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Class Action Settlements in Louisiana

*Kent A. Lambert**

INTRODUCTION

The class action has enjoyed an enormous upsurge in the last decade, a trend that both the state and federal courts in Louisiana have witnessed first hand.¹ The spoils of victory in high-stakes class action suits continue to make attorneys millionaires tens and even hundreds of times over, and there is little reason to expect a quick end to the romance.²

An inevitable focal point for any practitioner swept up in this enthusiastic wave is the nebulous practice of class action settlements. As numerous critics have had recent occasion to observe, settlements have become such an integral part of modern class action litigation that they often appear to provide both the motive and the tactical engine driving high-profile class action suits.

As a general matter, settlements are a favored means for the resolution of legal disputes.³ This has been as true in the context of class action litigation as in the context of traditional non-class litigation. Class action settlements offer obvious benefits to litigants and courts alike by providing a valuable mechanism for disposing of massive lawsuits that threaten to usurp huge amounts of resources and time. At the same time, such settlements afford the members of plaintiffs' classes with certainty in their recovery, while simultaneously providing class action defendants with the benefits of *res judicata* extended across an entire class of potential claimants.⁴ Increasingly, however, critics are claiming that many class action suits are meritless inventions of over-aggressive plaintiffs' counsel, pursued solely for their potential to extort favorable settlements through the risk that even de minimus individual damage claims will be multiplied at the class level into

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1. See generally Geoffrey P. Miller, *Class Actions in the Gulf States: Empirical Analysis of a Cultural Stereotype*, 74 Tul. L. Rev. 1682 (2000) (documenting a dramatic increase in the number of class action lawsuits filed in Louisiana state and federal courts).

2. Several Louisiana attorneys have exploded into national prominence thanks to the tobacco mass tort litigation, reaping pecuniary gains on a heretofore unimaginable scale. Jack Wardlaw, *Law Firms to Split \$575 Million Fee*, Feb. 1, 2000, the Times-Picayune, A-1. Indeed, the Washington Times recently quoted one New Orleans litigator as complaining that "a \$1 billion fee is 'not really all that big.'" Frank J. Murray, *Big Tobacco Case Means Big Bucks to Attorneys: Even \$1 Billion is Fee to Blow Smoke At*, Mar. 19, 1999, Washington Times, A1.

3. *Williams v. First Nat'l Bank*, 216 U.S. 582, 585, 30 S. Ct. 441, 443 (1910); *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 449 (E.D. Pa. 1985); see also *Florida Trailer & Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960) ("the policy of the law [is] generally to encourage settlements").

4. See, e.g., *Plummer v. Chemical Bank*, 668 F.2d 654, 660 (2d Cir. 1982).

massive sums of money that can empty even the deepest corporate pockets.⁵ These critics argue that, at the very least, the high agency cost of class action litigation is too often magnified by non-adversarial settlements.⁶

Perceptions of opportunistic, if not outright collusive, settlements by class counsel have recently led to charges that *most* class settlements, policed by an overburdened judiciary with little incentive to oppose them,⁷ are choreographed by the class attorneys to line their own pockets with huge sums of money garnered at the direct expense of the class members whom they are supposed to be serving. These and similar criticisms have gained an audience among the courts⁸ and legal

5. A striking example of this appears in recent media coverage of the blossoming HMO litigation, which has repeatedly commented upon attempts by so-called "mega-firms" to manipulate and exploit Wall Street reaction to large class actions bought by powerful "conglomerations" of well-healed plaintiffs' attorneys to force settlements out of companies that investors fear may be unable to weather protracted litigation. See, e.g., David Segal, *Tag-Team Lawyers Make Businesses Blink: HMOs Latest to Grapple With Threat of Investor-Scaring Mega-Verdicts*, Washington Post, Nov. 12, 1999, at A01; see also Allisa J. Rubin & Henry Weinstein, *HMOs Hit With Class-Action Suits*, Austin American-Statesman, Nov. 24, 1999 at A-1. And corporate fears of debilitating litigation are not without some legitimacy. Annual price tags well into the tens-of-millions of dollars for defending against aggressive class action litigation are not unheard of, and such suits can drag on for years, even decades. Mark Herrmann, *From Saccharin to Breast Implants: Mass Torts, Then and Now*, 26 Litig. 50, 52 (1999).

6. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 12-27 (1991); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 883-89 (1987).

7. In Orleans Parish, the Civil District Court has seen on average more than 20,000 suits per year over the last decade with an upward trend. Even one large class action suit, such as the recent Dow silicone implant litigation, can forestall justice to literally thousands of litigants in these over-burdened state trial courts, as well as consume an inordinate amount of appellate court resources. See, e.g., Dawn M. Barrios, *The Long and Winding Road for Spitzfaden, Louisiana's Breast Implant Class Action: Ad Astra per Aspera*, 74 Tul. L. Rev. 1941 (2000) (detailing the tortuous history of the Dow Corning Corporation breast implant case, which, after years of burdensome pre-trial activities, numerous appellate proceedings, and a six-month trial, ended with the decertification of the class).

8. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying nation-wide tobacco class action); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (decertifying plaintiffs' class in penile-implant suit); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1292 (7th Cir. 1995) (decertifying class in hemophiliac/HIV "mass tort" litigation).

Nor are these criticisms without some striking real-world examples, as illustrated by the result in *Hoffman v. Bank of Boston Corp.*, No. 91-1880 (Ala. Cir. Ct., Jan 24, 1994). In *Hoffman*, a group of industrious class action specialists engineered a suit against Bank of Boston for allegedly requiring excessive escrow deposits from its mortgagors. See *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 508 (7th Cir. 1996). In their suit, class counsel purported to sue for recovery of the lost interest and the return of the escrowed principal itself. In a settlement drafted by class counsel—after rejecting a prior settlement proposed by the Bank, which offered to refund all surplus escrow and pay an additional \$500,000 to class counsel—the Bank was to make a one-time interest payment on the escrowed funds and return all surplus escrowed principal, with class counsel receiving fees out of this "fund" equal to one-third of the total economic benefit to class members. See *id.* at 1063. The "brilliance" of this proposal by class counsel, pursuant to which the bulk of the "consideration" to the class consisted of the "return" of their escrowed principal, was the surrender of one-third of the principal to class counsel in exchange for interest payments "ranging from \$0.00 to \$8.76." *Kamilewicz*, 92 F.3d at 508. The net result to individual class members was a loss of upwards of \$100 each. *Id.* The total fee to class counsel for managing to lose money for the class members—between \$8.5 to \$14 million. *Id.*

scholars⁹ around the country—not to mention within the national media.¹⁰ As a result of the increasing resonance of such criticisms within the legal community and the public in general, practitioners and courts must be prepared to deal with the fallout, both in terms of mastering evolving procedural requirements and in terms of overcoming (or exploiting) increasing hostility to many heretofore “common” class action settlement techniques.

The recent adoption in Louisiana of a new procedural scheme for class actions, based upon Rule 23 of the Federal Rules of Civil Procedure, presents a unique opportunity to take a fresh look at this crucial facet of class action practice within the state. However, even at the federal level, a recent succession of landmark Supreme Court decisions has drastically altered the procedural landscape within which class action settlements must be crafted.

This article provides a practical introduction to some of the most important procedural issues surrounding the settlement of class action lawsuits, both under the Federal Rules of Civil Procedure and the new articles governing class actions in Louisiana’s state courts. Part I of this article surveys the basic mechanics of class action settlement procedures. Part II discusses how these procedures have been and could be applied to safeguard against abuses of the class action mechanism.

I. THE NUTS AND BOLTS OF SETTLEMENT PRACTICE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

A. *An Introduction to Rule 23(e)*

Federal Rule of Civil Procedure 23(e) provides that “[a] class action shall not be dismissed or compromised without the approval of the court, and notice . . . to all members of the class in such manner as the court directs.”¹¹ Thus, “class

9. See, e.g., Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995); Barry F. McNeil & Beth L. Fancsali, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483 (1996); 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 (1986). Indeed, these leading commentators have been joined by the likes of Samuel Issacharoff, Larry Tribe, and John Leubsdorf in criticizing liberalization of the rules governing class action settlements.

10. E.g., Joseph Nocera, *Fatal Litigation*, *Fortune*, Oct. 16, 1995, at 60, 62; Joseph Nocera, *Fatal Litigation II: Dow Corning Succumbs*, *Fortune*, Oct. 30, 1995, at 137; Neil A. Lewis, *First Thing We Do, Let's Pay All the Lawyers*, *N.Y. Times*, Oct. 11, 1997, at A8; Chris Woodyard, *Big Settlements Mean Banner Year for Lawyers*, *USA Today*, Aug. 29, 1997, at 1-8; Michael Grinfeld, *Fat City: Diet Drugs, Once Fat for Masses Becomes Mass Tort*, *California Lawyer* 47, 48 (Aug. 1998). Indeed, as reported by Donald Massey et al. in a recent law review article, the Louisiana bench and bar have been the object of particularly harsh criticism of late from the national press. Donald C. Massey et al., *Curtailing the Tidal Surge: Current Reforms in Louisiana Class Action Law*, 44 *Loy. L. Rev.* 7, 50-51 nn.302, 305 (1998). Of course, there is some irony here, since it is also the tabloid-driven news media that are responsible for launching many of the mega-actions they then criticize.

11. The requirements of Rule 23(e) represent a specific exception to the general rule that voluntary dismissals do not require court approval. See Fed. R. Civ. P. 41(a)(1) (“Subject to the provisions of Rule 23(e) . . . an action may be dismissed by the plaintiff without order of court. . . .”);

actions" cannot be compromised without first obtaining court approval and affording proper notice (and an opportunity to be heard) to absent class members.¹²

Clearly, Rule 23(e) paints with a broad brush. It leaves to the courts the task of working out the practical details. Building on Rule 23(e), the Federal Judicial Center's current *Manual for Complex Litigation*—a commonly-cited resource for federal courts handling class action suits—suggests a two-stage process. First, the proposed settlement should be submitted to the court for preliminary approval. Second, an order is entered providing for notice of a formal "fairness hearing," during which the court will make a final determination as to whether the settlement is fair, reasonable, and adequate.¹³

This approach has been parsed by the courts into five distinct steps: (1) the preparation and submission of a joint stipulation of settlement by class and defense counsel; (2) a preliminary hearing at which the court makes an initial determination as to whether to require notice of the settlement to class members and hold an evidentiary hearing with respect to the fairness, reasonableness, and adequacy of the proposed settlement; (3) the issuance of notice to all class members, as directed by the court, disclosing the terms of settlement, the options available to class members, and the date, time, and location of the evidentiary hearing; (4) an evidentiary hearing, at which time the parties, objectors, and any intervenors are required to present arguments and evidence bearing upon the fairness, adequacy, and reasonableness of the proposed settlement; and (5) the issuance of a final judgment approving or disapproving of the proposed settlement.¹⁴

B. The Settlement Agreement

The formal settlement process begins with the confection of a joint stipulation of settlement for submission to the court. At a minimum, the stipulation must set forth the essential terms of the proposed settlement, including "the amount of settlement, form of payment, manner of determining the effective date of settlement,

see also National Hairdressers' & Cosmetologists Ass'n, Inc. v. Philadelphia Co., 4 F.R.D. 106 (D. Del. 1944) (holding that a local rule providing for automatic dismissal of an action for non-prosecution was preempted by the requirement of court approval and notice in case of class actions). *But see* Papilsky v. Berndt, 466 F.2d 251, 257 n.6 (2d Cir. 1972) (dismissal for lack of prosecution did not trigger Rule 23(e) because it was "involuntary").

12. So-called "peripheral compromises," or "side settlements" between class action defendants and absent class members, however, ordinarily do not require court approval absent a clear indication of fraud against the class or the court. As the First Circuit recently explained, because such separate merits compromises do not purport to settle the class action, Rule 23(e) is not directly implicated; moreover, the systemic concerns with protecting absent class members through judicial scrutiny of proposed class settlements are simply not present when absent class members obtain a settlement on their own behalf with separate counsel. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999); *see also* *In re General Motors Corp.*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S. Ct. 146 (1979); *In re Shell Oil Refinery*, 152 F.R.D. 526 (E.D. La. 1989).

13. *See* *Manual for Complex Litigation* § 30.41, at 236-37 (3d ed. 1995).

14. In cases where a class-wide settlement is reached before a class is certified, this process is modified. The settlement process in such cases is discussed below in Part I(E)(1)(d).

and any recapture clause."¹⁵ As will be seen, counsel must be cognizant of myriad factors in approaching the confection of a potential class action settlement. These factors will have a direct impact upon the interests of their clients and the prospects of court approval. They include: (1) the timing of the settlement (e.g., pre- or post-certification); (2) the parties to the settlement, particularly the settling class (including such issues as the impact upon future unrealized claims, the types of claims to be covered, and the like); (3) the consideration being offered (e.g., is any of the consideration non-pecuniary, as in the case of "coupon settlements," "reverter-fund settlements," and "monitoring settlements,"); (4) whether all or any portion of the settlement consideration will be borne by insurers; (5) the risk of adverse publicity (or the potential for favorable publicity) for the client;¹⁶ and (6) the extra-jurisdictional impact of the proposed settlement on other like-actions.¹⁷ Ordinarily, the settlement will also provide for the payment of administration costs, including notice expenses, distribution and claim/opt-out processing expenses, and the like. Typically, these costs are either borne directly by the defendant or are deducted from the settlement fund.¹⁸

This is also the appropriate occasion for class counsel to address the question of attorneys' fees in cases involving a common fund settlement. Usually this can be accomplished through the submission of a petition for the allowance of fees and expenses to be paid out of the fund, although a stipulation by class counsel that total fees will be limited to a certain percentage *may* also be an appropriate alternative in some situations.¹⁹ The concern here is to ensure that absent class members are provided with enough information to allow them to calculate, or at least fairly estimate, their net recoveries in connection with their evaluation of the proposed settlement.²⁰

15. Ordinarily, the stipulation would address all of the following: (1) the timing of distribution; (2) the release between defendants and the class (and, if appropriate, between the various defendants); (3) the payment of notice costs; (4) opt-out and proof of claim procedures including "blow" provisions applicable where there are excessive opt-outs; (5) attorneys' fees; (6) confidentiality provisions; (7) choice of law and choice of forum clauses; (8) "no-admission" clauses; (9) contribution and indemnity provisions; (10) administration of the settlement funds; and (11) provisions concerning drafting and execution of any ancillary pleadings or documentation. In so-called "public interest settlements," such as a civil rights class action settlement, careful attention must also be given to defining the affected class and the practice sought to be remedied. See Herbert B. Newberg & Alba Conte Newberg on Class Actions § 11.24, at 11-34 (3d ed. 1992) [hereinafter Newberg] (citing Stanley Levy, *Class Action Settlement Techniques & Procedures*, 19 Practical Law No. 8, at 69, 75 (Dec. 1975)).

16. See, e.g., *Editorial Laptop Illogic*, Wall Street Journal, Nov. 3, 1999, at A26 (suggesting that Toshiba entered into \$2.1 billion dollar settlement merely to protect consumer good will).

17. See, e.g., *Matsushita Elect. Indus. Co. v. Epstein*, 516 U.S. 367, 374, 116 S. Ct. 873, 878 (1996).

18. See also *In re Penn Cent. Sec. Litig.*, 560 F.2d 1138, 1145 (3d Cir. 1977).

19. Concerns raised by the practice of class counsel negotiating for a fixed fee award with the class action defendants at the same time the overall settlement is being negotiated are addressed separately below in Part I(E)(1)(a).

20. A related issue too often overlooked by parties in crafting settlement agreements is the disposition of unclaimed or unused settlement proceeds. A negotiated solution to this issue can sometimes be used to smooth other feathers ruffled at points in the settlement dialogue. See *infra* notes 192-197 and accompanying text.

Ultimately, however, the stipulation should be tailored to its purpose, which is to enable the court to make an informed "preliminary" determination as to the "fairness" of the proposed settlement. To that end, common practice is to supplement the stipulation with formal memoranda and supporting affidavits. These documents can flesh out the background for the proposed settlement, including a summary of the suit's subject matter and procedural history, a discussion of the substantive merits of the case and any significant procedural hurdles, and an explanation of why the proposed settlement is appropriate and fair with respect to the interests of the absent class members.

C. *The Preliminary Hearing*

There is no express requirement under the Federal Rules for a preliminary hearing to evaluate a proposed settlement, or even for preliminary approval of the proposed settlement; final court approval of a proposed settlement is required, however. Thus, some form of preliminary review of the proposed settlement makes sense. A preliminary review can ensure that the expense of notice, as well as the investment of time and resources by litigants and courts alike in connection with the formal fairness hearing, are not wasted on a settlement that is outside the range of anything the court might be prepared to approve.²¹

The *Manual for Complex Litigation* recommends that courts ordinarily conduct a formal hearing at this stage. This hearing affords an opportunity for the court to ensure that it is well informed about the context out of which the proposed settlement arose, including the circumstances surrounding the parties' negotiations. Further, the hearing provides a forum for the parties' counsel to explain the settlement (as well as for anyone excluded from the material negotiations to be heard).²² Notice of this preliminary hearing need not be provided to absent class members, which minimizes the burden on the participating parties.²³ Thus, an informal conference may be all that is required if the court already is familiar with the particular lawsuit. Indeed, it may even be sufficient in the odd case for the parties simply to submit the matter to the court on briefs.²⁴ Nevertheless, some sort

21. See *In re Corrugated Container Antitrust Litig.*, 1979-1 Trade Cases (CCH) ¶ 62,690, at 77,880 (S.D. Tex. 1979). Preliminary review proceedings also provide a convenient forum for counsel and the court to visit concerns raised by "competing" suits in other jurisdictions to their ability to close on a settlement. In the federal courts, the possibility of obtaining injunctive relief to stay competing state court proceedings under the "in aid of jurisdiction exception" to the Anti-Injunction Act, 28 U.S.C. § 2283, can be breached with the court at this time. See generally, e.g., *White v. National Football League*, 41 F.3d 402, 409 (8th Cir. 1994). Similarly, removal of a competing state court class action in the same venue as a settling federal class action may also be possible under the All Writs Act, 28 U.S.C. § 1651.

22. See *Manual for Complex Litigation* § 30.41, at 237.

23. *Mungin v. Florida E. Coast Ry. Co.*, 318 F. Supp. 720, 733 (M.D. Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897, 92 S. Ct. 203 (1971).

24. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S. Ct. 695 (1988); see also *Manual for Complex Litigation* § 30.41, at 236.

of preliminary determination by the court as to the settlement's chances is advisable in nearly every case.²⁵

According to the *Manual for Complex Litigation*, preliminary approval should be granted by the court so long as the court's "preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval"²⁶ In short, the question is "whether there is 'probable cause' to notify the class of the proposed settlement."²⁷ This inquiry allows the court an opportunity to raise any concerns it may have with respect to the proposed settlement. A court may condition preliminary approval upon such terms as it deems appropriate, or even require that further steps be taken as a prerequisite to the fairness hearing itself.²⁸

D. Notice of the Settlement

Assuming the court determines that preliminary approval of the proposed settlement is warranted, the court should direct that notice of the proposed settlement be given to the class members, including appropriate notice of a formal fairness hearing.²⁹ Rule 23(e) flatly prohibits the settlement of a class action without notice to all class members, and non-compliance with this requirement necessitates that the offending settlement be overturned.³⁰ Because a class action settlement will bind absent class members who, by definition, are individuals that are not before the court, notice under Rule 23(e) has significant due process ramifications.³¹ However, Rule 23(e) requires only that notice be given "in such manner as the court directs," leaving the court with much discretion with respect to the contents and manner of transmittal of the required notice.³²

25. See, e.g., *Armstrong v. Board of Sch. Dirs.*, 616 F.2d 305, 314 n.13 (7th Cir. 1980).

26. See *Manual for Complex Litigation* § 30.41, at 237.

27. *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp 825, 827 (E.D.N.C. 1994).

28. E.g., *Fisher Bros. v. Phelps Dodge Indus.*, 1985-1 Trade Cases (CCH) ¶ 66,536, at 65,670 (E.D. Pa. 1984); see generally *Fed. R. Civ. P. 19(6)*, 23(d)(5); *In re LaMarre*, 494 F.2d 753 (6th Cir. 1974); see also *Local Rule 9.4 for the Eastern District of Louisiana*.

29. See *Manual for Complex Litigation* § 30.41, at 237.

30. *Simer v. Rios*, 661 F.2d 655, 663-64 (7th Cir. 1981), *cert. denied*, 456 U.S. 917, 102 S. Ct. 1773 (1982); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 2249 (1997) (Rule 23(e) protects absent class members from "fainthearted" or selfish representatives); *Glidden v. Chromalloy Am. Corp.*, 808 F.2d 621, 626-27 (7th Cir. 1986) (Rule 23(e) was designed to frustrate attempts by class representatives to settle the case on terms favorable to them but at the expense of absent class members).

31. E.g., *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905, 101 S. Ct. 3029 (1981); see also *Sanders v. Robinson Humphrey/American Express, Inc.*, [1990 Transfer Binder] *Fed. Sec. L. Rep. (CCH)* ¶ 95,315 (N.D. Ga. May 23, 1990); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1991).

32. See *Weinberger v. Kendrick*, 698 F.2d 61, 70-71 (2d Cir. 1982), *cert. denied*, 464 U.S. 818, 104 S. Ct. 77 (1983); *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1501 (N.D. Ala. 1991),

The manner in which notice must be given is ordinarily the same as is required for other types of class action notices. Individualized notice, ordinarily provided by mail, only needs to be provided to those individuals who can be identified through reasonable means.³³ In securities litigation, beneficial holders are probably not entitled to notice of settlement, even though notice to beneficial holders of the pendency of class action litigation is required.³⁴ Options available in situations where individual notice by direct communication is not feasible or practicable include publication of the notice in newspapers, magazines, periodicals,³⁵ radio and television announcements,³⁶ posting announcements on community bulletin boards,³⁷ and the like.³⁸

Just as is the case with manner of notice, there are no prescribed standards³⁹ governing the content of a Rule 23(e) notice.⁴⁰ Nonetheless, the jurisprudence does

aff'd per curiam, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 509 U.S. 906, 113 S. Ct. 2999 (1993); *Quigley v. Braniff Airways, Inc.*, 85 F.R.D. 74, 77 (N.D. Tex. 1979).

33. *Weinberger*, 698 F.2d at 71; *see also, e.g.*, *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979); *Whitford v. First Nationwide Bank*, 147 F.R.D. 135 (W.D. Ky. 1992); *Hill v. Art Rice Realty Co.*, 66 F.R.D. 449 (N.D. Ala. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975).

34. *Compare Lewis v. Anderson*, 81 F.R.D. 436, 441-42 n.5 (S.D.N.Y. 1978) with *In re Franklin Nat'l Bank Sec. Litig.*, 574 F.2d 662, 668-72 (2d Cir.), *mod'd* 599 F.2d 1109 (2d Cir. 1978).

35. *E.g.*, *White v. National Football League*, 41 F.3d 402 (8th Cir.), *cert. denied*, 515 U.S. 1137, 115 S. Ct. 2569 (1994); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956 (3d Cir. 1983); *Airlines Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc.*, 455 F.2d 101 (7th Cir. 1972); *In re Prudential Ins. Co. of Am.*, 177 F.R.D. 216 (D.N.J. 1997); *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993); *Handschu v. Special Serv. Div.*, 605 F. Supp. 1384 (S.D.N.Y. 1985), *aff'd*, 787 F.2d 828 (2d Cir. 1986); *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981).

36. *See In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 311 (N.D. Ga. 1993); *Harris v. Pensley*, 634 F. Supp. 1042, 1047 (D. Pa. 1987); *cf. Stanley v. Darlington Cty. Sch. Dist.*, 879 F. Supp. 1341, 1372 (D.S.C. 1995), *rev'd in part on other grounds*, 84 F.3d 707 (4th Cir. 1996).

37. *Plummer v. Chemical Bank*, 668 F.2d 654, 657 (2d Cir. 1982); *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1547 (N.D. Ala. 1995); *Lelsz v. Kavanagh*, 783 F. Supp. 286, 289 (N.D. Tex. 1991), *aff'd*, 983 F.2d 1061 (5th Cir.), *cert. denied*, 510 U.S. 906, 114 S. Ct. 287 (1993); *Harris*, 634 F. Supp. at 1048.

38. *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994) (notice to brokers holding disputed securities in street names); *Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 391 (3d Cir. 1981) (announcement at plant meeting); *Meyer v. Citizens & So. Nat'l Bank*, 677 F. Supp. 1196 (D. Ga. 1988) (notice to state agencies provided by mail to state governors); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 730 (E.D.N.Y. 1983) (same).

39. Like any rule, this one does have its exceptions. For instance, the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995), expressly mandates the disclosure of certain information settlement notices issued in private actions arising under the Securities Act of 1933, 15 U.S.C. § 77a (the "Securities Act") or the Exchange Act of 1934, 15 U.S.C. § 78a (the "Exchange Act"), that were not pending as of December 22, 1995. Specifically, notices in covered cases must discuss all of the following and provide a summary of the information on the notice's cover page (together with any other information the court might deem necessary or appropriate): (1) the amount of the settlement; (2) the potential recovery had the class prevailed on the merits; (3) the attorneys' fees and costs sought by class counsel; (4) the identity of class counsel; and (5) the reasons for the proposed settlement. The Act also expressly prohibits placing covered settlement agreements under seal, though there is an allowance for the protection of certain portions of such agreements if necessary to protect against direct and substantial harm which can include reputational injury to a settling party. Securities Act, at § 21D(a)(5); *see also* H.-S. Conf. Rep., H. Rep. No. 104-369, at 35 (1995); S. Rep. No. 104-98, at 13 (1995).

40. *See Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982); *see also In re Corrugated*

offer some general rules of thumb. First, the notice must provide basic information about the nature of the lawsuit, the general terms of the proposed settlement, and the options available to class members with respect to the proposed settlement. Second, it must alert the absent members to the fact that detailed information can be retrieved from the court record and that they have the right to appear and be heard at the fairness hearing.⁴¹

Despite the lack of any mandatory form, notices are increasingly becoming standardized in their style and content, and almost always contain at least the following: (1) a heading containing the caption of the lawsuit, a description of affected class, and the time, date, location, and purpose of the fairness hearing; (2) a description of the litigation, including an explanation of the asserted claims and any affirmative defenses, and a summary of the case's procedural history; (3) a description of the proposed settlement; (4) a disclosure of any requested allowances for attorneys' fees; and (5) an explanation of the procedures for filing objections to the proposed settlement, for obtaining documents, and for making claims against the settlement fund.⁴² On occasion, a settlement notice will actually include a copy of the stipulation of settlement,⁴³ but ordinarily all that is necessary is a general description of the settlement's essential terms.⁴⁴ Counsel, struggling with the dilemma of providing comprehensive disclosures in a summary form accessible to unsophisticated laymen and (in many cases) destined for publication through one or more news media, can obtain some level of comfort by ensuring that the notice explains how potential class members can get more information, for example, by instructing class members who want more information on how to make appropriate inquiries with the clerk of court.⁴⁵ Again, the sufficiency of the notice of settlement will be evaluated in light of its ability to so inform class members of the settlement that they can make a reasoned and informed decision as to whether they will intervene or otherwise raise questions or concerns about the settlement with the parties or the court, or even whether they will refuse to participate in the settlement outright.⁴⁶

Understandably, courts generally do not require that the settlement notice set out what each claimant can expect to recover. In most cases it would be extremely

Container Antitrust Litig., 643 F.2d 195, 223 (5th Cir. 1981).

41. See, e.g., In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 759 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S. Ct. 695 (1988); Miller v. Republic Nat'l Life Ins. Co., 559 F.2d 426 (5th Cir. 1977). This information should be presented in a neutral, non-biased manner, couched in language readily accessible to the layman. See, e.g., White v. Alabama, 74 F.3d 1058 (11th Cir. 1996); Heit v. Amrep Corp., 88 F.R.D. 130, 136 (S.D.N.Y. 1979).

42. See Carlough v. Amchem Prods., Inc., 158 F.R.D. 314 (E.D. Pa. 1993); see also Weinberger v. Kendrick, 698 F.2d 61, 79 (2d Cir. 1982); Newberg, *supra* note 15, § 8.32, at 8-105. Cf. Securities Act, at § 21D(a)(5).

43. In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y., June 11, 1984) (slip opinion).

44. Handschu v. Specials Servs. Div., 787 F.2d 828, 833 (2d Cir. 1986).

45. Often, courts will provide a special procedure through which class members can obtain and review copies of the record. This procedure is designed to avoid unnecessary impositions upon the court and clerk staff.

46. See Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978).

difficult, if not impossible, to do so.⁴⁷ On the other hand, the notice should generally apprise class members of the method in which their share of the total settlement proceeds is to be determined. It is usually appropriate as well to alert absent class members to the fact that legal fees and expenses will be sought by class counsel and, if appropriate, that these costs are to be deducted from the total recovery available for distribution to the class members. Finally, the notice should disclose when and how approval of those fees will be requested, state whether the fees are to be paid out of a settlement fund or be borne separately by the defendants, and note that the court will review and approve the requested fees.⁴⁸

As is normally the case, if a procedure for making claims against the settlement fund (or for opting out) has been proposed, then it should also be included in the notice.⁴⁹ Similarly, most notices set forth a mandatory procedure by which objections to the settlement must be submitted for consideration by the court. Imposing such procedures is really a practical necessity, but they can be enforced only to the extent class members have notice of them. Included in both the proof of claim and objection descriptions should be a clear indication of when, where, and how the objection must be submitted, as well as what it should contain.⁵⁰

Finally, mention should also be made of items that courts have concluded do not need to be included in a Rule 23(e) notice. Prominent among these unnecessary items is information concerning the existence of objectors to the settlement⁵¹ and disclosure of the possibility that class members themselves may be exposed to potential future liability.⁵²

E. Final Approval and the Fairness Hearing

Final court approval of a class action settlement is mandatory under Rule 23(e).⁵³ Although commentators have argued in favor of amending Rule 23(e) to iterate specific factors that courts should consider in evaluating a proposed settlement,⁵⁴ none are presently specified, leaving the analysis squarely within the

47. See, e.g., *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 224 (5th Cir. 1982); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 1085 S. Ct. 695 (1988).

48. See Newberg, *supra* note 15, § 8.32, at 8-107.

49. See Manual for Complex Litigation § 41.44, at 490-91.

50. The jurisprudence does not give any clear indication as to what constitutes an appropriate delay period for claims or objections, although a 30 to 60 day period appears common. See Newberg, *supra* note 15, § 8.37, at 8-118. Nonetheless, if the notice period is found to be too short, it may result in the settlement being upset on due process grounds. Cf. *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 429 (5th Cir. 1977).

51. See, e.g., *In re Corrugated Containers*, 643 F.2d at 224.

52. See also, *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

53. The Manual for Complex Litigation states that "[a]pproval is required of the settlement of any action brought as a class action, regardless of whether the settlement occurs prior to certification, and even if the only claims being settled are those of the individual plaintiffs, with the class claims being dismissed without prejudice." Manual for Complex Litigation § 30.41, at 237.

54. See, e.g., William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L. Rev. 837 (1995).

discretion of the trial court.⁵⁵ The exact mechanics of the fairness hearing are also left to the court's discretion.⁵⁶ Indeed, a formal hearing need not be held at all under certain circumstances, such as where there has already been extensive discovery and pre-trial motion practice.⁵⁷ In other circumstances, however, a full evidentiary hearing may be indispensable.⁵⁸

The proponents of the settlement bear the burden of demonstrating that it is "fair, reasonable, and adequate."⁵⁹ Because the court's decision is discretionary, it is reviewable only for abuse of discretion.⁶⁰ Nonetheless, the court must "apprise itself of all facts necessary for an intelligent and objective opinion," and reach an independent decision on the merits.⁶¹ The trial court ordinarily must provide written reasons that include specific findings as to the "fairness, reasonableness, and adequacy" of the proposed settlement and explain how the court reached those findings.⁶²

Significantly, however, the court is called upon to make the foregoing inquiries without purporting to adjudicate the merits of the underlying claims, and without presuming to rewrite the agreement negotiated between the parties.⁶³ By necessity, this means that courts must give considerable weight to the views of counsel as to the merits of a proposed settlement.⁶⁴ Again, however, the court is charged with conducting an independent analysis,⁶⁵ and must be cognizant that counsel have competing interests and obligations that may be at odds with full and unqualified

55. *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426 (5th Cir. 1977); *see also* *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988); *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir.), *cert denied*, 409 U.S. 1039, 93 S. Ct. 521 (1972); *Grish v. Jepson*, 521 F.2d 153, 156 n.7 (3d Cir. 1975).

56. *See, e.g.*, *Van Horn v. Trickey*, 840 F.2d 604 (8th Cir. 1988) (no hearing required); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677 (7th Cir. 1987) (same).

57. *See Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983); *Weinberger v. Kendrick*, 698 F.2d 61, 79 (2d Cir. 1982); *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1385 (S.D.N.Y. 1972), *aff'd in part*, 495 F.2d 448 (2d Cir. 1974).

58. *Calhoun v. Cook*, 487 F.2d 680 (5th Cir. 1973); *see also* *Mandujano v. Basic Veg. Prods., Inc.*, 541 F.2d 832 (9th Cir. 1976).

59. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983); *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 138-39 (W.D. Ky. 1992); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979), *aff'd in pertinent part*, 645 F.2d 488 (5th Cir. 1981); *cf. Grinnell Corp.*, 495 F.2d at 464; *but see* *Airline Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), *cert. denied*, 439 U.S. 876, 99 S. Ct. 214 (1978).

60. *Maywalt v. Parker & Parsley Petr. Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1176-77 (8th Cir. 1995).

61. *Weinberger*, 698 F.2d at 74; *see Malchman v. Davis*, 706 F.2d 426, 432-33 (2d Cir. 1983).

62. *Malchman*, 706 F.2d at 433; *Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2d Cir. 1982); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 218 (5th Cir. 1981); *Kohn v. American Metal Climax, Inc.*, 489 F.2d 262, 263 (3d Cir. 1973).

63. *See, e.g., Malchman*, 706 F.2d at 433; *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 804 (3d Cir.), *cert. denied*, 419 U.S. 900, 95 S. Ct. 184 (1974). *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312 (N.D. Ga. 1993).

64. *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 426-27 (7th Cir. 1977); *Grinnell Corp.*, 495 F.2d 462; *see also* *Manual for Complex Litigation* § 30.43, at 241 ("Counsel for the parties are the court's main source of information concerning the settlement.").

65. *See, e.g., Hoffman Elec., Inc. v. Emerson Elec. Co.*, 800 F. Supp. 1289, 1295-96 (W.D. Pa. 1992) (approving settlement over objections of class counsel).

disclosures.⁶⁶ Obviously, what comes out of this meat grinder is a highly discretionary judgment call by the trial court—one that should not lightly be upset on appeal.

The *Manual for Complex Litigation* indicates that the courts' inquiry should focus upon "whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than being pursued;"⁶⁷ the jurisprudence has re-articulated the same concept by asking whether the settlement is fair, reasonable, and adequate from the perspective of the affected class members.⁶⁸ The courts' inquiry should be guided by the principal, perceived dangers posed by class action settlements, to wit: (1) infringement of the rights of absent class members who may not have had a sufficient voice during the settlement negotiations⁶⁹ and (2) the possibility of collusion between the parties that actually negotiated the settlement.⁷⁰ Clearly, the inquiry is fact specific, and "requires an amalgam of delicate balancing, gross approximations and rough justice."⁷¹

Commentators interpreting the reported jurisprudence addressing court approval of proposed class actions settlements have identified two general lines of substantive inquiry. The first of these areas of inquiry calls for scrutiny of "the negotiating process by which the settlement was reached, . . . demanding that the compromise be the result of arm's-length negotiations and that plaintiff's counsel possessed the experience and ability, and engaged in the discovery, necessary to effective representation of the class's interests."⁷² The second line of inquiry analyzes the objective or "substantive" fairness of the proposed settlement as presented to the court, comparing "the terms of the compromise with the likely rewards of litigation [to the class]."⁷³

66. See *Manual for Complex Litigation* § 30.44, at 242 (while counsel owe a duty of candor to the court, they "need also to take into account their ongoing obligations to their clients and the need to protect their position should the settlement fail"); *In re Oracle Secs. Litig.*, 829 F. Supp. 1176, 1179 (N.D. Cal 1993) ("an attractive attorney fee provision in the settlement agreement may induce class counsel to settle regardless of the likelihood that further pursuit of the litigation might substantially increase the total class recovery").

67. See *Manual for Complex Litigation* § 30.42, at 238.

68. See, e.g., *Austin v. Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437, 1456 (E.D. Pa. 1995); see also *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.), *cert. denied*, 506 U.S. 953, 113 S. Ct. 408 (1992).

69. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217, 103 S. Ct. 1219 (1983); *White v. National Football League*, 822 F. Supp. 1389, 1416 (D. Minn. 1993); cf. *Saylor v. Lindsey*, 456 F.2d 896 (2d Cir. 1972) (Courts must "exercise particular care to see to it that non-asserting plaintiff has had a full opportunity to develop the basis for his objection.").

70. See, e.g., *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); see also *Weinberger v. Kendrick*, 698 F.2d 61, 73-74 (2d Cir. 1982); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1442 (1995).

71. *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1385 (S.D.N.Y. 1972), *aff'd in part*, 495 F.2d 448 (2d Cir. 1974).

72. *Weinberger*, 698 F.2d at 74.

73. *Protective Comm. for Ind. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 425, 88 S. Ct. 1157, 1163 (1968); see also *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987).

1. *Scrutiny of the Negotiation Process*

As numerous courts and commentators have observed, there is an obvious potential for collusion in class-action settlements between the defendants (who are seeking to resolve liability with respect to the broadest possible class of putative plaintiffs) and the class' counsel (who are interested in maximizing their own attorney fees).⁷⁴ These concerns are heightened in the context of mass tort class action settlements involving exposure claims and like situations, where the potential for resolving future claims may be a significant, or even the dominant driving force behind a proposed settlement.⁷⁵ As is explained later, scrutiny of the settlement negotiation process in the mass tort class action context has given rise to two of the U.S. Supreme Court's most significant recent decisions addressing class action settlements.

Despite the acknowledged risk of collusion, the federal judiciary has articulated a general rule that presumes the absence of fraud or collusion in the negotiation of class action settlements. The rule is based solely upon a *prima facie* showing that the settlement was the product of arms-length negotiations between experienced counsel, trusting the objective review of the settlement terms themselves to expose any harmful abuses by counsel.⁷⁶ In this way, the courts recognize that settlements by their very nature represent the exercise of imperfect judgment by the negotiating parties, who are attempting to evaluate and balance the potential of often undeveloped legal and factual issues that may or may not ultimately be placed before the court at trial. This jurisprudential approach has aptly been described as the "proof is in the eating" standard, whereby courts are excused from second guessing the judgment of counsel and the negotiating parties so long as the end product appears fair and reasonable.⁷⁷ In the words of the Fifth Circuit:

It is, ultimately, in the settlement terms that the class representatives' judgment of the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable, and adequate, . . . whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.⁷⁸

74. See, e.g., *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 152 (S.D. Ohio 1992); *Coffee*, *supra* note 6, at 883-89.

75. See *Coffee*, *supra* note 70, at 1442.

76. See, e.g., *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel*, 834 F.2d at 681-82; *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981), *cert. denied*, 456 U.S. 998, 102 S. Ct. 2283 (1982); see also *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 823-24 (D. Mass. 1987); cf. *Katz v. E.L.I. Computer Sys., Inc.* [1970-71 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,994 at 90,676 (S.D.N.Y. 1971) (there is a "strong initial presumption that the compromise is fair and reasonable").

77. "Rather than attempt to proscribe the modalities of negotiation, the district judge permissibly focus[es] on the end result of the negotiation. . . . The proof of the pudding is indeed in the eating." *Mars Steel*, 834 F.2d at 684.

78. *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 212; see also, e.g., *Bowling*, 143

a. Negotiating Class Counsel's Fees

Nonetheless, the foregoing provides a general rule only; there are situations which present unique concerns requiring courts to scrutinize more closely the negotiation process. Chief among these are cases involving the negotiation of class counsel's fees as part of an overall settlement. Many courts (and commentators) have perceived a risk that class counsel may be distracted from zealously guarding the best interests of the class, and particularly the class' absent members, if the question of their own legal fees becomes an essential element of a proposed settlement.⁷⁹ As one commentator explains:

The absence of a real client impairs the incentive of the lawyer for the class to press the suit to a successful conclusion. His earnings from the suit are determined by the legal fee he receives rather than by the size of the judgment. No one [involved directly in the negotiations] has an economic stake in the size of the judgment except the defendant, who has an interest in minimizing it. The lawyer for the class will be tempted to offer to settle with the defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant, provided the sum of the two figures is less than the defendant's net expected loss from going to trial.⁸⁰

Certainly, it is common practice for defendants to challenge attorneys' fees sought by a plaintiff. Especially in cases involving statutory fee provisions, such challenges can have a noticeable impact upon the ultimate award approved by the Court.⁸¹ This potential leverage can lead defendants to attempt to exact a more favorable settlement in exchange for stipulating to a fee award (or even merely agreeing not to contest fee applications below a ceiling figure).⁸² Unscrupulous class counsel may be tempted to "sell out" the class to guarantee themselves a good fee.

Even in the absence of obvious collusion, mixing negotiation of the overall settlement with discussions of attorneys' fees can muddy the waters.⁸³ Particularly in consumer and mass tort claims, where the class representatives are often unsophisticated laymen, these concerns can at least lend themselves to an appearance of impropriety.⁸⁴ Offsetting these concerns, however, is the possibility

F.R.D. at 152-53.

79. See, e.g., *Cisek v. National Surface Cleaning, Inc.*, 954 F. Supp. 110, 110 (S.D.N.Y. 1997) (citing *Malchman v. Davis*, 761 F.2d 893, 904-05 (2d Cir. 1985)); see also *Mendoza v. United States*, 623 F.2d 1338, 1352-53 (9th Cir. 1980), cert. denied, 450 U.S. 912, 101 S. Ct. 1351 (1981).

80. Richard A. Posner, *Economic Analysis of Law* 570 (4th ed. 1992).

81. See, e.g., *Coffee*, supra note 70, at 1351.

82. See, e.g., *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524-25 (1st Cir. 1991).

83. *Id.*

84. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir.), cert. denied, 516 U.S. 824, 116 S. Ct. 88 (1995) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170-74 (2d Cir.), cert. denied, 484 U.S. 1004, 108 S. Ct. 289 (1987)).

that defendants will be far less likely to settle cases where attorneys' fees are an issue if that potential liability cannot be capped as part of the overall settlement.⁸⁵

Staking its claim at one extreme of the jurisprudential spectrum, the Third Circuit in *Prandini v. National Tea Co.*⁸⁶ adopted a per se prohibition against the simultaneous negotiation of attorneys' fees with the overall class settlement, concluding that a flat prohibition is necessary to prevent an "attorney-class conflict" over "one fund divided between the attorney and [an absent] client."⁸⁷ This per se prohibition was subsequently overruled in *Evans v. Jeff D.*,⁸⁸ at least as to cases involving statutory fee claims. The Third Circuit, for one, continues to consider the timing of fee negotiations to be relevant to the approval of a proposed class-action settlement, and is inclined to enforce *Prandini* in cases where statutory fee awards are not at issue.⁸⁹

In *Evans*, the Supreme Court expressed its marked reluctance to deprive class counsel of the ability to include attorneys' fees and costs as an element of a proposed settlement in actions that involve possible statutory fee awards (*Evans* was a civil rights suit). It explained that potential exposure to fee awards can be of crucial significance in such cases,⁹⁰ given the difficulty of anticipating how a court will exercise its discretion in fixing a fee award. The Court stated: "It is . . . not implausible to anticipate that parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open."⁹¹

Echoing the Supreme Court's concerns, a Third Circuit Task Force, appointed to address the issue of court-awarded attorney's fees, back-peddled from *Prandini*. It recognizing that a *per se* ban even outside of statutory fee cases "may well tend to discourage settlement . . . [by] mak[ing] it difficult for the defendant to ascertain precisely what [that] liability will be, thereby eliminating the very certainty that makes settlement attractive to the defendant." The Task Force recommended various alternatives to a per se prohibition, including the following:

[T]he defendant should be permitted to make an offer of settlement that is conditional on a subsequent satisfactory resolution of the question of fees. This type of offer, assuming the fee in question is pursued in good faith,

85. One questionable resolution of these competing interests suggested in some corners is to allow agreements wherein defendants agree not to contest fees up to a ceiling. See, e.g., *Parker v. Anderson*, 667 F.2d 1204 (5th Cir.), cert. denied, 459 U.S. 828, 103 S. Ct. 63 (1982). By injecting the court into the mix, this approach does mitigate some appearance problems, but it still raises the same basic conflict of interest concerns that an outright fee agreement would.

86. 557 F.2d 1015 (3d Cir. 1977).

87. *Id.* at 1021; see also *Court Awarded Attorneys' Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 266 (1985).

88. 475 U.S. 717, 734-38, 106 S. Ct. 1531, 1540-43 (1986).

89. *In re General Motors Trucks*, 55 F.3d at 804; cf. *Ashley v. Atlantic Richfield Co.*, 794 F.2d 128 (3d Cir. 1986).

90. Significantly, the failure of the parties to address attorneys' fees in the settlement should not per se bar their recovery. See *El Club Del Barrio, Inc. v. United Community Corp.*, 735 F.2d 98, 100-01 (3d Cir. 1984); see also *Hanrahan v. Hampton*, 446 U.S. 754, 757-58, 100 S. Ct. 1987 (1980); cf. *Wakefield v. Matthews*, 852 F.2d 482 (9th Cir. 1988); but see *Aho v. Clark*, 608 F.2d 365, 367-68 (9th Cir. 1979).

91. *Evans*, 475 U.S. at 735-37, 106 S. Ct. at 1541-43.

usefully separates the issues of settlement of the merits and resolution of the fees in a way that should minimize the defendant's reluctance to negotiate.⁹²

The Task Force added that, in some situations, a ban on simultaneous negotiations could be abandoned altogether with appropriate disclosures and court supervision: "The risk of liminal or even subliminal conflicts of interest arising seems to be extremely low when the parties approach the court and request a waiver of *Prandini* under the trial judge's supervision."⁹³

b. Non-Pecuniary Settlements

Similar concerns have been expressed with respect to so-called "non-pecuniary" settlements. These settlements are seen in cases involving "coupon settlements",⁹⁴ securities litigation settlements involving the distribution of stocks, puts, or warrants;⁹⁵ as well as certain other non-traditional settlement arrangements, such as those employing reverter funds,⁹⁶ monitoring funds,⁹⁷ and *cy pres* or fluid fund distributions.⁹⁸ It should be borne in mind that these approaches are not

92. 108 F.R.D. at 269.

93. *Id.*

94. In a coupon settlement—common in consumer class suits—discount, rebate, or other types of manufacturer or vendor coupons are provided to class members as the settlement consideration. *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995); *General Motors v. Bloyed*, 916 S.W.2d 949 (Tex. 1996). Typically, these agreements involve the defendant assuming notice and administrative costs relating to the settlement, as well as the payment of attorneys' fees based upon the parties' valuation of the coupons made available to class members.

95. In such non-cash securities settlements, the defendants contribute securities or put warrant rights to class members as consideration for a class-wide release. In the most straight-forward example, the class members receive stock in the defendant corporation out of a "stock fund" in proportion to their alleged losses. *See, e.g., In re TSO Financial Litigation*, Civ. No. 87-7903, 1989 U.S. Dist. LEXIS 7434 (E.D. Pa. June 29, 1989). In a put-option settlement, the defendant offers to issue put-options to members of the plaintiff shareholder's class whereby the corporation is bound to re-purchase the holders' shares at the guaranteed floor price. *See, e.g., Derdiarian v. Futterman Corp.*, 254 F. Supp. 617 (S.N.D.Y. 1966). Class members who have divested themselves of the defendant's stock would get nothing under such an arrangement. In a warrant arrangement, the defendant agrees to sell stock to class members at a strike price, usually set modestly above its then-current trading price. *See, e.g., Seidman v. American Mobile Sys.*, 965 F. Supp. 612 (E.D. Pa. 1997). This allows the defendant to reduce any cash components of the settlement while allowing class members to share in any gains in the value of the defendants' stock.

96. In reverter fund settlements, the defendant contributes cash to an escrow account to be paid out to class members who apply for funds pursuant to a pre-set claims process, with any unclaimed funds reverting to the defendant at the end of the set period. *See, e.g., Boeing v. Van Gemert*, 444 U.S. 472, 100 S. Ct. 745 (1980).

97. In monitoring fund settlements, money is set aside and earmarked to identify and pay future damages incurred by class members. *See, e.g., Woodward v. Nor-Am Chem. Co.*, Civ. No. 94-0780-CBC, 1996 U.S. Dist. LEXIS 7372 (S.D. Ala. May 23, 1996).

98. In *cy pres* settlements, payments are made to claimants even though they have not established damages, or even membership in the class, and can be utilized in consumer interest cases where class membership is substantial and individual losses and recoveries minimal. *See generally, Michael Malina, Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U. L. Rev. 477 (1972).

mutually exclusive, and are often utilized along with a monetary component as well. The principal criticism of such arrangements is that parties to a non-adversarial settlement can manipulate the valuations of such non-traditional considerations to enhance the likelihood of approval and in this way increase attorneys' fees for class counsel. The result is a direct expense to class members who, in a more traditional monetary settlement, likely would have been able to demand greater total out-of-pocket consideration from the defendant. The defendant often is concerned only with the total actual settlement value and, hence, does not have a vested interest in how the settlement proceeds are allocated between class members and class counsel. Therefore, the defendant may be perfectly content to go along with an enhanced valuation to close a deal, thereby improving the prospects of getting court approval for the settlement, and making exaggerated fees obtained by class counsel look more humble than they actually are relative to the true recovery ultimately realized by the class.

Despite these quite legitimate reasons for concern, the use of alternative forms of consideration can, in some instances, benefit class members. An example is seen where the defendant and the class are able to split cost-savings that the defendant realizes as the result of avoiding certain capital-generation/liquidation expenses or even by enabling the defendant to avoid bankruptcy.

c. Reverse Auctions

The increasingly common situation of the simultaneous pendency of several multi-jurisdiction class actions targeting the same defendant in separate jurisdictions⁹⁹ should raise another red flag for courts examining proposed settlements. A defendant in this situation can find itself, however unwittingly, in a position that allows it to play class counsel in the competing actions against one-another. By exploiting the threat that it may be able to retard the progress of those actions with uncooperative class counsel,¹⁰⁰ a defendant can force class counsel in the competing suits to enter into a bidding war through early settlement discussions. This ploy might force one to resolve their actions first, thereby assuring that they will recover their fees.¹⁰¹

99. See Linda S. Mullenix, *Dueling Class Actions*, Nat'l L.J., Apr. 26, 1999, at B18. The problem is at its worse where multiple state court suits are involved, as federal transfer rules such as 28 U.S.C. § 1407, stay orders, and local consolidation provisions should limit the worst examples in federal practice. See, e.g., *Blair v. EquiFax Check Services, Inc.*, 181 F.3d 832, 839 (7th Cir. 1994). Cf. *Matsuchita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 116 S. Ct. 873 (1996) (recognizing that state courts have the power to decide multi-jurisdictional class action lawsuits).

100. The possibility of obtaining federal injunctive relief enjoining further prosecution of other, competing class-action lawsuits to protect a settlement adds yet another layer to this analysis. See *supra* note 21.

101. See Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. Rev. 514 (1996). A variation of this "reverse auction" process can arise where multiple attorneys are competing to get a class action certified. Here, a defendant can shop settlement offers amongst the competing attorneys in exchange for assisting the one with the best offer to obtain certification. See, e.g., *Coffee*, *supra* note 70, at 1370-73. Cf. *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1249, 1250 (9th Cir. 1997); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 814 (3d Cir. 1995).

d. *Pre-Certification Settlements*

Pre-certification settlement discussions are yet another "red flag" for courts scrutinizing proposed class settlements. Pre-certification settlements, effected through the use of "settlement classes," have become a "stock device" for resolving class-action litigation, and are recognized in every circuit.¹⁰² Despite its widespread acceptance, the settlement class device is not expressly recognized under Rule 23, and has recently been the subject of some fairly harsh criticism by courts and commentators who suggest that settlement classes are a veritable petri dish for collusion.¹⁰³

Ironically, the *Manual for Complex Litigation*, which in its first version disapproved of the practice of settlement classes altogether, has moved to a cautious endorsement of the practice. Historically, in a pre-certification settlement, the parties stipulate to the composition of a temporary settlement class with "certification" of the settlement class "merged" into the court's approval of the settlement itself and without any direct analysis of the requirements of Rules 23(a) and 23(b).¹⁰⁴

The practice of side-stepping certification in cases where a quick settlement seems possible has come under increasing attack. In *General Motors Corp. Pick Up Truck Fuel Tank Products Liability Litigation*, the Third Circuit held that before a court may approve a proposed pre-certification class-action settlement, it must first determine, upon a proper inquiry, that at least the requirements of Rule 23(a) are satisfied.¹⁰⁵ According to the court, the threshold findings for class certification under Rule 23(a) are required before a court can effectively safeguard against collusion, buy-offs, and other potential abuses. It cannot adequately adjudicate the proposed settlement's fairness, reasonableness, and adequacy with respect to absent class members without such findings.¹⁰⁶ In the court's words, "[A] class is a class

102. See *Amchem v. Windsor*, 521 U.S. 591, 618-19, 117 S. Ct. 2231, 2247 (1997); see also, e.g., *Gould v. Alleco, Inc.*, 883 F.2d 281 (4th Cir. 1989), cert. denied, 493 U.S. 1058, 110 S. Ct. 870 (1990); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 175 n.5 (5th Cir. 1979) (collecting cases), cert. denied, 452 U.S. 905, 101 S. Ct. 3029 (1981); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 n.2 (S.D.N.Y. 1984) (collecting cases).

103. See, e.g., *In re General Motors Corp. Pick-Up Truck Prod. Liab. Litig.*, 55 F.3d 785 (3d Cir.), cert. denied, 516 U.S. 824, 116 S. Ct. 88 (1995); Judith Resnik, *Litigating & Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. Davis L. Rev. 835, 848 (1997).

104. See *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.), cert. denied, 493 U.S. 959, 110 S. Ct. 3770 (1989); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 176 (5th Cir. 1979), cert. denied, 452 U.S. 905, 101 S. Ct. 3029 (1981); see also *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996) (citing Newberg, *supra* note 15, § 11.28, at 11-58), vac'd sub nom. *Flanagan v. Ahern*, 521 U.S. 1114, 117 S. Ct. 2503 (1997); *In re General Motors Corp.*, 55 F.3d at 798; *Georgine v. Amchem Prods.*, 157 F.R.D. 246, 314-19 (E.D. Pa. 1994), vac'd, 83 F.3d 610 (3d Cir. 1996), aff'd sub nom. *Amchem Prods. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997). Cf. *In re Dennis Greenman Secs. Litig.*, 622 F. Supp. 1430, 1436 (S.D. Fla. 1985) (certifying mandatory limited-fund settlement class to force settlement), rev'd, 829 F.2d 1539, 1546 (11th Cir. 1987) (finding limited fund theory inappropriate under facts of case).

105. *In re General Motors Corp.*, 55 F.3d at 794-97. For a more in depth discussion of certification requirements for a putative class action, see Kent A. Lambert, *Certification of Class Actions in Louisiana*, 58 La. L. Rev. 1085 (1998).

106. *In re General Motors Corp.*, 55 F.3d at 787.

is a class,' and a settlement class, if it is to qualify under Rule 23, must meet all of its requirements."¹⁰⁷

A few years later, in *Georgine v. Amchem Corp.*,¹⁰⁸ the Third Circuit went even further by expressly requiring that settlement classes comply with the applicable provision under Rule 23(b)¹⁰⁹—in that case, Rule 23(b)(3)—as well as the requirements of Rule 23(a). The Supreme Court affirmed the Third Circuit's decision, ruling that while "[s]ettlement is relevant to class certification," concerns of collusion and like misconduct underlying Rule 23 "demand undiluted, even heightened attention in the settlement context" to the requirements for certification under Rules 23(a) and (b).¹¹⁰ The prior case law approving of a relaxed application of certification requirements to settlement classes was thereby abrogated.¹¹¹ The Court's only concession was to allow that "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."¹¹² The Supreme Court expressly rejected the argument that Rule 23(e)'s fairness inquiry obviated the necessity for strict compliance with the requirements of Rules 23(a) and 23(b).¹¹³ Writing in dissent, Justice Breyer argued that the existence of a proposed settlement should play a much more significant factor in the evaluation of a proposed settlement than allowed by the majority's ruling.¹¹⁴

Most recently, the Supreme Court in *Ortiz v. Fibreboard Corp.*,¹¹⁵ rebuffing an attempt by the Fifth Circuit to limit *Amchem* to class actions arising under Rule 23(b)(3), held that approval of a mandatory Rule 23(b)(1)(B) limited-fund settlement class required the development of a record demonstrating that the essential prerequisites for certification of a Rule 23(b)(1)(B) class are satisfied. This requires proof that the only available "fund" for satisfaction of class members' claims is inadequate and that the "fund" can be equitably distributed to all class members in a manner adequately addressing any potential intra-class conflicts. The Supreme Court found that the record developed before the district court, in

107. *Id.* at 799-800.

108. 83 F.3d 610 (3d Cir. 1996).

109. *Cf.* Lambert, *supra* note 105, at 1111.

110. *Amchem Prods. v. Windsor*, 521 U.S. 591, 620, 117 S. Ct. 2231, 2248 (1997). As Justice Ginsburg explained:

The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria . . . 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 variety—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 permit[ed] class designation despite the impossibility of litigation, both class counsel and court would be dis-armed. . . .

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.

Id. at 621-22, 117 S. Ct. at 2248-49.

111. *Id.* at 619-23, 117 S. Ct. at 2248-49.

112. *Id.* at 620, 117 S. Ct. at 2248 (citations omitted).

113. *Id.* at 622-28, 117 S. Ct. at 2249-51.

114. *Id.* at 629-30, 117 S. Ct. at 2252. (Breyer, J., concurring in part and dissenting in part).

115. 527 U.S. 815, 119 S. Ct. 2295 (1999).

connection with its approval of a \$1.535 billion class action settlement, was inadequate because the court had relied upon the parties' stipulation as to the existence of a limited fund.¹¹⁶ Furthermore, it had failed to address potentially conflicting interests of "easily identifiable categories of claimants" (particularly future claimants)¹¹⁷ through provisional certification of subclasses under Rule 23(c)(4)(B). Justice Breyer, joined by Justice Stevens, wrote a lengthy dissent echoing the concerns he had iterated in his dissent in *Amchem*.

The Supreme Court's focus on so-called "futures" claimants is an entré to one of the most hotly debated issues surrounding pre-certification settlements. "Futures" classes are classes consisting of individuals who *may* be harmed in the future as the result of alleged past misconduct by a defendant, usually as the result of their exposure to some harmful product (so-called "exposure-only" claimants).¹¹⁸ Obviously, defendants who are faced with potentially substantial exposure to future claimants, as in the case of many mass tort claims,¹¹⁹ will view the ability to cap their exposure to these claimants as a critical component of any large-scale class-action settlement.¹²⁰

As noted above, the U.S. Supreme Court has made it clear that a proposed settlement class must satisfy the requirements of Rule 23(a) and (b). This raises one of the most significant hurdles to futures class-action settlements: adequacy of representation. Because future claimants by definition have not yet realized any cognizable injuries, class representatives who have initiated litigation because they have already been injured would ordinarily be inadequate representatives of the future claimants.¹²¹ In addition, although perhaps to a lesser degree, the presence of future claimants would appear to raise problems under the typicality requirement of Rule 23(a) and, if applicable, the superiority and predominance requirements of

116. The court was troubled by the absence of proof establishing the upper limit of the posited fund. This was especially glaring, since the fund consisted primarily of insurance proceeds, leaving intact nearly all of the named defendant's net worth. The court was also concerned by the apparent exclusion from the settlement class, evidently pursuant to negotiations between the parties, of a significant number of individuals with claims or foreseeable future causes of action based upon the "common" theory of liability asserted against the defendant, an obvious anathema to a limited fund settlement.

117. See *infra* notes 118-139.

118. See generally *Georgine v. Amchem Prods.*, 83 F.3d 610, 617-18 (3d Cir. 1996), *aff'd sub nom. Amchem Prods. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997).

119. Pursuant to 1999 La. Acts No. 989, § 1 (eff. July 9, 1999), La. Civ. Code art. 2315 was amended to prevent asymptomatic plaintiffs from recovery for medical monitoring or other exposure-based "damages." Section two of the act confirms that the legislation specifically intended to overrule *Bourgeois v. A.P. Green Indus.*, 716 So. 2d 355, 361 (La. 1998). The statute provides for retroactive application in all pending actions.

120. See generally Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 *Ariz. L. Rev.* 687, 700-02 (1997).

121. See *Amchem Prods. v. Windsor*, 521 U.S. 591, 626-27, 117 S. Ct. 2231, 2251 (1997) (explaining that claimant with existing injuries cannot adequately represent future claimants because the former seeks to maximize immediate distributions, rather than secure largest possible protected fund to pay future claims); *Walker v. Liggett Group*, 175 F.R.D. 226, 233 (S.D.W. Va. 1997); see also *Georgine*, 83 F.3d at 630-31 (noting other potential conflicts between present and future class members).

Rule 23(b)(3).¹²² With respect to typicality, the Third Circuit in *Georgine*—echoing many of the same concerns it raised with respect to adequacy of representation—concluded that:

Even if this case included only futures plaintiffs, we would be skeptical that any representative could be deemed typical of the class. In addition to the problems created by differences in medical monitoring costs, the course of each plaintiff's future is completely uncertain. Given these uncertainties, which will ultimately turn into vastly different outcomes, the futures plaintiffs share too little in common to generate a typical representative.¹²³

For essentially the same reason, the Third Circuit in *Georgine* felt that it would be impossible to say that common issues of law and fact predominated when speaking of future claimants because “[i]t is unclear whether they will contract asbestos-related diseases and, if so, what disease each will suffer.”¹²⁴ One could, however, criticize this post-facto analysis as overlooking the fact that, until the injury is manifest, all future claimants do have a common interest in maximizing future allowances and facing common legal and factual issues with respect to the defendants' liability.

Even if these threshold certification dilemmas can be satisfactorily addressed, as through the use of futures sub-classes represented by potential future claimants,¹²⁵ there are other problems posed by futures class settlements. For example, because many (if not all) future claimants are likely unaware that they may suffer future injuries as the result of some prior occurrence, such as exposure to a toxin, it is unlikely that they can be relied upon to provide meaningful supervision of class counsel.¹²⁶

Additionally, difficulties in estimating the volume of future claims and the potential for collusion between the defendant and class counsel, at the expense of as-yet-unidentified futures class members, presents an obvious risk that the futures claims will not be resolved in a fair or adequate manner.¹²⁷ This is true especially in lump sum settlements or other arrangements capping a defendants' potential liability to future claimants. Two constitutional issues are also posed by settlements involving future claimants. The first is notice, which, as discussed above, has been held to have crucial due process implications.¹²⁸ Providing adequate notice, in

122. *Georgine*, 83 F.3d at 634-35.

123. *Id.* at 632.

124. *Id.* at 626.

125. So long as the harm complained of is common to the class, it should not be necessary to demand that the representative must be at risk to develop exactly the same injury as class members. See, e.g., *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 675 (1974)). But see *Coffee*, *supra* note 70, at 1434-36.

126. See *Coffee*, *supra* note 70, at 1432.

127. *Id.* at 1361-63 nn.58-60.

128. See generally *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

accordance with Rule 23(e) to future claimants, presents an obvious problem. Nonetheless, in *In re "Agent Orange" Product Liability Litigation*,¹²⁹ the court held that published and broadcast notice was sufficient for "unknowing" class members.¹³⁰ On appeal, the Second Circuit concluded that individual notice to future claimants presently unaware of any injury was largely an exercise in futility, and could be done away with in light of the more effective safeguards afforded by "vigorous and faithful vicarious representation," as well as "fair and just recovery procedures."¹³¹

This would remain the position of the federal jurisprudence for nearly a decade, until the Third Circuit's decision in *Georgine v. Amchem Products*.¹³² After the district court had specifically approved published notice to unidentifiable future claimants, the Third Circuit reversed and remanded, holding: (1) that the district court had improperly proceeded with a stipulated settlement without ensuring compliance with Rules 23(e) and 23(b), and (2) that the proposed settlement class failed to meet the requirements under those rules. Addressing itself specifically to the "superiority" requirement under Rule 23(b)(3), the Third Circuit appeared to suggest that notice problems posed by adequately informing future claimants of a proposed class settlement barred approval of any settlement attempting to resolve future claims absent individual notice. This approach is rarely, if ever, feasible in mass tort cases, which are the most common context for futures class-action settlement.¹³³ According to the Third Circuit, future claimants likely would be unaware that they were at risk of future injuries. Even if they were aware and knew that they were within a proposed settlement class, they likely would not have enough information to make an intelligent decision as to whether or not to opt out of the settlement.¹³⁴ Although the Supreme Court affirmed *Georgine* on appeal without reaching the issue of notice,¹³⁵ it did "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."¹³⁶

The other constitutional issue of note concerns whether "future claims" rise to the level of a "case" or "controversy" under Article III, Section 2 of the U.S. Constitution. The salient question is whether prospective future claims are merely "hypothetical," such that they fail to present an injury in fact susceptible of adjudication. The Supreme Court has addressed this question only in the context

objections."); see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, 94 S. Ct. 2140, 2152 (1974).

129. 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S. Ct. 695 (1988).

130. *Id.* at 729-30.

131. *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993); see also *Mullane*, 339 U.S. at 317, 70 S. Ct. at 658-59 (holding that notice need not be given to persons "whose interests are either conjecture or future"); Manual for Complex Litigation § 30.45, at 244.

132. 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem Prods. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997).

133. *Amchem Prods.*, 521 U.S. at 633, 117 S. Ct. at 2254.

134. *Id.*

135. The Supreme Court decided and affirmed *Georgine* solely on the questions of adequacy of representation and predominance. See *Amchem*, 521 U.S. at 628, 117 S. Ct. at 2252.

136. *Amchem*, 521 U.S. at 628, 117 S. Ct. at 2252.

of injunctive class actions, where its decisions support standing for future claimants. However, there are significant differences between the formulation of the case or controversy requirement in the context of injunctions and its formulation in the context of damage cases.¹³⁷ The Supreme Court has thus far refused to address the issue in cases involving damages class actions.¹³⁸ Lower courts that have addressed the issue have reached different results through the application of diverging interpretations of prior Supreme Court precedent.¹³⁹

Recent cases have identified several other issues applicable to practitioners considering a pre-certification class action settlement. Among the most significant of these concerns is the timing of the settlement discussions. Obviously, the sooner the parties enter into serious settlement discussions, the less likely it is that plaintiff's counsel are in a position to fully exploit the crucial leverage provided by the threat of litigation during settlement negotiations.¹⁴⁰ Nonetheless, this is a fact-specific inquiry, as illustrated by the Fifth Circuit's decision in *In re Asbestos Litigation*.¹⁴¹ In that case, the court refused to deny approval of a proposed settlement merely because it was filed on the same day as the class-action complaint. Based upon what the court described as the lengthy and adversarial history of the underlying dispute and evidence showing that the settlement

137. See Laurence H. Tribe, *American Constitutional Law* § 3-16, at 119-24 (2d ed. 1988) (collecting cases). Indeed, the Supreme Court has stressed the need for an immediate threat of injury that is neither "conjectural" nor "hypothetical," but has failed to give any clear guidance with respect to where the line should be drawn. The Supreme Court has noted that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects," but in the context of asbestos litigation, for example, the causal connection between past exposure and a heightened risk of certain illnesses can be demonstrated, often through so-called "inventory class members" who have already manifested such illnesses. *O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S. Ct. 669, 676-77 (1974). In the absence of clear criteria as to what amount, or even what sort of proof is needed to move from the conjectural and hypothetical to the immediate, courts are left to fend for themselves. Perhaps lessons can be drawn from the Supreme Court's recent excursions into the "gatekeeping" functioning of federal courts in determining the admissibility of expert testimony. See, e.g., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-51, 119 S. Ct. 1167, 1175-76 (1999).

138. See *Amchem*, 521 U.S. at 612-13, 117 S. Ct. at 2234-35. The Court has made it clear that concerns relating to the Article III standing of putative class members should not be addressed until after class certification issues have been resolved:

Ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before going to the merits. But the class certification issues are, as they were in *Amchem*, "logically antecedent to [the existence of any] [sic] Article III" concerns, and themselves pertain to statutory standing, which may properly be treated before Article III standing. Thus, the issues about Rule 23 certification should be treated first, "mindful that [the Rule's] requirements must be interpreted in keeping with Article III constraints . . ."

Ortiz v. Fireboard Corp., 527 U.S. 815, 830, 119 S. Ct. 2295, 2307 (1999) (quoting *Amchem*, 521 U.S. at 612-13, 117 S. Ct. at 2234-35).

139. Compare *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1434 (2d Cir. 1993) (suggesting exposure to know toxin may satisfy the imminent and real risk of injury requirement), and *Ashton v. Pierce*, 541 F. Supp. 635, 637-38 (D.D.C. 1982) (exposure to lead paint held to confer standing), with *Robinson v. Vaughn*, No. 91-7646, 1992 U.S. Dist. LEXIS 19518, at *4 (E.D. Pa. Dec. 2, 1992) (exposure to asbestos held not sufficient to confer standing).

140. See generally *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

141. 90 F.3d 963 (5th Cir. 1996), vacated on other grounds *sub nom.* *Flanagan v. Ahearn*, 521 U.S. 1114, 117 S. Ct. 2503 (1997), *aff'd*, 134 F.3d 668 (5th Cir. 1998).

negotiations were genuine and conducted at arm's length, the coincidence of filing of the lawsuit and the proposal of a settlement did not show that the settlement was collusive. A slightly different situation—contributing to a contrary conclusion—is articulated in the Third Circuit's decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*. The *General Motors* court found that the proposed settlement was reached within only four months of the inception of the litigation, which strongly suggested that class counsel did not have a sufficient grasp of the merits of their case "fairly, safely, and appropriately [to] decide to settle the action."¹⁴² The Third Circuit was particularly troubled by the absence of any significant discovery by the class, notwithstanding their access to discovery generated in related lawsuits.¹⁴³ According to the court, without indicia that class counsel had the benefit of a clear understanding of the strength of their case during negotiations, a court simply could not reasonably conclude that there had been genuine, arm's-length negotiations.¹⁴⁴ In other words, it was unclear that they were fully in a position to bring to bear the leverage attendant to the threat of litigating the class action. On the other side of the coin is the possibility that the plaintiffs would ultimately fail in getting a class certified at all, in which case the defendants would be in the much stronger position of taking on piecemeal those claims brought by class members actually inclined to sue on their own behalf. In the case of many consumer class suits, denial of certification can, quite literally, be the death knell of the entire litigation.

2. Analysis of the Settlement Agreement

The other half of the "fairness" inquiry, required for final approval of a proposed class-action settlement, requires that the court scrutinize the proposed settlement itself. Distilled to its most essential elements, this line of analysis requires that the court compare "the terms of the compromise with the likely rewards of litigation."¹⁴⁵ To do this, the court must reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated," based upon "an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise."¹⁴⁶ The Supreme Court's admonition for objectivity notwithstanding, this inquiry is inherently subjective and fact-specific. For this reason, courts must guard against the temptation to turn an appraisal of the potential success of a class-action lawsuit into a dress rehearsal of

142. 55 F.3d 768, 814 (3d Cir. 1995), *aff'd*, 134 F.3d 133 (3d Cir. 1998).

143. *Id.*

144. *Id.*

145. Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25, 88 S. Ct. 1157, 1163 (1968). See also *Maywalt v. Parker & Parsley Petr. Co.*, 67 F.3d 1072, 1079-80 (2d Cir. 1995).

146. *Anderson*, 390 U.S. at 424, 88 S. Ct. at 1163; see also *In re Dow Corning Corp.*, 192 B.R. 415, 421-22 (E.D. Mich. 1996).

the very trial the litigants are attempting to avoid.¹⁴⁷ Moreover, the court must guard against substituting its judgment for the informed judgment of the litigants.¹⁴⁸

In undertaking this difficult analysis, the federal courts have identified a myriad of factors that, under the particular circumstances of a given case, *may* bear upon the appropriateness of approving a proposed class-action settlement.¹⁴⁹ These include: (1) "the complexity, expense, and likely duration of the litigation";¹⁵⁰ (2) the reaction of the class members to the proposed settlement, including the number of objectors;¹⁵¹ (3) the "reasonableness" of the consideration offered to the class in light of the best possible recovery if the case were litigated, with appropriate allowances accounting for the risks of establishing liability and damages, and for other potential contingencies during litigation;¹⁵² (4) the defendant's ability to withstand a judgment affording a greater recovery;¹⁵³ (5) the possibility of whether insurance proceeds have buttressed the consideration offered to the class and, if so, whether there is a risk that litigating the class's claims could result in a denial of recovery (and what effect this would have upon the defendant's ability to satisfy an adverse judgment);¹⁵⁴ (6) the practical merit of the proposed plan of distribution;¹⁵⁵ (7) the impact the settlement may have upon other rights or claims of the class members against the defendants;¹⁵⁶ and (8) the views of class counsel.¹⁵⁷

147. *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982), *cert. denied sub nom. Lewy v. Weinberger*, 464 U.S. 818, 104 S. Ct. 77 (1983); *Behrens v. Wometco Enterps., Inc.*, 118 F.R.D. 534, 539 (S.D. Fla. 1988); *Stull v. Baker*, 410 F. Supp. 1326, 1333 (S.D.N.Y. 1976); *Entin v. Barg*, 412 F. Supp. 508, 513 (E.D. Pa. 1976).

148. *See, e.g., Weinberg v. Lear Fan Corp.*, 627 F. Supp. 719, 722 (S.D.N.Y. 1986).

149. *See generally Girsch v. Jepsen*, 521 F.2d 153, 157 (3d Cir. 1975) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)); *see also Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir.), *cert. denied sub nom. Byrd v. Civil Serv. Comm'n of San Francisco*, 459 U.S. 1217, 103 S. Ct. 1219 (1982).

150. *Girsch*, 521 F.2d at 157; *Behrens v. Wometco Enterps., Inc.*, 118 F.R.D. 534, 539 (S.D. Fla. 1988).

151. *Marshall v. Holiday Magic, Inc.* 550 F.2d 1173, 1178-79 (9th Cir. 1977); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1217 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1020 (1979); *Grinnell Corp.*, 495 F.2d at 462; *White v. National Football League*, 822 F. Supp. 1389, 1425 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994); *Burger v. CPC Int'l, Inc.*, 76 F.R.D. 183, 186 (S.D.N.Y. 1977). *But see In re Oracle Secs. Litig.*, 829 F. Supp. 1176 (N.D. Cal. 1993).

152. *DeBoer v. Mellon Mrtg. Co.*, 64 F.3d 1171, 1177 (8th Cir. 1995); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995); *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988); *Grinnell Corp.*, 495 F.2d at 463; *see also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 325 (N.D. Ga. 1993); *Thompson v. Midwest Found. Indep. Phys. Assoc.*, 124 F.R.D. 154 (S.D. Ohio 1988).

153. *Marshall*, 550 F.2d at 1178; *Girsch*, 521 F.2d at 157; *Grinnell Corp.*, 495 F.2d at 467; *In re Warner Comms. Sec. Litig.*, 618 F. Supp. 735, 741 (S.N.D.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

154. *See, e.g., Spencer v. Comserve Corp.*, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 23,124 at 95,529 (D. Minn. 1986).

155. *In re Clearly Canadian Sec. Litig.*, 966 F. Supp. 930, 937 (N.D. Cal. 1997); *Ohio Publ. Interest Campaign v. Fisher Foods, Inc.*, 546 F. Supp. 1, 11 (N.D. Ohio 1982).

156. *See, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1285 (9th Cir.), *cert. denied*, 506 U.S. 953, 113 S. Ct. 408 (1992).

157. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1020 (1979); *see also Fisher Bros v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446 (E.D. Pa. 1985).

a. Judicial Risk Analysis

Without attempting a comprehensive survey of the jurisprudence applying the foregoing (and other) criteria, a few key practice points do bear special mention. First, most courts, as one would expect, devote the majority of their attention to determining the size of the settlement viewed against the risks of litigation. It is indeed the rare settlement that offers the plaintiff class everything it could reasonably have expected to recover had the case gone its way at trial.¹⁵⁸ As a result, this inquiry tends to degenerate into scrutiny of the plaintiffs' chances of prevailing, with the court attempting to look behind the business judgment of the negotiating parties to test the soundness of the fruit of their efforts—all without purporting to decide the merits.¹⁵⁹

The court obviously cannot be expected to engage in this risk-analysis with mathematical precision any more than the parties could. In some cases, such as shareholder suits, even basic cost-benefit analysis can quickly become mired in the minutia of complex and often speculative lawsuits.¹⁶⁰ If the court perceives significant risks against ultimate success, then a modest settlement offer may appropriately be considered fair, reasonable, and adequate.¹⁶¹ As the focus on substantive potential suggests, courts should *not* allow their analysis to be distracted by discussions about the availability of treble or punitive damages or statutory fee awards.¹⁶²

b. The Role of Class Counsel

Another salient factor must be the input received by the attorneys involved in the litigation and settlement process. Indeed, many opinions explicitly concede that "great weight" was afforded to the recommendations of participating counsel.¹⁶³ Nonetheless, the court must be cognizant of the fact that these attorneys may not share the same agenda as the court.¹⁶⁴ Aside from concerns about collusion and

158. See *Marshall v. Holiday Magic Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

159. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170-74 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S. Ct. 696 (1988); *Anderson v. Torrington Co.*, 755 F. Supp. 834, 835-39 (D. Ind. 1991); *Behrens v. Womteco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988); *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 919 (E.D. Pa. 1985); *In re Corrugated Container Antitrust Litig.*, 1981-1 Trade Cases (CCH) ¶ 64,114 (S.D. Tex. June 4, 1981), *aff'd*, 659 F.2d 1322 (5th Cir. 1981); *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

160. See *Newberg*, *supra* note 15, § 11.44, at 11-99 n.242.

161. *In re Traffic Exec. Ass'n Eastern RR*, 627 F.2d 631 (2d Cir. 1980); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974).

162. See, e.g., *Grinnell Corp.*, 495 F.2d at 458-59; *In re Dennis Greenman Secs. Litig.*, 622 F. Supp. 1430, 1441 (S.D. Fla. 1985); *Fisher Bros.*, 604 F. Supp. at 451; *cf. In re Baldwin-United Corp.*, 607 F. Supp. 1312, 1331 (S.D.N.Y. 1985).

163. See, e.g., *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1020 (1979); *Feder v. Harrington*, 58 F.R.D. 171, 176 (S.D.N.Y. 1972); *Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 308, 316 (S.D.N.Y. 1972).

164. See, e.g., *Morales v. Turman*, 569 F. Supp. 332 (E.D. Tex. 1983); *Percodani v. Riker-Maxson Corp.*, 50 F.R.D. 473, 478 (S.D.N.Y. 1970).

fraud, courts should also consider such factors as the length of time the attorney has been involved in the litigation as well as the competence and experience of the attorney providing the recommendation to the court.¹⁶⁵ Similarly, approval of the settlement by an interested governmental agency also warrants judicial attention.¹⁶⁶

c. Class Reaction

Finally, the courts also must consider the reaction (if any) of the class members themselves to the proposed settlement. The absence or relative dearth of objectors has long been recognized to provide significant support for a proposed settlement.¹⁶⁷ Those courts that have emphasized this element have usually noted overwhelming affirmative support for the settlement among the absent class members, as might be shown where members are prepared to walk away from individual suits to participate in the settlement.¹⁶⁸

On the other hand, the absence of objections is not alone dispositive,¹⁶⁹ and in some contexts may be of little moment.¹⁷⁰ Similarly, even a considerable number of objectors is not, of itself, an adequate basis for a court to *reject* a proposed settlement.¹⁷¹ Courts must scrutinize objections carefully to determine whether they raise legitimate concerns that do, in fact, call into doubt the fairness, reasonableness, and/or adequacy of the proposed settlement, and then independently determine whether those concerns, if legitimate, warrant disapproval of the settlement.¹⁷²

165. Newberg, *supra* note 15, § 11.47, at 11-112; see *Morales*, 569 F. Supp. at 337-38.

166. See *Marshall v. Holiday Magic Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977); see also *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S. Ct. 1351 (1981).

167. See, e.g., *Marshall*, 550 F.2d at 1178; *Sanders v. U.S. Dept. of Housing & Urban Dev.*, 872 F. Supp. 216 (E.D. Pa. 1994); *In re Dunn & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366 (S.D. Ohio 1990); *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482 (E.D. Pa. 1985).

168. See, e.g., *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974); *Sanders*, 872 F. Supp. at 220-21; *White v. National Football League*, 822 F. Supp. 1389, 1425 (D. Minn. 1993); *In re Art Materials Antitrust Litig.*, 100 F.R.D. 367, 372 (N.D. Ohio 1983); *cf. In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1137 (7th Cir.) ("Acquiescence to a bad deal is something quite different than affirmative support."), *cert. denied*, 444 U.S. 870, 100 S. Ct. 146 (1979).

169. See *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. 1981); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); see also *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979), *cert. denied*, 452 U.S. 905, 101 S. Ct. 3029 (1981).

170. See, e.g., *In re General Motors Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 812-13 (3d Cir.) (absence of objections could not be construed as support for settlement where class members may have lacked adequate information to understand and evaluate offer), *cert. denied*, 516 U.S. 824, 116 S. Ct. 88 (1995); *Buchett v. ITT Consumer Fin. Corp.*, 845 F. Supp. 684, 691 (D. Minn.), *op. amended*, 858 F. Supp. 944 (D. Minn. 1994); *In re Oracle Secs. Litig.*, 829 F. Supp. 1176, 1179 (N.D. Cal. 1993) (poverty of objectors was "of little moment, however, because agency costs often discourage meaningful objection in securities class actions").

171. See, e.g., *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1325 (2d Cir. 1990); see also *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987); *In re Southern Ohio Correctional Facility*, 173 F.R.D. 205, 214 (S.D. Ohio 1997).

172. See generally Newberg, *supra* note 15, § 11-48, at 11-118 through 119 (discussing *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981); *Parker v. Anderson*, 667 F.2d 1204 (5th Cir. 1982); and *Ficalora v. Lockheed Co.*, 751 F.2d 995 (9th Cir. 1985)); see also *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1217 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1020

Note that any party to the proposed settlement has standing to object, including any member of the settling class.¹⁷³ However, individuals that are not members of the class, such as those who may have opted out, do *not* have standing to challenge a proposed settlement,¹⁷⁴ although they may obtain standing through intervention.¹⁷⁵ Non-settling defendants also lack standing to object to a settlement,¹⁷⁶ except to the extent that particular terms of a proposed settlement may unduly affect or prejudice their rights.¹⁷⁷

Courts should not be too quick to pass over the concerns of objectors. Objectors are entitled, as a general matter, to pursue reasonable discovery necessary for them fully to evaluate and address a proposed settlement.¹⁷⁸ Nonetheless, whether to permit additional discovery by objectors beyond what has already occurred in the lawsuit is a matter fully within the court's discretion.¹⁷⁹ In deciding whether to permit objectors to impose the burden and expense of responding to additional discovery upon the settling parties, the court should carefully consider whether it is truly necessary, by requiring the objectors to demonstrate that sufficient information is not already available to them from other sources, including the record itself.¹⁸⁰ To obtain additional discovery, the objectors already must have reviewed the record¹⁸¹ and be able to demonstrate to the court *why* they need additional information beyond what can be found there.¹⁸² This burden may be met, for example, where the objectors can demonstrate that the class representatives did not conduct appropriate adversarial discovery prior to the settlement.¹⁸³

Courts are particularly reluctant to permit objectors to pursue discovery concerning the settlement negotiations themselves. As a general rule, discovery about the settlement negotiations is permitted only where the objectors provide *prima facie* proof of collusion or fraud.¹⁸⁴ Indeed, only one reported federal

(1979).

173. *E.g.*, *Gould v. Alleco, Inc.*, 883 F.2d 281 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058, 110 S. Ct. 870 (1990); *cf.* *Cook v. Powell Buick, Inc.*, 155 F.3d 758, 761 (5th Cir. 1998) (non-named class members of a certified class do not have standing to appeal a final judgment approving the settlement of a class action).

174. *Gould*, 883 F.2d at 285; *In re Sunrise Sec. Litig.*, 131 F.R.D. 450 (E.D. Pa. 1990).

175. *See Cook*, 155 F.3d at 761-62; *cf.* *Luevano v. Campbell*, 93 F.R.D. 68, 77-78 (D.D.C. 1981).

176. *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230 (7th Cir. 1983); *In re Fire Paper Litig.*, 632 F.2d 1081 (3d Cir. 1980); *see also In re Beef Indus. Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905, 101 S. Ct. 3029 (1981).

177. *See, e.g.*, *In re Granada Partnership Secs. Litig.*, 803 F. Supp. 1236 (S.D. Tex. 1992) (allowing non-settling defendants to challenge term purporting to limit their indemnification or contribution rights); *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620, 625 (S.N.D.Y. 1972); *see also Florida Power Corp. v. Granlund*, 82 F.R.D. 690 (M.D. Fla. 1979).

178. *See Girsch v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).

179. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 464 (2d Cir. 1974).

180. *See, e.g.*, *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1315 (3d Cir. 1993); *Weinberger v. Kendrick*, 698 F.2d 61, 79 (2d Cir. 1982), *cert. denied*, 464 U.S. 818, 104 S. Ct. 77 (1983); *Grinnell Corp.*, 495 F.2d at 463.

181. *See, e.g., Weinberger*, 698 F.2d at 79.

182. *Id.*; *see also Grinnell Corp.*, 495 F.2d at 464.

183. *See, e.g., Saylor v. Lindsley*, 456 F.2d 896, 904 (2d Cir. 1972).

184. *See, e.g., Mars Steel Corp. v. Continental Illinois Nat. Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987) (discovery of settlement negotiations is "proper only where the party seeking it lays a

appellate court decision could be located wherein the court actually found that direct discovery into settlement negotiations was actually warranted.¹⁸⁵

F. Post-Judgment Issues

Once the court approves the settlement, the order is considered a final judgment that may be appealed under 28 U.S.C. §1291.¹⁸⁶ Standing to appeal that decision ordinarily is vested in all class members who objected to the proposed compromise.¹⁸⁷ However, at least one circuit has held that individual, un-named class members must have actually intervened to have standing to appeal a final judgment in a class action.¹⁸⁸ The Eleventh Circuit explained this result as follows:

There are essentially three reasons for holding that individual, non-named, class members do not have standing to appeal a final judgment binding on the class members. *First*, such individuals cannot represent the class absent the procedures provided for in Rule 23 *Second*, class members who disagree with the course of a class action have available adequate procedures through which their individual interests can be protected. *Third*, class actions could become unmanageable and non-productive if each member could individually decide to appeal.¹⁸⁹

The Third, Seventh, and Ninth Circuits, however, have reached the opposite conclusion.¹⁹⁰

There is also a split among the federal circuits as to whether the *disapproval* of a monetary settlement is appealable as a final decision under §1291.¹⁹¹ Of course, a party may always seek to have a ruling disallowing a settlement certified for immediate review pursuant to 28 U.S.C. §1292(b) and Rule 54(b).

The trial court ordinarily will retain jurisdiction to supervise and enforce implementation of the settlement. Certainly, disputes requiring court intervention can and do arise in the implementation phase. A common example is a dispute over

foundation by adducing from other sources evidence indicating that the settlement may be collusive") (citing *Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042, 1046 (2d Cir. 1992)); *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994); *see also Gautreaux v. Pierce*, 690 F.2d 616, 632 (7th Cir. 1982).

185. *See In re General Motors Engine Interchange Litig.*, 594 F.2d 1106, 1126 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S. Ct. 145 (1979).

186. *Cf. id.*

187. *See Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060-61 (7th Cir. 1970).

188. *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987).

189. *Id.*; *Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *see also Bowling v. Pfizer, Inc.*, No. 93-1912, 1993 WL 533489 (6th Cir. Dec. 21, 1993) (non-named class members generally have no standing to appeal final judgment in class action).

190. *See Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1308 (3d Cir. 1993); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977); *see also In re VMS Ltd. Partnership Secs. Litig.*, 976 F.2d 362, 368 (7th Cir. 1992) (non-named class member may appeal if she intervenes or makes an appearance at fairness hearing).

191. *Compare Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970) (appealable as collateral order), *cert. denied*, 401 U.S. 912, 91 S. Ct. (1971), *and In re International House of Pancakes Franchise Litig.*, 487 F.2d 303 (8th Cir. 1973) (allowing appeal), *with New York v. Diarylea Coop., Inc.*, 698 F.2d 567 (2d Cir. 1983) (refusing appeal) *and Seigal v. Merrick*, 590 F.2d 35 (2d Cir. 1978) (same).

unclaimed or unused settlement proceeds, which in some cases can represent sizeable sums of money.¹⁹² If not addressed in the settlement agreement,¹⁹³ the court is vested with substantial discretion to resolve disputes concerning the distribution of excess funds.¹⁹⁴ Many courts confronted with such a situation have exercised their discretion to direct a *cy pres* distribution of the funds to educational institutions, charities, or other public service groups.¹⁹⁵ The court may also order that excess funds be returned to the defendant in appropriate cases.¹⁹⁶ A further distribution to class members already fully compensated, however, seems inappropriate, as it would merely result in a windfall to them.

Another common dispute arising in the implementation phase is what to do with late-filled proofs of claim in settlements providing for payments to class members on a claims-made basis. Reported decisions addressing such situations have articulated a fact-specific "good cause" analysis.¹⁹⁷ Such an approach seems sound and appropriate.

Note should also be taken, however, of the common practice of delegating administration of the settlement fund, including oversight of the processing of proofs of claim and the distribution of *cy pres* allocations, to third party professionals or special masters.¹⁹⁸ In cases where an administrator is used, the matter ordinarily will remain open until a final accounting is filed into the record showing that the settlement has been fully effectuated.¹⁹⁹

192. See, e.g., *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970) (addressing \$32 million in unclaimed settlement proceeds).

193. See *supra* note 20.

194. See, e.g., *Jones v. National Distillers*, 56 F. Supp. 2d 355, 357-69 (S.D.N.Y. 1999). It has been suggested, however, that courts in fact do not have this discretion in all cases, because any unclaimed funds deposited with the court should "escheat" to the government as unclaimed property. Louisiana, which has adopted the Uniform Distribution of Unclaimed Property Act, La. R.S. 9:151 (2000), expressly provides for the escheat of "property received by a court as proceeds of a class action, and not distributed to members of the class, one year after the distribution date." La. R.S. 9:159(a)(9) (2000). It seems doubtful that this provision applies to settlement proceeds, particularly to excess funds addressed in a settlement agreement. The federal courts have reached exactly this result under 28 U.S.C. §§ 2041-2042, which provide for the escheat of unclaimed funds deposited with federal courts. See *Van Gemert v. Boeing Co.*, 739 F.2d 730, 735-36 (2d Cir. 1985); *Jones*, 56 F. Supp. 2d at 358. These cases conclude that escheat is at most one of several options available to a court faced with unclaimed funds, and is more appropriately seen merely as a fall-back position in cases where guidance cannot be gleaned from *cy pres* principles of the equitable interests of the parties themselves. See also *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (5th Cir. 1990); *Houck v. Folding Carton Admin. Comm'n*, 881 F.2d 494 (7th Cir. 1989); *Van Gemert*, 739 F.2d at 736.

195. See, e.g., *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 478-79 (N.D. Ill. 1993); *In re Folding Carton Antitrust Litig.*, No. MDL 250, 1991 WL 532867 (N.D. Ill. Mar. 6, 1991), *aff'd mem.*, 934 F.2d 323 (7th Cir. 1991); see also *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706-07 (8th Cir. 1997).

196. See *Friedman v. Landala Parking Auth.*, [1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,676 (E.D. Pa. Mar. 31, 1995); see also *Boeing Co. v. Van Gemert*, 444 U.S. 472, 488 n.4, 100 S. Ct. 745, 754 n.4 (1980).

197. See, e.g., *Grace v. City of Detroit*, 145 F.R.D. 413, 414 (E.D. Mich. 1992).

198. See *Barnes v. Osofsky*, 254 F. Supp. 721, 726 (S.D.N.Y. 1966).

199. *Newberg*, *supra* note 15, § 11.33, at 11-68 through 11-69.

G. Private Settlements

1. Attempting to Settle with Class Representatives Alone

A significant, though ancillary, facet of class action settlement practice concerns attempts by the defendant to enter into private settlements, either with the class representatives or with absent prospective class members. In the former context, settlement is sought only with the named representatives, without purporting to bind any absent class members. At first blush, Rule 23(e) might seem superfluous in this setting, since settlement is not sought with the class. Hence, prejudice to absent class members—a principal concern underlying Rule 23(e)—ought not to be a big problem, especially in cases where the settlement is proposed pre-certification. Upon closer scrutiny, however, it is clear that Rule 23(e) should apply, and the courts have so held.

To begin, it must be remembered that Rule 23(e) is concerned with preventing abuse of the class action device, as well as protecting absent class members. It takes little imagination to envision a situation where claimants seek to exploit the threat of an all-or-nothing class action lawsuit to exact an excessive settlement, possibly at the expense of similarly situated absent class members who are now left to sue a poorer defendant on their own behalf. For this reason, courts have long held that approval of such settlements is mandatory under Rule 23(e).²⁰⁰ There is always the risk that representatives suing a defendant with limited funds will be tempted to take a larger individual settlement through an early, private settlement rather than waiting for a smaller payout as part of a class-wide settlement. If there is a risk of insolvency of the defendant, the representative plaintiffs resemble creditors seeking preferential treatment from a failing debtor. Since the representative plaintiffs assume a fiduciary relationship with the absent putative class members, such conduct is plainly improper.²⁰¹

In addition, the other principal aim of Rule 23(e)—protecting absent class members—is also implicated by private settlements with putative class representatives. As one early decision explained: “The very bringing of a class action, especially where counsel are known to be skilled in the field, may deter the institution of suits by members of the ostensible class. The passage of time may impair or defeat the rights of others thus deflected from acting for themselves.”²⁰² Again, this concern is consistent with the fiduciary obligations of class

200. See, e.g., *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 42 F.R.D. 324, 328 (E.D. Pa. 1967) (“[N]o litigant should be permitted to enhance his own bargaining power by merely alleging that he is acting for a class of litigants.”); see also *Burgener v. California Adult Auth.*, 407 F. Supp. 555, 560 (N.D. Cal. 1976); *Moreland v. Rucker Pharmacal Co.*, 63 F.R.D. 611, 614 (W.D. La. 1974).

201. See, e.g., *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) (citing *Newman v. Stein*, 464 F.2d 689 (2d Cir.), cert. denied, 409 U.S. 1039, 93 S. Ct. 521 (1972)). In Louisiana, the guiding civilian concepts can be found within the Civil Code articles governing the revocatory action.

202. *Muntz v. Ohio Screw Prods.*, 61 F.R.D. 396, 398 (N.D. Ohio 1973) (quoting *Rothman v. Gould*, 52 F.R.D. 494, 496 (S.D.N.Y. 1971)).

representatives to assert and promote the interests of all absent putative class members.²⁰³

Rule 23(e), of course, requires both court approval of the settlement *and notice* to all members of the class *in such manner as the court directs*. Some courts have taken this language to require that *notice* of individual settlements with class representatives be given to absent class members in *all* cases.²⁰⁴ The vast majority of the cases, however, have refused to impose a *per se* rule with respect to notice of such private settlements, allowing the courts to exercise their discretion to forego notice where it is unnecessary to ensure that the purposes of Rule 23(e) are served.²⁰⁵ Many of these cases appear to base this conclusion upon questions as to whether Rule 23(e) applies at all where absent class members are not to be bound by the proposed settlement. This reasoning, as noted above, is flawed; nonetheless, the discretion vested in the district court under Rule 23(e) with respect to notice ought to allow a judge to forego notice in cases where it appears unnecessary to promote the goals of the rule. It is possible to envision situations where notice could unnecessarily impede a proposed settlement (a favored means for resolving the parties' disputes),²⁰⁶ impose unjust costs upon litigants,²⁰⁷ and/or invite abuse.²⁰⁸ Regardless, if the court believes that there is reason to be concerned about possible collusion or some sort of prejudice to absent class members, then notice *must* be provided. Failure to do so may require that the settlement be vacated if collaterally attacked by an absent class member.²⁰⁹

Once the class action has been certified, an entirely different situation arises. Courts will not approve of a private settlement with the representatives without

203. The court may not assume that, merely because they did not intervene or otherwise take any active interest in the class action, the absent members did not rely upon the pendency of the class demand and on that basis delay acting on their own behalf:

A class member has no duty to intervene, opt out, or take any other action regarding a class action until the class has been certified and notice of class membership sent. The district court erred in concluding that a lack of action by the class indicated a lack of reliance on the filing of the class action.

Diaz, 876 F.2d at 1410 (citing *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552, 94 S. Ct. 756 (1974)). Because of the deference given by the law to the act of *filing* documents into the public record, this result would seem inevitable.

204. See, e.g., *Papilsky v. Berndt*, 466 F.2d 251, 257 (2d Cir.), *cert. denied*, 409 U.S. 1077, 93 S. Ct. 689 (1973); *Pittson Co. v. Reeves*, 263 F.2d 328, 330 (7th Cir. 1959); *Rothman*, 52 F.R.D. at 496; see also *Banks v. Lockheed-Georgia Co.*, 46 F.R.D. 442 (N.D. Ga. 1968); *Muntz*, 61 F.R.D. at 398 (holding that court could approve private pre-certification settlement with class representatives without notice "only if it determines that this particular settlement is an exception to the notice requirement").

205. See, e.g., *Simer v. Rios*, 661 F.2d 655, 666 (7th Cir. 1981), *cert. denied*, 456 U.S. 917, 102 S. Ct. 1773 (1982); *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1314-16 (4th Cir. 1978); *Berse v. Berman*, 60 F.R.D. 414 (S.D.N.Y. 1973); see also *Diaz*, 876 F.2d 1408-11; *Glidden v. Chromalloy Am. Corp.*, 808 F.2d 621, 627 (7th Cir. 1986); Michael A. Almond, *Settling Rule 23 Class Actions At the Pre-Certification Stage: Is Notice Required?*, 56 N.C. L. Rev. 303, 317-31 (1978).

206. See, e.g., *Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978); *Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61 (S.D. Tex. 1977).

207. See, e.g., *Austin v. Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437 (E.D. Pa. 1995); see also *Baham v. Southern Tel. & Tel. Co.*, 55 F.R.D. 478 (W.D. La. 1972).

208. See, e.g., *Simer*, 661 F.2d at 665-66.

209. See *Diaz*, 876 F.2d at 1410-11; see also *Pittson Co.*, 263 F.2d at 330-31.

notice to absent class members, inviting them to intervene in order to continue the litigation²¹⁰ or without some equivalent guarantee that an adequate representative will remain to continue the litigation.²¹¹ Obviously, the desire of a class representative to settle is clearly relevant to his or her adequacy as a class representative. The timing of the representative's withdrawal should also be carefully scrutinized to ensure against collusion or other prejudice to the absent class members.²¹²

The foregoing analysis ought to apply regardless of whether the settlement is presented in terms of a request for approval of settlement, or a request for a voluntary dismissal pursuant to a settlement. Furthermore, litigants should not be permitted to avoid Rule 23(e) merely by seeking to peel away the class action elements of a suit before settlement, as through a Rule 15 amendment deleting the class action demand,²¹³ or even through more subtle conduct, such as foregoing timely submission of a request for certification. Indeed, if done to avoid Rule 23(e) in collusion with the defendant, such practice comes close to a fraud on the court.

2. Settlement with Absent Class Members

Defendants may also approach class actions by attempting to negotiate private settlements with absent class members. If done pre-certification, the defendant may hope that enough class members can be weeded out to frustrate certification by making joinder a feasible alternative. Not only may the defendant thus be able to push for favorable terms with absent class members who have not had their expectations colored by direct communications with zealous class counsel, this alternative—because it does not affect the interests of non-settling class members—will not trigger Rule 23(e)'s approval and notice requirements.²¹⁴

Of course, the strategic advantages of this approach to defendants also opens the window to potential abuse. Unsupervised communications between defense counsel and absent class members could become an occasion for misleading representations to unrepresented layman. In addition, some members of the plaintiffs' bar have complained that allowing defendants a free hand to weed out class members perceived to have the least interest in the litigation could become a means of stripping the utility of class-action procedure. This may be true particularly in cases where a class action is being utilized to pursue claims that individuals acting alone might not have a sufficient motive to prosecute, such as is the case with many consumer-interest suits.

210. See, e.g., *Rothman v. Gould*, 52 F.R.D. 494, 496 (S.D.N.Y. 1971).

211. See, e.g., *Milonas v. Amerada Hess Corp.*, 25 Fed. R. Serv. 2d (CBC) 738 (S.D.N.Y. 1977).

212. See *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981); see also, e.g., *Hanzley v. Blue Cross, Inc.*, 1989-1 Trade Cas. (CCH) ¶ 68,604, at 61,190 (W.D.N.Y. Mar. 30, 1989).

213. See, e.g., *Yaffe v. Detroit Steel Corp.*, 50 F.R.D. 481, 483 (N.D. Ill. 1970).

214. See, e.g., *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206 (2d Cir.), cert. denied, 484 U.S. 908, 108 S. Ct. 250 (1987); *In re General Motors Corp., Engine Interchange Litig.*, 594 F.2d 1106, 1138 (7th Cir.), cert. denied, 440 U.S. 870, 100 S. Ct. 146 (1979); *Moreland v. Rucker Pharmacal Co.*, 63 F.R.D. 611 (W.D. La. 1974).

Responding to the former concern, most courts have concluded that there are ethical constraints upon the ability of defense counsel to engage in *ex parte* communications with absent putative class members, even pre-certification.²¹⁵ Rules 3.4, 4.2, and 8.4 of the Louisiana Rules of Professional Conduct impose significant constraints upon such communications in any case arising in Louisiana. However, a flat bar against such communications has been held by the U.S. Fifth Circuit to violate the First and Fourteenth Amendments to the United States Constitution.²¹⁶ The second concern—focused upon preserving the utility of class-action procedure—has not been well received in the jurisprudence.²¹⁷ The reasoning behind these decisions seems sound.²¹⁸

One final issue, although somewhat beyond the scope of this article, concerns individual settlements in mass tort litigation involving the use of mandatory punitive damages classes. Presumably, even with respect to a "mandatory" class, private individual settlements should be permissible. However, allowing such settlements would seem to presuppose that the settling defendants will be able to claim some sort of credit, or offset, against any punitive class award based on allocated "punitive damages" included in a settlement.²¹⁹

II. CLASS ACTION SETTLEMENTS IN THE LOUISIANA STATE COURTS

The class action rules in the Louisiana Code of Civil Procedure, as amended by Acts 1997, No. 839, § 1, address the settlement of class action lawsuits at two places, Article 594 and Article 591(B)(4). Article 594 is the principal provision governing the compromise of class actions. Although clearly rooted in Federal Rule of Civil Procedure 23(e) and the federal jurisprudence interpreting that rule, Article 594 both expands upon and modifies the federal rule and the practice under it. Article 591(B)(4) implements a proposal advanced, but ultimately tabled, by the Federal Rules Advisory Committee to amend Rule 23(b) specifically to provide for settlement classes. In the wake of *Amchem* and *Ortiz*, this latter provision may prove to be one of the more significant procedural changes to Louisiana law in the past decade. Clearly, it is an open invitation to class counsel increasingly frustrated

215. See, e.g., *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1203 (11th Cir. 1985); *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032 (E.D. Wash. 1985); *Resnick v. American Dental Assoc.*, 95 F.R.D. 372 (N.D. Ill. 1982); see also *Fulco v. Continental Cablevision, Inc.*, 789 F. Supp. 45 (D. Mass. 1992).

216. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 477 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89, 101 S. Ct. 2193 (1981); see also *Cada v. Cost Line, Inc.*, 93 F.R.D. 95 (N.D. Ill. 1981).

217. See, e.g., *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972).

218. See *id.* ("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 . . . other potential members of the class who are of a mind to do this . . .").

219. See *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 438 (E.D. Pa. 1984), *aff'd in part, vac'd in part*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 915, 107 S. Ct. 182, 318 (1986).

by federal hostility to mass tort and similarly aggressive class actions to try their luck before our state courts.²²⁰

A. Article 594

1. Paragraph (A): Approval and Notice Requirements

Pursuant to Article 594(A)(1), “[a]n action previously certified as a class action shall not be dismissed or compromised without the approval of the court exercising jurisdiction over the action.”²²¹ This general language tracks Rule 23(e), and is consistent with Louisiana law prior to the 1997 amendment of Article 594.²²²

Article 594(A)(2) provides that “[n]otice of the proposed dismissal of an action previously certified as a class action shall be provided to all members of the class, together with the terms of any proposed compromise that the named parties have entered into. Notice shall be given in such manner as the court directs.”²²³ This subsection also tracks Rule 23(e), which provides that “notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”²²⁴

Despite the obvious similarities between Subsections (1) and (2) of Article 594(A) and Rule 23(e), there are a few noteworthy distinctions. The first significant demarcation is the explicit limitation of the approval and notice requirements to actions “previously certified as a class action,” instead of “class actions” generally, as is the case under Rule 23(e). This refined language must be read in tandem with Article 591(B)(4), which unlike Rule 23 expressly provides for the certification of settlement classes. So read, it appears that Article 594(A) mandates court scrutiny and notice of any settlement on behalf of a certified class, while it exempts pre-

220. See Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 Loy. L.A. L. Rev. 373, 386-94 (1998) (discussing migration of class actions from federal to state court); *Class Actions: High Court's Amchem Ruling Raises Issues on Scope of Class Settlements, Panelists Say*, 66 U.S.L.W. 2122 (Aug. 26, 1997) (predicting that “Amchem will accelerate the trend of bringing class actions in state courts”); Resnik, *supra* note 106, at 842-43; John C. Coffee Jr., *After the High Court Decision in Amchem Products Inc. v. Windsor, Can a Class Action Ever Be Certified Only for the Purpose of Settlement?*, Nat'l L.J., July 21, 1997, at B4 (“The migration of class actions to state courts, which began in the wake of the Private Securities Litigation Reform Act of 1995, is also likely to accelerate after Amchem.”). Louisiana practitioners can attest to this trend first hand, as is exemplified by the migration of the class action suit de-certified by the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) (rejecting proposed nationwide settlement of product liability class action concerning General Motors pickup trucks), which re-appeared, in almost identical terms, in Louisiana shortly thereafter. See *White v. General Motors Corp.*, 718 So. 2d 480 (La. App. 1st Cir. 1998); see also Edward F. Sherman, *Class Action Practice in the Gulf South*, 74 Tul. L. Rev. 1603, 1604 nn.1-2 (2000) (discussing the migration of class action litigation to Louisiana, Texas, and Alabama).

221. La. Code Civ. P. art. 594(A)(1).

222. See, e.g., *Verdin v. Thomas*, 191 So. 2d 646, 651-52 (La. App. 1st Cir. 1966).

223. La. Code Civ. P. art. 594(A)(2) (emphasis added). As discussed elsewhere, the discretion afforded under the second sentence of this Article may well allow district courts to dispense with notice altogether in certain circumstances. See *supra* notes 204-209 and accompanying text.

224. Fed. R. Civ. P. 23(e).

certification, individual settlements with class representatives, presumably even where they will result in the dismissal of the putative class action.²²⁵

If Article 594(A) is interpreted as exempting individual settlements with class representatives from the article's notice and approval requirements, it would represent a marked departure from federal practice.²²⁶ As noted above, federal courts have long construed Rule 23(e) as mandating judicial scrutiny of individual settlements with putative class representatives in order to prevent the manipulation of the class device to extort unjust settlements at the expense of absent class members.²²⁷ Similarly, although subject to the courts' discretion,²²⁸ notice of pre-certification, individual settlements with class representatives is also generally required to ensure that absent class members are not prejudiced by the dismissal of a class action which they are relying upon to advocate their rights and interests.²²⁹ The same concerns are triggered by attempts to amend pleadings to excise class demands, whether directly or through an unopposed exception of misjoinder, if undertaken to facilitate individual settlements with putative class representatives. The potential for abuse of the class action device in the context of pre-certification settlements with the named representatives is troubling and there is no obvious justification for carving out such settlements from the approval and notice requirements applicable under Article 594(A) to class-wide settlements.

While Subsections (1) and (2) of Article 594(A) somewhat narrow the scope of the approval and notice requirements under the source federal rule and jurisprudence, Article 594(A)(2) expands on the notice requirements under Rule 23(e) by expressly mandating both notice of the settlement and of the terms of the compromise, while preserving the court's discretion otherwise to regulate the method and contents of the notice. Nevertheless, federal practice in this area should continue to provide guidance to the Louisiana courts,²³⁰ both with respect to what should be included in settlement notices and with respect to how that notice should be given.²³¹ As the federal jurisprudence illustrates, the minimum information now expressly required to be present in notices under Article 594(A)(2) ought to be included in any event. Ordinarily, notice should be supplemented with such details as the time and place of the fairness hearing, directions on how to obtain additional

225. Similarly, in a case such as *Speaks v. New York Life Ins. Co.*, 693 So. 2d 340 (La. App. 4th Cir. 1997), wherein the court struggled with the adequacy of "informal" notice to putative class members of the dismissal of a class action demand by amendment of the named plaintiffs' petition, the result is now much easier: in the absence of prior certification, dismissal requires neither notice nor court approval (absent requirements imposed under other provisions, such as La. Code Civ. P. art. 1151).

226. See *supra* Part I(G)(1).

227. See, e.g., *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 42 F.R.D. 324, 328 (E.D. Pa. 1967) ("No litigant should be permitted to enhance his own bargaining power by merely alleging that he is acting for a class . . .").

228. See, e.g., *Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61, 67-68 (S.D. Tex. 1977).

229. See *supra* notes 204-209 and accompanying text; see also, e.g., *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1410 (9th Cir. 1989).

230. See *Billieson v. City of New Orleans*, 729 So. 2d 146, 152 (La. App. 4th Cir. 1999).

231. See *supra* Part I(D).

information, procedures for objecting, and an explanation of the reasons for the settlement, including the risks and potential benefits to class members that would attend the continuation of the action.²³² While the parties are not obligated to exhaust all possible means of identifying and giving notice to class members,²³³ reasonable efforts must be fully pursued on both counts.²³⁴

2. Preliminary Approval

Article 594, like Rule 23(e), does not expressly contemplate preliminary approval of the proposed settlement as a prerequisite to the issuance of notice. Nonetheless, obtaining preliminary approval for a proposed class action settlement is common practice in the state courts already, and that practice should be continued. Even if a trial court were willing to agree to dispense with this preliminary inquiry, the parties themselves would be well advised to pursue input from the court as early in the process as possible.²³⁵ A preliminary hearing or conference is not only useful to avoid waste and to help educate the court, but it is also an excellent opportunity for the parties and the court to resolve logistical details concerning notice, objections, and the like. The *Complex Litigation Bench Book for Judges*, published by the Committee on Complex Litigation through the Louisiana Supreme Court, specifically contemplates a preliminary hearing for exactly these reasons.²³⁶ Moreover, as noted above, approval is often granted with no formal hearing even at the federal preliminary level.²³⁷ The *Complex Litigation Bench Book for Judges*²³⁸ describes the appropriate inquiry at this stage as follows:

Proposed settlements are presented to the trial judge for review and preliminary approval. If a case is being settled without substantial

232. See also State of Louisiana, *Complex Litigation Bench Book for Judges* 3-22 (1997) ("If the trial judge preliminarily approves the proposed settlement, he/she then goes to the second step and orders that all class members be given notice of the proposed settlement and their right to appear at the hearing thereon to make their objections.") [hereinafter *Louisiana Bench Book for Judges*]. Cf. La. Code Civ. P. art. 594(B) (requiring that members of the class be permitted an opportunity to be heard at fairness hearing, thereby at least implicitly requiring that adequate notice of the hearing and minimal information about the process for objecting and being heard be included in the notice to class members); Louisiana Bench Book for Judges 3-22 (stating that properly noticed fairness hearing is required by due process).

233. See, e.g., *Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985).

234. See *supra* note 33 and accompanying text.

235. The expense and burden of providing notice and proceeding with the full fairness hearing would be futile in cases in which the terms of settlement are facially unsatisfactory.

236. See Louisiana Bench Book for Judges, *supra* note 232, at 3-22.

237. Ordinarily, the parties should at a minimum supply the court with joint statement setting forth the terms of the settlement and briefs, including supporting documentation and affidavits, sufficient to make a prima facie case for the fairness, reasonableness, and adequacy of the settlement. *Id.* at 5.

238. The *Complex Litigation Bench Book for Judges* is the fruition of an extended project by the Louisiana Supreme Court and the Judicial Council. Overall, it provides an extremely useful and practical overview of complex litigation practice in the state. The Bench Book was published prior to the 1997 amendments to Articles 591-597 and, hence, is somewhat dated at places; nonetheless, it remains useful and instructive on most issues.

litigation, the judge should satisfy him/herself that there has been no collusion in confecting the settlement. In considering whether the settlement should be approved, the court should be satisfied that it represents the results of an "arm's length" bargain that appears fair and reasonable and within the range of probable judicial approval.²³⁹

After examining the same core factors that it must consider at the formal fairness hearing, the court should preliminarily approve or disapprove the settlement. Again, it is perfectly appropriate for the court at this stage to notify the parties of particular provisions in the proposed settlement that it finds troubling, and even to explain to them what changes the court feels would be necessary to gain final approval of a proposed agreement that the court is nonetheless prepared preliminarily to approve.²⁴⁰ Of course, preliminary approval is not a mandatory prerequisite to obtaining a definitive ruling from the court at a fairness hearing, and the parties are thus free to force the issue should they deem that to be appropriate.

3. Paragraph (B): The Fairness Hearing

Article 594(B) provides that:

After notice of the proposed compromise has been provided to the members of the class, the court shall order a hearing to determine whether the proposed compromise is fair, reasonable, and adequate for the class. At such hearing, all parties to the action, including members of the class, shall be permitted an opportunity to be heard.²⁴¹

Under this article, a formal fairness hearing is expressly mandated. As noted above, the practice of the federal courts is to conduct a formal hearing in almost every case where the dismissal or compromise of a class action is before the court. However, Rule 23(e) does not mandate this procedure, and a formal hearing is not always afforded to the parties.²⁴² Although an amendment to Rule 23(e) that would have mandated a hearing in all cases was proposed,²⁴³ it was subsequently tabled by the Advisory Committee. Nevertheless, the proposal was evidently picked up by the redactors of Article 594.

As is true under Rule 23(e), the fairness hearing is not a "mini trial" on the merits of the class' claims; rather, the court is to concern itself merely with determining whether or not the terms of the proposed settlement are within a plausible range of results that the parties—faced with the uncertainties of litigation—could reasonably have agreed to in the exercise of their business

239. Louisiana Bench Book for Judges, *supra* note 232, at 3-22.

240. See, e.g., *In re California Micro Devices Sec. Litig.*, No. C-94-2817-VRW, 1995 WL 476625 (N.D. Cal. Aug. 4, 1995); *Morales v. Turman*, 569 F. Supp. 332 (E.D. Tex. 1983).

241. La. Code Civ. P. art. 594(B).

242. See, e.g., *Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983); *Weinberger v. Kendrick*, 698 F.2d 61, 79 (2d Cir. 1982), *cert. denied*, 464 U.S. 818, 104 S. Ct. 77 (1983). Cf. *Saunders v. Naval Air Rework Facility*, 608 F.2d 1308, 1311-12 (9th Cir. 1979).

243. See Advisory Comm. Minutes, 167 F.R.D. at 565.

judgment. The same factors and inquiries developed in the federal courts for evaluating proposed settlements under Rule 23(e) can and should influence Louisiana's state courts conducting fairness hearings under Article 594(B).²⁴⁴

As is true under the federal case law, Article 594(B) entitles members of the class to appear and be heard at the fairness hearing. Nonetheless, as is also true under federal jurisprudence, it is entirely appropriate for courts to make this right contingent upon the timely submission of written objections and reasonable procedural steps.²⁴⁵ Finally, the trial court should issue specific findings and conclusions in its decision in order to facilitate appellate review.²⁴⁶

A decision approving a proposed class action settlement should be appealable as a final judgment.²⁴⁷ However, an order denying approval of a class action settlement probably should not be immediately appealable; instead, review should be sought through the discretionary exercise of appellate supervisory jurisdiction.²⁴⁸ Despite the law's predisposition in favor of settlements, the decision by the trial court to approve or disapprove of a proposed class action settlement is entirely discretionary and, hence, should be reviewable only for the abuse of that discretion.²⁴⁹

4. Miscellaneous Provisions of Article 594

Article 594 reflects some other procedural refinements worthy of note. First, pursuant to Article 594(C), "[t]he court shall retain the authority to review and approve any amount paid as attorney fees pursuant to the compromise of a class action, notwithstanding any agreement to the contrary." Article 594(D) adds that "[a]ny agreement entered by the parties to a class action that provides for the payment of attorneys' fees is subject to judicial approval." Read together, these two

244. See *supra* Part I(E); see also, e.g., *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); *Parker v. Anderson*, 667 F.2d 1204 (5th Cir.), *reh'g denied*, 671 F.2d 1378 (5th Cir.), *cert. denied*, 459 U.S. 828, 103 S. Ct. 63 (1982); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir.), *aff'd*, 659 F.2d 1322 (5th Cir. 1981), *cert. denied*, 456 U.S. 998, 102 S. Ct. 2283, 2308 (1982).

245. See *supra* notes 49-50 and accompanying text; see also *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956 (3d Cir. 1983).

246. See, e.g., *Piambino v. Bailey*, 757 F.2d 1112, 1139 (11th Cir. 1985), *cert. denied sub nom. Hoffman v. Sylva*, 476 U.S. 1169, 106 S. Ct. 2889 (1986).

247. In order for absent class members who received actual notice of the fairness hearing to preserve standing to attack it on appeal, they should register their objections in accordance with the procedure set forth in the notice. See *supra* notes 49-50 and 173-174. And, as is true in the federal courts, "futility" should be no excuse for a class member's failure to object should the non-objector later seek standing on appeal. An opt-out from the settlement class, however, should not be required and, indeed, may well bar standing to challenge settlement approval on appeal. *Id.*

248. See *supra* Part I(F); see also, e.g., *Seigal v. Merrick*, 590 F.2d 35, 37 (2d Cir. 1978). However, given the likelihood of injustice from delay, in addition to the absence of any chance for meaningful review on appeal, it would be unusual indeed for the appellate courts to decline to review such rulings on a supervisory basis.

249. See *supra* note 60; see also *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 218 (5th Cir.), *aff'd* by 659 F.2d 1337 (5th Cir. 1981).

paragraphs provide welcome amplification and clarification to the federal jurisprudence on the subject of judicial scrutiny of attorney fees in class action settlements.²⁵⁰ Under these provisions scrutiny should extend to the applications submitted under "ceiling" and "clear sailing" agreements, as well as to settlement agreements purporting to obligate the defendant to pay class counsel's fees independent of (i.e., in addition to) those amounts to be paid into a common fund for the benefit of class members.²⁵¹ Similarly, just because a defendant purports to reserve the right to challenge class counsel's fee application (or the right to appeal an award rendered on an unopposed application), careful scrutiny of class counsel's fee application is still appropriate.²⁵²

Article 594(E) reiterates the provisions previously contained under former Article 594(B), reconciling the approval and administration of common-fund settlements with the Code of Civil Procedure's provisions governing the procedural capacity of minors, interdicts, successions, and other incompetents or absentees.

B. Settlement Classes under the 1997 Amendments to Code of Civil Procedure Article 591

Probably the most interesting change to the rules governing the settlement of class actions effected by the 1997 revision to the Code of Civil Procedure's class action articles does not even appear in Article 594. For this we turn to newly-introduced Article 591(B)(4) which provides for the certification of Subparagraph (B)(3) classes "for purposes of settlement" in any case where the threshold requirements of Article 591(A) are met—regardless of whether the requirements for certification imposed under Subparagraph (B)(3) are also satisfied. This provision was obviously lifted from a proposed amendment to Rule 23, advanced by the Federal Rules Advisory Committee in 1996 in an attempt to clarify federal law in this highly controversial area of class action practice.²⁵³ The proposed amendment

250. See *supra* Part I(E)(1)(a).

251. See *supra* notes 82 and 85 and accompanying text.

252. *Id.* Mention should be made at this point of a related and evolving trouble spot with class action fee awards—fee sharing agreements between class counsel. By way of example, the U.S. Second Circuit expressly disapproved of a fee-sharing arrangement between class counsel. In this agreement certain "deep-pocket" members of the plaintiffs' management committee agreed to front a large portion of the class' litigation expenses in exchange for a three-fold return on investment out of any approved fee award to be afforded priority over the fee claims of other class attorneys, who would then participate in a pro rata distribution of the remainder of the funds allocated for attorneys' fees. In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 216, 224 (2d Cir.), *cert. denied sub nom.* Schwartz v. Dean, 484 U.S. 926, 108 S. Ct. 289 (1987). *Inter alia*, the Second Circuit was troubled by this agreement because it provided for fees entirely unrelated to the services provided by the "investing" attorneys, and, more importantly, because it presented an obvious conflict of interest between the influential constituency of class attorneys and the class they represented. *Id.* at 223-24. *Cf.* Brown v. Seimers, 726 So. 2d 1018 (La. App. 5th Cir. 1999). As noted above, other collusive practices between class counsel have recently sparked arguments urging the extension of antitrust liability to certain anti-competitive arrangements occasionally "negotiated" amongst purportedly competing plaintiffs' counsel.

253. See Civil Rules Advisory Committee, Draft Minutes, 167 F.R.D. 539, 563 (1996) (explaining that the amendment was designed to resolve the "newly apparent disagreement" between courts that

to the Federal Rules, which provided for an identical result with respect to "settlement classes" under Rule 23(b)(3), was tabled in the wake of the Supreme Court's decision in *Amchem*.²⁵⁴ In consequence, the federal approach to settlement classes, as it has evolved under both *Amchem* and *Ortiz*, is somewhat distinct from the approach established by the Louisiana legislature for state courts—a variance that has the potential to become even more pronounced in the immediate future.

Interestingly, the only reported Louisiana decision to address the use of settlement classes under Louisiana law as it existed prior to the enactment of Article 591(B)(4) explicitly followed *Amchem*. In that case, the Louisiana First Circuit Court of Appeal concluded that the requirements for certification under Article 591(B) had to be met in addition to those under Article 591(A) before a settlement class could be approved as part of a proposed class action settlement.²⁵⁵ Clearly, this is no longer the law in Louisiana, although exactly how much of an influence *Amchem* and its progeny will have in at least curtailing the potentially expansive language of Article 591(B)(4) remains to be seen. Because the article speaks in permissive terms only, it does not purport to strip trial courts of the discretion to refuse certification to settlement classes even where the requirements of Article 591(A) are met. Therefore, it is recommended that courts use the requirements for certification under Article 591(B)(3) to inform their scrutiny of any settlement class proposed under Article 591(B)(4) in much the same way federal courts are instructed to proceed under *Amchem*.

III. WHERE DO WE GO FROM HERE?

Common wisdom says that power corrupts, and the class action is an extraordinarily powerful tool. This procedure simultaneously vests class counsel with sizeable leverage over the defendant and unprecedented authority to speak for and bind masses of individuals without the immediate and direct accountability that defines the traditional lawyer-client relationship. It should be of no surprise, then, that class action settlements, like other areas of class action practice, have been an occasion for abuse in the past. In turn, the proverbial pendulum, driven by increasing criticism by the mass media and others, has begun to swing toward the curtailment of the discretion of the parties and their counsel to fashion and implement potentially sweeping class action settlements. The halcyon days in

permit settlement class actions even if the class could not be certified for trial, and the recent Third Circuit decisions, citing *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 626 (3d Cir. 1996), *aff'd on other grounds sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997); and *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 799 (3d Cir. 1995)).

254. See *supra* notes 108-114 and accompanying text.

255. *White v. General Motors Corp.*, 718 So. 2d 480, 489-91 (La. App. 1st Cir.), *writ denied*, 729 So. 2d 591 (La. 1998). Interestingly, although the first circuit overturned the lower court's decision approving the settlement and remanded the case for further proceedings and findings in line with *Amchem*, it later approved the settlement in January 1999 when presented with these findings. Recall that this lawsuit was filed in Louisiana in the wake of the failed attempt to obtain approval of a similar settlement before the U.S. Third Circuit.

which we might have justifiably anticipated extreme judicial deference to nearly any settlement jointly proposed by a defendant and class counsel may be waning, but this should not come as altogether unwelcome news.

Certainly, there are enough real-world examples of abuse in connection with class action settlements to counsel a good deal more caution than is evident in many early cases, wherein the courts were quick to presume the fairness of settlements based upon little more than a *prima facie* showing that the proposed compromise was the product of "real" negotiations between defendants and class counsel.²⁵⁶ Examples range from the now-infamous Bank of Boston debacle²⁵⁷ (which has prompted stinging criticism not only from academia²⁵⁸ but from the bar as well)²⁵⁹ to less overt examples of abuse, including the exploitation of "futures claimants,"²⁶⁰ *cy pres* distributions,²⁶¹ and non-pecuniary consideration²⁶² to inflate class counsel's fees;²⁶³ inventory settlements;²⁶⁴ and reverse-auctioning.²⁶⁵ Nonetheless, this plethora of potential abuses does not necessarily warrant legislative reform. Indeed, changes in the procedural framework for the review and approval of class action settlements is probably premature at present, as the bench has only recently begun fully to embrace and exploit the mechanical safeguards already built into the approval process under Rule 23 and, now, Article 594. Indeed, without allowing courts a fair opportunity to apply these rules with the benefit of the growing consciousness of the abuses that can accompany class-wide settlements, new legislation might well do more harm than good, especially at the state level, where

256. See, e.g., *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass 1987); *In re Baldwin-United Corp.*, 607 F. Supp. 1312, 1320 (S.D.N.Y. 1985).

257. See *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996), *reh'g denied*, 100 F.3d 1348 (with five dissents), *cert. denied*, 520 U.S. 1204, 117 S. Ct. 1569 (1997).

258. See, e.g., Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051, 1057-68 (1996).

259. See, e.g., Hon. Milton I. Shadur, *From the Bench: The Unclassy Class Action*, 23 Litig. No. 2, at 3 (Winter 1997).

260. See, e.g., *Coffee*, *supra* note 70, at 1394 (discussing *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom* *Amchem Prods. Inc. v. Windsor*, 521 U.S. 491, 117 S. Ct. 2231 (1997)); see also *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987).

261. *Coffee*, *supra* note 70, at 1367-75.

262. See generally, e.g., *In Camera*, 16 Class Action Rep. 369, 485-87 nn.2-8 (1993) (surveying coupon settlements shown to be worthless to class members); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 472-74 (1996).

263. See, e.g., *In re General Motors Pick-Up Truck Prod. Liab. Litig.*, 55 F.3d 768, 780-81, 807-09 (3d Cir. 1995).

264. See, e.g., *Georgine*, 83 F.3d at 630; *Koniak*, *supra* note 258, at 1063; *Coffee*, *supra* note 70, at 1373-74.

265. See, e.g., *Prezant v. DeAngelis*, 636 A.2d 915, 917-18 (Del. 1994), see also *Coffee*, *supra* note 70, at 1370-73. For an interesting variation on this type of practice—and an example of the scathing media treatment often afforded to perceived settlement abuses—see Richard B. Schmitt, *Class Action? Louisiana-Pacific Cut a Quick Deal to Avert Homeowner Lawsuits: Now Claims on Faulty Siding Exceed Settlement Fund, But Lawyers Are Happy*, Wall Street Journal, July 24, 1998 at A1.

multi-jurisdictional class actions are flourishing in the wake of *Amchem* and *Ortiz*.²⁶⁶

That said, there are several pressing issues that cry out for special attention by members of the bench and bar alike. Solely in the hope of generating further discourse, I offer below a brief list of a few of the more significant emerging problem areas affecting class action settlement practice not just locally, but nationally. In no particular order, and without any pretense at a comprehensive survey of the recent jurisprudence and commentary in this area, my brief list of settlement related concerns is as follows:

1. *Settlements of Multi-Jurisdictional Class Actions in State Court.* The pendency of multiple class actions involving at least one state-court proceeding can be particularly nettlesome because the federal multi-district litigation rules do not apply. Making matters worse, because of Louisiana's unique legal heritage, the consolidation of a Louisiana class action with overlapping suits is often viewed with special skepticism. Accordingly, Louisiana's state court jurists need to be prepared to deal with such potential abuses as fee auctioning and the exploration of gratuitous, "copy-cat" class action suits filed by opportunistic lawyers with the goal of borrowing off other lawyers' efforts to extort easy fees out of the defendant—ultimately at the expense of the class. While this obviously is a case-specific concern, as a general matter, courts should be cognizant of potential warning signs, such as settlements that purport to expand upon the class definition, allegations, or demands alleged in the plaintiffs' petition, and any settlements with overly broad releases.²⁶⁷
2. *"Cy Pres" Distributions of Settlement Awards.* The use of *cy pres* or fluid fund provisions in common-fund class actions is increasingly common, and can be used to good effect. Nonetheless, it is a device that can be manipulated in collusive settlements to the detriment of absent class members (as where it is used to inflate fees while

266. See *supra* note 1.

267. This latter indicator actually raises a related concern: whether it is possible and appropriate to obtain a class-wide release that is broader than the claims set forth on behalf of the class in the plaintiffs' pleadings. Based on the reasoning in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 116 S. Ct. 873 (1996), it appears that such releases are enforceable if there was adequate representation and appropriate notice and opportunity for opting out to absent class members. Even so, aggressive releases, such as releases purporting to reach future claimants or even just uncertified individual claims, may nonetheless be improper, not to mention inappropriate from an ethical and professional/fiduciary duty viewpoint. See *Amchem v. Windsor*, 521 U.S. 491, 625-37, 117 S. Ct. 2231, 2250-51 (1997); see also La. R.S. 37:4-16, La. R. Prof. Cond. 1.8(g) (1987) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.") Cf. Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Roads*, 80 Cornell L. Rev. 1159, 1188 (1995).

affording the defendant a structured, cheaper payment).²⁶⁸ Certainly, such distributions are inappropriate whenever there is a viable means to make (or even attempt) distributions to the injured class members themselves. Moreover, such distributions should also be constrained to situations where the designated beneficiary is such that absent class members receive some sort of ascertainable indirect benefit.²⁶⁹

3. *Notice of Settlement.* Although Article 594 provides a little more guidance than Rule 23(e) as to inclusions in the typical settlement notice, both leave a great deal to the courts to figure out for themselves. While this provides important flexibility, it seems worthwhile for Louisiana courts to take advantage of the introduction of new legislation to refine the guideposts governing settlement notices. Examples of the sort of information that ordinarily is and/or ought to be found within such notices is set forth above.²⁷⁰ It is generally in the interest of all involved—the named plaintiffs, absent class members, defendants, court, and counsel—to ensure that this notice is as accessible and comprehensive as possible to minimize the potential for needless objections and substantively unwarranted collateral attacks.
4. *Settlement Classes.* This issue is addressed extensively above. While *Amchem* and *Oritz* afford excellent benchmarks for federal courts and practitioners, the enactment of Article 591(B)(4) has left state jurists and litigators with many unknowns. As written, this new legislation offers no guidance to state courts faced with certification requests for settlement classes. Indeed, the rule could potentially be construed to require no more than the satisfaction of Rule 591(A) and the parties' consent. A loose and deferential approach to settlement classes is highly problematic, however. Not only does it raise serious due process and "case or controversy" concerns, it also invites collusion. The legislature's decision to recognize by statute what remains a highly controversial practice in the jurisprudence is extremely troubling. Hopefully, the courts will exercise appropriate restraint and ensure that the jurisprudence evolves in such a manner as to provide necessary constraints upon the use of settlement classes.
5. *Mass Torts.* The question of mass tort class actions has been, and continues to be, one of the most hotly debated issues among the class

268. This and related concerns affecting most non-monetary settlement arrangements are explored in more detail *supra* at Part I(E)(1)(b).

269. See *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 606 (D.N.J. 1994). Cf. *Friedman v. Landsdale Parking Auth.*, [1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98, 676 (E.D. Pa. Mar. 31, 1995).

270. See *supra* Part I(D).

action practitioners, jurists, and academicians. At the risk of diluting what is already an exhaustive body of commentary discussing this complex and evolving area of practice, it seems worthwhile at least to highlight some of the more troubling discrete concerns raised by such suits. One of the most prominent problem areas is how to deal with futures claimants and truly troubling questions about adequacy of representation and standing for exposure-only mass tort victims and other "futures." Another high-profile concern is the unprecedented extortive leverage that such suits can have over defendants, especially in an industry targeted by the new breed of plaintiff mega-firms armed with novel tort theories. A single overzealous, under-researched exposé by an "aggressive" television tabloid show looking to garner ratings with a high-impact story in the tried and true consumer interest genre can quickly snowball into a business (and even industry) crippling onslaught of mass tort class action litigation (witness the breast implant *mêlée*, which continues to labor on despite the absence of any credible scientific support).²⁷¹ For present purposes, however, the important point is that mass tort litigation is still an immature, and hence volatile practice. When mixed with the equally unstable mechanism of settlement classes, the procedural cocktail can quickly reduce the entire proceeding to a proverbial parade of horrors. If an outright proscription against settlement classes in mass tort suits is going too far (or, more likely, is a matter that must await a legislative, rather than a judicial, resolution), then at the very least extraordinary caution should be the rule of the day for any court, state or federal, faced with a request to approve such an arranged settlement.

IV. CONCLUSION

Settlements in class actions are simultaneously favored and feared. They are an expeditious and efficient resolution to what otherwise could be debilitating litigation with the potential to overwhelm everyone involved. It is also an open invitation for collusion and other abuses, often at the expense of the very people the class action device is supposed to benefit.

Courts at both the state and federal levels have in place, and immediately available to them, powerful tools to police abusive settlement practices. Guided by an informed bar, the courts can and should make use of these tools simultaneously to promote advantageous, amicable resolutions to certifiable class claims and to ferret out collusive conduct from both sides of the bar.

271. See, e.g., Steven A. Holmes, *It's Awful! It's Terrible! It's . . . Never Mind*, *The N.Y. Times*, July 6, 1997 at sec. 4, 3; see also Herrmann, *supra* note 5, at 50-51.

