided sufficient explanation for its decision and did not abuse its considerable discretion in approving a settlement. *See Lane,* 696 F.3d at 818.

IV

The district court did not err in approving the fee award. Plaintiffs' class counsel asked for attorneys' fees in the amount of 25% of the overall settlement fund of $27,250,000 and the district court granted class counsels' request. In awarding attorneys' fees under Federal Rule of Civil Procedure 23(h), "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable." *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 941. In this circuit, there are two primary methods to calculate attorneys fees: the lodestar method and the percentage-of-recovery method. *Id.* at 941–42. Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in this circuit, the benchmark percentage is 25%. *Id.* at 942. The lodestar method requires "multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Id.* at 941.

While a district court has discretion in calculating fees, or approving a fee request, we have held that a district court "abuses that discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward."*In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d 988, 992 (9th Cir.2010) (internal quotation marks omitted). One way that a court may demonstrate that its use of a particular method or the amount awarded is reasonable is by conducting a cross-check using the other method. For example, a crosscheck using the lodestar method "can 'confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate.' " *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 945 (quoting *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 821 n. 40 (3d Cir.1995)).

A

We first consider the argument, advanced by several objectors, that the attorneys' fee award must comply with provisions of CAFA governing "coupon settlements." We conclude the district court properly decided that the portion of the settlement that will be paid in Walmart gift cards was not a "coupon settlement" within the meaning of CAFA. CAFA directs courts to apply heightened scrutiny to coupon settlements. 28 U.S.C. § 1712(e); *see also In re HP Inkjet Printer Litig.,* 716 F.3d 1173, 1178 (9th Cir.2013) (citing *Synfuel Tech., Inc. v. DHL Express (USA), Inc.,* 463 F.3d 646, 654 (7th Cir.2006) ("[W]e note that in that statute Congress required heightened judicial scrutiny of coupon-based settlements....")). Objectors' primary reason for raising CAFA is Section 1712's requirement that "the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." 28 U.S.C. § 1712(a). In other words, Objectors contend that the Walmart gift cards are coupons and fall under CAFA and, as a result, ***950** the district court erred by calculating the fee award as a percentage of the overall settlement fund, including the total dollar value of the gift cards, instead of calculating the portion of the fee award based on the gift cards as a percentage of the gift cards that were actually redeemed.

The district court correctly held that the Walmart gift cards in this settlement do not constitute a coupon settlement that falls under the umbrella of CAFA.[8] In construing a statute, we first determine whether the statutory language is plain and unambiguous, examining not only the text, but "the structure of the statute as a whole, including its object and policy." *Children's Hosp. & Health Ctr. v. Belshe,* 188 F.3d 1090, 1096 (9th Cir.1999). If the plain language is unambiguous, our inquiry is at an

end. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877–78 (9th Cir.2001) (en banc).

Because Congress does not define the ambiguous term "coupon" within the statute, *see*28 U.S.C. § 1711; *see also In re EasySaver Rewards Litig.*, 921 F.Supp.2d 1040, 1047 (S.D.Cal.2013) ("[CAFA] does not define what constitutes a 'coupon.' "), "we may 'look to other interpretive tools, including the legislative history' in order to determine the statute's best meaning." *In re HP Inkjet Printer Litig.*, 716 F.3d at 1181 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005)). CAFA's legislative history, along with the decisions of district courts that have considered the issue, convince us that these gift cards are not coupons.

In CAFA's findings and purposes, Congress emphasized its concern about settlements when class members receive little or no value, including settlements in which "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." Class Action Fairness Act of 2005, Pub.L. No. 109–2, § 2, 119 Stat. 4 (2005). The Senate Judiciary Committee's Report offers more detail, stating that congressional hearings have exposed class action settlements in which "class members receive nothing more than promotional coupons to purchase more products from the defendants." S.Rep. No. 109–14, at 15 (2005), 2005 U.S.C.C.A.N. 3, 16. The report goes on to give twenty-nine examples of problematic coupon settlements. *Id.* at 15–20. The report cites and criticizes coupon settlement awards that provide class members with "$30 to $40 discounts" on a future cruise, "a $5 to $10 voucher good for future purchases of particular computer hardware or software products", "$1 off every subsequent $5 purchase" at a chain of restaurants, "a 30 percent discount on selected products" during a one-week time period, $55 to use on a purchase of a new crib from a defendant crib producer accused of making defective cribs, "$1.25 off a $25 dollar [video] game", and so on. *Id.* at 15–17.

The Walmart–Netflix settlement differs from the settlements that drew the attention of Congress. Affording over 1 million class members $12 in cash or $12 to spend at a low-priced retailer does not leave them with "little or no value." The district court did not err when it stated simply that "$12, while not a lot of money these days even at Wal–Mart, is $12." Moreover, this case is distinguishable from every single coupon-settlement example in the Senate report. The report focuses on ***951** settlements that involve a discount—frequently a small one—on class members' purchases from the settling defendant. S.Rep. No. 109–14, at 15–20; *see also True v. Am. Honda Motor Co.*, 749 F.Supp.2d 1052, 1069 (C.D.Cal.2010) (stating that $500 or $1000 rebates off the purchase of a new Honda or Acura vehicle are coupons and quoting *Fleury v. Richemont North America, Inc.*, No. C–05–4525 EMC, 2008 WL 3287154, at *2 (N.D.Cal. Aug. 6, 2008) for the proposition that coupons offer only " 'a discount on another product or service offered by the defendant in the lawsuit' "). These discounts require class members to hand over more of their own money before they can take advantage of the coupon, and they often are only valid for select products or services. The gift cards in this case are different. Instead of merely offering class members the chance to receive a percentage discount on a purchase of a specific item or set of items at Walmart, the settlement gives class members $12 to spend on any item carried on the website of a giant, low-cost retailer. The class member need not spend any of his or her own money and can choose from a large number of potential items to purchase. Even if the gift card is only worth $12, it gives class members considerably more flexibility than any of the coupon settlements listed in the Senate report.

District courts that have considered the issue have not classified gift cards as coupon settlements falling under CAFA. *See Reibstein v. Rite Aid Corp.*, 761 F.Supp.2d 241, 255–56 (E.D.Pa.2011) (holding that $20 Rite Aid gift cards with "actual cash value," that will be mailed to "(mostly) regular customers, have no expiration date, are freely transferrable, and can be used for literally thousands of products for which ordinary consumers ... have need", are "more like 'cash' than 'coupons' ")[9]; *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06–04149, 2008 WL 8150856, at *2, *4–16 (C.D.Cal. Jul. 21, 2008) (approving a settlement and attorneys' fees award, outside the strictures of CAFA, that provides class members with gift cards to Victoria's Secret); *Petersen v. Lowe's HIW, Inc.*, Nos. C 11–01996 RS, C 11–03231 RS, C 11–02193 RS (N.D.Cal. Aug. 24, 2012) (approving a settlement and attorneys' fees award, outside the strictures of CAFA, that provides class members with $9 gift cards to Lowe's); *see also In re Bisphenol–A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, MDL No. 1967, Master Case No. 08–1967, 2011 WL 1790603, at *2–4 (W.D.Mo.2011) (holding that a settlement that provides class members with vouchers to obtain new products was

not a coupon settlement because the vouchers do not require class members to spend their own money and do not require class members to purchase the same or similar products as those that gave rise to the litigation). Similar to the gift cards in these cases, the Walmart gift cards can be used for any products on walmart.com, are freely transferrable (though they cannot be resold on a secondary market) and do not expire, and do not require consumers to spend their own money.

Our conclusion that the settlement does not constitute a "coupon settlement" within ***952** the meaning of CAFA does not conflict with the Seventh Circuit's decision in *Synfuel Technologies, Inc.,* 463 F.3d at 654, as Frank suggests. The pre-paid shipping envelopes in *Synfuel* are different than the Walmart gift cards. Unlike a pre-paid shipping envelope, a gift card to walmart.com does not simply offer class members one type of complete product. It offers them a set amount of money to use on their choice of a large number of products from a large retailer. Like the gift cards to Rite Aid in *Reibstein,* part of what separates a Walmart gift card from a coupon is not merely the ability to purchase an entire product as opposed to simply reducing the purchase price, but also the ability to purchase one of many different types of products. That distinction also separates these gift cards from the e-credits we deemed coupons in *In re HP Inkjet Printer Litig.,* 716 F.3d at 1176 (labeling e-credits, which could be used to obtain Hewlett–Packard "printers and printer supplies," coupons).

Frank also argues that failing to apply CAFA to these gift cards will "eviscerate the Class Action Fairness Act," because settlements will be able to avoid CAFA merely by labeling their coupons as gift cards. Our holding will have no such effect. First, gift cards are a fundamentally distinct concept in American life from coupons. *Cf.*15 U.S.C. § 1693*l*–1 (regulating gift cards, under the 1978 Electronic Fund Transfer Act and the Credit Card Accountability Responsibility and Disclosure Act of 2009, as an electronic form of cash (i.e., similar to credit or debit cards)). District courts are more than capable of ferreting out the deceitful coupon settlement that merely co-opts the term "gift card" to avoid CAFA's requirements. Second, our holding is limited. We conclude only that the gift cards in this case are not subject to CAFA, without making a broader pronouncement about every type of gift card that might appear.

Finally, Frank raises the concerns that these gift cards will not disgorge Walmart of ill-gotten gains and will force class members to buy from the defendant in their class action. But, giving thousands of consumers the ability to purchase $12 in goods from the Walmart website for free will not be insignificant to the retailer. Moreover, this case does not present the same problems as one like *Young v. Polo Retail, LLC,* in which the class members were former Polo Retail employees who complained about being forced to purchase Polo clothing and were then given Polo Retail gift cards. No. C–02–4546, 2006 WL 3050861, at *3–5 (N.D.Cal.2006) ("[W]hy would former employees, who allegedly were forced to buy a great deal of unwanted Polo products, desire product vouchers so that they could purchase even more clothes?"). Here, class members are suing due to an online-DVD rental agreement between Walmart and Netflix. Since Walmart sells many products beyond DVDs, class members have less reason to be wary of a gift card to the defendant retailer than did the plaintiffs in *Young.* Moreover, the claimants in this case had the option of obtaining cash instead of a gift card, undercutting the argument that the settlement forces them to buy from the defendant. In sum, we hold that the Walmart gift cards in this case are not coupons that fall under the umbrella of CAFA.[10] The district court did not err in failing to apply CAFA to this case.[11]

***953** B

The district court did not err in calculating the attorneys' fees award by calculating it as a percentage of the total settlement fund, including notice and administrative costs, and litigation expenses. Frank argues the $4.5 million in notice and administrative costs, which facilitate alerting class members to the settlement and processing claims submitted by class members, do not inure to the benefit of the class. *See In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 942 (noting that a percentage-of-recovery fee award is calculated by taking a percentage of the "common fund for the *benefit of the entire class* " (emphasis added)). He argues the district court's mode of calculation fails to encourage class counsel to reduce notice and administrative costs. He also contends that by basing the fee award on the entire common fund, some of class counsels' fees are simply a percentage of their litigation expenses award—thus their work is being "double-count[ed]."

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The district court did not abuse its discretion in calculating the fee award as a percentage of the total settlement fund, including notice and administrative costs, and litigation expenses. We have repeatedly held "that the reasonableness of attorneys' fees is not measured by the choice of the denominator." *Powers v. Eichen,* 229 F.3d 1249, 1258 (9th Cir.2000) (rejecting an objector's argument that a fee award in a securities settlement should be based on "net recovery," which does not include "expert fees, litigation costs, and other expenses"); *see also Staton,* 327 F.3d at 974–75 ("The district court also did not abuse its discretion by including the cost of providing notice to the class ... as part of its putative fund valuation.... We have said that 'the choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable.' " (quoting *Powers,* 229 F.3d at 1258)). Here, the district court concluded that class counsels' fee request, which applied the 25% benchmark percentage to the entire common fund, was reasonable. Indeed, the court explicitly explained how administrative costs in particular make it possible to distribute a settlement award "in a meaningful and significant way." Similarly, notice costs allow class members to learn about a settlement and litigation expenses make the entire action possible. Thus, the court acted within its discretion under this court's precedent in *Powers* and *Staton.* [12]

***954** C

The district court provided adequate notice to the class of the attorneys' fee petition. Federal Rule of Civil Procedure 23(h)(1) requires a claim for attorneys' fees to be made by motion under Rule 54(d)(2) and for "[n]otice of the motion [to] be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." *In re Mercury Interactive Corp. Securities Litigation,* 618 F.3d at 993–95, analyzed the rule and rejected as insufficient Rule 23(h) notice when the motion for attorneys' fees was due after the deadline for class members to object to the attorneys' fees motion. In other words, even though class counsel had provided preliminary notice of the total amount they would seek in fees, they had not provided class members with "an adequate opportunity to object to the motion itself because, by the time they were served with the motion, the time within which they were required to file their objections had already expired." *Id.* at 994.

Citing *In re Mercury,* Objectors argue that class counsel here failed to provide adequate notice of their attorneys' fee petition to class members under Rule 23(h). [13] *See In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d at 993–94 ("The plain text of [Rule 23(h)] requires that any class member be allowed an opportunity to object to the fee 'motion' itself, not merely the preliminary notice that such a motion will be filed."). Objectors argue that by stating in the email and mail notices only that class counsel would seek attorneys' fees in the amount of 25% of the common fund, class counsel did not provide the "[n]otice of the motion" required by Rule 23(h).

The district court did not abuse its discretion in its approval of the attorneys' fees request. Here, the notice e-mailed and mailed to class members informed them that class counsel would be seeking fees in the amount of 25% of the total settlement fund of $27,250,000. The notice also gave class members a clear deadline of Feb. 14, 2012 for filing an objection. The district court set the deadline for filing a fee motion fifteen days before the deadline for filing an objection. Indeed, the motion was filed on January 30, 2012, and the objection deadline was February 14, 2012. This schedule satisfies the requirements of *In re Mercury.*

D

The district court provided an adequate explanation of its rationale. In *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1047–50 (9th Cir.2002), we listed several factors courts may consider in assessing a request for attorneys' fees that was calculated using the percentage-of-recovery method. These factors include the extent to which class counsel "achieved exceptional results for the class," whether the case ***955** was risky for class counsel, whether counsel's performance "generated benefits beyond the cash settlement fund," the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis. [14] *See id.* at 1048–50 (internal quotation marks omitted). In addition, a court may cross-check its percentage-of-recovery figure against a lodestar calculation. *Id.* at 1050.

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Sullivan argues the district court failed to adequately explain its attorneys' fee award, and that the case should be remanded for the court to apply the list of six factors he gleaned from *Craft v. County of San Bernardino,* 624 F.Supp.2d 1113, 1116–17 (C.D.Cal.2008). [15] While there are no doubt many factors that a court could apply in assessing an attorneys' fees award and while *Vizcaino* does not purport to establish an exhaustive list, we conclude the district court did not abuse its discretion in its analysis, explanation, and approval of class counsels' request for attorneys' fees.

First, class counsel requested, and the court awarded, the 25% benchmark award only. While the benchmark is not per se valid, it is a helpful "starting point." *Vizcaino,* 290 F.3d at 1048. Second, the court did compare the benchmark to the summary lodestar numbers provided by class counsel and concluded those lodestar estimates were three times the benchmark. The district judge noted that while she frequently reduces a lodestar request, she has never reduced one by half. Thus, where, as here, the lodestar amount was *three times* the benchmark, it was not an abuse of discretion for the district court to accept the benchmark using a quick cross-check of class counsel's lodestar summary figures. Third, the judge did provide a reasoned explanation for her decision to approve the fee request, both in her order and in an oral ruling. The judge addressed many of Objectors' arguments, summarized her lodestar cross-check, and, applying a number of the *Vizcaino* factors, correctly noted that class counsel risked great time and effort and advanced significant costs on behalf of the class action. Thus, the court did not abuse its discretion in the explanation of its decision to approve the attorneys' fees award. [16]

***956** V

In sum, we affirm the district court's decision to approve the settlement between the class of Netflix subscribers and Walmart, to certify the settlement class, and to grant class counsels' motion for attorneys' fees.

AFFIRMED.

All Citations

779 F.3d 934, 2015-1 Trade Cases P 79,083, 15 Cal. Daily Op. Serv. 1987, 2015 Daily Journal D.A.R. 2322

Footnotes

* The Honorable Lloyd D. George, Senior District Judge for the U.S. District Court for the District of Nevada, sitting by designation.

1 For ease of reference, "Wal–Mart Stores, Inc." and "walmart.com USA LLC" shall be collectively referred to as "Walmart" throughout this opinion.

2 Netflix had alleged that Plaintiffs' lead counsel, Robert G. Abrams, had a conflict of interest because he had moved to a new firm, Baker & Hostetler, LLP, that represents Walmart on other, unrelated matters.

3 The court chose an ending date for the class (i.e., a person who subscribes to Netflix after the ending date is not a class member) of September 2, 2011.

4 Prior to final approval of the Walmart settlement, but after preliminary approval and after the initial notice was e-mailed to class members, the court granted Netflix's motion for summary judgment on November 23, 2011. The settlement website was updated to reflect the court's decision to grant Netflix's summary judgment motion. The version of the notice that was subsequently mailed to class members who did not receive an email was also updated.

5 Incorporating Frank's arguments regarding the attorneys' fees in this case, Cox also claims class counsel "over-inflated their own fee award at the expense of unnamed class members," thereby creating a conflict of interest that bars certification. Because we reject Frank's arguments that the attorneys' fees in this case are unreasonable or over-inflated, *infra,* we also reject Cox's arguments that their fee request presents a conflict of interest.

6 Settlements in which the settlement agreement is negotiated *prior* to formal class certification require "an even higher level of scrutiny." *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 946. Here, the court gave preliminary certification of the *settlement class* after the settlement agreement had been reached, and final approval did not occur until the court's March 29, 2012 order. Unlike in *In re Bluetooth,* however, the court did certify a Netflix litigation class in the action against both Netflix and Walmart before a settlement was reached. *See In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 939 (noting that "before any motion was made to certify a class for merits purposes," the parties reached a settlement

agreement); *see also*William B. Rubenstein, *Newberg on Class Actions* § 11:27 (4th ed. 2002) ("The Manual [of Complex Litigation] also notes that approval under Rule 23(e) of settlements involving settlement classes, however, requires closer judicial scrutiny than approval of settlements where class certification has been litigated."). The litigation and settlement classes in this case are substantially the same. Thus, since the district court did not apply any heightened scrutiny, and since the parties have not raised this issue on appeal, we assume, without deciding, that the heightened scrutiny in *In re Bluetooth* does not apply here. *See Rodriguez,* 563 F.3d at 963–64 (applying the eight *Churchill* factors, but not heightened scrutiny, in a case in which settlement negotiations came after certification of a litigation class but before certification of a settlement class).

7 Class counsel argues Cox waived this argument by not raising it below. Since the district court did rule on it, however, we consider it on appeal. *United States v. Northrop Corp.,* 59 F.3d 953, 957 n. 2 (9th Cir.1995).

8 Frank argues that the issue of whether CAFA applies to the gift card portion of the settlement is an issue of statutory interpretation that should be reviewed de novo. *Bush v. Cheaptickets, Inc.,* 425 F.3d 683, 686 (9th Cir.2005) ("As we consider CAFA's requirements, we may review the construction, interpretation, or applicability of a statute de novo."). Even under de novo review, we hold that CAFA does not apply.

9 Frank attempts to distinguish Reibstein from this case by arguing the gift cards in Reibsten, unlike in this case, " 'have actual cash value' and 'are freely transferrable.' " However, the Reibstein gift cards are not significantly different than in this case. The Reibstein court clarifies, elsewhere in the decision, that the Rite Aid gift cards are " 'not redeemable for cash' " and simply that they are "freely transferrable." *Reibstein,* 761 F.Supp.2d at 246. Similarly, the gift cards in this settlement agreement are "fully transferrable," though they cannot be resold. Both appear to be equally freely transferrable and, to the extent they have cash value, it is because they are equal to a certain dollar amount and can be spent on a variety of useful goods.

10 Because we reject Objectors' argument that this settlement should fall under CAFA, we also reject Objectors' argument that the case should be remanded for the district court to analyze the settlement itself under the heightened scrutiny required by CAFA.

11 Pointing to empirical studies, Zimmerman also argues gift cards are generally not worth their face value. He raises this point, however, in the context of arguing the gift cards in this case are coupons. Since we have held that CAFA does not apply to this settlement, we need not consider this argument. Nevertheless, courts still have an obligation to review a settlement carefully, whether CAFA applies or not. Fed.R.Civ.P. 23(e)(2). Indeed, some district courts have valued gift cards, in settlements, at less than their dollar value. *Fernandez,* 2008 WL 8150856 at *10–11 (valuing Victoria's Secret gift cards at 85% of their face value and thus valuing the $10 million gift card settlement fund at $8.5 million "for [the] purposes of evaluating counsel's fee request"). Even if we construed Zimmerman's argument to mean he seeks a remand regardless of whether CAFA applies, we still would conclude the court did not abuse its discretion in valuing the Walmart gift cards at 100% of their face value. Although the court did not explicitly consider on the record whether the gift cards might be worth less than face value, the court did note that the "vast majority" of class members elected to obtain gift cards, concluding this settlement was similar to an all-cash settlement. Moreover, unlike the gift cards in *Fernandez* or the vouchers in *Young,* these gift cards provide class members with the ability to purchase a wide variety of items. Thus, the court was within its discretion to value the gift cards at 100% of their face value.

12 Sullivan briefly argues that some of the litigation expenses are not properly reimbursable, because they relate to the related litigation against Netflix. We disagree and hold that the district court did not abuse its discretion in approving class counsel's request for $1.7 million in litigation expenses. The court oversaw both the Walmart settlement and the litigation against Netflix and interacted with attorneys on both sides. It was within its discretion to accept class counsels' contentions that the expenses requested were "only approximately half the expenditures by Class Counsel" on the litigation and that certain experts were needed in the Walmart litigation to help push the company toward settlement.

13 Sullivan contends that because class counsels' notice regarding the settlement, including the notice of the attorneys' fee request, violates due process, the court should review the issue de novo. *See Torrisi,* 8 F.3d at 1374 ("We review de novo whether notice of a proposed settlement satisfies due process."). Sullivan's argument, however, focuses on whether the notice of the attorneys' fees request violates Rule 23(h). Thus, we review this argument for abuse of discretion. *In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d at 993 (reviewing a challenge under Rule 23(h) to notice of an attorneys' fee motion under the abuse of discretion standard).

14 Although the Supreme Court in *City of Burlington v. Dague,* 505 U.S. 557, 566, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) rejected using a case's contingency status for "the determination of a reasonable fee," it did so in the context of using a lodestar method to calculate the fee. *See In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 942 n. 7 (noting, in a discussion of the lodestar calculation method, that the Supreme Court had rejected the "contingency" factor that this court

established in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir.1975)). Thus, the *Vizcaino* court, in analyzing a percentage-of-recovery fee request, appropriately noted that class counsel had litigated the action on contingency for eleven years. *Vizcaino,* 290 F.3d at 1050.

15 In addition to arguing for remand, Sullivan also argues that "six 'special circumstances' justify (and mandate) an award of less than the 'benchmark' " in this case. These special circumstances include undisclosed conflicts of interest on the part of class counsel, the lack of risk and low level of skill needed to litigate the Netflix and Walmart cases, and the "partial" nature of the settlement. Because it appears these "circumstances" are what Sullivan believes the district court should properly apply on remand to reduce the attorneys' fees award, and because we hold that the district court did not abuse its discretion in approving the fee award or in its explanation of that decision, we do not address each of these "special circumstances" individually.

16 Cope and Bandas also argue that the district court failed to properly respond to their argument that class counsels' fee petition was substantively insufficient. We conclude, however, that the district court did provide a reasoned explanation. Moreover, Cope and Bandas's citation to *In re Bluetooth,* which involves a lodestar fee request, does not support its contention that class counsel's fee motion was insufficiently detailed.

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Major Checkpoints

- ❑ ***Will notice effectively reach the class?***
  The percentage of the class that will be exposed to a notice based on a proposed notice plan can always be calculated by experts. A high percentage (e.g., between 70–95%) can often reasonably be reached by a notice campaign.
- ❑ ***Will the notices come to the attention of the class?***
  Notices should be designed using page-layout techniques (e.g., headlines) to command class members' attention when the notices arrive in the mail or appear on the Internet or in printed media.
- ❑ ***Are the notices informative and easy to understand?***
  Notices should carry all of the information required by Rule 23 and should be written in clear, concise, easily understood language.
- ❑ ***Are all of the rights and options easy to act upon?***
  There should be no unnecessary hurdles that make it difficult for class members to exercise their rights to opt out, object, submit a claim, or make an appearance.

Before Certification/Preliminary Settlement Approval

- ❑ ***Can any manageability problems from notice issues be overcome?***
  Consider potential problems in reaching and communicating with class members—e.g., language barriers, class size, geographic scope—and whether a notice plan will be able to overcome such problems.
- ❑ ***Can a high percentage of the proposed class be reached (i.e., exposed to a notice)?***
  Consider the breakdown of known and unknown class members, the age of any mailing lists, and the parties' willingness to spend necessary funds to fully reach the class.
- ❑ ***Is it economically viable to adequately notify the class?***
  If the cost to reach and inform a high percentage of the class is not justified by a proposed settlement, an opt-out class may not be appropriate. Inability to support proper notice may also be evidence that the settlement is weak.
- ❑ ***Will unknown class members understand that they are included?***
  If a well-written notice will leave class members in doubt as to whether they are included, consider whether the class definition, or the class certification, is appropriate.

Upon Certification/Preliminary Settlement Approval

- ❑ ***Do you have a "best practicable" notice plan from a qualified professional?***
  A proper notice plan should spell out how notice will be accomplished, and why the proposed methods were selected. If individual notice will not be used to reach everyone, be careful to obtain a first-hand detailed report explaining why not. See "Notice Plan" section below.

- ❑ ***Do you have unbiased evidence supporting the plan's adequacy?***
  Be careful if the notice plan was developed by a vendor who submitted a low bid and might have incentives to cut corners or cover up any gaps in the notice program. In order to find the "best practicable" notice as Rule 23 requires, your own expert report may be advisable. This is especially true in the diminished adversarial posture in which settlement places the parties. It is also true at preliminary approval, before outsiders are aware of the proposed notice plan, which itself may limit the parties' awareness, in turn impacting your final approval decision.
- ❑ ***Have plain language forms of notice been created?***
  Draft forms of the notices should be developed, in the shape, size, and form in which they will actually be disseminated, for your approval before authorizing notice to the class. See "Notice Documents" below.
- ❑ ***Will a qualified firm disseminate notice and administer response handling?***
  There are many experienced firms that compete for administration of notice dissemination and claims and response handling. Appointing a qualified firm is important because errors may require re-notification, drain funds, delay the process, and threaten recognition of your final judgment.

Notice Plan

- ❑ ***Is the notice plan conducive to reaching the demographics of the class?***
  The notice plan should include an analysis of the makeup of the class. There may be more women than men; it may skew older; it may be less educated than average. Each audience can be matched with the most efficient and effective methods of notice for reaching those people.
- ❑ ***Is the geographic coverage of the notice plan sufficient?***
  Notice for a class action should take steps to reach people wherever they may be located, and also take into account where most class members reside.
  - ❍ ***Is the coverage broad and fair? Does the plan account for mobility?***
    Class members choose to live in small towns as well as large cities. Be careful with notice exclusively targeted to large metropolitan newspapers. Class members move frequently (14–17% per year according to the U.S. Census Bureau), so purchasers in one state may now reside in another.
  - ❍ ***Is there an extra effort where the class is highly concentrated?***
    Evidence may show that a very large portion of class members reside in a certain state or region, and notice can be focused there, while providing effective, but not as strong, notice elsewhere.
- ❑ ***Does the plan include individual notice?***
  If names and addresses are reasonably identifiable, Rule 23(c)(2) requires individual notice. Be careful to look closely at assertions that mailings are not feasible.
  - ❍ ***Did you receive reliable information on whether and how much individual notice can be given?***
    Consider an expert review of the information you have been provided regarding the parties' ability to give individual notice. The parties may have agreed to submit a plan that does not provide sufficient individual notice in spite of the rule.

- ***Will the parties search for and use all names and addresses they have in their files?***
  If the parties suggest that mailings are impracticable, look to distinguish between truly unreasonable searches (e.g., the defendant has nuggets of data that could be matched with third-party lists by a new computer program and several man-years) and situations where a search would be difficult but not unreasonably burdensome (e.g., lists reside directly in the defendant's records but are outdated or expensive to mail to because of the volume). Rule 23 generally requires the latter.
- ***Will outdated addresses be updated before mailing?***
  The plan should detail steps to update addresses before mailing, including postal service change-of-address records, and third-party address databases if the list is very old. Watch out for potentially ineffective "last known address" mailings.
- ***Has the accuracy of the mailing list been estimated after updating efforts?***
  Look for information that indicates how accurate the mailing addresses will be after the planned address updating effort.
- ***Has the percentage of the class to be reached by mail been calculated?***
  The parties should be able to indicate how great a percentage of the overall class will be reached by individual notice, so that the extent of any necessary additional notice can be determined.
- ***Are there plans to re-mail notices that are returned as undeliverable?***
  Even after updating addresses before mailing, mail will be returned as undeliverable. Further lookup tactics and sources are often available, and it is reasonable to re-mail these notices.
- ***Will e-mailed notice be used instead of postal mailings?***
  If available, parties should use postal mailing addresses, which are generally more effective than e-mail in reaching class members: mail-forwarding services reach movers, and the influx of "SPAM" e-mail messages can cause valid e-mails to go unread. If e-mail will be used—e.g., to active e-mail addresses the defendant currently uses to communicate with class members—be careful to require sophisticated design of the subject line, the sender, and the body of the message, to overcome SPAM filters and ensure readership.

☐ ***Will publication efforts combined with mailings reach a high percentage of the class?***
The lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%. A study of recent published decisions showed that the median reach calculation on approved notice plans was 87%.

☐ ***Are the reach calculations based on accepted methodology?***
An affiant's qualifications are important here. Reach calculation methodology is commonly practiced in advertising and media-planning disciplines. Claims administrators are often accountants by training and may lack personal knowledge or the training to conduct reach analyses.

- ***Is the net reach calculation thorough, conservative, and not inflated?***
  Circulation figures for separate dissemination methods cannot simply be added to determine reach. Total audience must be calculated for each publication and the net must be calculated for a combination of publications. Be sure the reach calculation removes overlap between those people exposed to two or more dissemination methods (e.g., a person who receives a mailing may also be exposed to the notice in a publication).

- ❍ ***Do the reach calculations omit speculative reach that only might occur?***
  Watch for estimated reach calculations that are based in part on speculative notice that might occur, e.g., news coverage about the lawsuit or settlement. Often, these news articles do not ultimately explain class members' rights, and the content is not in the court's control.
- ❍ ***Is any Internet advertising being measured properly?***
  Audiences of Internet websites are measured by "impressions." Total, or "gross," impressions of the entire website do not reveal how many people will view the notice "ad" appearing periodically on a particular page. Inflated audience data via Internet ads is common. It is very expensive to reach a significant percentage of a mass audience with Internet banner ads. Watch for suggestions that Internet ads and social network usage can replace all other methods. Reach, awareness, and claims will likely be very low when such a program is complete.

❑ ***Is non-English notice necessary?***
Consider the demographics of the class to determine whether notice is necessary in Spanish or another language. The number of class members whose native language is not English should guide you on whether to actively disseminate notice in other languages, or to simply make foreign language notices available at a website.

❑ ***Does the notice plan allow enough time to act on rights after notice exposure?***
Class members need time to receive a notice by mail or in a publication. A minimum of 30 days is necessary from completed dissemination before deadlines, with 60–90 days preferred. This allows for re-mailings, fulfillment of requests for more information, and consideration of rights and options.

❑ ***Will key documents be available at a neutral website?***
Class members should have access to information beyond the notice. Besides the summary notice and detailed notice (following the FJC examples at www.fjc.gov), it is reasonable to post the following documents at a neutral administrator's website dedicated to the case: the plaintiffs' complaint, the defendants' answer, your class-certification decision (in the event of a class certified for trial), and the settlement agreement and claim form (in the event of a settlement). Other orders, such as your rulings on motions to dismiss or for summary judgment, should ordinarily be made available as well.

❑ ***Can the class get answers from a trained administrator or from class counsel?***
Even the best notice will generate questions from class members. A toll-free number call center, an interactive website staffed by trained administrators, and class counsel who are accessible to the people they represent are reasonable steps to help class members make informed decisions.

Notice Documents ***(also see Plain Language Notice Guide, below)***

❑ ***Have you approved all of the forms of the notices?***
Before authorizing the parties to begin disseminating notices, you should ask for and approve all forms of notice that will be used. This includes a detailed notice; a summary notice; and information that will appear at the website and in any other form, such as an Internet banner, TV notice, and radio notice. See www.fjc.gov for illustrative notice forms for various cases. It is best to see and approve the forms of notice the way they will be disseminated, in their actual sizes and designs.

- ❑ ***Are the notices designed to come to the attention of the class?***
  The FJC's illustrative notices, as also described in the accompanying "***Plain Language Notice Guide***," explain how to be sure the notices are "noticed" by the casual-reading class member. With "junk mail" on the rise, and the clutter of advertising in publications, legal notices must stand out with design features long-known to communications pros.
  - ❍ ***Does the outside of the mailing avoid a "junk mail" appearance?***
    Notices can be discarded unopened by class members who think the notices are junk mail. A good notice starts with the envelope design, examples of which are at www.fjc.gov.
  - ❍ ***Do the notices stand out as important, relevant, and reader-friendly?***
    It is important to capture attention with a prominent headline (like a newspaper article does). This signals who should read the notice and why it is important. The overall layout of the notice will dictate whether busy class members will take time to read the notice and learn of their rights.
- ❑ ***Are the notices written in clear, concise, easily understood language?***
  Required by Rule 23 since 2003, it is also simply good practice to recognize that communicating legal information to laypeople is hard to do.
- ❑ ***Do the notices contain sufficient information for a class member to make an informed decision?***
  Consider the amount of information provided in the notice. Watch for omission of information that the lawyers may wish to obscure (such as the fee request) but that affects class members nonetheless.
- ❑ ***Do the notices include the Rule 23 elements? Even the summary notice?***
  Summary notices, whether mailed or published, encourage readership, and the FJC illustrative notices show that even summary notices can include all elements required by Rule 23(c)(2)(B). But an overly short summary notice, one that mostly points interested readers to a detailed notice, can result in most class members (who read only the summary notice) being unaware of basic rights.
- ❑ ***Have the parties used or considered using graphics in the notices?***
  Depending on the class definition or the claims in the case, a picture or diagram may help class self-identify as members, or otherwise determine whether they are included.
- ❑ ***Does the notice avoid redundancy and avoid details that only lawyers care about?***
  It is tempting to include "everything but the kitchen sink" in the detailed notice. Although dense notices may appear to provide a stronger binding effect by disclosing all possible information, they may actually reduce effectiveness. When excess information is included, reader burnout results, the information is not communicated at all, and claims are largely deterred.
- ❑ ***Is the notice in "Q&A" format? Are key topics included in logical order?***
  The FJC illustrative notices take the form of answers to common questions that class members have in class action cases. This format, and a logical ordering of the important topics (taking care to include all relevant topics) makes for a better communication with the class.
- ❑ ***Are there no burdensome hurdles in the way of responding and exercising rights?***
  Watch for notice language that restricts the free exercise of rights, such as onerous requirements to submit a "satisfactory" objection or opt-out request.

- ❑ ***Is the size of the notice sufficient?***
  Consider the balance between cost efficiency and effectiveness. A smaller publication notice will save money, but too small and it will not afford room for a noticeable headline, will not fit necessary information, and will not be readable if using fine print.

Claims Process

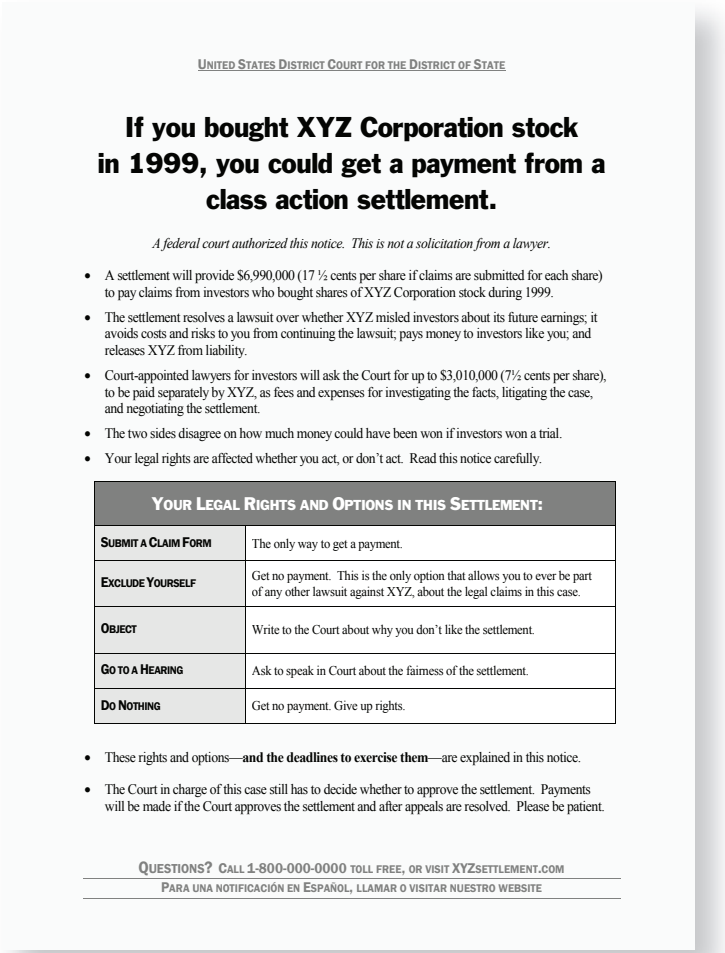
- ❑ ***Is a claims process actually necessary?***
  In too many cases, the parties may negotiate a claims process which serves as a choke on the total amount paid to class members. When the defendant already holds information that would allow at least some claims to be paid automatically, those claims should be paid directly without requiring claim forms.
- ❑ ***Does the claims process avoid steps that deliberately filter valid claims?***
  Close attention to the nature of a necessary claims process may help eliminate onerous features that reduce claims by making claiming more inconvenient.
- ❑ ***Are the claim form questions reasonable, and are the proofs sought readily available to the class member?***
  Watch for situations where class members are required to produce documents or proof that they are unlikely to have access to or to have retained. A low claims rate resulting from such unreasonable requirements may mean that your eventual fairness decision will overstate the value of the settlement to the class and give plaintiff attorneys credit for a greater class benefit than actually achieved.
- ❑ ***Is the claim form as short as possible?***
  A long, daunting claim form is more likely to be discarded or put aside and forgotten by recipients. Avoid replicating notice language or injecting legalistic terminology into the claim form which will deter response and confuse class members.
- ❑ ***Is the claim form well-designed with clear and prominent information?***
  Consider whether the claim form has simple, clearly worded instructions and questions, all presented in an inviting design. The deadlines and phone numbers for questions should be prominent.
- ❑ ***Have you considered adding an online submission option to increase claims?***
  As with many things, convenience is of utmost importance when it comes to claims rates. Today, many class members expect the convenience of one-click submission of claims. Technology allows it, even including an electronic signature. Claim forms should also be sent with the notice, or published in a notice, because many will find immediate response more convenient than going to a website.
- ❑ ***Have you appointed a qualified firm to process the claims?***
  You will want to be sure that the claims administrator will perform all "best practice" functions and has not sacrificed quality in order to provide a low price to win the administration business.

- ❑ ***Are there sufficient safeguards in place to deter waste, fraud, and/or abuse?***
  The claims process, the claim form itself, and the claims administrator all play roles in ensuring that approved claims are valid claims, so that payments go to class members who meet the criteria. Closely monitoring the process, perhaps through a special master—or at least by requiring the parties to file full reports of claims made—is a good idea.

After Notice/Before Trial or Final Settlement Approval

- ❑ ***Did the notice plan achieve what it promised?***
  Look for evidence that the notice plan reached the class members as well as anticipated.
- ❑ ***What is the reaction of the class?***
  You will want to look at the number and nature of any objections, as well as the number of opt-outs and claims. Special note: waiting for the claims deadline to expire before deciding on final approval ensures that you can look at a full picture of the fairness of the settlement. By so doing you will be able to judge the actual value of the settlement to the class and calculate attorney fees in relation to that value.
- ❑ ***Have you made sufficient findings in the record?***
  Consider, based on the evidence, making detailed findings so as to inhibit appellate review or to withstand a subsequent collateral review of your judgment.
- ❑ ***Is any subsequent claims-only notice necessary?***
  If you find the settlement fair, reasonable, and adequate, but the number of claims is low, you may consider additional notice to the class after final approval.

Detailed Notice—First Page



UNITED STATES DISTRICT COURT FOR THE DISTRICT OF STATE

If you bought XYZ Corporation stock in 1999, you could get a payment from a class action settlement.

A federal court authorized this notice. This is not a solicitation from a lawyer.

- A settlement will provide $6,990,000 (17 ½ cents per share if claims are submitted for each share) to pay claims from investors who bought shares of XYZ Corporation stock during 1999.
- The settlement resolves a lawsuit over whether XYZ misled investors about its future earnings; it avoids costs and risks to you from continuing the lawsuit; pays money to investors like you; and releases XYZ from liability.
- Court-appointed lawyers for investors will ask the Court for up to $3,010,000 (7½ cents per share), to be paid separately by XYZ, as fees and expenses for investigating the facts, litigating the case, and negotiating the settlement.
- The two sides disagree on how much money could have been won if investors won a trial.
- Your legal rights are affected whether you act, or don't act. Read this notice carefully.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:	
SUBMIT A CLAIM FORM	The only way to get a payment.
EXCLUDE YOURSELF	Get no payment. This is the only option that allows you to ever be part of any other lawsuit against XYZ, about the legal claims in this case.
OBJECT	Write to the Court about why you don't like the settlement.
GO TO A HEARING	Ask to speak in Court about the fairness of the settlement.
DO NOTHING	Get no payment. Give up rights.

- These rights and options—**and the deadlines to exercise them**—are explained in this notice.
- The Court in charge of this case still has to decide whether to approve the settlement. Payments will be made if the Court approves the settlement and after appeals are resolved. Please be patient.

QUESTIONS? CALL 1-800-000-0000 TOLL FREE, OR VISIT XYZSETTLEMENT.COM
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

- Page one is an overall summary of the notice. The objective is to use the fewest words to say the most. It is a snapshot of the case, of the reasons for the notice, and of the rights that class members have.

- The court's name at the top conveys the importance of the notice.

- A headline in a large font captures attention. It conveys what the notice is about and who is included, and it suggests a benefit to reading the entire notice.

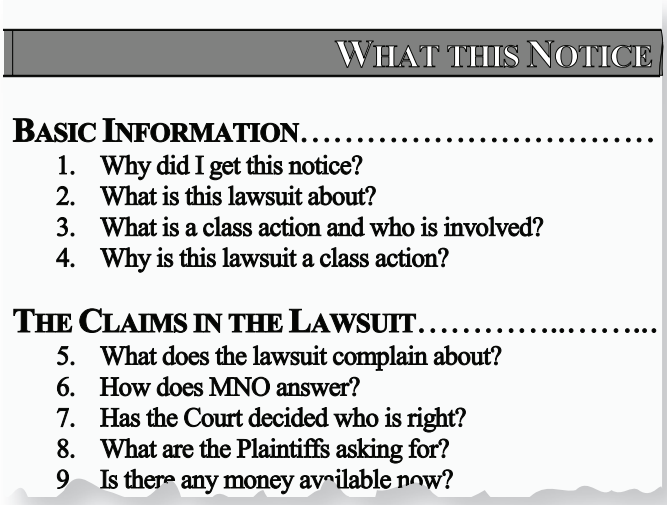
- The words in italics below the headline communicate the official nature of the notice and provide a contrast from a lawyer's solicitation. Be sure to avoid a traditional legalistic case caption.

- Short bullet points highlight the nature of the case and the purpose of the notice. Bullet points also communicate who is included, the benefits available (if it is a settlement), and steps to be taken—identifying deadlines to observe. The first page should pique class members' interest and encourage them to read the entire notice.

- The table of rights explains the options available. These are deliberately blunt. Be careful to avoid redundancy with the information inside the notice.

- The first page should prominently display a phone number, e-mail address, or website where the class can obtain answers to questions.

- If appropriate for the class, include a non-English (e.g., Spanish) language note about the availability of a copy of the notice in that language.



WHAT THIS NOTICE

BASIC INFORMATION.....
1. Why did I get this notice?
2. What is this lawsuit about?
3. What is a class action and who is involved?
4. Why is this lawsuit a class action?

THE CLAIMS IN THE LAWSUIT.....
5. What does the lawsuit complain about?
6. How does MNO answer?
7. Has the Court decided who is right?
8. What are the Plaintiffs asking for?
9. Is there any money available now?

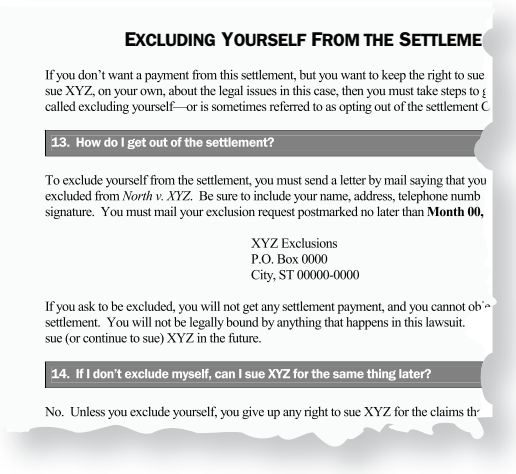
Detailed Notice—Table of Contents

- Organize the topics into different sections and place the information in a logical order.

- A "Q&A" or "Answers to Common Questions" format helps class members find the information that is important to their decision-making process.

- Customize the topics to the facts of the case, but keep the overall notice short: 8–11 pages should be plenty even for complex matters.

- Don't avoid obvious questions (or answers) that class members will have.



EXCLUDING YOURSELF FROM THE SETTLEME

If you don't want a payment from this settlement, but you want to keep the right to sue sue XYZ, on your own, about the legal issues in this case, then you must take steps to called excluding yourself—or is sometimes referred to as opting out of the settlement C

13. How do I get out of the settlement?

To exclude yourself from the settlement, you must send a letter by mail saying that you excluded from *North v. XYZ*. Be sure to include your name, address, telephone numb signature. You must mail your exclusion request postmarked no later than **Month 00,**

XYZ Exclusions
P.O. Box 0000
City, ST 00000-0000

If you ask to be excluded, you will not get any settlement payment, and you cannot ob settlement. You will not be legally bound by anything that happens in this lawsuit. sue (or continue to sue) XYZ in the future.

14. If I don't exclude myself, can I sue XYZ for the same thing later?

No. Unless you exclude yourself, you give up any right to sue XYZ for the claims th

Detailed Notice—Inside Content

- Short answers are best. Be sure that the text answers the question being asked and does not "spin" the information in a way to achieve a desired result—e.g., do not use language that encourages class members to accept a proposed settlement.

- Watch for redundant and lengthy information, but also substantive omissions. Be frank and open for better reader comprehension and, as a result, a stronger binding effect.

- Every detail does not belong in the notice, but all rights and options do. Explain settlement benefits and state the fees that the lawyers will seek. Watch for burdensome requirements that might inhibit objections, opt outs, or claims.

- Use plain language. You may closely follow the illustrative models at www.fjc.gov.

Summary Notice

- The summary notice should be short but comprehensive. Refer to all of the requirements of Rule 23 in a simple and clear summary fashion. Follow the FJC models wherever possible.

- The "Legal Notice" banner at the top helps stop a publisher from typesetting the word "advertisement" at the top, which would create a perception that the notice is a solicitation. Do not use the legal case caption style.

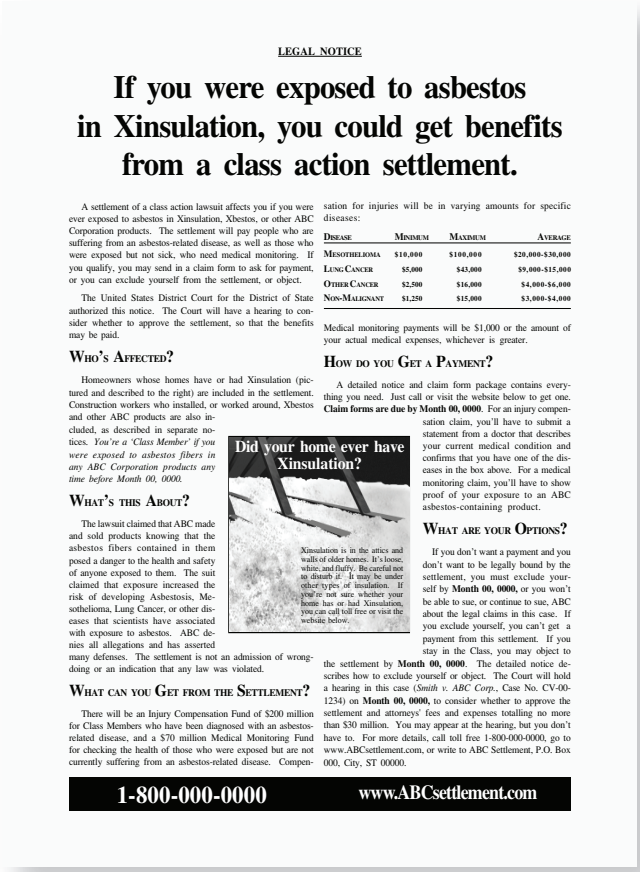
- The headline in large font captures the attention of readers who glance at the page. It flags what the notice is about, who is included, and it signals a benefit to be derived by reading the notice.

- The initial paragraphs provide a snapshot of all key information.

- Be sure to explain class membership in a simple way. Consider a graphic to help readers understand that they are included.

- Make a brief but clear reference to the substance of the case and the claims involved.

- Identify clearly what class members could get and how they would get it. These are the most common questions from class members.



LEGAL NOTICE

If you were exposed to asbestos in Xinsulation, you could get benefits from a class action settlement.

A settlement of a class action lawsuit affects you if you were ever exposed to asbestos in Xinsulation, Xbestos, or other ABC Corporation products. The settlement will pay people who are suffering from an asbestos-related disease, as well as those who were exposed but not sick, who need medical monitoring. If you qualify, you may send in a claim form to ask for payment, or you can exclude yourself from the settlement, or object.

The United States District Court for the District of State authorized this notice. The Court will have a hearing to consider whether to approve the settlement, so that the benefits may be paid.

Who's Affected?

Homeowners whose homes have or had Xinsulation (pictured and described to the right) are included in the settlement. Construction workers who installed, or worked around, Xbestos and other ABC products are also included, as described in separate notices. *You're a 'Class Member' if you were exposed to asbestos fibers in any ABC Corporation products any time before Month 00, 0000.*

What's this About?

The lawsuit claimed that ABC made and sold products knowing that the asbestos fibers contained in them posed a danger to the health and safety of anyone exposed to them. The suit claimed that exposure increased the risk of developing Asbestosis, Mesothelioma, Lung Cancer, or other diseases that scientists have associated with exposure to asbestos. ABC denies all allegations and has asserted many defenses. The settlement is not an admission of wrongdoing or an indication that any law was violated.

What can you Get from the Settlement?

There will be an Injury Compensation Fund of $200 million for Class Members who have been diagnosed with an asbestos-related disease, and a $70 million Medical Monitoring Fund for checking the health of those who were exposed but are not currently suffering from an asbestos-related disease. Compensation for injuries will be in varying amounts for specific diseases:

Disease	Minimum	Maximum	Average
Mesothelioma	$10,000	$100,000	$20,000-$30,000
Lung Cancer	$5,000	$43,000	$9,000-$15,000
Other Cancer	$2,500	$16,000	$4,000-$6,000
Non-Malignant	$1,250	$15,000	$3,000-$4,000

Medical monitoring payments will be $1,000 or the amount of your actual medical expenses, whichever is greater.

How do you Get a Payment?

A detailed notice and claim form package contains everything you need. Just call or visit the website below to get one. **Claim forms are due by Month 00, 0000**. For an injury compensation claim, you'll have to submit a statement from a doctor that describes your current medical condition and confirms that you have one of the diseases in the box above. For a medical monitoring claim, you'll have to show proof of your exposure to an ABC asbestos-containing product.

What are your Options?

If you don't want a payment and you don't want to be legally bound by the settlement, you must exclude yourself by **Month 00, 0000,** or you won't be able to sue, or continue to sue, ABC about the legal claims in this case. If you exclude yourself, you can't get a payment from this settlement. If you stay in the Class, you may object to the settlement by **Month 00, 0000**. The detailed notice describes how to exclude yourself or object. The Court will hold a hearing in this case (*Smith v. ABC Corp.*, Case No. CV-00-1234) on **Month 00, 0000,** to consider whether to approve the settlement and attorneys' fees and expenses totalling no more than $30 million. You may appear at the hearing, but you don't have to. For more details, call toll free 1-800-000-0000, go to www.ABCsettlement.com, or write to ABC Settlement, P.O. Box 000, City, ST 00000.

Did your home ever have Xinsulation?

Xinsulation is in the attics and walls of older homes. It's loose, white, and fluffy. Be careful not to disturb it. It may be under other types of insulation. If you're not sure whether your home has or had Xinsulation, you can call toll free or visit the website below.

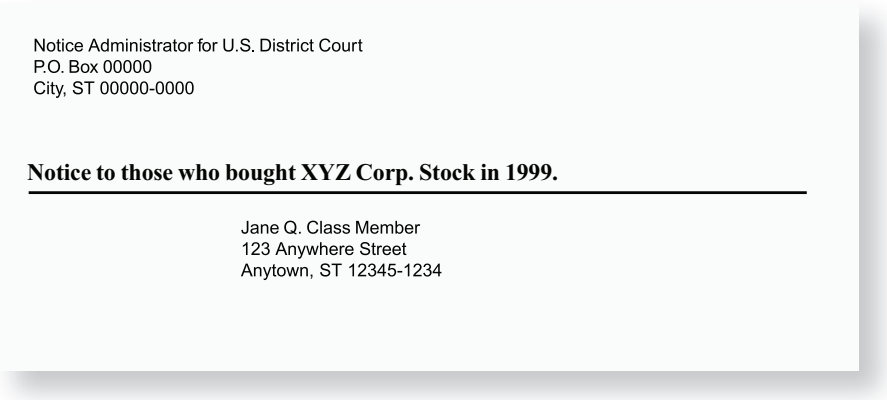
1-800-000-0000 **www.ABCsettlement.com**

- Be sure to include clear references to opt out, objection, and appearance rights. State the amount of the lawyers' fee request.

- Include a prominent reference to the call center and website.

Outside of Mailing

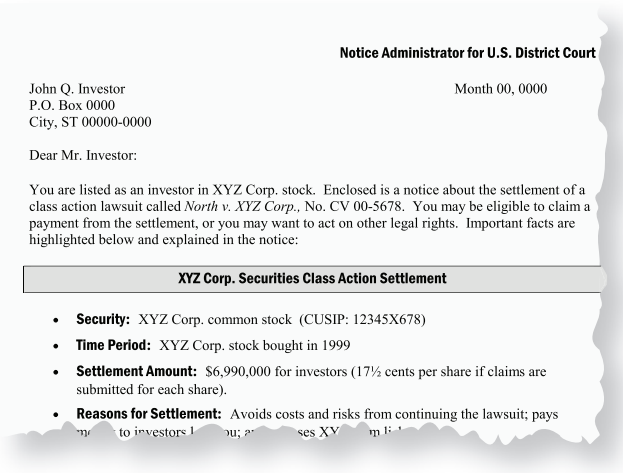
- Design the notice to make it distinguishable from "junk mail."
- A reference to the court's name (at the administrator's address) ensures that the class recognizes the notice's legitimacy.
- "Call-outs" on the front and back encourage the recipient to open and read the notice when it arrives with other mail.


Notice Administrator for U.S. District Court
P.O. Box 00000
City, ST 00000-0000

Notice to those who bought XYZ Corp. Stock in 1999.

Jane Q. Class Member
123 Anywhere Street
Anytown, ST 12345-1234

- The call-out on the front (shown on example above) identifies what the notice is about and who is affected. On the back you may highlight the settlement benefits, or the rights involved.
- Use these techniques even if the mailed notice is designed as a self-mailer, i.e., a foldover with no envelope.


Notice Administrator for U.S. District Court

John Q. Investor
P.O. Box 0000
City, ST 00000-0000

Month 00, 0000

Dear Mr. Investor:

You are listed as an investor in XYZ Corp. stock. Enclosed is a notice about the settlement of a class action lawsuit called *North v. XYZ Corp.*, No. CV 00-5678. You may be eligible to claim a payment from the settlement, or you may want to act on other legal rights. Important facts are highlighted below and explained in the notice:

XYZ Corp. Securities Class Action Settlement

- **Security:** XYZ Corp. common stock (CUSIP: 12345X678)
- **Time Period:** XYZ Corp. stock bought in 1999
- **Settlement Amount:** $6,990,000 for investors (17½ cents per share if claims are submitted for each share).
- **Reasons for Settlement:** Avoids costs and risks from continuing the lawsuit; pays

Cover Letter (when compliance with PSLRA is needed)

- Identify the court's administrator as the sender—this conveys legitimacy.
- The content should be very short. Remember that this is not the notice.
- A reference in bold type to the security involved flags the relevance of the letter.
- The bullet points track each PSLRA cover letter requirement. Avoid lengthy explanations that are redundant with the notice. Be blunt for clarity.
- The content in the FJC's PSLRA cover letter can simply be customized for the case at hand. The design encourages interest, reading, and action.