Improving the Class Action Settlement Process: Little Things Mean a Lot*

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Introduction

Several years after I started the Public Citizen Litigation Group[1] in February 1972, we were asked to represent a shareholder who thought that a settlement in a case brought under Rule 23 of the Federal Rules of Civil Procedure ("Rules") was unfair. At that time, both derivative actions and class actions were covered by the same rule, and because both the substantive standards for approving such settlements and the procedural rules covering them were the same, that case could have been either type, and we filed objections in both categories in those years. The objections seemed well founded, so we went forward.

What we found was that all the lawyers in every case, as well as virtually every district court judge, were very unhappy to see us and not at all pleased with the substance of our objections. To say that we were considered the proverbial skunk at the garden party would be about as politely as it could be put, even though the Rules clearly gave class members the right to appear and object. And to make sure we got the message, a large number of procedural barriers were placed in our way. Whether intentionally or unthinkingly I never determined, but they made it very difficult to object in a meaningful way, especially because we were operating on a very tight budget.

Fastforward to 2010. The American Law Institute ("ALI") published its *Principles of the Law of Aggregate Litigation* ("Principles"),[2] which include extensive discussion of and rules for class actions gener-

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* With apologies to Joni James and Kitty Kallen, both of whom sang a song with this title when I was growing up.

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1 The Public Citizen Litigation Group was founded in 1972 by the author and Ralph Nader. Its main issues included improving the availability and affordability of legal services to ordinary consumers. Assuring fair class action procedures was seen as an important part of that effort. For more on the Public Citizen Litigation Group, see Barbara Hinkson Craig, Courting Change: The Story of the Public Citizen Litigation Group (2004).

2 Principles of the Law of Aggregate Litig. (2010).

ally and for their settlement in particular. A practitioner from the 1970s would barely recognize the procedures that this prestigious (and hardly radical) bastion of American legal practitioners approved, even though the substantive standard for settlements—that they are fair, just, and reasonable—remained unchanged. A few of these changes result from amendments to Rule 23 and from court decisions, but many reflect changes in practices and norms that have become generally accepted. Some are the views of the ALI on what the law and practice should be, even if it is not there yet. What makes their adoption by the ALI even more significant is that these principles were supported by lawyers from both the plaintiff and defense class action bars, judges who regularly hear these cases, as well as academics and lawyers who represent class action objectors. This Essay discusses the most important of these little changes and explains why they have vastly improved the process by which the fairness of class settlements is evaluated.[3]

I. Setting the Stage

The famous and fierce legislative combatant, Representative John Dingell (D-Mich.), once said, "I'll let you write the substance on a statute and you let me write the procedure, and I'll screw you every time."[4] In the 1970s, most of the procedures that worked to the disadvantage of class action objectors were not contained in any rules or found in any judicial opinions. There was nothing in any law that actually created any barriers to objectors; it was more that there was nothing to protect them. Those who controlled what actually happened in the settlement process either had incentives that worked to make life as difficult as possible for objectors, or, in the case of the judges (and some lawyers), they were not aware that certain procedures had the effect of putting objectors at a serious disadvantage and they had no reason to question how the process was working.

To understand the need for change, it is useful to focus on what traditionally happened when the parties to a class action reached a

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3 Further references will be only to class actions, in part because the ALI project did not deal with shareholder derivative actions. In addition, some of the issues relating to intraclass conflicts generally do not arise in derivative actions because any payment goes to the company, not to individual shareholders. But insofar as the ALI's Principles are directed at assuring fair treatment for objectors, they should apply to derivative suits, which are now governed separately under Rule 23.1 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23.1.

4 *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. Dingell).

settlement. Often there had been a considerable amount of contentious litigation, including motions to dismiss, a motion for class certification, and spats over discovery, with the prospect of more to come. The parties finally came to an agreement, although, in virtually all class actions, it was counsel for the plaintiff class that acted as the client because the class representative generally had only a small stake in the outcome and in most cases was not in a position to argue with class counsel over whether the deal represented the best outcome obtainable. Defendants had agreed to pay a certain price, which they probably believed was more than the case was worth, and having an objector come in could only make things worse. An objection might result in defendants having to pay more in the settlement and surely would cause them to spend more on legal fees to deal with the objector. Class counsel was certainly the least happy to see an objector, especially one who might persuade the court to reject the settlement or cut the lawyer's requested fees. And most judges were all too happy to get rid of big-problem cases, at least if the parties were satisfied. Under these circumstances, it was no wonder that neither the parties nor the court would go out of their way to provide more procedures for persons whom the Rules and due process required have an opportunity to be heard, but whom no one in the case thought had anything useful to add.

Typically, when the parties reached an agreement and had prepared the necessary papers, they would call chambers and arrange a meeting with the judge to inform her of the settlement and to start the approval process. Under Rule 23(e), the court must approve the notice to the class, which describes the case and the general terms of the settlement.[5] To do this, the judge had to review the settlement to be sure that the notice was accurate and reasonably complete, without overwhelming the recipients, and also had to approve the plan by which notice was to be given. The judge would read the settlement to be sure that there was nothing that jumped out as an obvious problem. If the parties proposed to have the class certified solely for settlement purposes, as became increasingly popular after the 1970s, the judge had to consider the propriety of the class definition because that determined who would receive notice and be entitled to object. In most cases, no class member was even aware that any settlement was being considered, let alone was present when the meeting with the judge took place. Thus, there was no one who offered any reasons for ques-

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[5] FED. R. CIV. P. 23(e).

tioning anything that the parties—who were making peace, not war—had proposed. In most cases that was both inevitable and unavoidable.[6]

There is an obvious reason for the judge to make this kind of preliminary review: if she spotted a problem, it should be addressed at that stage before notice was sent or time and money spent on holding a hearing. What the parties did, however, was ask that the judge grant "preliminary approval" for the settlement, which had the psychological, if not legal, effect of making it harder for the judge to change her mind and disapprove the settlement—or even to raise objections to parts of it. Moreover, counsel for the settling parties often tried to persuade would-be objectors to desist, using the preliminary approval to suggest that it would be quixotic to oppose the settlement. The ALI recognized the serious prejudgment problem raised by the use of terms like "preliminary approval," opting instead for "preliminary review."[7] It is unlikely that anyone will be able to demonstrate that a settlement was disapproved or significant changes were made before approval *because* the preliminary approval label was not used, but its absence surely makes for a more level playing field.

II. The Schedule

One of the first discoveries that I made in trying to mount an objection to a class action settlement was that the court-approved schedule posed a significant problem to making a timely and meaningful submission. On reflection, that should not have been a surprise because the schedule was set the same way that the preliminary approval was obtained: by the parties making a proposal tying the filing of objections to a date that the judge's chambers had given them for the hearing, and working backwards from that and forward from when the notice could be sent. The following is an example of how this would work in a hypothetical case and why it would cause problems for objectors.

The parties agree in early January to a settlement, and they ask the judge's secretary for an in-chambers meeting to present the settlement for preliminary approval, obtain the judge's approval of the notice, and obtain an order setting the schedule. They also check on the

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6 The ALI recommends that where there are class members with an interest in the proceedings, such as class counsel in other overlapping litigation, they should be invited in at this stage. Principles of the Law of Aggregate Litig. § 3.03 cmt. a (2010).

7 *Id.* § 3.03(a). Comment a to that section explains why the use of preliminary approval is ill-advised, relying on many of the reasons given in the text. *Id.* § 3.03 cmt. a.

judge's schedule and see that the last week in March is open, which fits into counsel's schedule as well. The secretary suggests January 20th for the meeting with the judge, and the parties arrive on that date with a proposed schedule. The class consists of the company's shareholders, and so it has their addresses. The proposed order provides for notice to be sent to the class by first-class mail before January 30th, with class members having until March 5th to file any objections. The parties then have fifteen days to respond, with the hearing set for March 31st. Because the time to file a response to a motion for summary judgment is twenty days and, in this case, would-be objectors have more than thirty days, the schedule looks reasonable on its face, and the judge approves it. There are serious difficulties for an objector, however, and the ALI's Principles—plus some help from changing technology—have lessened them considerably.

There are several flaws in the summary judgment response analogy. When a party receives a motion for summary judgment, the party is already litigating the case, using counsel familiar with it, and if more time is needed, it can almost always be readily obtained. None of those applies to most class members in most class actions. In the hypothetical above, unless the shareholder is a careful reader of *The Wall Street Journal* or the company's quarterly reports, she may not even be aware that a class action has been filed, let alone know anything about the merits of the case. She certainly does not have counsel who is familiar with the case and essentially expecting a motion or some other action by opposing counsel. And because the court has set a hearing date, with notice sent out to all class members, the chance of getting any extension, let alone one long enough to do significant research and prepare a meaningful objection, is very slight.

Assuming our hypothetical shareholder reads the notice when it arrives and understands enough of it to be suspicious, she then has to find an attorney to represent her on a very short timeline, almost certainly in a state other than the one where she lives.[8] In most class actions, the amount of the recovery for an individual class member is quite small, which is why the case was brought as a class action. If our hypothetical shareholder wants to object, it is unlikely that she is doing so because she expects a large additional payment if the settlement is rejected or improved because her stake, even where it resulted in a total victory, would not amount to much. Therefore, no matter what happens, she will not be able to use her recovery from the case to pay

[8] Some judges required counsel for objectors to be admitted in their courts, which further complicated the problem.

an attorney to interpose her objection. This means that she will probably need to find counsel who is willing to do the case pro bono. Public Citizen handled such cases in this manner because it was part of our mission to try to improve the fairness of class actions and protect absent class members who would otherwise be unrepresented.[9]

Our shareholder finds a lawyer who agrees to look into whether an objection should be filed, which is all that any competent lawyer could agree to do at this stage without further investigation. In addition to the very short time, which is now probably about twenty days in what amounts to a new case, there is another major problem: lack of access to key documents. All that class members receive is a notice that summarizes the complaint and the settlement, but those documents, as well as any other relevant papers in the case, are not included (nor would it be reasonable to require that they be provided to every class member). The notice states that copies of other papers are available for inspection during regular business hours in the office of the clerk of the court, probably in another state. Clerks would usually charge fifty cents per page for copies plus postage, but could not be sure when they would have time to fill the request.

There was another problem: you did not know what else was in the court file that might bear on the reasonableness of the settlement. Although sometimes it was possible to find someone to go to the courthouse and make a copy of the docket sheet so that you knew what was on file, that would not tell you what discovery had been taken because most discovery was not filed. Counsel were not required to provide copies of filed papers to class members, and requests for papers often went unanswered or unfulfilled despite promises to do so.[10]

Technology has substantially reduced this part of the objector's difficulty, and courts have seen to it that settlement processes make some use of technological advances. Fax machines were the first big help, as they shortened time horizons and brought down costs. Attaching electronic versions of filings to e-mails also helped greatly, and

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9 There are also some attorneys who represent class members primarily to earn a fee, but they can do so only if their efforts succeed in improving the settlement. Issues surrounding their involvement are discussed *infra* pp. 442–43.

10 One of the ironies of this dilemma for objectors who cannot gain ready access to the relevant papers is that class counsel often argues that because objector's counsel are new to the case, their views should be rejected for lack of familiarity with the matter. And sometimes class counsel rhetorically asks whether objector's counsel is prepared to try the case if the settlement is rejected, as if that were an obligation that counsel undertakes when exercising the right to object.

now many case settlements have websites that include the settlement agreement and sometimes the complaint and other relevant documents as of the date of the notice.[11] And now, the availability of filings online through PACER has made it possible to gain easy, direct access to the docket so that parties can find out what has been filed and what might be worth examining.[12]

Not only did objectors have to battle time and lack of access to relevant documents, but they often had to file their objections without knowing the other parties' positions as to why the settlement should be approved. This ignorance was directly attributable to the schedule prepared by the parties, which did not require them to make any submission in support of the settlement until *after* all objections had been filed. Thus, objectors often did not know the basis on which the settlement would be defended as a reasonable compromise, including what the benefits were worth (if they involved something other than money, as they often did) and why the plaintiff was taking less than the full amount requested in the complaint. In some cases it was possible to predict parties' eventual justifications from the notice, but that was not always true. Furthermore, allowing later submissions enabled the settling parties to offer different justifications when objectors had pointed out serious weaknesses in the apparent reasons for settling.

Most settlement hearings also heard objections to the fees of class counsel, and those also had to be filed along with objections to the settlement itself. In our experience at Public Citizen, in most settlements where there were issues of fairness, there were also serious questions about whether the fees for class counsel were excessive. Indeed, excessive fees were often a sign that the class had been sold out for the benefit of class counsel, and so we almost always included a fee objection with a settlement objection. As difficult as it was for objec-

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11 The *Manual for Complex Litigation* recommends use of internet sites for "complete access to a wide range of information about a class settlement." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 23.311 (2004).

12 Because discovery is generally not filed, PACER does not solve all the problems of identifying potentially useful documents. In addition, discovery and other papers are occasionally under seal, and courts have not always been willing to unseal papers for use by class members in connection with settlement hearings. Beyond the issue of sealing (which can be dealt with by having counsel agree to the terms of the sealing order), the parties often resist turning over discovery on various theories. Given the tight timetables, even under a reasonable schedule, it is very difficult, as a practical matter, to gain access to discovery prior to filing an objection. One avenue is to move for access to existing discovery in order to use it for a supplemental submission or at the hearing. Some objectors have sought to take additional discovery, directed at examining the reasons behind the settlement, which raises issues beyond the scope of the procedures on which this Essay is focused.

tors to surmise the basis for the settlement and prepare at least some kind of timely objection to it, it was virtually impossible to frame a meaningful objection to a fee request without seeing the application, which included submissions showing the time spent by counsel and their hourly rates. Yet, under the schedule prepared by counsel for parties (which was almost never changed by the judge), the fee application was submitted with the papers supporting the settlement—several weeks *after* objections to both were due. In several cases that I recall, the submissions were not made until just days before the hearing, and in one case were not even served on us as objectors, so that we first saw them when we arrived in court for the hearing.

The ALI has rightly recognized in section 3.03(a) that an application to approve a settlement and to award attorney's fees is a motion which, like any other motion, requires the moving parties to file all their papers in support of the motion *before* the time to respond even begins, "[a]bsent special circumstances."[13] This change enables would-be objectors to assess the reasons for settlement and the basis for attorney's fees before deciding whether to object. And if they do object, they have fixed targets at which to take aim, with some expectation that the reasons will not change before the hearing.

III. Reasons—Bogus and Other—for Approving the Settlement

One of the ALI's major contributions is its focus in section 3.05(a) on factors that are relevant in every settlement. In Comment a to section 3.05(a), the ALI also thoughtfully rejects many of the reasons that parties and courts give to justify a settlement due to their lack of probative value.[14] The fact that the parties supported the settlement is hardly a surprise; nor is much added because a third party helped the parties reach agreement. And the fact that class counsel is experienced is also a given, because otherwise the lawyer would not be an adequate representative, as required by Rule 23(a)(4).[15] Similarly, citing prior vigorous battles on motions or discovery shows only that the case was litigated like most other cases and not that the result is a fair one. Sometimes the parties cite the support of all of the indi-

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13 Principles of the Law of Aggregate Litig. § 3.03(a) (2010). Relying on Rule 23(h), and not citing section 3.03(a), the Ninth Circuit recently remanded a court approval of attorney's fees where the application was not filed until after the objections were due. *In re* Mercury Interactive Corp. Sec. Litig., 618 F.3d 988, 995 (9th Cir. 2010).

14 Principles of the Law of Aggregate Litig. § 3.05(a) cmt. a (2010).

15 Fed. R. Civ. P. 23(a)(4).

vidual class representatives, on the apparent theory that they are better informed, and the ALI rejects that claim for the fairly obvious reason that these individuals can hardly be expected to disagree with their lawyer.[16]

The ALI rejects reliance on some other reasons commonly given to support settlement because, in other cases, the opposite reason is given. For example, some courts cite the fact that the case has been pending for a long time, with many motions and much discovery, as a sign that the parties had thoroughly studied the case and found a solid basis for settlement. That may be true, but it may also mean that class counsel was finally worn down and was willing to take almost any offer—so long as it included attorney's fees. Then, in other cases where the settlement comes quickly, that fact is heralded as proof that the parties quickly got to the heart of the case and did not run up large attorney's fees, which meant more money remained for the class. As the ALI noted, the import of these facts is dependent on circumstances, and so there must be better reasons for accepting a settlement than these.

Another bogus reason for accepting a settlement that the ALI rightly rejects is that very few class members have opted out (suggesting that they like the settlement) or objected (suggesting that those who have objected are ill-informed, or troublemakers, or are driven by lawyers seeking a fee). But a small number of opt-outs may reflect the reality that most claims of class members are viable only as part of the class, and so the failure to opt out may be no more than a recognition that staying in is the only way for the class member to get anything. And given the difficulties of mounting an objection, the fact that there are *any* objectors may be the relevant fact, suggesting that the settlement must indeed be quite problematic for there to be any objections at all.[17] Eliminating these "factors" does not mean that the settlement cannot be approved, but only that its fairness must be judged based on the facts and law of the case, not by slogans that either have no salience in a particular case or can be manipulated to argue either side of a proposition.

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16 In some cases, some class representatives do not support settlement, which may be relevant but also could be a sign of some other disagreement unrelated to the merits of the settlement.

17 Class members have the right to object without having a lawyer, but when they do, their participation is often derided by claiming that the objection is so meritless that the class member could not even find counsel willing to assert it.

IV. Determining the Appropriate Type of Class Action

Class actions are generally brought under Rules 23(b)(2) or 23(b)(3), with significant practical differences between them; only the latter classes are entitled to notice and the right to opt out. The basic division between the two lies in cases primarily seeking injunctive relief—under (b)(2)—and those seeking money damages—under (b)(3).[18] In a settlement context, differences in notice requirements have much less significance because Rule 23(e) requires notice to the class regardless of the subdivision under which the class is certified.[19] But in many cases, choosing a (b)(2) rather than a (b)(3) class for settlement purposes has serious adverse consequences to class members by denying them the right to opt out. In section 2.07(c), the ALI makes a major contribution to protecting class members by focusing the opt-out question on the type of relief sought or obtained—whether the relief is indivisible, a term defined in section 2.04—rather than relying on the subdivision of Rule 23 used for certification, as illustrated by the following example[20]:

A complaint in an employment discrimination case seeks both injunctive relief and money damages for the class. The injunction would provide future relief, while the damages would compensate those injured in the past. There is usually substantial but incomplete overlap of the two groups. On the one hand, the injunction would protect both present and future employees, but they would have no claim for monetary relief. On the other, some employees may have left the company; for them, an injunction is of no use, but they may be eligible for money damages. And even within the group that was with the company for the relevant time period and is still employed, only some may have valid claims (if, for example, the violation related to promotion and only some class members were eligible for a promotion and were denied it). Finally, in an employment discrimination context, the claims of some class members may be fairly large, and because of the

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18 Fed. R. Civ. P. 23(b)(2)–(3).

19 *Id.* 23(e).

20 Principles of the Law of Aggregate Litig. § 2.07(c) (2010). The ALI has also approved a notice system that recognizes both that some notice to at least a representative segment of the class is needed, even for injunctive-relief cases outside the settlement context, *id.* § 2.07 cmt. f, and that individual notice to all class members in damages cases is not required, especially when individual claims are so small that they are unlikely to be pursued on an individual basis, *id.* § 3.04(b) & cmt. a. The latter insight is of some use in the settlement context, but because the defendant generally pays the cost of notice and has an incentive to be sure that notice is effective (lest the settlement be subject to collateral attack), it is of less practical significance than when class counsel has to pay for the notice after the court orders certification.

availability of attorney's fees in addition to damages, it may be possible to find lawyers to handle the damages claims of individual class members, especially if liability is established or conceded for the class as a whole.

To settle the case, the defendant must provide both injunctive relief and some payment for the monetary claims of class members. Although (b)(2) class actions normally focus on injunctive relief, for some time the courts have allowed claims for restitution, through which readily calculated (and often fairly modest) claims for monetary relief can be awarded without converting the case into a (b)(3) action.[21] This allows class counsel to dispense with the mandatory notice to the class required by Rule 23(c)(2)(B), for which plaintiffs' counsel must advance the cost,[22] and also avoids some of the more stringent requirements needed to certify a class under (b)(3). In many settlement classes, those aspects were of little importance, but the other difference between (b)(2) and (b)(3) classes—the right to opt out, which is available only for (b)(3) classes—became very significant.

A defendant would oppose any opt-out because that would expose it to additional litigation and possibly additional liability. On claims for injunctive relief, opposition to allowing opt-outs is justified because the defendant needs to have one set of rules regarding, for example, whether to have a test for promotions, and allowing opt-outs might subject the company to inconsistent standards of conduct. But on monetary aspects, the company also prefers a definitive end to litigation through the payment of a fixed sum of money, with class members forbidden from bringing their own suits seeking monetary relief.[23] On the other side, class counsel are, at best, indifferent to the desire of some class members to opt out, and in some cases may actively oppose it for fear that the settlement will collapse, taking their attorney's fees with it. Unfortunately, many courts, perhaps out of a desire to get rid of a case, allowed the use of a (b)(2) non-opt-out class on the theory that the claim for injunctive relief "predominated" over claims for monetary relief, which are proper (b)(3) claims.[24] The result was that

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21 *See, e.g.*, Allison v. Citgo Petrol. Corp., 151 F.3d 402, 418 (5th Cir. 1998) (allowing a case to proceed under Rule 23(b)(2) as to claims for restitution, but not for claims for actual and punitive damages).

22 FED. R. CIV. P. 23(c)(2)(B).

23 The problem has increased since the 1991 amendments to Title VII, which permit the recovery of damages beyond lost wages, including a right to limited punitive damages. *Allison*, 151 F.3d at 409–10. Because of the change in the substantive law, employees would be more likely to opt out if the monetary relief provided in the settlement were inadequate.

24 *See, e.g.*, Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 163–64 (2d Cir. 2004)

a defendant paid far less in damages than it might have because there was no opt-out threat that would make the monetary component of the settlement reasonable.

The ALI has shifted the focus from the issue of predominance to the issue of remedy in determining whether an opt-out is required. It has also recognized that a single case can have two kinds of remedies or, under Rule 23, both (b)(2) and (b)(3) classes, with some class members in both classes and some in only one. The line under section 2.07(c) is essentially a practical one: If the relief is indivisible because the same regime has to apply to everyone—either the test for promotion can be given or it cannot—then there is no right to opt out. But when the claim also seeks monetary relief, on which some class members might prevail and others might not because of the relative strengths of their claims on the merits, they must be given the opportunity to litigate their own claims and cannot be refused the opportunity to opt out.[25] However, assuring an opt-out right does not necessarily mean that many members will exercise it, because the defendant will know that the best way to guard against opt-outs will be to provide sufficient funds to persuade most class members that taking a little less now, with no further litigation and no additional attorney's fees, is a better idea than taking a chance in the court system on their own. Class counsel will also have a greater incentive to ensure a large enough fund to make opt-outs unattractive, especially if their fees are based on what is actually distributed to the class.[26]

Related to the issue of what type of class action is appropriate is the issue of how the class is defined and whether a single set of lawyers can adequately represent the entire class. Once again, the ALI has made a major contribution in this area by requiring courts to ex-

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(quoting *Allison v. Citgo Petroleum Corp.* extensively). The word "predominate" is not found in the text of Rule 23(b)(2), but only in the Advisory Committee's Notes. FED. R. CIV. P. 23(b)(2)–(3) advisory committee's note. Allowing the restitution claims to be brought under (b)(2) was useful because it avoided the notice problems discussed in the text. But even in employment cases, determining which type of claim "predominates" was a difficult one, and outside that context it was often abused to cover cases where the injunctive claim was the tail wagging the dog, instead of the other way around. *See, e.g.*, Smith v. Tower Loan of Miss., Inc., 216 F.R.D. 338 (S.D. Miss. 2003), *aff'd sub nom.* Smith v. Crystian, 91 F. App'x 952 (5th Cir. 2004).

25 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(a)(2) & cmt. e (2010).

26 *See infra* p. 441. A 2003 amendment, which is now Rule 23(e)(4), allowed courts to provide a second opt-out at the time of settlement, in addition to the one that is given when class certification is granted. That option is rarely exercised by courts, but the ALI's position would require it, unless there were special circumstances making it inequitable. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.11 (2010).

amine whether there are "structural" conflicts within a proposed class that make it improper for class counsel to represent them all.[27] This problem is best illustrated by *Amchem Products, Inc. v. Windsor*,[28] in which the Supreme Court rejected a proposed class because it found that class counsel could not adequately represent different segments whose interests in the settlement fund were antagonistic to one another. The proposed settlement established a fund that had a schedule of payments for various injuries resulting from exposure to asbestos, and that schedule applied not only to those presently injured but also to those whose injuries might not appear until many years later because of the long latency period between exposure to asbestos and the onset of symptoms.[29] The Court ruled that class certification was precluded because one set of attorneys was attempting to represent both claimants with present injuries, as well as those whose injuries might not manifest until much later, and because the fund for all claimants was fixed, it might run out before future claimants could make a claim.[30] The Court in *Amchem* concluded that the fact that all claimants were united against the defendants in seeking money for asbestos injuries was not sufficient to allow one group of attorneys to represent both present and future claimants. The ALI now more broadly forbids the certification of a class when there are structural conflicts that may result in one group of claimants being shortchanged to the benefit of another, and it included a special provision dealing with the problem of future claims.[31]

V. Attorney's Fees

Attorney's fees are the driving engine of class actions: without the prospect of substantial fees, lawyers would not bring them. The trick is to figure out the right standard for paying class counsel a "reasonable fee" and establishing sensible procedures for reaching a proper result in each case. No one thinks that perfection can be achieved on either score, but there has been considerable progress over the last forty years, as reflected in the ALI's Principles.[32]

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27 Principles of the Law of Aggregate Litig. § 2.07(a)(1) (2010).

28 Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

29 *Id.* at 603–04.

30 *Id.* at 601.

31 Principles of the Law of Aggregate Litig. § 3.10 (2010).

32 Some of these issues also occur when the class obtains a litigated judgment, but this Essay discusses fees only in the more problematic situation when the case is resolved by settlement.

Because fees for class counsel are always contingent on success, one approach would be to use the standard contingent fee in personal injury cases—which, in most places and for most kinds of cases, is one-third of the recovery—to which clients agree, at least formally, when they retain counsel. But because the entire class, and not just the named representative, is the client in a class action, there is no comparable agreement by all the clients. Moreover, awarding one-third of the recovery in most class actions would likely have produced very high fees even in the 1970s, and surely would result in excessive fees in today's mega securities class actions.

The courts began to use what came to be called the "lodestar method," which sought to replicate the principles on which counsel for the defendants were paid—a reasonable number of hours, multiplied by a reasonable hourly rate, but adjusted for risk of nonpayment or delay in payment and, in some cases, a success premium—on the theory that all lawyers just sell their time and paying for time was the best way to compensate them. But the theory did not work out in practice for a number of reasons. First, most class action lawyers did not have regular hourly rates, and they had not set up their offices to keep regular time records. The job of deciding whether particular hours were reasonably spent—which corporate counsel might be set up to monitor—proved very difficult for courts, especially when there were several law firms jointly representing the class. In addition, some lawyers began piling on the hours after the settlement had been agreed on in principle in order to justify the fee being sought. Quite understandably, judges were unwilling to delve into the minutiae of time records, to make assessments of which rates are reasonable for which lawyers, and to decide what adjustments should be made to the lodestar determination to reflect risk and delay. Moreover, courts also realized that placing so much weight on time created a disincentive to settle a case early, even when doing so was in everyone's best interest.

As a result, for class actions in which the principal relief obtained was monetary, the court shifted back to the percentage-of-recovery method, with the percentages well below the one-third commonly used in personal injury cases. That still left the difficult job of determining what percentage is appropriate in a given case, and, in doing that, the courts have tended to look at the percentages used by other courts in what appear to be comparable cases. Perhaps this has led to more or less consistent percentages, but with no assurance that the percentages are reasonable overall.

One useful step that has been taken is giving judges discretion to use the unadjusted lodestar as a crosscheck to protect against truly excessive fees, but not in a way that covertly reintroduces the problems that the lodestar created when it was the primary fee determinate. The ALI has blessed this approach in section 3.13(b),[33] and in section 3.13(d) it has encouraged courts to follow the practice of a few judges and try to set the percentage at the outset of the case, subject to adjustment in exceptional cases if the assumptions about the case turn out to be seriously in error.[34] However, if the court sets a presumptive fee early in the case, other class members are unlikely even to know about the case, let alone participate in the process by which that percentage is determined, thus reducing the role that possible objectors might play in assuring that the fee is reasonable.

From the perspective of the class member who opposes excessive fees, while recognizing that there would be *no* class recovery without reasonable fees, these changes are welcome, as are other refinements discussed below. Examining pages and pages of fee submissions, particularly those submitted at the last moment, with no realistic opportunity to question class counsel about them, was not only tedious but rarely produced much that would move the judge to reduce a fee request. It is much easier to argue about whether a given percentage is too high and to compare it to those used in other cases. And the use of the lodestar as a crosscheck will help eliminate the truly unreasonable fee, such as one where the percentage chosen would result in rates of $10,000 an hour for all lawyers on the team, even junior associates.[35]

The bigger problem for courts was how to enlist the help of class members to develop the facts and legal arguments on the other side,

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33 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13(b) (2010).

34 *Id.* § 3.13(d). Setting the percentage at the outset is possible only in those cases where there is a significant amount of information available on both liability and damages and when the case is similar to other class actions against different defendants, the most common examples of which are securities class actions. Those are now governed by the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 27(a)(3)(B), 109 Stat. 737, 739 (codified at 15 U.S.C. § 77z-1 (2006)), under which the class member with the largest stake is generally entitled to choose class counsel and to negotiate the percentage to be paid (perhaps on a sliding scale), on the theory that such person (now often an institutional investor) is sophisticated in these matters and has proper incentives to set the right fee percentage because it will have the most at stake in the case. *See In re* Cendant Corp. Litig., 264 F.3d 201, 243–44 (3d Cir. 2001).

35 When the relief obtained is not a fund of money, the courts and the ALI recognize the need to use the lodestar method. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13(b) (2010). In some of those cases, the parties attempt to place a value on what is being provided by the defendant and to use a percentage of that value as the amount to be paid in cash by defendant, a practice that itself raises other issues. *See infra* p. 443.

so that the judge was not both an adversary and the decisionmaker. The usual adversary—the defendant—was not in the picture because the settlement was often specifically structured to make the defendant indifferent to what happened on fees. Thus, if the agreement was to pay $10 million, defendant did not care whether 90%, 80%, or 70% ended up with the class because its liability was fixed at $10 million. Public Citizen opposed excessive fees, even without any monetary incentive to do so, because we believed that the natural opponents of class actions would use excessive fees to argue against all uses of class actions, thereby enabling wrongdoers to keep their ill-gotten gains by ensuring that there would be no practical way for individuals to bring suit and recover absent the class action mechanism. In order to create incentives for other lawyers to object on behalf of class members, not only to the fees sought but to the adequacy of the settlement and other aspects of it as well, the courts began to award fees to counsel for objectors whose efforts improved the settlement or, in the case of attorney's fees, lowered the fee sought, which meant that there was more money for the class, a practice that the ALI also endorsed in section 3.08(a).[36]

One way that some class counsel tried to minimize the likelihood that class members would object to their fees was by having the defendant pay their fees "in addition to" the money going to the class. Moreover, the defendant often entered a "clear sailing agreement" with class counsel, under which it would not object as long as the fees sought did not exceed the agreed-upon amount. Initially, the parties argued that this arrangement was solely between counsel and the defendant, and so class members had no standing to object. When that did not work, in part because the court had an independent obligation to approve the fee, parties sometimes included a specific provision saying that the *defendant*, not the class, would get to keep any part of the proposed payment to counsel that the court found to be unreasonable. Economics 101 should have been enough for the courts to reject

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[36] PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.08(a) (2010). These incentives produced some less desirable side effects, discussed below, that in turn produced additional reforms, also supported by the ALI. Other parts of section 3.08 allow prevailing objectors to recover fees if a disapproved settlement is later approved in the same or a reconfigured case, *id.* § 3.08(b), and open the possibility of sanctions, which would include counsel fees against plaintiffs, defendants, and their counsel in certain circumstances, *id.* § 3.08(c). In addition, if "objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving" a settlement, that may subject counsel or their clients to sanctions "under applicable law," the same standard as under section 3.08(c), which includes Rule 11 and 28 U.S.C. § 1927, both of which are mainly available to sanction counsel, not clients. *Id.* § 3.08(d).

that approach, but a number of courts permitted the reversion; although the practice seems less prevalent now, the ALI did not speak to it either way.

In some cases, defendants did not agree to pay a fixed amount, but instead agreed to pay all valid claims, as determined by the terms of the settlement agreement, usually employing an alternative dispute mechanism for this purpose. This meant that the defendant might ultimately pay much less if fewer valid claims were made, or more if the parties underestimated either the number of class members or the average amount to which each was entitled. The principal effect was that the defendant took on the risk of misestimation, which could be a benefit or a detriment, depending on future events. But it introduced a separate problem for fee-calculation purposes: what is the size of the recovery to which the appropriate percentage is applied given these uncertainties? In theory, defendants might want the total recovery number to be low, so that their shareholders (and perhaps customers) would not see them as creating a large liability (or being very evil), which would offset class counsel's desire to have the value be particularly large. In practice, neither side wanted a low figure because the defendant had already agreed to a maximum fee and simply wanted to be done with the matter. Another problem with using an estimate of the total recovery is that such a structure deprived class counsel of any incentive to design the system in a way that maximized both actual recovery and the ease with which class members could file claims or, better yet, have claims paid without having to file anything.

There was a simple solution to the problem that eventually dealt with both aspects: determine the fee only after all the claims had been paid. Class counsel rightly did not want to wait for all their money for what might be several years, and so the courts allowed the immediate payment of a minimum fee (usually equal at least to the lodestar amount), with the full amount paid only if the actual claims paid were close to the estimated value of the settlement. This both reduced the role of guesstimates and created real incentives for class counsel to design the process to maximize the amount that class members would recover.

One species of claims is particularly suspect, and yet the courts originally approved it: claims involving coupon settlements. Coupon settlements are now designated for special attention and concern by Congress, in the Class Action Fairness Act;[37] the courts; and the ALI,

[37] Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 1712, 119 Stat. 4, 6 (codified as amended in scattered sections of 28 U.S.C.).

in Comment a to section 3.13.[38] Instead of providing cash to class members, defendants provide class members with coupons that give discounts on purchasing the defendant's product or services in the future. There are many problems with coupon settlements, although in a few cases they may make sense. However, the valuation problem is even greater than in the ordinary claims case because there are so many uncertainties, including how to deal with defendants that regularly use coupons or other discounts unrelated to litigation, such as grocery stores or automobile dealers. It is therefore even more important to defer payment of class counsel's fees until the period for using the coupon has expired so that class counsel will have a real stake in being sure that the conditions of use are reasonable, and so that the courts can employ actual usage figures, not optimistic estimates.

Finally, courts are beginning to require, as the ALI urges in section 3.13(c), that the results of these claims procedures be made public—especially in coupon cases—instead of, as both class counsel and defendants prefer, only the court receiving the results. Making the results public enables objectors to weigh in on the reasonableness of the final fee, but even more importantly, it enables class members and courts in future cases to argue that a particular settlement is worth far less than it is touted to be and should not be approved for that reason. For example, a coupon settlement involving the Ford Explorer was approved by a California state court, along with a multimillion-dollar attorney's fee, but with the condition that the actual usage of the coupons be publicly disclosed.[39] Despite expert testimony from the parties that placed the value of the settlement at millions of dollars, the takeup rate was 0.0075%, for an actual value to the class of about $100,000.[40] Unfortunately, the fees were not conditioned on the actual amount paid out, but the public information about the actual use has been relied on by objectors in another automobile coupon settlement case as a basis to persuade another court to reject the proposed settlement as essentially worthless.[41]

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38 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13 cmt. a (2010).

39 True v. Am. Honda Motor Co., No. EDCV 07-0287-VAO (OPx), 2010 WL 707338, at *17 (C.D. Cal. Feb. 26, 2010) (citing a settlement report from *Gray v. Ford Motor Co.*, No. 03AS0391 (Sacramento Cnty. Super. Ct. June 26, 2009)).

40 *Id.*

41 The use of cy pres awards to distribute funds that cannot be reasonably distributed to class members is also discouraged by the ALI's Principles in section 3.07, but its application is outside the scope of this Essay, with one exception: the third paragraph of Comment a to section 3.13 states that "court[s] need not give such settlements the same full value for purposes of

Making fees available to objectors in certain cases has helped to provide courts with an analysis of the settlement beside that offered by the parties. It has also spawned the arrival of what are sometimes derided as "professional objectors" (perhaps in contrast to the lawyers at Public Citizen, which might mean that we were considered amateurs). These lawyers were not so much interested in improving particular class settlements, or assuring that the process was not harmed by lawyers taking unreasonable fees, but rather in the prospect of making a fee by objecting to the settlement or to counsels' requested fees. To the extent that these lawyers made meritorious objections, their motives should be no more relevant than were Public Citizen's. But in a number of cases, the lawyers did not have, or at least did not submit, valid objections. Rather, they simply filed, or in some cases threatened to file, objections with the often-realized hope that class counsel would pay them a substantial fee out of counsel's own anticipated recovery to make them go away. Indeed, from time to time, lawyers at Public Citizen would receive calls from class counsel to discuss objections that they had filed or were planning to file, during which a question was posed along the lines of, what do you *really* want?, which we took to mean, how much will it cost us to get you to go away? And unlike the overall fee for class counsel, these side deals did not have to be approved by the court and were never made public.

One of these side deals was made in *Duhaime v. John Hancock Mutual Life Insurance Co.*,[42] in which Public Citizen represented objectors who made suggestions for improving the claims process that were eventually agreed to by the parties, and for which it received a fee, approved by the court. Another set of objectors opposed the settlement, but the court rejected all of their arguments, from which they took an appeal. Although we did not expect to participate in the appeal, we were interested in following it, in part because our fee would not be paid unless the settlement went through. One of our attorneys checked the docket and learned that the appeal had been withdrawn by consent. He contacted counsel for the objectors, who said the agreement was confidential but acknowledged that it included immediate payments for the class members and a sizeable fee for the lawyer. This seemed to us to be very bad class action policy: if the settlement was not reasonable, it should not have been approved. On the other hand, if it was a reasonable settlement, the objector's lawyer

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setting attorney's fees as would be given to direct recoveries by the class." PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13 cmt. a (2010).

42 Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1 (1st Cir. 1999).

had improperly used the considerable leverage of a threatened appeal, which would delay the process and require the parties' lawyers to spend time and money opposing meritless objections aimed at obtaining a fee to which the lawyer was not entitled. The First Circuit did not agree,[43] but Rule 23(e)(3) was added thereafter to prohibit secret side deals not subject to court approval, and the ALI concurred.[44]

Conclusion

As I was reading the published version of the ALI's Principles, I realized how much had changed in the past thirty-five years in the way that courts examine the fairness of class action settlements and the fees requested by class counsel. The outright hostility that class counsel, defense counsel, and even the courts expressed toward objectors has largely disappeared, although I doubt that the parties are ever happy to see an objector. But judging by the response of those ALI lawyers who generally represent defense counsel, there is a recognition that objectors make the system work better overall, and perhaps even make it more difficult for class counsel to overreach in a way that harms defendants. Judges are more cognizant of their responsibilities under Rule 23(e), and they increasingly realize that counsel for objectors can help them carry out their responsibilities.

There is no single amendment to Rule 23 that caused this attitudinal and operational change in the processing of class action settlements. Rather, as this Essay tries to establish, there were a multitude of little changes that produced a much better system for carrying out Rule 23(e) than previously existed. The ALI has publicly endorsed these changes and has suggested significant additional improvements. The class action settlement process is not perfect, but the myriad little changes over the past three decades have made it much better.

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43 *Id.* at 7–8.

44 Principles of the Law of Aggregate Litig. § 3.08 cmt. a (2010).