LECTURE

THE SETTLEMENT BLACK BOX*

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The proposed settlements in major asbestos class action proceedings have inspired intensive questioning of the lawyer's role in the negotiation of settlements. The essential question is whether more effective controls can be imposed on lawyers negotiating settlements for claimants, particularly personal injury claimants, without infringing on the client's right to confidentiality or impairing the client's bargaining position. Additional complexities arise when a class is involved, because the class members ordinarily cannot participate or consent in the same way as clients who are individually represented. Requiring the lawyer to make a confidential record of the negotiations, for example, could have some beneficial effects. Regardless of any such procedural changes, however, it seems inescapable that an irreducible measure of trust, under the rubric of "professional judgment," must continue to repose in the lawyer. This means that negotiating settlements, a key function in our calling, is effectively beyond regulation. That in turn should remind us that our calling is indeed a profession—that we as lawyers above all must be trustworthy.

Asbestos cases bring forward the question of lawyers' role in settlement in a specially imperative way. As is well known, there are tens of thousands of asbestos cases now pending in courts throughout the country. Other ten thousands of asbestos cases have already been resolved, the overwhelming proportion of them by settlement rather than by adjudication. With the aging of the worker population that was exposed to asbestos and asbestos products, the future will likely bring yet more ten thousands of asbestos cases.

There is a special imperative to achieve settlement of these cases. The "asbestos cases" are often thought to constitute a single category and therefore to be appropriate for a common disposition. The cases all involve similar origin and causation, a limited number of repeat defendants, a limited number of plaintiffs' lawyers who have received the cases by common pathways, a limited number of defense lawyers who have received the cases by other common pathways, common background facts

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relevant to liability, common injury etiology, and common problems of insurance coverage. As the litigation has burgeoned, the claims have fallen into statistical categories whereby otherwise idiosyncratic personal injuries may be directly compared with each other in evaluations for settlement. Claims processing has become specialized to the point where all the lawyers, judges, and other professionals know each other. The sheer number of cases with these similarities makes the asbestos cases distinctly visible in court calendars, unlike automobile and products liability cases, for example, which continue to be regarded as separate and unique.

The inevitable result of these categorical imperatives are endeavors to settle the cases en masse. The procedure employed is a settlement class suit. A settlement class suit is a proceeding brought after negotiations between plaintiffs' representatives and the defense have concluded, in which the purpose and effect of the suit is not litigation but a binding, judicially approved contract that will govern all future cases.¹ The result is called a "global settlement," signifying that it covers all claims by all defined claimants against all defined defendants. For society, the court system, and the involved professionals, a global settlement makes obvious sense. Global settlement on anything like reasonable terms would also benefit the victims. At minimum, settlement would mitigate the scandalously high transaction costs entailed in litigating the asbestos cases—something like two-thirds or three-quarters of the dollars going for purposes other than to compensate the victims.² Indeed, visitors from foreign countries would consider that even the thought of litigating these cases is grotesque proof of American misguided faith in litigation as a remedy for social ills.

Nevertheless, there are serious questions about these proposed settlements. Objections in court have been made in the name of future claimants whose rights are governed by the settlement agreements. These objections have been voiced by plaintiffs' lawyers who have represented asbestos claimants over the years but who are not themselves participants in the settlements. Cynics think that one motivation for objections by these lawyers is the prospect of losing a rich income flow from the asbestos cases—literally millions of dollars a year in so-called contingent fees that will continue to flow as long as the play goes on. But academics of standing have also voiced objections.

These objections are threefold. First, some argue that personal injury


cases cannot be settled justly, or at least settled justly by the bunch. Others argue that the settlements actually reached are unfair as defined in Rule 23 of the Federal Rules of Civil Procedure, governing class actions. That is, the terms are so far outside the range of reasonableness that they cannot properly enjoy the blessing of court approval. Finally, others claim that lawyers representing the plaintiffs in these cases violate standards of ethics in negotiating these settlements. I will address all three objections.

I. The Just Settlement of Personal Injury Claims

The notion that parties cannot justly settle personal injury claims is absurd, unless one takes the position that parties lack the capacity to contract concerning their own interests. My colleague, Professor Owen Fiss, appears to have come close to embracing this premise. It is apparently his view that the justness, certitude, and rectitude of judicial decision, at least in cases involving civil rights, form the basis for ordering the future that we should prefer to a compact resulting from party negotiation. It seems to me that this view presupposes that judges as a group have a sense of justice that Professor Fiss would find congenial—for example, the sense with which Justice Brennan was endowed. We should call to mind, however, that not all judges are Justice Brennan, not even those who have reached the Supreme Court. If Judge Learned Hand was correct in "dread[ing] a lawsuit beyond almost anything else short of sickness and death," then settlement has compelling relative attractions. In any event, personal injury cases are in fact regularly settled as a matter of course, and it is difficult to see why asbestos cases or any other class of cases should be categorically excluded from this form of dispute resolution.

II. Settlements and the Rule 23 Standard

The second objection to the global asbestos settlements is that their terms are not fair under the standards required by Rule 23 for approval of a class action settlement. The question, of course, is "fair as compared to what?" Professor Eric Green of this law school was appointed guardian ad litem for the class in the Ahearn litigation, another large-scale asbestos settlement class suit. The court charged Professor Green with the duty of assessing the fairness of the settlement in that case under the Rule

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3 See Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1075 (1984) ("Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority . . . . Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.").

4 Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter (Nov. 17, 1921), in Lectures on Legal Topics: 1921-1922, at 89, 105 (1926).

23 standard. His report speaks to the issue of Rule 23 fairness with more authority than I can invoke. In any event, as I understand the law, the legal standard of fairness under Rule 23 is more exacting than the legal standard of unfairness from which one could infer that counsel representing a client has been inadequate in the representation.

A. The Law of Rule 23 Settlements

There are many statements of the law governing Rule 23 settlements. The generally accepted formulation is both conclusory and redundant: The settlement must be "fair, adequate and reasonable." Some courts have developed a more elaborate formulation, seeking to specify independent "factors" for judges to weigh in application. Thus, in Parker v. Anderson the court said:

In evaluating settlement proposals, six factors should be considered: (1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representative, and the absent class members.

I will not stop to dissect these factors. I only observe that they either reiterate the concept of "fair, adequate and reasonable" or identify evidentiary elements from which one might conclude that a settlement met that standard, or refer to secondary sources that might evidence whether the standard has been met. One may also observe that the factors do not reference the negotiation technique employed, except to exclude fraud or collusion, which in any event would vitiate a contract of settlement. The factors also do not reference the relationship between initial settlement proposals and final proposed terms, nor should they. If courts established initial offers as an obligatory reference point, negotiators would simply make extravagant formal proposals as a preliminary step to more serious discussions. Finally, the factors do not reference the amount of the settlement as such. This of course is appropriate. As nearly everyone recognizes, when a judge is deciding whether to approve a settlement, the amount of the settlement is the question and not the answer. Hence, we are back to "fair, adequate and reasonable."

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7 E.g., In re Corrugated Container Antitrust Litig., 643 F.2d 195, 207 (5th Cir. 1981) (citing Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)).
8 667 F.2d 1204 (5th Cir. Unit A), cert. denied, 459 U.S. 828 (1982).
9 Id. at 1209 (citing Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1213-19 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979)).
B. The Rule 23 Standard Relative to Other Settlement Standards

An alternative approach to understanding the law governing Rule 23 settlements is to compare the Rule 23 standard with the legal standards that govern when an individual claimant seeks to set aside a settlement contract or to avoid a settlement contained in a judgment dismissing the individual's claim.

A claimant seeking to avoid a settlement, and thereby open the claim to de novo consideration against the alleged wrongdoer, typically must attack the contract of release in which the settlement is embodied. Here, the law of rescission for fraud or mistake provides the standard for setting aside the settlement.\(^\text{10}\) “Fraud or mistake” in this context, however, ordinarily refers to fraud practiced or mistake induced by the opposing party. Accordingly, to set aside a claimant's settlement contract with an opposing party on the ground of inadequate representation by the claimant's own lawyer requires proof not only that the representation was inadequate, but also that the opposing party was legally complicit in that dereliction. Proof that will satisfy a court of such a conspiracy will be rare, and properly so. If the standard of proof were not high, all settlements would be in jeopardy of a change of heart by claimants who had agreed to settle but then later thought better of it.

More typically, particularly for claims of substantial amount, a settlement is documented in a judgment dismissing the client's claim rather than simply in a settlement contract. The procedural mechanism for avoiding such a settlement is a motion under Rule 60(b) of the Federal Rules of Civil Procedure, or the counterpart under state practice, to set aside the judgment.\(^\text{11}\) In this context the general standard is again fraud or mistake, and again refers to fraud or mistake caused by the opposing party.\(^\text{12}\)

The problem addressed here, however, is the standard that applies when the client complains, not against the opposing party for fraud or mistake, but against his own lawyer for inadequacy of representation.

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\(^{10}\) See, e.g., Restatement (Second) of Contracts § 162(1) (1981) (defining fraudulent misrepresentation as a person's intent to make a false or factually unsupported statement in order to induce agreement); Dice v. Akron, C. & Y.R.R., 342 U.S. 359, 362 (1952) (discussing the common law definition of fraudulent misrepresentation and finding a release of rights void when signed in reliance on deliberately false, material information about its contents).

\(^{11}\) See Restatement (Second) of Judgments § 78 (1982) (stating the procedural rule for relief from judgment is by motion in the court that rendered the judgment).

\(^{12}\) Fed. R. Civ. P. 60(b)(3) (“On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.”). See generally Mary K. Kane, Relief from Federal Judgments: A Morass Unrelieved by a Rule, 30 Hastings L.J. 41 (1978).
The law is inhospitable to contentions that the complaining party was ill-served by his lawyer. The decisions under Rule 60(b), governing relief from judgments, indeed appear to have become even less hospitable in recent years. The point can be made through a sample of judicial language in cases where the client was innocent but his lawyer made a serious blunder.

Thus in Partee v. Metropolitan School District, the lawyer represented a teacher in claims under 42 U.S.C. §§ 1981 and 1983, alleging racial discrimination and violation of First Amendment rights. The lawyer had virtually stipulated the plaintiff out of court by withdrawing a claim for personal liability against the school superintendent while failing to allege that the superintendent's had acted pursuant to school district policy. The stipulation left the client with no claim on which relief could be granted. But the court nevertheless denied the client, who had retained new counsel, an opportunity to present a restated claim:

[I]t was not excusable neglect for [plaintiff's] experienced counsel to have misunderstood the distinction between "personal capacity" and "official capacity."

In Taylor v. Texgas Corp., the defendant employer sought to set aside a judgment that in effect paid compensation to an employee who was already receiving a company pension for the very disability that was the foundation of the suit. The defendant employer had failed to notice, and its attorney had failed to inquire about, the fact that defendant's own pension department was already paying the disability pension to the employee. The appeals court held that the trial court's grant of a motion for relief was inappropriate:

Given that [the employee] rightfully could have assumed that counsel for [the employer] was aware that [the employer] was sending [the employee] pension payments, [the employee's] conduct does not rise to the level of fraud.

Then again, in Lepkowski v. United States Department of Treasury, the court gave plaintiff no chance to pursue his claim against the Treasury Department when his lawyer consistently, and with at least reckless disregard of his obligations as an advocate, failed to file papers opposing the Government's motion to dismiss and then, with equal persistence and reckless disregard, failed to explain or justify that failure. Said the

13 954 F.2d 454 (7th Cir. 1992).
14 Id. at 455.
15 Id. at 458.
16 831 F.2d 255 (11th Cir. 1987).
17 Id. at 257.
18 Id. at 260.
19 804 F.2d 1310 (D.C. Cir. 1986).
20 Id. at 1312-13 (chronicling this attorney's inaction).
It was well within the bounds of the court’s permissible discretion to find that [plaintiff’s] counsel had not even attempted to demonstrate that his dilatory failings were the product not of mere neglect but, rather, excusable neglect, for which his client should not be penalized.\textsuperscript{21}

And, as a last example, in \textit{Nemaizer v. Baker}\textsuperscript{22} the court refused to relieve a plaintiff from his attorney’s blunder in stipulating to a dismissal of a federal action “with prejudice” when it was contemplated that plaintiff would then bring a suit on a different legal theory.\textsuperscript{23} The court, holding that “with prejudice” precludes all subsequent litigation upon the same cause of action, said:

\begin{quote}
[W]e have consistently declined to relieve a client . . . of the “burdens of a final judgment . . . due to the mistake or omission of his attorney . . . .” This is because a person who selects counsel cannot thereafter avoid the consequences of the agent’s acts or omissions.\textsuperscript{24}
\end{quote}

Thus, courts have severely constrained the remedies for setting aside a settlement on the ground of inadequate representation.\textsuperscript{25} I have stated my understanding that the Rule 23 fairness standard is more exacting

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\textsuperscript{21} \textit{Id.} at 1313. \\
\textsuperscript{22} 793 F.2d 58 (2d Cir. 1986). \\
\textsuperscript{23} \textit{Id.} at 60. \\
\textsuperscript{24} \textit{Id.} at 62 (internal citations omitted). \\
\textsuperscript{25} A final remedy potentially available to a claimant, that of legal malpractice, has narrow scope as applied to negotiation of a settlement. The decisions in which plaintiff has survived a motion to dismiss have involved situations in which the essence of the grievance is the failure to investigate facts that would form the basis for negotiation, not failure in the actual negotiation process. For example, two leading cases involve failure on the part of a lawyer in divorce negotiations to use reasonable diligence to ascertain the extent of the marital property. Grayson v. Wofsey, 646 A.2d 195 (Conn. 1994); Malfabon v. Garcia, 898 P.2d 107 (Nev. 1995). The extent of marital property is of course the very framework of divorce negotiations. So also, failure to transmit to the client a settlement offer that later proves more generous than a later settlement offer, or a judgment suffered at trial, is a violation of an ethical obligation and a basis of virtually \textit{per se} civil liability. \textit{Model Rules of Professional Conduct} Rule 1.4 cmt. 1 (1995) (“A lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.”). Put differently, assuming that the lawyer can show exercise of reasonable diligence in gathering the materials that formed the basis of the negotiation, and that the settlement was not outside the limits embraced by plausible professional judgment, the client cannot establish the causal connection required for a malpractice remedy. For a further discussion of negotiation malpractice, see Chief Judge Posner’s analysis in \textit{Nicolet Instrument Corp. v. Lindquist & Vennum}, 34 F.3d 453, 455 (7th Cir. 1994) (noting the difficulty of proving causation in such cases, as one cannot label negotiation results as “wrong” or “right”).
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than the common law standard governing these inadequate representa-
tion claims. It follows that an attack on a settlement in a Rule 23 class
suit has greater scope and possibility. However, I now wish to explore an
essential difficulty inherent in all of these remedies. This is the problem
of proving that there was a causal relationship between the lawyer's al-
leged deficiency in conducting the settlement negotiations and the resul-
tant injury to the claimant—in other words, the problem of proving that
the client would have obtained a better deal if the lawyer had been more
effective.

C. Limits to the Rational Assessment of Settlements

The focal point of concern about the settlement process is whether the
lawyer has adequately and vigorously represented the client. The lawyer
in settlement discussions is in essence a negotiating representative. The
key question is whether there is some objective way of measuring the
performance of a negotiating agent. By this I mean some way of compar-
ing the outcome achieved by the negotiator with some external standard,
as distinct from evaluating it in terms of the negotiator's sincerity, com-
mitment of time, or other measure of "input" into the negotiations. Un-
fortunately, there are severe intrinsic limits to establishing any such stan-
dard.

1. The Inherent Conflict Between Client and Lawyer

First, one must recognize that there is an irreducible divergence of in-
terest, if not a legal conflict of interest, between client and lawyer. This
conflict exists both in class suits and in litigation where there is a client
who has directly employed the lawyer. Judge Henry Friendly explained
the essence of the divergence years ago in an analysis that is difficult to
improve upon. In Saylor v. Lindsley,26 Chief Judge Friendly wrote:

There can be no blinking at the fact that the interests of the plaintiff
in a stockholder's derivative suit and of his attorney are by no means
congruent. . . . The plaintiff's financial interest is in his share of the
total recovery less what may be awarded to counsel, simpliciter; counsel's financial interest is in the amount of the award to him less
the time and effort needed to produce it. . . . The risks in proceeding
to trial vary even more essentially. For the plaintiff, a defendant's
judgment may mean simply the defeat of an expectation . . . [F]or
his lawyer it can mean the loss of years of costly effort by himself and
his staff.27

26 456 F.2d 896 (2d Cir. 1972).
27 Id. at 900-01; see also 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, 677-84 (1986) (discussing principal-
agent issues in the context of class and derivative actions); Bryant Garth et al., The
I explore this conflict in the context of class suits more fully below.\textsuperscript{28} I only mention the divergence of interest between client and lawyer here for an analytic reason. At least with respect to major claims, claimants almost always have counsel, because they recognize that ordinarily they will do better with counsel than without. Claimants are thus compelled to entrust negotiation to representatives whose interests diverge in some respects from their own. The claimant cannot know whether a particular settlement figure is really in his interest or merely in the interest of his lawyer. Nor can the court. Nor, indeed, will the lawyer himself be able to make the distinction in a way that is both honest and precise. Thus, the divergence between client interest and lawyer interest is a variable to which a court usually cannot assign a weight in comparing actual settlement outcome with a standard of "fair, adequate and reasonable." For this reason, it is an inherent limitation on the law's ability to monitor the lawyer's fidelity and competence.

2. Indeterminacy Concerning the Relative Efficacy of Different Negotiation Techniques

A further set of difficulties derives from the near absence of any solid empirical evidence concerning the relative effectiveness of various methods of negotiation process and technique in the settlement of legal claims. In professional lore we understand differences among "hardball," "stone-wall," "conciliation," and so forth, yet we do not know when or how one approach works better than another. The most careful evaluation of negotiation techniques is apparently that of Herbert Kritzer.\textsuperscript{29} The substance of Professor Kritzer's findings is that there is no demonstrable relationship between technique of settlement negotiation and outcome of negotiation. When it comes to negotiating settlement of legal claims, we have a rich store of professional lore on how it should be done but very little evidence about the effects of various procedures under various circumstances.\textsuperscript{30}


\textsuperscript{28} See infra Part III.


3. No “Objective” Criteria of Settlement Fairness

There is a more fundamental difficulty in evaluating the fairness of a settlement, a difficulty existing independent of the unavoidable conflict of interest between lawyer and client, independent of negotiation technique, and indeed independent of whether the attorney conducted the negotiations on behalf of his client with perfect competence and fidelity. The essence of this difficulty is that the objective value of a settlement is indicative of unfairness in a settlement only in outrageously bad settlements.

Understanding this point requires an understanding of the economics and dynamics of the negotiation of a settlement contract. A settlement is a contract negotiated under unusually constrained conditions. The economist’s concept of “free market” does not apply to settlements. There is no “market freedom” because, by definition, the parties to settlement negotiations face the immediate alternative of going to trial if they exit the negotiations. Moreover, there is no shared reference point as to the value of the claim, such as “reasonable market price.” Litigation claims have no market in the understood sense of that term. The very object of the negotiations is to arrive at a payment that will substitute for one that might have been arrived at had market conditions actually existed.

With this limitation in mind, we understand that parties can arrive at a settlement only if there is an area in which plaintiff will be better off by settling for less than he might wish and defendant will be better off by settling for more than he might wish. If there is no such area of mutual advantage in a case, the case does not settle. Correlatively, as every trial lawyer knows, a case can be settled only if there is such an area of benefit.

As a prefatory matter, it is well to remember that the existence of an area of mutual advantage itself depends on judgment calls rather than a definite calculus. The lower boundary of an area of mutual advantage is the amount a plaintiff’s lawyer and client in fact are willing seriously to think about accepting. Thus, do those on plaintiff’s side consider the case worth “at least” $100,000 or is the minimum figure only $50,000? The upper boundary of an area of mutual advantage is the amount that a defendant and its counsel in fact are willing seriously to think about paying. Is the maximum “at most” $175,000 or could it be $250,000? Thus, the area of mutual advantage is itself more or less indeterminable. However, experienced lawyers form judgments that can converge. The settlement

Ordinary Litigation (1991) and Herbert M. Kritzer, The Justice Broker: Lawyers and Ordinary Litigation (1990)) (noting that in spite of criticism of Kritzer’s work, his work provides the “best information yet” about negotiation).


32 It was apparently Melvin Belli who originally set forth this concept of a zone of settlement in personal injury claims. See 1 Melvin M. Belli, Modern Trials § 109, at 748 (1954).
area emerges when the boundaries come to be in discussable proximity. When the boundaries do not come into proximity, a case goes to trial. Except in unusual cases, the area of possible settlement is fairly broad. That is, the settlement area consists of a wide band of different prices at which it will benefit both parties to settle. This settlement area is known in economics as the "cooperative surplus."

The key point for present purposes is that there is no inherently rational basis on which to divide the cooperative surplus. Thus, for example, if it is rational for both parties to settle anywhere between $100,000 and $175,000, there is no rational basis for allocating the $75,000 difference between them. Any division of the cooperative surplus would meet a standard of "fair, adequate and reasonable."

This in turn means that there would be no rational basis for criticizing a plaintiff, conducting his own negotiations, who settled for $100,001, nor for criticizing a defendant who settled for $174,999. It also follows that there would be no rational basis for criticizing a lawyer representing either the plaintiff or the defendant for arriving at either figure. Thus, any settlement figure within this area of "cooperative surplus" could not be rationally criticized as being outside the bounds of reasonable professional judgment. Put differently, a settlement could be criticized as falling outside the bounds of professional judgment only if it is one that no sensible lawyer, acting honestly, could have recommended.

It is also the case that the larger the costs of litigation, the greater the indeterminacy of settlement possibilities. The "cooperative surplus" between parties is essentially equivalent to the transaction costs the parties would incur by continuing the litigation of their dispute, plus the "price of avoiding" the risk of an adverse determination. The latter is something like the insurance premium on a unique risk—the kind Lloyds of London handles, or used to handle. Accordingly, when litigation costs and outcome risks are high, the zone of settlement is correspondingly larger. And when the zone of settlement is relatively large, there is a larger zone in which it is not possible to make rational criticism of the terms of a settlement. In the asbestos cases, for example, the transaction costs are approximately two-thirds or three-quarters of the parties' expenditures for litigation. The range of reasonable settlement is correspondingly large.

There are still further subsidiary difficulties. Available evidence indicates certain irrationalities in people's determinations of a fair bargain. Most people are risk averse, preferring a certain resolution to an uncertain opportunity. As expressed in folklore, a bird in the hand is worth two in the bush. People also tend to undervalue long-term transactions

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compared to transactions where there is a near-term payoff.\(^3\) A professional negotiator can moderate these irrational predispositions by undertaking persuasion of his client based on his more extensive experience. However, in the lawyer-client relationship the client legally has the final say in settlement.\(^3\) That being so, there are limits to the influence that a professional negotiator can bring to bear. There are corresponding limits on the rationality of criticism of the outcomes realized through a professional negotiator. And this means that there are limits to rational second-guessing of a settlement that a lawyer has recommended to a client.

Thus, although class suit settlements can be attacked on the grounds that they do not meet Rule 23's *gestalt* "fair, adequate and reasonable" standard, one would be severely constrained in trying to show that a settlement was not in fact fair under that standard. The difficulty of making such a showing reinforces the importance of lawyer self-regulation in the area of settlement negotiation.

### III. The Ethics of Class Suit Settlement Negotiations

The third objection to global settlements is that plaintiffs' attorneys violate standards of ethics in negotiating these settlements. I discuss these considerations by first addressing ethical issues that arise in the settlement of multiparty litigation in general, and then focus on the ethics of the settlement class suit itself.

#### A. Multiparty Litigation

In cases having multiple claimants, whether class suits or simply the product of multiple joinder, the interests of the members of the claimant group in relation to settlement are likely to differ. Consider the simple case of a single attorney representing three claimants: a wife driving the family car, the husband who is the car's legal owner, and a passenger—a child—in the back seat. All are injured in an accident with a defendant. Each claimant's interest in the prospect of settlement typically will be different. These differences will include their respective legal bases of liability and vulnerability to potential defenses, measures of damages, and aversion to risk of losing the case if it should go to trial.

Thus, the wife as driver is subject to a defense or mitigation for contributory fault. That fault may or may not be imputed to the husband-owner under applicable law. It will not be imputed to the child. A statute of limitations defense would certainly operate differently as to the child in any event. It is unlikely that the claimants will have suffered the same

\(^3\) See id. at 513-15 (reviewing anomalous results of various intertemporal choice experiments).

\(^3\) E.g., *Model Rules of Professional Conduct* Rule 1.2(a) (1995) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.").
character and severity of injuries—medical and rehabilitation expenses, lost earnings, and pain and suffering—or have the same possibility of receiving punitive damages. The risks of trial usually will affect them very differently, for example, if the child must look to settlement for long term care while the parents look to it as something of a windfall for pain and suffering.

However, a defendant typically will settle only if the settlement package includes all of the claims. A chief benefit of settlement from a defendant’s viewpoint is being spared the cost of defense and the risk of a high adverse verdict. These costs and risks pro tanto remain open if the entire case is not settled. Accordingly, the conflicting interests of the claimants must be resolved if there is to be a settlement.

Under the prevailing rules of professional ethics, the plaintiff’s lawyer may mediate these conflicts and arrive at a settlement package, without being subject to a conflict of interest, if he explains to all the claimants the basis of the settlement as a whole and their individual share in it. However, this can require some diplomacy and more. The complexity of the negotiation among the claimants will be greater when they do not have the tie of being in the same household. Additional complexities arise if there is more than one lawyer involved in representation of the claimants, for each lawyer’s fee will depend on the award allocated to his client. There are cases where a plaintiff’s lawyer has conceded a share of the fee in order to get all the claimants into line. In any event, the negotiation is covered by the veil of the attorney-client privilege and hence ordinarily is beyond the purview of the court.

Perhaps it does not require repeating that there is no obvious basis on which to allocate among multiple claimants the “cooperative surplus” of settlement that goes to them as a group. That is, the indeterminacy of fairness of a settlement as between a defendant and a plaintiff is compounded by the indeterminacy of the fairness of the allocation of the cooperative surplus among the plaintiffs. The question of fairness will become an open issue, however, only if a claimant becomes so unhappy as to protest.

Additional complexities are introduced when, as is often the situation in a “big” case, there are multiple defendants and multiple sources of insurance coverage. Only by coincidence could two or more defendants have the same exposure in terms of the rules governing their liability, their financial resources at risk, and their insurance coverage. In some situations the case against one defendant can involve exposure to “bet the ranch” liability, with a corresponding effect on the risk of going to trial. For these reasons the interests of multiple defendants in a specific level of

36 Id. Rule 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.").
settlement normally diverge. The same applies to the insurers who are usually in the background. The insurers typically will have different monetary limits, different coverages and exclusions, and different stratifications in their reinsurance.

These differences of situation result in different interests in sharing the burden of a settlement that, in its aggregate terms, all would agree is within the range of fairness. There will be a bargaining struggle among those called upon to pay, similar to that among multiple claimants. Because separate defendants usually have independent representation, arriving at agreement requires concurrence not only of the clients but also among their lawyers. All of these complications are usually involved in trying to settle a multiparty suit.

B. Class Suit Complications

The class suit presents further difficulties, in addition of course to all of the foregoing ones. The additional complexities in class suits result from the anomalous position of the plaintiff "client" and of the lawyers for the class.

The plaintiff in a class suit is nominally a set of people who undertake to act for others in prosecution, and possibly settlement, of claims owned by the absentees. Thus, the class representatives do not speak only for themselves but also are fiduciaries who speak for others, with the constraints that a fiduciary obligation imposes on their freedom of decision. In the typical class suit, moreover, the representatives have no preexisting relationship with the other class members, resulting in a distance that puts additional strain on their fiduciary responsibility. The class representatives are therefore required to reach a settlement that will meet the standard of fairness on behalf of people they do not know, whose interests are inevitably divergent in various degrees, in negotiations with defendants who themselves usually have divergent interests.

The position of class counsel is also different from that of counsel who has been retained in the conventional manner. Counsel for a plaintiff class is usually the architect of the suit itself. That is, plaintiff’s counsel will have been the author of the legal theory of the suit, the definition of the class, the designation of the plaintiff representatives, and the strategies to be pursued. Plaintiff’s counsel typically will also be the producer and financial backer of the enterprise. The strength of the case, and its potential for eliciting a settlement, will therefore be primarily a product of the labors of class counsel. Whatever might be said about the rights of class counsel according to the legal theory of class suit representation, in

37 See Coffee, supra note 27, at 681 (“In some areas of contemporary litigation, the pattern is typically one of the lawyer finding the client, rather than vice versa.”).

38 See id. at 683 (“[U]nless the client is willing to invest in the action by bearing litigation expenses, the attorney will still make the critical investment decisions, thereby reversing the normal roles of principal and agent.”).
economic terms counsel has very legitimate interests in the settlement proceeds.\textsuperscript{39}

Viewed realistically, therefore, plaintiff's counsel has an interest in a potential settlement that is substantially distinct from the interests of the class itself. As such, he is an additional and important claimant to the cooperative surplus in a settlement, notwithstanding that in formal legal terms his position is merely auxiliary to that of the class. The presence of this third-party claimant introduces an independent variable in appraising the fairness of settlement for the members of the class. By the same token, it is a variable in the negotiation of how much and from whom a settlement fund might be constituted.

On top of all of these complications is uncertainty as to whether the suit is or is not a class suit. The key issue is whether the court certifies the suit as a class suit. Whether a suit becomes a class suit, or merely involves the permissive joinder of several individual claimants, usually determines whether or not the case is "big." If the proceeding is a class suit—that is, if the court certifies it as such—defendants can face massive liability. If the court does not certify the proceeding as a class suit, the case reduces itself essentially to a few claims, some of them of modest amount. However, a suit purporting to be on behalf of a class does not become such until the trial court holds it to be so, and even then it is vulnerable to dissolution on appeal or through collateral attack. This uncertainty hovers over the process of settlement. Does the case involve $100 to $175 for each of the named plaintiffs, or does it involve similar amounts for hundreds or thousands of claimants? The size of the cooperative surplus—as a practical matter, whether there is any such surplus—turns on this issue. The claims of the class members on the average may be much larger, as in the asbestos cases—$5000 to as much as $500,000. This "spread" between upper and lower limits of justifiable settlement is correspondingly larger in dollar terms.

There are powerful restraints against making a firm judicial determination of whether the suit is a class proceeding or not. The Supreme Court's decision in \textit{Eisen v. Carlisle & Jacquelin}\textsuperscript{40} radically discouraged such determinations prior to full-scale discovery. A defendant typically does not want the case certified as a class suit unless it is fairly confident of victory on the merits or has the terms of a settlement firmly in hand. The uncertainty about certification is a bargaining chip, but for whom is usually unclear.

\textsuperscript{39} See \textit{id.} at 683-84 ("[O]ne better understands the behavior of the plaintiff's attorney in class and derivative actions if one views him not as an agent, but more as an entrepreneur who regards a litigation as a risky asset that requires continuing investment decisions.").

\textsuperscript{40} 417 U.S. 156, 177-78 (1974) (holding that a preliminary hearing on the merits of a suit to determine whether it may be brought as a class action is not permitted under \textit{Fed. R. Civ. P.} 23).
It is the confluence of these factors that has begotten the "settlement class suit." A settlement class suit permits the defendants' and plaintiffs' counsel to determine the size of the controversy through a bargaining process, and by the same process to resolve the controversy. Determining the size of the case and reaching resolution by settlement are interdependent, and unavoidably so. The bargain determines the size of the "pot," the shares of the pot to be awarded the claimants, or a formula for determining their shares; the shares of the burden to be imposed on the defendants and their insurers or a formula for that determination; and the share to be given to plaintiffs' counsel as the "third man," so to speak.

Whether the result is "fair, just and equitable" is a question whose answer can be clear only in clear cases, no matter what words are used to define the inquiry.

CONCLUSION

It may well be that settlements of many litigation claims are imprudent in the sense that a different outcome might have been realized. It may well be that many settlements conducted by lawyers are the result of ineffectual or self-interested negotiation by the lawyers. The point holds not only against lawyers for claimants who got too little but against lawyers for defendants who paid too much. The legal remedies for such failures are, however, very limited. In essence, the dissatisfied client has to prove that his lawyer was guilty of fraud. The settlement process is therefore a black box, structurally impervious to enlightened scrutinization from without.

This conclusion is surely unsettling in a culture committed to the idea that every legal wrong should have a remedy, a culture that also is not inclined to be sparing of lawyers. Yet the conclusion seems inescapable. If this is true, then the burden of moral responsibility in conducting settlement negotiations must be recognized as correspondingly heavier.

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41 For such a case, see In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 818-19 (3d Cir.) (finding a class settlement not "fair, reasonable, or adequate" because of valuation problems and "lingering safety concerns," but leaving open the possibility of approving a settlement on a more well-developed record), cert. denied, 116 S. Ct. 88 (1995).

42 This analysis suggests that the outcome, although not the analysis, in Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346 (Pa.), cert. denied, 502 U.S. 867 (1991), may make more sense than first appears. In that case, the Supreme Court of Pennsylvania held that a dissatisfied plaintiff cannot sue his attorneys after a settlement to which the plaintiff agreed unless the plaintiff can show that his attorney fraudulently induced him to settle the original action. Id. at 1348.