SETTLEMENT OF PRIVATE ANTITRUST LITIGATION INCLUDING CLASS TYPE ACTIONS AND MULTIPLE DEFENDANT LAWSUITS

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Settlement is one of the first practical considerations a lawyer should make in today's modern antitrust practice. The adage is, "A fair settlement is better than a bad lawsuit," or, stated another way, "A fair settlement is better than a good trial." Apparently, the American antitrust bar recognizes the particular applicability of these adages to antitrust treble damage actions. Professor Milton Handler of Columbia Law School has observed that not one antitrust treble damage class action has been tried since amendments to Rule 23 became effective in 1966. Apparently, all have been settled or otherwise disposed of. I wish to spend a few moments with you discussing some of the legal problems involved in settling antitrust treble damage class actions. Not all of the cases I will cite are antitrust cases, but most are. All of the cases I cite are class actions, and I think their holdings are equally applicable to antitrust actions.

Let's assume a treble damage antitrust action has been commenced in federal court against your client. The action will typically allege a violation of §§ 1 and 2 of the Sherman Act and typically will involve multiple defendants combined in an alleged conspiracy. Let's further assume that the action has only recently been commenced, no class action determination has been made, and a vigorous discovery program has started. Your client wants out of the litigation and is willing to pay to do so. Can you get your client out of the action prior to there being a class action determination and consequently prior to notice to class members?

Federal rule 23(e), "Dismissal or compromise," states:

> 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. (emphasis added).

To state the question more generally: Must there be a determination under rule 23(c)(1) whether the action may be maintained as a class action before the provisions of 23(e) become operative? At least two courts of appeal, the Third[1] and Ninth[2] Circuits, and two district courts,[3] following the lead of Judge Fullam in *Philadelphia Electric Co. v. Ana-*

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[1] Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir. 1970).

[2] Inglewood v. Los Angeles, 451 F.2d 948 (9th Cir. 1972).

[3] Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970); Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969).

conda American Brass Co.,[4] have answered that question in the negative. The *Philadelphia Electric* case corresponds with the case assumed above. Some of the parties agreed on a settlement and sought court approval and dismissal of the respective plaintiffs' claims as to them. Judge Fullam held that an action "must be assumed to be a class action for purposes of dismissal or compromise under 23(e) unless and until a contrary determination is made under 23(c)(1)."[5] The notice requirement of rule 23(e) was held to be applicable to the proposed settlement and the motion seeking court approval of those settlements was held in abeyance pending a determination of the class action question and further order of the court. The requirements of rule 23(e) most likely apply, then, at the commencement of an action designated by the plaintiff as a class action. These requirements cannot be avoided by reaching a compromise before the court has determined that the action may be maintained as a class action.

I. Attempts to By-Pass Rule 23(e)

While the approval provision of rule 23(e) applies to all dismissals or compromises of class actions, the notice provision applies only to voluntary dismissals by the plaintiff(s). Nevertheless, attempts to avoid notice to class members of the termination of a class action, other than on the merits, have met with little success.

In *Rothman v. Gould*[6] a settlement offer was made to the named plaintiff individually. Plaintiff sought an order determining that the action could not be maintained as a class action, no contrary determination having been made. Plaintiff's motion was unopposed, but the court, noting the unprotected interests of the remaining class members, denied the motion and ordered that a form of notice to the class be presented to the court. An attempt by plaintiffs to amend their complaint to strike the class action allegations and effect a settlement of the remaining individual claims failed in *Yaffe v. Detroit Steel Corp.*[7] Even though the proposed amendment had been filed at a time when it should have been allowed as a matter of course, Judge Decker felt that to allow the amendment to stand would result in an evasion of rule 23(e). Noting the potential harm to absent class members and the undeserved leverage conferred upon plaintiffs as a result of allowing such amendments, the judge vacated the amendment and disallowed the stipulation of dismissal. Thus it appears that attempts to avoid rule 23(e) by seeking a determination that the action is not a class action or by seeking to amend the complaint to drop class action allegations have met with little favor. But to attempt to give new life to a

[4] 42 F.R.D. 324 (E.D. Pa. 1967).

[5] *Id.* at 326.

[6] 14 Fed. Rules Serv. 2d 1541 (S.D.N.Y. 1971).

[7] 50 F.R.D. 481 (N.D. Ill. 1970).

cliché that has fallen into disuse, "There is new light at the end of the tunnel!"

Rule 23(e) does not, by its terms, appear to apply to settlements negotiated with individual nonparty class members. This principle was applied recently in *Weightwatchers of Philadelphia, Inc. v. Weightwatchers International, Inc.*,[8] a treble damage class action by a franchisee on behalf of a class of all franchisees against their common franchisor charging that the franchisor had imposed maximum prices that could be charged by franchisees to customers. The management of the franchisor thought it undesirable for the franchisees' clientele to learn that the franchisees were seeking to be free to charge higher prices. But, nevertheless, the franchisor sought to renegotiate the franchise contracts with nonparty franchisees. The lower court by order allowed the defendant-franchisor to negotiate settlement with individual class members and the Court of Appeals for the Second Circuit dismissed plaintiffs' appeal as one from nonappealable order. In doing so, the Second Circuit made the following interesting comments:

> Indeed, we are unable to perceive any legal theory that would endow a plaintiff who has brought what would have been a "spurious" class action under former Rule 23 with a right to prevent negotiation of settlements between the defendant and other potential members of the class who are of a mind to do this; it is only the settlement of the class action itself without court approval that F.R. Civ. P. 23(e) prohibits.[9]
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> . . . .
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> Here, even if defendant should succeed in settling with so many franchisees that the court will be forced to deny class action status, plaintiffs' complaint will remain untouched. As we have, in essence, already noted, plaintiff has no legally protected right to sue on behalf of other franchisees who prefer to settle; F.R. Civ. P. 23(e), requiring court approval of the dismissal or compromise of a class action, does *not* bar non-approved settlements with individual members which have no effect upon the rights of others.[10]

Thus, this case suggests that a defendant can settle, without court approval and without notice to the class, the claims of individual class members so long as the rights of the alleged class at large are not compromised.

For those of you who are plaintiffs' lawyers, there is no need to worry about defendants pulling the rug from under your class. In the *Weightwatchers* case the district court did impose limitations upon defendant's right to negotiate. The principal limitations were: (1) no negotiation without class members' lawyers being present; and (2) no negotiation except after five days' notice of the place and time of the negotiation given to

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[8] 455 F.2d 770 (2d Cir. 1972), *dismissing an appeal from* 55 F.R.D. 50 (E.D.N.Y. 1971).

[9] 455 F.2d at 773 (footnotes omitted).

[10] *Id.* at 775 (emphasis added).

the class action plaintiff's lawyer. If the lawyer showed up at the negotiation, he was allowed to advise the negotiating class member of the member's rights. Finally, for practical reasons, the right to negotiate with individual class members recognized by this case would only seem applicable to a situation involving a relatively small class.[11]

Well then, is there no way, except by individual settlements with each class member, to get your client out of the litigation before a class action determination and notice to the class? The answer is yes and no.

In the *Philadelphia Electric*[12] case, some defendants did come to early written agreements with plaintiffs' attorneys as to the terms of settlement. Court approval of those agreements was left hanging while plaintiffs prosecuted the remaining alleged conspirators. In due time and after protracted discovery, all remaining defendants saw the wisdom of settling and the earlier reached settlements were finally approved as part of an overall settlement.

The advantage of this course is that, if you settle early, your client will probably get out cheaper, as happened in *Philadelphia Electric*, and the substantial expenses of discovery are avoided. The disadvantage is that your client is not wholly out of the lawsuit, and plaintiffs' attorneys, will probably extract from your client a written promise to be at least subject to document and deposition discovery while the case proceeds against others.

As you may know, the American College of Trial Lawyers has recommended certain changes in rule 23. I understand these recommendations, and others, are under consideration by the Advisory Committee to the Supreme Court on Federal Rules of Civil Procedure. One of the recommended changes, if adopted, would eliminate the notice requirements if the dismissal is *without* prejudice, or with prejudice to the class representative *only, provided* there is no compensation paid or promised to the class representative or his attorney. The proposed change apparently would not be applicable in a settlement situation unless the settlement were a capitulation by plaintiff.

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[11] In *Weightwatchers*, the maximum class size was between 44 and 53 franchisees, depending upon whether defendant's or plaintiff's contentions were accepted. However, in a stipulation filed with and approved by the court, the parties agreed that there were actually only nine potential members of the putative class that plaintiff sought to represent. The diminution of alleged class size was due, *inter alia*, to written statements from a number of franchisees to the effect that defendant never committed the alleged antitrust law violations and releases or agreements to release defendant from any claim for the alleged violations from other franchisees. On the basis of these and other stipulated facts, the court approved an amendment of the complaint striking class action allegations and dismissal of the class action with prejudice and without costs, preserving only the claim of the one named plaintiff. This claim was subsequently settled and the action discontinued.

[12] 42 F.R.D. 324 (E.D. Pa. 1967).

II. Judicial Involvement Prior to Approval of the Compromise

In related antitrust cases involving multiple defendants and numerous plaintiffs representing a number of national or regional classes, early judicial involvement is desirable, if not a necessity. In such cases, defendants generally face an array of plaintiffs, each plaintiff or group of plaintiffs undertaking to represent a class of aggrieved persons. The aim of the defendants is to settle as many claims as it can with one settlement offer. Generally, this is attempted by making one offer to each group in an effort to reach a "global" settlement with that category of claimants. Since procedural mechanics designed for settlements between one or more defendants and a single class of plaintiffs do not lend themselves directly to these more complicated cases, innovation by court and counsel is called for. A discussion of two recent major antitrust cases is illustrative.

The *Plumbing Fixture*[13] cases were actions brought against the manufacturers of certain plumbing fixtures by builder-owners, states, cities and other public bodies, wholesalers, retailers, and plumbing and general contractors. Defendants reached separate settlement agreements in the form of proposed orders with the wholesaler and contractor plaintiffs. These settlement orders provided for the establishment of temporary national classes of those in each category and for the publication and sending of notice to prospective members of the temporary national classes. Class members were to be given the option of accepting the settlement or excluding themselves therefrom and prosecuting their claims against defendants. The settlement orders were the subject of scheduled hearings to determine whether the temporary classes should be determined and held to be permanent classes and whether judgment should be entered against those who had not excluded themselves from participation.

The settlement order dealing with the conditional settlement offered to the contractors was challenged by some contractor-plaintiffs. They argued that the order established, without a hearing, a national class and national class representatives and approved a settlement with that class, thus prejudicing the rights of those who did not wish to accept the settlement, but might wish to continue with national or regional class litigation. The court concluded that the order was consistent with proper procedure. The order did *not* give final approval to the settlement: the settling plaintiffs or defendants could still withdraw the settlement agreement, and even if the settlement were approved, those excluding themselves were free to litigate their claims either individually or as a class.

In response to an argument that a rule 23(c)(1) determination of the class should have been made initially and class representatives then

[13] Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364 (E.D. Pa. 1970) (dealing with settlement offers to the wholesalers and contractors).

appointed to conduct settlement negotiations, the court pointed to the harsh results that could have occurred if such a procedure were used. If the class were determined first, the court noted, the class members would be locked into any subsequent settlement approved by the court, whereas under the procedure established by the court, those who preferred to litigate rather than accept settlement would be free to do so.

In the *Plumbing Fixture* cases, Chief Judge Lord and Judge Harvey used a procedure whereby the class determination requirements of rule 23(c)(1), the notice requirements of rule 23(c)(2), and the approval and notice requirements of rule 23(e) were incorporated into one simplified, single step. The procedures established in that case left the class members with flexibility to decide, upon consideration of the proposed settlement, whether they wished to accept it, and at the same time gave the defendants a (somewhat dubious) chance to achieve the "global" settlement they sought.

The settlement in those cases was approved by both the district court[14] and the Third Circuit.[15] In doing so, the court of appeals made two significant statements. First, a class member who does not opt out, as allowed under rule 23(c)(2), whose objections to the settlement are overruled and who thereby obtains the benefit of the settlement, still has standing to appeal the final judgment and to seek to upset the settlement. Second, the Third Circuit cautioned that it is preferable in the first instance for the court to appoint a class representative to conduct negotiations with defendants. Here an unofficial (not appointed by the court) class representative had rejected defendants' last settlement offer and had terminated settlement negotiations with defendants; however another unofficial class representative took up negotiations with defendants and accepted the figure rejected by the first representative. This figure was submitted to and approved by the court; the court granted approval because the settlement was otherwise fair and equitable.

The *Antibiotic Antitrust Litigation*[16] involved some 150 actions charging patent fraud and invalidity and a conspiracy to violate the antitrust laws. The private plaintiffs sued after the Department of Justice had filed a criminal antitrust case against the same defendants. Following a jury verdict against them in the criminal action, defendants offered to settle 26 of the actions brought by private hospitals and 66 other actions involving state governmental entities and wholesale and retail druggists. The

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[14] Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 322 F. Supp. 834 (E.D. Pa. 1971).

[15] Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971).

[16] West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971).

proceedings which ensued from the latter offer are illustrative of judicial involvement in the settlement process in complex antitrust cases.

Defendants offered $100,000,000 in settlement of *all* claims of government entities (other than the federal government) arising out of purchases of the subject antibiotics or out of payments to recipients of welfare aid and claims of wholesalers, retailers, and individual consumers arising out of their purchases, including claims of states on behalf of their citizens. The offer was in the form of a settlement plan. The plan provided that: (1) appropriate actions would be determined to be maintained as class actions; (2) required notices would be sent to class members; (3) if there were "substantial and material" exclusions or "opt outs," defendants could withdraw; (4) if defendants did not withdraw, the $100,000,000 settlement figure would be reduced to reflect exclusions; (5) accepting plaintiffs could present to the court proposed plans for allocation of the global settlement amount and, if plaintiffs could not agree on a plan, defendants could choose any plan or modification thereof; (6) the agreed upon plan would then be submitted to the court for approval; (7) costs incurred in the settlement procedure were to be paid from the settlement amount; and (8) if the settlement were approved, all claims covered thereby would be satisfied or terminated.

After the offer of settlement was accepted in principle by nearly all plaintiffs, the court entered an order providing for a "temporary national class action" for government entities and a "consolidated wholesaler-retailer class action." The "temporary national class" was to comprise two subclasses: (1) government hospitals and institutions (city, county, and state); and (2) individual consumers. Each state was allowed the options of rejecting the offer of settlement by notice excluding themselves, filing a statement indicating its wish to participate in the settlement without being included in the "temporary national class," or electing to become a member of the class. For those states accepting the offer, the order determined that their actions be maintained as class actions. The order further determined that the "consolidated wholesaler-retailer class action" was to be maintained as a class action and the members of the class were specified. The order stated that the class action determination and the establishment of classes were for the purpose of administering the proposed settlement.

The above order was directed to the states as notice to members of the "temporary national class" and most states accepted the offer of settlement. Notices were ordered to be sent to class members in the various class actions and included a provision that a class member had until a certain date by which to file a claim if he wished to participate in the settlement. They also established an earlier date by which a class member had to exclude himself from participation in the settlement.

When the exclusions were received and defendants did not elect to

withdraw, allocation plans were submitted by a number of plaintiffs pursuant to the settlement plan. Following further negotiations and compromise, the defendants elected an allocation plan that was a modified version of a plan submitted by the state of Alabama. At the request of counsel for certain plaintiffs, the court then entered an order to show cause why notice should not be sent to class members pursuant to rule 23(e) in the form as annexed to the order. After a hearing the court redrafted a form of notice and such notices, advising of a hearing to be held on the proposed compromise, were sent to those class members who had filed claims. Judge Wyatt ultimately approved the settlement, including the overall plan for allocating the settlement fund, and his approval was affirmed on appeal by the Second Circuit[17] and the Supreme Court.[18]

In both the *Plumbing Fixture* and *Antibiotic* cases, classes were first determined only in the context of settlement discussions. The value of the overall settlement for each class was negotiated and known. In the *Antibiotic* cases, after the "opt outs" were known, defendants reduced their settlement offer to about $82 million, but despite their agreement to pay that sum, defendants are still involved in major litigation now in Minneapolis-St. Paul with those classes and members that opted out of the settlements. That experience, from a defendant's viewpoint, suggests the advisability of striving for early class action determinations *outside* the settlement context.

Rule 23(c)(1) mandates that "as soon as practicable after commencement of an action as a class action, the court shall order whether it is to be so maintained." By local court rule in some districts, that means within 60 or 90 days of filing the complaint. The purpose for requiring early determination was to prevent "fence sitting" or "one way intervention." Potential plaintiffs would simply watch the class representatives prosecute their common claims. If the representative tried the claim and won or settled, then the fence sitters would know on which side of the fence they belonged. If the representative lost the case, nary a word would be heard from the fence sitters who did not want to be bound by such an inequitable result. Heads plaintiffs win! Tails defendants lose!

If there is an early class action determination, then the defendants can better enumerate the number of plaintiffs they are up against and, unless class members take the affirmative step of opting out, they will thereafter be bound by what the class representative does, including agreeing to a settlement.

Another device, which, if allowed in the court's discretion, tends to facilitate settlements, is requiring class members to "opt in" in order to participate in the settlement. As already noted, the initial notice to class

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[17] West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971).

[18] Cotler Drugs, Inc. v. Chas Pfizer & Co., 404 U.S. 871 (1971).

members in the *Antibiotic* cases included a provision requiring those wishing to participate in the settlement amount to file proof of their claims by a specified date. In *Philadelphia Electric Co. v. Anaconda American Brass Co.*[19] Judge Fullam directed a procedure whereby the claims of passive members of the class were to be barred "unless within a reasonable period they file a brief statement of their intent to prove damages." In fact, it was not until after the deadline for class members to file a statement with the court that nonsettling defendants realized that the class, and therefore their potential exposure, was not as large as first thought. This immediately lead to settlement.

In the one case found in the Sixth Circuit, *Biechele v. Norfolk & Western Ry.*[20] plaintiffs sued an operator of a coal loading facility, seeking injunctive relief and damages for nuisance. The notice to class members required those desiring to present damage claims to enter an appearance by a certain date. Several hundred persons joined in the damage action and this delineated the class for the purposes of recovery.

This procedure as utilized by courts is fully in accord with rule 23. Rule 23(d)(2) provides:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, *to* intervene and *present claims* or defenses, *or otherwise to come into the action.* (emphasis added)

Thus, Professor Moore has stated that, "A court may, however, give a dual or an additional notice, under [rule 23] (d)(2) to class members who do not opt out, and require them to take some affirmative action as a condition of ultimate recovery."[21] However, as the language implies, whether such orders will be entered lies in the court's discretion. The weight of case authority fully sanctions this procedure.[22]

There are several distinct advantages which accrue to the court and the parties if some affirmative action is required of class members. First, it will compel those absent class members who have meritorious claims to step forward to advise the court and parties of that fact. Second, and flowing from the first benefit, once it is known affirmatively who is in

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[19] 43 F.R.D. 452, 459 (E.D. Pa. 1968).

[20] 309 F. Supp. 354 (N.D. Ohio 1969).

[21] 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55, at 1161 (2d ed. 1969) (footnotes omitted).

[22] *See* Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, Herriman v. Midwestern United Life Ins. Co., 405 U.S. 921 (1972); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968); Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 70 (D. Utah 1966).

and who is out of the litigation, it allows the parties, at both counsel tables, to realistically assess the magnitude of potential recovery on plaintiffs' side and potential damages on the defendants' side. Judge Fullam succinctly summarized the benefits which can flow from compelling absent class members to take "some kind of minimal affirmative action":

> In the nature of things, it can be expected that many class members will remain passive. Under the old rule, their claims were neither adjudicated nor guarded against. Under the new rule, passive members will be bound by the judgment; but if they have no intention of proving their individual damages, *it is to everyone's advantage to know it early.* To bar the claims of the passive members unless within a reasonable period they file a brief statement of their intent to prove damages would reveal the true scope of the litigation, and would either greatly reduce the trouble and expense of any subsequent notices which may be required, or provide a basis for informed re-appraisal of the class-action question under 23(c)(1).[23]

Third, and also flowing from the first benefit, once it is known affirmatively who is in and who is out of this litigation, steps can effectively be taken toward an adjudication of such issues as remoteness, standing, and passing-on.

III. Court Consideration of the Proposed Settlement

Approval or disapproval of a proposed compromise is a matter within the discretion of the trial court. In exercising that discretion the court should approve the compromise if the settlement offered is "fair, reasonable and adequate." The burden of showing to the court that the settlement meets these criteria is upon its proponents.

In the *Antibiotic* cases Judge Wyatt stated that the most important factor to be considered in determining whether to approve a compromise is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement . . . [,] sometimes referred to as the likelihood of success."[24] This view is consistent with the guidelines recently laid down by the Supreme Court for use by a bankruptcy court in considering compromises arrived at in the course of reorganization proceedings.[25] In the *Antibiotic* cases the court reviewed the likelihood of plaintiffs' success should the cases go to trial. Noting that the defendants had been investigated and actions brought by the Federal Trade Commission and the Department of Justice (the conviction on criminal charges had subsequently been reversed and the case remanded) and that little or no hard evidence of an antitrust conspiracy had been found, the court estimated plaintiffs' chances of success as slight, certainly no better than 50-50. The

[23] Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. at 459 (emphasis added).

[24] West Virginia v. Chas. Pfizer & Co., 314 F. Supp. at 740.

[25] Protective Comm. v. Anderson, 390 U.S. 414 (1968).

court also noted other troublesome questions of law. Superimposed on this review of the merits of plaintiffs' case, however, was the caution that the court must not attempt to try or decide the merits of the controversy. Among other factors considered were the expertise and experience of counsel for representative plaintiffs, the extent of support for the settlement from interested parties, and the presence or absence of good faith bargaining. Similar considerations were suggested by Judge Harvey in his preliminary review of the reasonability of the settlement offer before the court in *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*[26]

Norman v. McKee[27] was a derivative action on behalf of investors in an investment fund. There the court disapproved a proposed settlement because it found that the steps which defendants offered to take in response to plaintiffs' claims would benefit, primarily, only future investors in the fund and, in any case, were required to be taken as a result of a prior settlement by defendants with the SEC. The court stated that while the judgment of named parties advised by competent counsel was entitled to considerable weight, a court should not approve a settlement which on its face was inadequate and therefore unfair to members of the represented class. The case demonstrates that boiler-plate approval of settlements by district courts is not to be expected.

IV. Appeal or Approval/Disapproval of Compromises

As indicated previously, approval or disapproval of a proposed settlement lies within the discretion of the trial judge. Therefore, such a decision will be reversed on appeal only upon a clear showing that the trial judge abused his discretion.[28] Such an abuse might be found if the trial court rendered a boiler-plate approval without sufficient facts at its disposal or refused to allow objectors to develop facts showing the impropriety of the settlement. In *Newman v. Stein*[29] the court based its affirmance on the premise that

> in any case there is a range of reasonableness with respect to a settlement —a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion. . . .[30]

The trial judge would not be reversed, the court continued, if the settlement were within the range described. There the court found the applicable decisional law sufficiently unsettled to merit approval of a settlement.

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[26] 323 F. Supp. 364 (E.D. Pa. 1970).

[27] 290 F. Supp. 29 (N.D. Cal. 1968).

[28] *See, e.g.*, Newman v. Stein, 464 F.2d 689 (2d Cir. 1972); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971).

[29] 464 F.2d 689 (2d Cir. 1972).

[30] *Id.* at 693.

Appeals may be taken by class members or class representatives from either the approval or disapproval of a proposed settlement. If a class member has been given notice of the trial court proceedings, however, he cannot withhold his objections to approval of a compromise and still expect to be granted review by an appellate court. Some cases might be illustrative of the appellate process.

Cohen v. Young,[31] decided by the Sixth Circuit 30 years ago, is still good law. It was an appeal from the approval of a settlement in a stockholders' derivative suit. Appellant had appeared and opposed the settlement and sought to intervene. The trial court approved the settlement based on the recommendation of approval by counsel for plaintiffs of record. It also denied appellant's petition to intervene and refused to allow appellant to present evidence.

The court of appeals held that appellant, a stockholder of the corporation, had standing to appeal the approval of the settlement since he and all other stockholders would be bound thereby. The court further held that the trial court had abused its discretion in following the recommendation of counsel without independent consideration of the evidence and in refusing further evidence proffered by appellant.

This case has been followed very recently in this circuit. In *Sertic v. Cuyahoga County*,[32] a class action case, albeit under the labor laws, the Sixth Circuit said:

> Under Rule 23(e), FRCP, a compromise entered into between the parties to a class action must be approved by the court "and notice of the proposed . . . compromise shall be given to all members of the class in such manner as the court directs." The above language is mandatory and where a compromise is negotiated between the parties, thereby forming the basis of the final judgment, omission of the notice requirement by the court is clear error and is prejudicial to the rights of the members of the class. . . .
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> In Cohen v. Young, supra, 127 F.2d at 725, this court established that the Rule requiring notice to class members of a proposed compromise carries with it the *obligation of the court* to consider *any* available evidence from such members and *to include in the record the documents relied upon to reach the compromise*.[33]

This holding of the Sixth Circuit reflects the actual practice in antitrust class actions. While in a typical commercial litigation the settlement papers filed in court may be nothing more than a one page stipulation of settlement and dismissal, that is not sufficient for court approval of a class action settlement. Ordinarily, there must be a formal notice of motion seeking approval of the settlement. The motion should be supported by

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[31] 127 F.2d 721 (6th Cir. 1942).

[32] 16 FED. RULES SERV. 2d 263 (6th Cir. 1972).

[33] *Id.* at 265-66 (emphasis added).

affidavits of counsel outlining the legal issues in the case, the difficulties of proof involved, the discovery had and its results, plaintiffs' estimate of potential liability, and the amount to be paid in settlement. Briefs in support of the settlement should be filed, and, depending upon the court's preference, counsel for both plaintiffs and defendants should be prepared to present oral argument in support of the settlement.

Now, let me give some practical random considerations respecting settlements. First, your ultimate objective should be to get your client out of the litigation permanently so he never need be faced with the same claims again. To do that you may wish to re-examine the class definition already established by the court. Perhaps it is too narrowly constituted in terms of geography, product line, or time. Therefore, in the settlement you have to agree with plaintiffs as to the final composition of the class and convince the court to accept your agreement.

Second, as a defendant's lawyer, generally you should not want your client to give up one cent until he is out of the litigation permanently. Therefore, your settlement agreement should be fashioned so that your client does not disgorge any money until, at the earliest, one day after the expiration of time to appeal from the final judgment you have attained dismissing the action (needless to say, without any appeal having been filed).

Third, not only do you want a settlement bar against all claims that were actually asserted, but against all claims that could have been asserted. For example, in recent securities litigation plaintiffs' claims were made under only certain sections of the securities laws, and it was recognized that on the same facts other sections could have been asserted. It was expressly provided in the court approved settlement that theories of recovery not pleaded but which could have been pleaded were barred by the settlement. This point and the first point about re-examining the class definition go hand in glove.

Fourth, a defendant's lawyer should not want his client to bear the expenses of either sending notice to the class members or administering the distribution of the settlement funds. In a settlement both of these expenses, as far as I have observed, are payable, with court approval, out of the settlement fund. They can be very substantial expenses. As far as administering the distribution of the settlement fund is concerned, usually plaintiffs' attorneys are only too glad to oblige or, in some instances, the court will appoint a special master to do so.

Finally, you wish to assure that your client really gets the benefit of a total settlement bar to other claims. Therefore, you have a direct interest in the form of notice given to class members and the manner of giving notice to class members. Our Constitution requires "due process," and due process under the rule—rule 23(c)(2)—requires "the best notice practica-

ble under the circumstances, including individual notice to all members who can be identified through reasonable effort." Consequently, you cannot be indifferent to the notice requirements if your client is to achieve the greatest possible benefit for the sums advanced in settlement.