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COMMENT

JUDGES! STOP DEFERRING TO CLASS-ACTION LAWYERS

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I. THE PROBLEM

I represent a national non-profit consumer rights organization, as an amicus, in a federal appeal challenging a district court's approval of a class-action settlement of claims under the federal Credit Repair Organization Act (CROA).¹ My client maintains that the district court erred in finding that the settlement was "fair, reasonable, and adequate," which is the standard for class-action settlement approval under the Federal Rules of Civil Procedure.² In particular, we argue that the district court committed a reversible legal error when it deferred to the class-action lawyers' recommendation to approve the settlement because, in those lawyers' view, it was fair, reasonable, and adequate. We also argue that the district court erred when, in approving the settlement, it relied in part on its belief that the plaintiffs' counsel, whose work the judge had observed for years, are really good lawyers.

The judge said that one factor that persuaded him to approve the settlement as fair, reasonable, and adequate was his "complete confidence in the ability and integrity" of the lawyers for the class.³ Those lawyers, he said, "are well known to me. They have

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1. 15 U.S.C. §§ 1679-1679l.

2. FED. R. CIV. P. 23(e)(2).

3. Order [approving class-action settlement] at 16 in *Miranda L. Day v. Persels & Associates, LLC*, No. 8:10-cv-2463-T-TGW (Mar. 12, 2010) (Doc. 157) (hereinafter "Order").

exceptional legal abilities and the utmost integrity. Consequently, not only am I convinced that there was no fraud and collusion in this case, but that plaintiff's counsel obtained in settlement the most that was achievable."⁴ "Counsel for the Class," the judge explained, "are seasoned attorneys and *they have determined* that this settlement is the best option under the circumstances."⁵ A court, the judge concluded, "should be hesitant to substitute its judgment for that of counsel," accurately quoting a recent, non-precedential Eleventh Circuit decision.⁶

To get a bit highfalutin for a moment, if you are thinking that what the judge did here is at odds with one of our most famous expositions of judicial independence—that "[t]he government of the United States has been emphatically termed a government of laws, and not of men"⁷—you'd be right. After all, the judge approved a class-action settlement based not solely on his independent scrutiny of the law and facts, but instead in significant part on deference to the class lawyers' reputations and their "judgment" that the settlement was a good deal.

But if you also thought that what the judge did here was unusual, you'd be very wrong. As noted, the judge followed a recent unpublished appellate decision, and dozens of decisions approving class-actions settlements have said the same or similar things, sometimes all but abdicating the judicial role to lawyers and nearly fawning over their reputations in the course of settlement approval. As I now explain, despite a few contrary voices, judicial deference to class-action lawyers' recommendations, reputations, and experience remains an important part of the settlement-approval landscape.

II. A FEW EXAMPLES AMONG MANY

A few examples of judicial deference help illustrate the problem. In approving complex antitrust settlements, one court trumpeted the lawyers on both sides of the case as "among the

4. *Id.* at 22.

5. *Id.* at 31–32 (emphasis added).

6. *Id.* at 15 (quoting *Canupp v. Liberty Behavioral Healthcare Corp.*, 447 Fed. Appx. 976, 978 (11th Cir. 2011)); see also *id.* at 32 (quoting *Canupp*, 447 Fed. Appx. at 977–78 ("In considering the [class-action] settlement, the court is entitled to rely on the judgment of experienced counsel for the parties.")).

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

best and most experienced antitrust litigators in the country.” “Consequently,” the judge said, “their opinion that these Settlements are fair, adequate, and reasonable is deserving of this Court’s consideration.”⁸ Although the court said it would not “blindly defer” to counsel, it nevertheless concluded that “it *must* consider that the Settlements were reached after several months of arms’ length negotiation by experienced counsel and that both counsel and all parties involved view the settlements as reasonable.”⁹

In approving the settlement of an employment-discrimination class action, another court explained:

Both of plaintiffs’ counsel ... and several of the defendants’ counsel, have expressed themselves in favor of the settlement agreement. It is their opinion that the future course of conduct by the defendant ... will be much improved, and that the affirmative action plan will be complied with in good faith. The Court has a high opinion of all counsel who have participated in this litigation. Their judgment as to the merits of the settlement agreement therefore weighs heavily with the Court, particularly since the Court is convinced that agreement was not reached easily but rather was the result of long and difficult negotiations.¹⁰

And, in a case involving the alleged theft of corneas from the dead, the court noted that the plaintiffs’ lawyer had “over 23 years’ experience as a trial attorney” and was “extremely qualified and experienced in medical class action litigation.”¹¹ The Court concluded that the lawyers’ “recommendation” leaned “in favor of approval of the proposed settlement.”¹² These three cases are, as I’ve said, just examples. Many recent rulings follow the same pattern.¹³

8. *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 106 (D.D.C. 2004).

9. *Id.* (emphasis added).

10. *Wattleton v. Ladish Co.*, 89 F.R.D. 677, 685 (E.D. Wis. 1981).

11. *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001).

12. *Id.*

13. *See, e.g.*, *Chavarría v. N.Y. Airport Serv., LLC*, 875 F. Supp.2d 164, 172–73 (E.D.N.Y. 2012); *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp.2d 179, 195 (S.D.N.Y. 2012) (recommendations of “experienced” counsel are entitled to “great weight”); *Sabo v. United States*, 102 Fed. 619, 628 (Fed. Cl. 2011); *Perez v. Asurion Corp.*, 501 F. Supp.2d 1360, 1380 (S.D. Fla. 2007) (explaining that court “*must* rely upon the judgment of experienced

III. SOME PUSHBACK (BUT NOT ENOUGH)

Not every court has followed in lockstep. One appellate court rejected deference to counsel's settlement-approval recommendation because that would undermine judicial independence in a context where independence is essential.¹⁴ "Reliance on counsel's opinion," the court explained, "tends to render the district court captive to the attorney and fosters rubber stamping by the court rather than the careful scrutiny which is essential in judicial approval of class action settlements."¹⁵ Nor, for example, would it be possible to square deference to class-action lawyers with the views of the late Third Circuit judge Edward Becker. Writing for the court in his important and wide-ranging *General Motors* decision, Judge Becker insisted that district courts scrutinize class settlements with great care to protect the interests of absent class members, eyes wide open to both the fee-seeking motives of class counsel and the preclusion-happy motives of defendants.¹⁶

And the American Law Institute (ALI), in its 2009 *Principles of the Law of Aggregate Litigation*, expressed skepticism about deferring to class-action lawyers' settlement recommendations, explaining (in understated fashion) that "the court should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less than a strong, favorable endorsement."¹⁷ But the ALI gave mixed signals. It said that a "court *might* give weight to the fact that counsel or the class or the defendant favors the settlement," though it provided no guidance about when deference to defense counsel might be appropriate.¹⁸ On the plaintiffs' side, on the other hand, the ALI said that "counsel's willingness to propose a settlement may be entitled to some

counsel and, absent fraud, 'should be hesitant to substitute its own judgment for that of counsel.')

14. See *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1149-50 (11th Cir. 1983).

15. *Id.* at 1150.

16. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 783-800, 801-03 (3d Cir. 1995); see also, e.g., *Lane v. Facebook, Inc.*, 696 F.3d 811, 830 (9th Cir. 2012) (Kleinfeld, J., dissenting).

17. Principles of the Law of Aggregate Litigation ¶ 3.05(a), comment a, at 206 (Amer. Law Inst. 2009).

18. *Id.* at 205-06 (emphasis added).

weight ... [w]hen class counsel shares class members' interest in maximizing claim values ..."¹⁹

The ALI has a point, but not one that justifies judicial deference to the settlement recommendation of class-action lawyers. To be sure, linking the economic fate of plaintiffs' class-action lawyers to that of their clients is often a sensible tool for controlling the lawyers' conduct.²⁰ In particular, settlement provisions providing this link should encourage the lawyers to work hard to put money in the clients' pockets once the settlement has been approved.²¹ Therefore, a judge properly may consider the presence of a provision tying fees to client compensation in deciding whether to approve a class settlement.

But a provision that directly links the amount of lawyer compensation with the amount of client compensation is not a sufficient reason for a judge to defer to the plaintiffs' lawyer's recommendation to approve a settlement rather than exercising her independent judgment regarding the settlement terms themselves. After all, a key concern is whether a defendant, knowing that the plaintiffs' lawyer has an interest in a fee,²² has offered less in settlement than is optimal, and that remains a concern where the settlement is structured to tie the lawyer's economic interest to that of her clients. A quick, cheap settlement may benefit the plaintiffs' lawyer (without optimizing client recovery), because she can reap a handsome fee with little work,²³ leaving her free to move on to the next case in short order.²⁴

19. *Id.* at 206.

20. See Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(6) (requiring that plaintiffs' counsel's fees not exceed a reasonable percentage of the amounts actually paid to the class members); see also *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 851–54 (5th Cir. 1998) (similar).

21. See, e.g., *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 380 (D. Mass. 1997); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 126, 1284 (S.D. Ohio 1996), *recon. denied*, 927 F. Supp. 1036, 1044 (S.D. Ohio 1996), *aff'd in rel. part*, 102 F.3d 777 (6th Cir. 1996).

22. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 802 (3d Cir. 1995).

23. *Id.* at 801–02, 803.

24. The ALI also explained that reliance on class-action lawyers' experience "should not normally lighten the burden" of showing that the settlement is fair and that the fairness determination ordinarily should depend on "the specific facts of the settlement." *Principles of the Law of Aggregate Litigation* ¶3.05, comment c, at 209 (Amer. Law. Inst. 2009) (emphasis added). The ALI did not, however, describe the "abnormal" circumstances in which reliance on a lawyer's experience might be warranted.

To be sure, in some cases, only the fairness of the *amount* of a settlement is disputed. In that situation, the court will attempt to appraise the value of the class claims by discounting the value of the claims at their maximum by the risk of non-recovery.²⁵ This assessment is imprecise (of course), and so the court will generally approve a settlement if it falls within a range of reasonableness.²⁶ But determining that range should not be an exercise in deference to settling counsel. Rather, the court should demand information from the settling parties that would assist the court in making its valuation. The court should also pay careful attention to objectors who have an incentive to question the settling parties' valuation. Again, in this circumstance, even where class counsel's fee is tied to the class members' recovery, counsel may be willing to settle sub-optimally because that could enable her to settle more quickly and move on to the next case.

IV. WHY THINGS SHOULD CHANGE

As explained, despite some pushback, judges continue to defer to the class-action lawyers in approving class-action settlements. That needs to change. In my view, a court should never give weight to settling counsel's judgment about the wisdom of a class settlement or rely on class counsel's reputation or experience in assessing a settlement's fairness or legality. That assessment should be solely for the court. Any other approach undermines judicial independence in a context where independence is critical.

To appreciate why deference of the kind that I've described should be rejected consider how a claim for deference would be viewed in ordinary, one-on-one litigation. Assume that a judge is presented with a motion in limine. The plaintiff's brief argues that the evidence is not hearsay and therefore admissible, while the defendant's brief, naturally, argues that the evidence is hearsay and must be excluded. And suppose that, in ruling on the motion, the judge says, "This hearsay issue presents a close case, and the lawyers seem to know more about the problem than I do. Having read the briefs and reviewed the facts and law, I rule in the

25. See, e.g., *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 179 (3d Cir. 2012) (citing *Girsh v. Jepsen*, 521 F.2d 153, 157 (1974)); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)).

26. See, e.g., *Dewey*, 681 F.3d at 179.

plaintiff's favor, deferring to the judgment of plaintiff's counsel and taking judicial notice of her fine reputation for first-rate legal analysis and integrity." This hypothetical ruling would almost certainly never occur in real life because a judge is supposed to decide cases independently, basing her decisions solely on the law and facts. And, if a district judge in Des Moines issued that ruling, it would be reversed before it got half way to St. Louis.

With the hearsay example in mind, now consider class-action settlements. There is *more* reason to be concerned about abdication of judicial independence and deference to counsel in that context than in traditional one-on-one litigation. In class cases, almost all the plaintiffs—the absentees—have agreed to nothing because they have no relationship with their lawyer. As a result, they have no way to monitor their lawyer's conduct and demand that she act in their interests. Class settlements therefore present the possibility of collusive (or at least sub-optimal) deals, in which the defendant maximizes its "purchase [of] res judicata,"²⁷ and the class members receive little or nothing, while, in exchange, plaintiffs' counsel receives "red-carpet treatment on fees."²⁸ That's not news. Legal academics and some judges have appreciated these concerns for years.²⁹

Although, as indicated earlier, some courts have been effusive in their praise for class-action lawyers and their recommendations, most that have deferred to the views of counsel have not provided a detailed rationale—sometimes saying only that settlement is a good thing and counsel is more familiar with the nuances of the case than they are.³⁰

The lack of information is a concern. Once a class action settles, the named parties are non-adverse, and judges do not have their lawyers' help in ferreting out the case's strengths and weaknesses as they do in other cases. This non-adversity, and the

27. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000).

28. *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991).

29. For a partial collection of judicial opinions and legal scholarship on the potential for break down in the agency relationship between lawyer and client in class actions, see *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289, 294 (7th Cir. 2010). For a recent judicial discussion of the problem, see *Lane v. Facebook, Inc.*, 696 F.3d 811, 830 (9th Cir. 2012) (Kleinfeld, J., dissenting).

30. See, e.g., *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp.2d 179, 195 (S.D.N.Y. 2012).

resulting concern about an information deficit, certainly distinguishes the hearsay-objection example discussed earlier. So, perhaps judges think deference is appropriate when they perceive themselves to be in the dark.³¹ Maybe that's why, in approving class-action settlements, with little litigation-engendered hard evidence at their disposal, courts often just assume that counsel for the parties' engaged in "arm's-length" negotiations in the absence of evidence of collusion.³²

But the settling parties' non-adversity cuts against deference to class-action lawyers, not in favor of it. As Judge Easterbrook has noted, the "fairness hearing" required by Federal Rule of Civil Procedure 23(e)(2) may be a "staged performance," jointly produced by class and defense counsel, at which "the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information."³³ The answer to that serious problem is not to make it worse by deferring to the lawyers, but to insist that trial courts probe the settling parties' assertions, listen, but not defer, to objectors (the only true adversaries),³⁴ and "act[] as a fiduciary ... [to] serve as a guardian of the rights of absent class members."³⁵

31. See, e.g., *id.* ("Recommendations of experienced counsel are entitled to great weight in evaluating a proposed settlement in a class action because such counsel are most closely acquainted with the facts of the underlying litigation.") (emphasis added; citation omitted).

32. See, e.g., *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 33 (1st Cir. 2009); *Sabo*, 102 Fed. Cl. at 628. I have never understood why, in approving class settlements, courts so often rely on the parties' "arm's-length" negotiations and the absence of collusion. To be sure, in some cases, judges are apprised of the intensity and the length of negotiations and the degree to which the parties' have exchanged information relevant to the issues on the table. But class-action lawyers are sophisticated. It is unlikely that a plaintiffs' lawyer explicitly would ask defense counsel for a fee in exchange for providing the defendant with a low-value settlement that rids it of a potentially costly legal problem. It is equally unlikely that a class-action defense lawyer would respond to an offer of that sort by saying that his client would like to collude by accepting the plaintiffs' offer. In any event, in most cases, settlement discussions go on behind closed doors, and so evidence of a sub-optimal deal generally is going to be the deal itself. See Principles of the Law of Aggregate Litigation ¶ 3.05, comment c, at 209; *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., joined by Manion, Rovner, and Wood, JJ., and Posner, C.J., dissenting from denial of rehearing en banc).

33. *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., joined by Manion, Rovner, and Wood, JJ., and Posner, C.J., dissenting from denial of rehearing en banc).

34. See *Lane*, 696 F.3d at 830 ("Objectors provide a critically valuable service of providing knowledge from a different point of view, but one that is too often not used

V. OTHER PROBLEMS WITH DEFERENCE

One element of the judge's ruling approving the CROA settlement underscores why courts should never defer to counsel in approving a class-action settlement. Recall that the judge's settlement approval there was premised in part on the fact that class counsel were "well known to me," giving the judge a basis for praising their "exceptional legal abilities" and "utmost integrity."³⁶ But, like many class-action settlements, the CROA settlement was *nationwide* in scope, comprised of absentees (and objectors' lawyers) who were *unknown* to the judge. I have represented absent class member objectors for a couple decades in cases around the country,³⁷ and I have never been a local lawyer "known" to the trial judge. And I am not alone. Most objectors' counsel are not regulars before the court and, thus, are unable to garner the "well-known-to-me" deference that the judge accorded the plaintiffs' lawyers in the CROA case.³⁸ The result of deference to settling counsel is to give them an irrational leg up on the objectors and their lawyers.

Finally, it's worth examining why judges may like the idea of "deference" to class-action lawyers. Recall that the judge in the CROA case said that "the court should be hesitant to substitute its

effectively."). On the beneficial role of objectors generally, see, *e.g.*, DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS:PURSuing PUBLIC GOALS FOR PRIVATE GAIN 491–96 (Rand Inst. for Civil Justice 2000). I recognize that "[i]n some circumstances objectors may use an appeal [from the approval of a class-action settlement] as a means of leveraging compensation for themselves or their counsel." Vaughn v. Am. Honda Motor Co., Inc., 507 F.3d 295, 300 (5th Cir. 2007). Though beyond the scope of this essay, there are ways to police objectors while encouraging them to play their critical role. See, *e.g.*, Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009).

35. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995) (citations omitted).

36. Order, *supra* note 3, at 22.

37. See, *e.g.*, Devlin v. Scardelletti, 536 U.S. 1 (2002); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Hecht v. United Collection Bureau, 691 F.3d 218 (2d Cir. 2012); Klier v. Elf Atochem, 658 F.3d 468 (5th Cir. 2011); *In re* Cmty. Bank of N. Va., 418 F.3d 277 (3d Cir. 2005); *In re* Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315 (3d Cir. 2001); *In re* General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995).

38. That judges have given weight to their longstanding experience with the parties' counsel in approving class-action settlements suggests that, all other things equal, clients would do well to hire local counsel known to the judge. For the antitrust implications of certain class-action settlement practices, see, for example, Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1089–1102 (1996).

judgment for that of counsel.”³⁹ Again, the judge was not breaking new ground; many other judges have said the same thing.⁴⁰ Perhaps this rationale is appealing because it has a ring to it. Sometimes, as in certain administrative law contexts,⁴¹ or in appellate review of district-court fact finding,⁴² courts use that language because the law accords one public official primary decision making authority over another.

But the law should not accord deference to *lawyers*. Lawyers are charged by the adversary system with making arguments for clients, not to determine the law and facts. Put another way, contrary to the understanding of judges who defer to class-action lawyers and worry about second-guessing those lawyers’ settlement recommendations, it is *exactly* the role of a court to substitute its judgment for the judgments of lawyers. That’s what courts do! And that should be all the more true in the class settlement context because there, as I’ve noted, some lawyers, unless properly policed, may strike a deal that benefits them at the class members’ expense.

VI. CONCLUSION

I’m not anti-class action. I favor its vigorous use. Class actions are often enormously useful tools for justice, and, for decades, they have compensated discrimination victims, reformed oppressive governmental institutions, and deterred a wide array of wrongful business conduct where individuals, acting alone, would not have had the means or adequate incentive to sue on their own.⁴³

But class actions can be abused, souring the public, politicians, and even judges, and jeopardizing the prospect of justice. The trick is to come up with standards for processing class actions—particularly class-action settlements—that help promote class

39. Order, *supra* note 3, at 22.

40. See, e.g., *Canupp v. Liberty Behavioral Healthcare Corp.*, 447 Fed. Appx. 976, 977–78 (11th Cir. 2011); *Williams v. Vukovich*, 720 F.2d 909, 922–23 (6th Cir. 1983); *Lopez v. City of Santa Fe*, 206 F.R.D. 285, 292 (D.N.M. 2002).

41. See, e.g., *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 7 (2001).

42. See FED. R. CIV. P. 52(a)(6).

43. See *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289, 294–95 (7th Cir. 2010) (noting both the structural concerns leading to class-action abuse and that class actions are “indispensable for the litigation of many meritorious claims”).

actions while curbing their misuse.⁴⁴ One small step in that direction is to assure that courts never defer to the views, reputation, or experience of settling counsel in determining whether a class-action settlement is fair and lawful.

44. *See, e.g.*, NAT'L ASS'N OF CONSUMER ADVOCATES, STANDARDS AND GUIDELINES FOR LITIGATING AND SETTling CONSUMER CLASS ACTIONS, 255 F.R.D. 215 (2d ed. 2006); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Action Settlements*, 71 N.Y.U.L. REV. 439, 477-507 (1996).