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# Viewing Class Settlements Through A New Lens: Part 1

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Class action settlements in federal court must be deemed "fair, reasonable, and adequate"[1] before courts will approve them. In recent years, however, obtaining judicial approval of class action settlements has become more and more difficult, due largely to increased judicial skepticism of plaintiffs counsel, who face incentives to sell out the interests of their clients in order to obtain a large fee award. Sometimes these concerns are well-founded; other times they are misplaced.

For instance, judges will often reject settlements as seemingly unfair on their surface merely because the class plaintiffs do not recover much. But this metric of settlement fairness is overly simplistic and overlooks the economics of settlement: Class recovery should be commensurate with the strength of the case. A weak case is a weak case, and a small settlement is not unfair when there is a high likelihood that the class could recover nothing at all if the case moved forward. Therefore, judges and practitioners should take a more pragmatic approach at the settlement approval phase by considering the strength of the case as the most important factor in the fairness analysis.

In part 1 of this two-part series, we discuss the practical considerations that parties and their counsel must take into account when deciding whether to settle or move forward — and how judicial hostility to class settlements alters this calculus. We suggest that settlement fairness is most properly viewed through the lens of the case's merits, because low-value settlements for low-value cases are inherently fair, reasonable and adequate. In part 2, we will address a maligned and misunderstood tool of class settlements: the coupon (or voucher) settlement. In appropriate cases, vouchers can help ensure that class members receive value even for weak claims, and they can often leave class members in a better position than they could hope to achieve without settlement.

**The Class Settlement "Racket"**

The Seventh Circuit recently observed that meritless class actions that "yield[] fees for class counsel and nothing for the class" are "no better than a racket" and "must end."[2] There are countless examples of real-world class action lawsuits that seem right up this alley, which are almost too absurd to be true and are brought for the sole purpose of exacting attorneys' fees. Take, for instance, the plaintiffs who sued the makers of Cap'n Crunch cereal because they believed "Crunch Berries" were real fruit.[3] Or

consider the class that sued the makers of soy milk products, purportedly on behalf of consumers disappointed upon learning that such products did not contain "milk" from a cow.[4]

Lawsuits like these reflect poorly on our system of justice; they take up the valuable time of courts and their staff, waste defendants' resources in defending the case, and offer no real benefit to the class members in whose name the suit is brought. While it is optimal to dispose of such cases at the earliest opportunity, liberal pleading rules may leave courts reluctant to dismiss even the most dubious legal theories at the pleading stage. As a result, rational defendants often elect to settle these class actions early on in order to minimize the exposure from legal fees and to ensure finality, given the risk — however slight — of massive liability due to damages that aggregate across huge classes.[5]

With this backdrop, it is no wonder that a significant number of class actions settle before trial. But inking a class settlement is just the start of a new phase of litigation: Class settlements require court approval to ensure that they are fair, reasonable and adequate.

Thus, when a class action enters the settlement phase, courts apply a degree of skepticism, since class plaintiffs lawyers face an economic incentive to "sell out" the interests of their clients with a settlement that provides substantial attorneys' fees and little actual value to the class.[6] To be sure, this suspicion is sometimes justified. And to some extent, a rational defendant "cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class."[7] Therefore, when a class action enters a settlement posture, courts tend to view themselves as fiduciaries to the absent class members, rather than as strictly neutral umpires calling balls and strikes between the parties.[8]

Yet the case law trend may be going too far in the other direction in rejecting settlements that are entirely fair, reasonable and adequate — particularly where the underlying claims serve no purpose other than the possibility of generating fees for class counsel.

**Settlement Economics 101**

**Settlement Value Should Largely be Based on the Likely Outcomes of Litigation**

It is well-understood that class actions can impose in terrorem settlement pressure on defendants. Even when a plaintiff has only a small chance of prevailing, a class action may introduce such a massive potential liability from the defendant's perspective that it may be too risky to litigate the case through trial — as the U.S. Supreme Court recently noted, even "plaintiffs with weak merits claims" know that "class certification often leads to a hefty settlement."[9] Moreover, a successful defense through trial and appeals can be unduly expensive and burdensome on a company's executives, employees and in-house legal team.

However, the increased judicial skepticism of class settlements has had the unintended consequence of making class actions even more costly and onerous. Even when the underlying claims have little to no merit, rational defendants may still have no practical choice but to incur sizable attorneys' fees (and to stomach the possibility of massive liability exposure, however unlikely) to litigate the case, faced with the alternative of a proposed settlement that — in order to ensure court approval — may need to overcompensate a class of uninjured and generally uninterested plaintiffs who in reality deserve nothing from the case. After all, when courts ultimately deem a settlement as "unfair" to the class, the defendant will have wasted considerable legal fees in connection with the approval briefing and responding to objectors, as well as the costs of providing notice to the class. Not only is this inefficient; it

is inherently unjust.

Courts across the country utilize a similar set of factors when considering whether a settlement is "fair, reasonable, and adequate." These factors include the risk, expense, complexity and likely duration of further litigation; the extent of discovery that has been completed and the current phase of the litigation; the risk of maintaining class status through trial; the settlement amount offered; and the views of experienced counsel.[10]

As a matter of common sense and basic fairness, the most important consideration when evaluating a settlement ought to be the likely outcome of the case if it proceeded to a resolution on the merits.[11] In reality, it is exceedingly time consuming, expensive and risky for plaintiffs to litigate a class action from the pleadings through discovery, class certification, summary judgment and then through trial and appeal. With each successive hurdle in the litigation, the likelihood of plaintiffs losing and recovering zero increases substantially. For instance, a string of recent Supreme Court decisions (including Walmart v. Dukes[12] and Comcast v. Behrend[13]) have clarified the stringent standards applied at the certification phase. Moreover, trials are inherently uncertain and risky. Even in the abstract, plaintiffs are likely to prevail less than half the time at best because they generally bear the high burdens of proof and persuasion.[14]

Notwithstanding these considerations, courts evaluating class settlements may occasionally become so bogged down in weighing the various "factors" and looking out for subtle signs of plaintiffs lawyers behaving badly that they risk overlooking the obvious: Settlement value is based on likely outcomes of the litigation, so weak cases should not be worth very much at all. Simply put, the class members should not fare better with a settlement than they would without it.

Therefore, courts should take a more pragmatic approach to settlement approval by putting an increased focus on the merits of the case — which is already one of several factors courts are supposed to consider, but too often this factor receives insufficient weight in the calculus.[15] Treating a case's underlying merit as the primary measuring stick in assessing settlement fairness would better serve class members, defendants and notions of judicial economy.

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[1] Fed. R. Civ. P. 23(e)(2).

[2] In re Walgreens Co. Stockholder Litig., 832 F.3d 718, 724 (7th Cir. 2016).

[3] Sugawara v. PepsiCo Inc., No. 08-cv-1335, 2009 WL 1439115, at *1 (C.D. Cal. May 21, 2009).

[4] Ang v. Whitewave Foods Co., No. 13-cv-1953, 2013 WL 6492353, at *1 (N.D. Cal. Dec. 10, 2013).

[5] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted

the risk of 'in terrorem' settlements that class actions entail ...").

[6] Eubank v. Pella Corp., 753 F.3d 718, 719 (7th Cir. 2014).

[7] Id. at 720.

[8] "The purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." In re Syncor ERISA Litig., 516 F.3d 1095, 1100 (9th Cir. 2008); see, e.g., Acosta v. Trans Union LLC, 243 F.R.D. 377, 393–94 (C.D. Cal. 2007); Pokorny v. Quixtar Inc., No. 07-0201, 2011 WL 2912864, at *1 (N.D. Cal. July 20, 2011); West v. Circle K Stores Inc., No. S-04-0438, 2006 WL 1652598, at *12 (E.D. Cal. June 13, 2006).

[9] Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1705 (2017); see also Concepcion, 563 U.S. at 350.

[10] See, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998).

[11] Synfuel Techs. Inc. v. DHL Express (USA) Inc., 463 F.3d 646, 654 (7th Cir. 2006) (describing this factor as the "most important factor relevant to the fairness of a class action settlement") (quotation marks omitted).

[12] 564 U.S. 338, 359–60 (2011) (holding that a class of over one million people could not be certified as a class because they lacked commonality in their individual claims).

[13] 133 S. Ct. 1426, 1435 (2013) (limiting the use of statistical evidence to show a uniform damages model that could be applied to an entire class).

[14] According to data collected by the U.S. Justice Department in 2005, plaintiffs won approximately 54 percent of state court jury trials in tort, contract, and real property cases; plaintiffs won about 50 percent of the time in federal court. Tort, Contract And Real Property Trials, http://www.bjs.gov/index.cfm?ty=tp&tid=451 (last updated Aug. 9, 2016).

[15] See, e.g., Bolger v. Bell Atl. Corp., 2 F.3d 1304, 1311 (3rd Cir. 1993) (approving settlement providing no pecuniary relief where the probability of the plaintiffs' success on the merits was uncertain); Yong Soon Oh v. AT&T Corp., 225 F.R.D. 142, 150 (D.N.J. 2004) (approving settlement that provided only injunctive relief in exchange for a broad release of damages due to the weakness of the plaintiffs' case); First State Orthopaedics v. Concentra Inc., 534 F. Supp. 2d 500, 521-22 (E.D. Pa. 2007) (approving settlement providing only injunctive relief in exchange for the release of money damages where the merits of plaintiffs' case were weak).

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