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Class Action Against Class Counsel

Susan P. Koniak

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These remarks are based on a paper that I wrote with Professor George Cohen of the University of Virginia Law School, which is entitled, "Under Cloak of Settlement."[1] What we mean by that is that in the class action settlement process some illegal cesspool-like activity is occurring. We believe some lawyers are committing fraud, committing gross malpractice, committing violations of the antitrust laws, and that this behavior is going unregulated, unpunished and unchecked by law.

Before any class action may be settled a court must determine that the settlement is fair and reasonable and that class counsel adequately represented the class.[2] To make these determinations the court generally conducts, what is called, a fairness hearing. In this fairness hearing, the court is supposed to make a finding that the settlement is not a product of collusion, which sounds like the court is supposed to determine whether class counsel and the defendant conspired to commit fraud on the class by presenting a settlement that serves class counsel's interests and the defendant's interests but not the interests of the class. But the "collusion" finding is empty: courts almost never define what behavior constitutes collusion, and a finding of "no collusion" is as close to a sure thing as one can ever come in law. Finding a court decision that concludes that a class settlement was the product of collusion is like finding a needle in a haystack.[3] Moreover, courts have no duty and make no attempt to determine during a fairness hearing whether the conduct of the negoti-

* Professor of Law, Boston University Law School. In one of the cases discussed in this essay, Kamilewicz v. Bank of Boston Corp., I have been assisting counsel for the allegedly injured class members as a consultant. In another case mentioned, Georgine v. Amchem Products, I served as an expert witness testifying on behalf of objectors to the settlement.

1. Susan P. Koniak and George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. —— (forthcoming 1996).

2. Fed. R. Civ. Proc. 23(e) and 23(a).

3. For example, a leading treatise on class actions cites no examples. Herbert Newberg and Alba Conte, NEWBURG ON CLASS ACTIONS, ch. 15 (3d ed. 1992). Nonetheless, some examples exist. *See e.g.*, Miller v. Calvin, No. 82-C-2253 (D.Colo. 1984) (slip opinion) ("[P]laintiffs' sincerity [is]. . . insufficient to expunge the taint of collusion, champerty and maintenance marring this lawsuit"). There may be others, but after extensive research I can assure readers that such opinions are, to say the least, extremely rare.

ations, the manner in which class counsel surfaced to represent the class, or the terms of the settlement itself violate other provisions of law, like the antitrust laws, for example. And there are good reasons why courts should not attempt to make definitive determinations on such matters in fairness proceedings.

In fairness hearings on class settlements, courts should not try to determine that all laws have been complied with in connection with the settlement because such determinations would be inherently suspect, if they were to be made. Why? Because fairness hearings generally are not adversary proceedings. What goes on in most fairness hearings is this: the defendant's lawyers and class counsel together try to convince the court that the settlement is fair, that they have not colluded, that class counsel's representation of the class was exemplary—and thus certainly "adequate"—and no one is present to tell the court any different. These are by and large *ex parte* affairs.[4] Even when an objector does appear to contest the presentation by class and defense lawyers, that objector is not likely to be represented by counsel because counsel for objectors typically receive no attorney's fees from the class settlement and individual class members normally do not have the resources to hire counsel to appear; opting-out of the settlement is a cheaper route for those who actually figure out that the settlement is a bad deal. Moreover, even in those rare cases when objectors are represented by counsel, the discovery available to that lawyer on the conduct of the class negotiations is so limited that any case she might make is likely to be based on speculation and inferences rather than hard evidence. Courts almost never, for example, allow objecting counsel to depose class counsel or defense lawyers on the course of the negotiations.[5]

The "fair" distribution of millions and millions of dollars is passed on in fairness hearings that on average run about forty-one minutes[6]—hearings with no lawyer to detail any problems with the settlement. Objectors, who appear generally without lawyers, find themselves trying

4. The preliminary results of a study of class action practice in two federal district courts conducted by the Federal Judicial Center found that in 60% of the fairness hearings on class settlements no objector appeared to challenge the presentation by the now-united class and defense lawyers. Thomas E. Wilfging, Laural L. Hooper & Robert J. Niemic, FEDERAL JUDICIAL CENTER PRELIMINARY EMPIRICAL DATA ON CLASS ACTION ACTIVITY IN THE EASTERN DISTRICT OF PENNSYLVANIA AND THE NORTHERN DISTRICT OF CALIFORNIA IN CASES CLOSED BETWEEN JULY 1, 1992 AND JUNE 30, 1994 at 5 (on file with author) [hereinafter FJC PRELIM. STUDY].

5. *See generally* William E. Haudek, *The Settlement and Dismissal of Stockholder Actions—Part II*, 23 SW. L.J. 765, 803-06 (1969) (arguing that courts do not receive adequate information about a settlement even when there are objectors because the objectors often themselves lack sufficient information to raise or sustain challenges to the settlement).

6. FJC PRELIM. STUDY, *supra* note 4.

to challenge settlement documents that may run well over 100 pages—documents that take quite detailed study to figure out what the deal actually provides for whom, when and why. Even with this brief overview, it should come as no surprise that the Federal Judicial Center's preliminary statistics showed that in one federal district court 87% of the class settlements presented to the court were approved with no changes; and in the other district which was studied 89% were approved without modification.[7] If one includes the settlements approved with some changes, however minor and usually just to the attorney's fees provided class counsel, the percentages rise to 94% and 100% respectively.[8] So there's almost no chance when you go to a court with a settlement in a major class action case that the court is going to say to you: "Oh, no, forget that. That's a terrible deal." Moreover, on appeal the chance that a settlement will be rejected are also quite slim. The same study conducted by the Federal Judicial Center shows that of the 60 class action settlements considered in the two districts studied only one was overturned on appeal and one appeal was still pending.[9] So the chance of having a settlement rejected on appeal is very slim indeed.

If there was little reason to believe that lawyers involved in class action settlements were violating legal norms that restrain lawyers in other contexts and little reason to question the benefits conferred on class members by these settlements, then this corner of the legal world might strike one as a model of efficiency, justice at its best: a mere 40 minutes or so to dispose of hundreds or thousands of claims. Forty minutes, millions of dollars reassigned and thousands of individual claims disposed of in a single stroke, that sounds like a judicial system functioning like nobody's business. Right? So what's the problem?

Let me start by telling you a story, one you may have read about in a front page story in *The New York Times*.[10] This case involves a settlement in a class action covering about 700,000 people from all across this

7. *Id.*

8. *Id.* at 57-58. In 83-84% of the settlements approved by the two districts, the courts awarded 100% of the amount requested in attorney's fees. *Id.* at 6.

9. *Id.* at 5. The second appeal has since been decided and that settlement was rejected by the appellate court. Georgine v. Amchem Products, 1996 U.S. App. LEXIS 11191 (3rd Cir. May 10, 1996). It is important to note that the two appellate reversals occurred in the only two settlement approvals that were the subject of appeals. That does not mean, however, that the other settlements were all good deals; it is more likely to reflect how few objectors have lawyers and how few of those lawyers have the incentive or information necessary to make an appeal sensible.

10. Barry Meier, *Math of a Class Action Suit: 'Winning' $2.19 Costs $91.33*, N.Y. TIMES, November 21, 1995, at A1.

country.[11] BancBoston was allegedly keeping excess money in the escrow accounts of its customers. The bank was, in other words, allegedly demanding that people deposit more money into escrow than their mortgage contracts actually required them to deposit. A group of plaintiffs' lawyers sued BancBoston on behalf of the class for this practice, and BancBoston eventually agreed to settle the case. The bank's offer of settlement went something like this: "We agree to stop this practice and to pay attorney's fees to you for having brought this suit for the class, our customers."[12] Class counsel were allegedly not, however, satisfied with the attorney's fees offered by the bank.[13] The class lawyers allegedly had a better idea. They allegedly suggested that instead of the bank paying attorney's fees, the fees be deducted from the customers' escrow accounts.[14] Why not, after all, charge the class members? They were the ones who had been represented. According to the bank, it was unsure about this idea,[15] particularly when it looked at class counsel's formula for charging the class. You see, it seems that the bank's assessment of that formula was that it would leave class members poorer for having "won" this lawsuit than they would have been without it.[16] Apparently,

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11. Hoffman v. BancBoston Mortgage Corp, Civil Action No. CV-91-1880 (Circuit Ct. Mobile Cty., Ala. 1991). *See also* Kamilewicz v. Bank of Boston, Corp., 1995 U.S. Dist. LEXIS 18973, *1 (N.D. Ill. Dec. 15, 1995) (describing *Hoffman* class action settled in Alabama state court).

12. Paraphrase of account given in a letter dated 3/30/95 from T. Thomas Cottingham, counsel to BancBoston Mortgage Corporation and Bank of Boston in the *Hoffman* suit (letter on file with author) [hereinafter Cottingham Letter]. This letter gives the bank's version of the settlement negotiations. Class counsel may have a different account.

The discussion in the text of this Article is necessarily based on somewhat limited information. It relies heavily on: the Alabama court opinion approving the settlement; the consent order issued by that court; the Notice sent to class members; the brief filed by the Florida Attorney General's office objecting to the settlement in this case and the manner of awarding attorney's fees; the letter from BancBoston's counsel, cited at the start of this note, to a class member explaining what happened in this suit, in particular explaining why the bank did not object to the award of attorney's fees; and a column written in the Maine Lawyers Review describing the effect of this settlement on Maine citizens. These materials were sent to me by Senator Cohen, Republican, Maine. It is possible that the above documents in some way misrepresent what actually occurred in this case. For example, the parties may not have actually followed the court's order. If that is so, then the description in the text and some of my conclusions would have to be altered to reflect that. I therefore caution my audience that this discussion proceeds by assuming that the parties followed the court order, that the bank's lawyer honestly described the bank's position in the negotiation and class counsel's ultimatum to the bank, and that the Florida Attorney General's brief was accurate on the facts in evidence at the fairness hearing. If any of those assumptions is wrong, my description of what happened and the conclusions I draw from that description might change.

13. Cottingham Letter, *supra* note 12.

14. *Id.*

15. *Id.*

16. Kamilewicz v. Bank of Boston Corp., 1995 U.S.Dist. LEXIS 18973, *3-4 (describing allegations in complaint filed to protest this conduct, a complaint dismissed by this opinion).

the method that class counsel had come up with for calculating attorney's fees would leave many members of the class with less money than they owned before the lawsuit had been brought.[17] The formula apparently contemplated deducting more money from the escrow accounts of some class members than would be deposited in those accounts as a result of the settlement. To be clear about this, I'm talking about a formula that apparently contemplated charging some class members what in effect would be attorney's fees of more than 100% of the economic benefit conferred by the settlement itself.

The bank filed objections to this plan, explaining in those objections that the formula would leave all members of the class worse off than before, but then the bank apparently abandoned these objections.[18] According to the bank, class counsel informed the bank that there would be no settlement—that they would take the bank to trial—unless the bank agreed not to object to the fee formula.[19] Trial would, of course, be costly for the bank, more costly in all likelihood than the settlement, particularly given that under the settlement the class would be paying its own attorney's fees. So now the bank, according to this version of events, had the following choice to make: spending its own money on a costly trial or settling the case by agreeing to keep quiet while the class lawyers took the bank customers' money. Apparently, the bank chose door number two—the door with the customers' money behind it.

So they trotted off to the court, class counsel and the defense lawyers, and they presented this deal to the Alabama state court judge. Now, having read the transcript of the hearing, I must say that the judge seemed more than predisposed to accept whatever settlement was presented to him by the parties and less than receptive to hearing about any alleged problems with this deal.[20] Class counsel explained to the judge that all they were requesting in attorney's fees was a third of all of the extra money that the bank had been holding.[21] A third sounds like a reasonable award. The problem is that the third wasn't really a third: at least it wasn't a third of the "economic benefit" conferred by this settle-

17. *Id.*

18. *Id.* at n1 (describing allegations in complaint).

19. Cottingham Letter, *supra* note 12.

20. The Florida Attorney General objected to the settlement in the hearing held in Alabama. The judge showed impatience with the Florida A.G., urging him to hurry it up and commenting that while a Florida court might tolerate what the Alabama court apparently considered too many questions on cross-examination by the Florida lawyer, the Alabama courts did things differently. Fairness Hearing Transcript of Proceedings in Hoffman v. BancBoston Mortgage Corp, Civil Action No. CV-91-1880 (Circuit Ct. Mobile Cty., Ala. 1991) (on file with author).

21. *Id.* The court awarded 28% of the excess money as attorney's fees, not a third, which was what class counsel requested.

ment. Why? Because the extra money being held by the bank already belonged to the class members. No one ever maintained anything else. The extra money was being held in the names of the class members/customers. The bank wasn't threatening to abscond with it. The only economic return provided by this class settlement was that class members got back the right to *use* their money today instead of eight years from now when their mortgages were paid off, or whatever number of years elapsed before they paid off those mortgages or refinanced—and the class got back-interest on any excess money held by the bank in the past.

The class lawyers didn't "recover" the excess money for class members. That money was sitting there in the names of class members. But one year after the settlement was approved in this case that money was no longer sitting there intact. Customers no longer owned all that money. Twenty-eight percent of that money was now in the pockets of the class lawyers, not the class. More shocking, even if you didn't have any excess money being held by the bank, you apparently ended up paying attorney's fees as if you did. You see, not every member of this class had excess money being held in escrow. Those people got no money restored to their present use. Those people, at most, got (in terms of actual money) some small amount representing back-interest on any excess money the bank may once have held, some amount like $8.76 or $2.19.[22]

One member of this class allegedly had no more than $2.19 deposited in his escrow account as a result of this settlement and had a little over $91.00 deducted from that account to pay class counsel.[23] That man was Dexter Kamilewicz. In some sense, it was amazing that Dexter figured out what had happened to him because his escrow statement did not read: "Attorney's Fees Deduction: $91.33." Allegedly, it said: "Miscellaneous Disbursement: $91.33."[24] Dexter, noticing this and wondering what it was, began making inquiries, and eventually found out that the "disbursement" went to pay some lawyers from Illinois and Alabama that he had never met.[25] Now, when I get my escrow statement I do not read it with great care, and, if I did and happened to notice some "miscellane-

22. For a detailed analysis of the money that would have been received (and taken) from class members under a formula like that in this settlement, see Koniak & Cohen, *Under Cloak of Settlement*, *supra* note 1.

23. Meier, *supra* note 10. Another person had nothing deposited in his account and over $100 deducted in back-interest. Conversation with Ted Benn of Dallas, Texas, June, 1996. Mr. Benn has filed his own lawsuit against the bank. *Id.*

24. *Kamilewicz*, 1995 U.S. Dist. LEXIS 18973, *9.

25. *See* Meier, *supra* note 10.

ous disbursement," I would assume some tax payment had come due or some such thing and would not call to inquire. Moreover, I believe that many people are more like me than Dexter. Those people, if they were in this class or some similar class settlement, might still have no idea that money was actually deducted from their accounts to pay class counsel or how much was taken.[26] Indeed, there may be some in this audience who paid these lawyers or other lawyers in a similar settlement and still don't know.[27]

If this wasn't a class action, a lawyer who managed to charge a client over 4000 percent in attorney's fees—after telling that client that the fee would be one-third of the economic benefit conferred by the settlement in the case—would be in a heap of trouble. In our paper we discuss how such conduct could reasonably be construed as violating the consumer fraud laws of most states. That is so because the notice to the class did not state that one might end up *losing* money by not opting-out of this class action; it did not state that the services being provided by the lawyers (and for which each class member with a current mortgage would be charged) might be of no benefit to some in the class and even injure some of them; it did not explain which members of the class stood a chance of paying out more money than they received, so those people could understand their interest in getting out of this wonderful settlement. If a private lawyer wrote such a misleading fee contract and collected such exorbitant fees based on it, the consumer fraud laws of most states would provide some sort of remedy to the client, often double or treble damages.[28]

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26. The class notice did state that the court would award "a reasonable attorney's fee to be paid out of each escrow account," but it is unclear how many people in this class actually read through the entire eight page, small-type, legalistic notice in this case. More important, even those who did read the notice would have found that the fees to be deducted would not exceed "one-third of the economic benefit conferred" by the suit. Notice in Hoffman v. BancBoston Mortgage Corp, Civil Action No. CV-91-1880 (Circuit Ct. Mobile Cty., Ala. 1991) (on file with author).

27. Since learning about this case, I have become aware of other settlements that were structured just like this one and have met members of this class who had no idea that money was deducted from their accounts to pay attorney's fees.

28. Many states have enacted consumer fraud statutes, providing for double or treble damages and the award of attorney's fees, see John A. Spanogle, Ralph J. Rohner, Dee Pridgen & Paul B. Rasor, CONSUMER LAW 79 (1991), and have applied those laws to fee arrangements between lawyers and clients. *See e.g.*, Heslin v. Connecticut Law Clinic of Trantolo and Trantolo, 190 Conn. 510 (1983) (holding the provision of legal services constitutes "the conduct of trade or commerce" under the state's unfair trade practices act); *But see* Rousseau v. Eshlemann, 128 N.H. 564 (1986) (practice of law not covered by state consumer fraud and unfair trade practice act). These laws generally prohibit, as deceptive, acts that have the "likelihood of inducing a state of mind in the consumer that is not in accord with the facts," *see e.g.*, Uniform Consumer Sales Practices Act Comment to § 3; cite specific statutes. whether those acts are written, verbal or misrepresentations made through

A case for common law fraud might also be made against a private lawyer who had managed to charge fees in this manner to an individual client. If an ordinary lawyer, i.e., not class counsel, stated to her client that her fee would be only one-third of any economic benefit conferred on the client and then managed to take 4000%, a case for fraud might be brought successfully.[29] It would also ordinarily constitute malpractice to leave one's plaintiff-client worse off by some settlement, while leaving oneself much better off. Moreover, punitive damages are available in malpractice cases against lawyers in which the breach of fiduciary duty by the lawyer amounts to constructive or explicit fraud.[30]

The question of our paper is: If a regular lawyer who acted in this fashion would be in trouble and potentially liable for her conduct, why not a class lawyer? Should court approval of the settlement somehow stop the operation of other law aimed at controlling certain kinds of conduct? Have we replaced legal norms that normally constrain lawyer self-dealing with a 41-minute *ex parte* hearing? Does that process somehow wipe out all tort liability? All liability for fraud?

Now this BancBoston story may sound aberrational to you, so let me just say that this exact scheme was replicated in other class settlements. I found that out when I brought this case to the attention of the consumer fraud divisions of the attorneys general offices in the New England states. One of these lawyers called me a few days later and said: "I've got another one just like the BancBoston settlement in front of me." He later told me that he had information to suggest that there were

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nondisclosure. *Id.* Under these laws, it is common to define as *per se* deceptive any act misrepresenting the actual price to be paid for the services rendered. *Id.* Comment to § 3(8).

The statutes also commonly proscribe unconscionable practices. In determining what constitutes an unconscionable practice these statutes generally instruct courts, *id.*§ 4(b), to consider whether the seller knowingly, *id.*§ 4(c): took advantage of the consumers "inability to understand he language of an agreement," *id.*§ 4(c)(1); sold the services at a price "grossly exceeding the price" of similar services readily available to like consumers, *id.*§ 4(c)(2); sold the services to consumers unable to receive any substantial benefit from the transaction, *id.*§ 4(c)(3); or designed the transaction to be "excessively one-sided in favor of the supplier," *id.* § 4(c)(5). Arguably, all of these factors would be present, if this contract were one between an individual lawyer and a client.

29. The basic elements of the intentional tort of fraudulent misrepresentation are: (1) a false statement on a material fact or an omission without which the statement made is materially misleading, where there is a duty to disclose; (2) made with intent to deceive; (3) which is reasonably relied on by the person to whom it is made; (4) to that person's detriment.

30. *See e.g.*, Mar Oil S.A. v. Morrissey, 982 F.2d 830, 843-844 (2d Cir. 1993), (upholding as not an abuse of discretion trial court's refusal to award punitive damages against lawyer who withdrew money from client's escrow account based on letter client signed that contained a buried paragraph providing for such a fee but noting in *dicta* that an award of punitive damages on these facts would probably have been sustained on appeal); Hall v. Wright, 261 Iowa 758 (1968) (upholding award of punitive damages against lawyer who had knowingly and falsely represented to client that seller had clear title to home that client was to purchase).

other such settlements, many others, with the same formula for calculating fees.

How much abuse exists in the settlement of class actions? No one really knows. The Alabama court opinion that affected Dexter was not published. Many approvals of class settlements go unpublished, so there's no reliable way of discerning how many really outrageous cases of abuse exist. But the incentives of the players suggest that abuse is widespread. Class lawyers can make a good deal of money by accepting fat fees in exchange for advocating deals that do little for the class; defendants can save lots of money by agreeing to pay class counsel good fees to accept (and sell to a court) a deal that does little for the injured class; and judges can clear dockets of many cases in one fell swoop by accepting class settlements. With incentives like these the problem of abuse is probably enormous.

I want to outline briefly three kinds of antitrust problems that may attend the settlement of class actions. The first is epitomized by the Oracle securities litigation, which some of you may be familiar with. Oracle's stock plummeted. Within the next several weeks, 20 or more law firms filed various suits on behalf of shareholders, charging securities law violations.[31] Then those plaintiff's lawyers held a meeting.[32] Two of the firms convened the meeting and all but two of the other firms attended.[33] At the meeting, these lawyers "voted on an organization of the litigation and a leadership structure of two co-lead counsel."[34] Nominations for the post of lead counsel were made, and thereafter a vote was taken, resulting in an agreement among these firms on the two firms to be presented to the court as co-lead counsel in this litigation.[35] Those two firms then sought the court's ratification of the agreement reached at the meeting. The two firms which had boycotted the meeting objected. "The two camps [the elected co-lead counsel and the boycotting firms] squared off, sending volleys of disparagement at each other."[36]

The court asked the two camps to compete for the position of lead counsel on the basis of price, requesting each camp to submit an anticipated budget for the litigation in ten days time.[37] But "[w]hen the deadline rolled around, the [two camps] filed a joint proposal to serve as co-

31. In re Oracle Securities Litig., 131 F.R.D. 688, 690 (N.D. Calif. 1990).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* Minutes of the meeting were prepared and signed, presumably by the attendees. *Id.*
36. *Id.*
37. *Id.*

lead counsel."[38] According to the court, "the prospect of competition, it seems, had whistled an end to the shouting match."[39]

The court in *Oracle* rejected this joint bid and ordered the firms to compete by submitting, *in camera*, applications to the court for the post of lead counsel.[40] The applications were to detail the firm's qualifications for the post and specify "the percentage of any recovery" the firm would charge as "fees and costs."[41] The lead firm's costs were to include any fees or costs that the firm thought it would be necessary to pay any firm that it hired to assist in the litigation.[42] Most interesting, the court believed it necessary to order each firm submitting a bid to certify to the court that "its compensation proposal was prepared independently and that no part thereof was revealed to any other bidder prior to filing with the court" and, further, to order that the applicants "not confer in any manner with other firms during the preparation of bids."[43] The judge apparently believed that absent his order the lawyers would continue to engage in conduct that might, in any other setting, be considered a violation of the antitrust laws.

Every class action creates a form of monopoly in that it stops competition among lawyers over representation of individuals in separate suits. But there's nothing about that fact that necessitates elimination of competition to represent the monopoly. The question then is whether the antitrust law should be applied to stop lawyers from eliminating that competition on their own—competition that might otherwise yield better representation to the class at a cheaper price.

The second kind of antitrust problem raised by class action settlements arises from the market for legal services created by the class settlements themselves. In mass tort actions, it is commonplace for a class settlement to set up an alternative dispute process to be used by individual claimants covered by the settlement. It is routine for the class settlement to include a cap on the fees a lawyer may charge claimants she represents in the dispute system set up by the settlement.

In antitrust cases, the courts have been very skeptical of the argument that caps on the fees charged by professionals is a good thing for consumers because those courts understand that caps become floors, i.e., no one charges less than the maximum set by the cap.[44] Courts thus

38. *Id.*
39. *Id.*
40. *Id.* at 697.
41. *Id.*
42. *Id.*
43. *Id.*
44. *See* Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) and its progeny.

generally see such caps as violations of the antitrust laws.[45] Yet, in almost every class action settlement involving a mass tort, the settlement includes just such a cap on the percentage of recovery lawyers may charge in the system set up by the settlement.

What's wrong with that? The judges in class action cases herald these caps as benefits to individuals within the class, who now won't be charged a normal contingency rate of one-third or more in an alternative dispute system that removes virtually all contingency about recovery. If, however, there is no contingency, why should the lawyers be allowed to charge even 20 percent of the recovery, a typical cap figure included in a class settlement? More startling, while approving these caps, courts tend to say a curious thing. They are likely to remark that 20 percent is too high a fee. But they approve the settlement with the 20 percent cap anyway. Now, this tells you one thing: the judges aren't picking this number of 20 percent. That figure is derived from an agreement among the plaintiff's lawyers involved in the class suit or on the plaintiff's steering committee.

The third antitrust problem can be found in the asbestos settlement recently reversed on other grounds by the United States Court of Appeals for the Third Circuit.[46] That settlement set up an alternative dispute system for processing claims that guaranteed that individuals represented by certain plaintiffs' firms would automatically be offered more money than identically situated people represented by other firms.[47] This was intended to ensure that those firms who had been big players in the pre-settlement market would continue to be big players in the post-settlement market.[48] Normally, such an attempt to lock-in market share would be seen as anti-competitive, a violation of the antitrust laws. Should court approval of the overall settlement change that?

The larger question is whether Rule 23(e) of the Federal Rules of Civil Procedure, mandating that a court approve any settlement of a class action, should somehow operate to suspend the substantive laws passed by Congress and the fifty states. It is our contention that anyone who assumes that court approval of a settlement somehow blocks later actions against class counsel or the defendant for misconduct attendant to a settlement is arguing for just such a result—an unjustified result, particu-

45. *Id.*

46. Georgine v. Amchem Products, 83 F.3d 610 (3d Cir. 1996).

47. For a full discussion of this part of the *Georgine* settlement, see Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products*, 80 CORNELL L. REV. 1045, 1107-1111 (1995).

48. *Id.*

larly given the inattention to other laws in most fairness hearings and the one-sided presentation that characterizes those hearings. We argue that fairness hearings are no substitute for a full and fair opportunity to litigate whether fraud, gross malpractice or antitrust violations attended the settlement of a class action.

It is our position that class members should have the same remedies available to other clients injured by their lawyers, and that class lawyers, well-compensated as they are, should not be the only lawyers with no malpractice worries.

Ted Schneyer spoke this morning about the institutional investor remedy to class action abuse. I think that solution has some promise, particularly in securities cases—the area in which the remedy has been proposed. But there are not always analogues to institutional investors in class actions. For example, the BancBoston case had no such analogues. Second, even when there are institutional investors or some analogous class actor, that player may have different interests than smaller players. For example, in the GM truck settlement, the cities, which owned fleets containing hundreds, sometimes thousands, of these trucks found the coupons to purchase new trucks provided by the settlement particularly useless, however arguably valuable they might be to those non-institutional class members who owned one truck.[49] We believe it's time to lift the cloak of settlement and ferret out the illegal conduct that attends some class action deals.

I want to end with telling you what Dexter's done to fight back and the obstacles he has faced thus far in that attempt. Dexter, you remember, is the man who paid class counsel $91.33. Dexter, his wife and another class member filed suit in federal court in Illinois against the class lawyers who came up with the formula that left him, in his eyes, worse off. On behalf of themselves and others in the class, they sued not just the class lawyers, but also the defendant bank for allegedly going along with this deal, and the bank's lawyers for assisting their client in this endeavor.[50] That case was dismissed on federalism grounds; the court invoked a somewhat obscure doctrine, known as Rooker-Feldman, which precludes federal courts from hearing appeals from state court

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

50. Kamilewicz v. Bank of Boston, Corp., 1995 U.S. Dist. LEXIS 18973 (N.D. Ill. Dec. 15, 1995) (dismissing Dexter's suit on the ground that one cannot "appeal" a state court action in a federal case). Dexter and the others have appealed that ruling. The Seventh Circuit has not yet ruled on Dexter's appeal.

judgments.[51] Dexter and the others have appealed the dismissal, and that appeal is now pending before the Seventh Circuit.

In the meantime, the class lawyers being sued by Dexter, went down to Alabama and filed a motion to show cause why Dexter and his fellow class members should not be bound by the class settlement and precluded from suing in federal court.[52] The friendly Alabama judge, who had approved the settlement in the first place, agreed to hear this motion. Dexter and his wife, who live in Maine, and the other named representative, who lives in Wisconsin, refused to appear in Alabama because it is their contention that the Alabama court has no proper jurisdiction over them—no jurisdiction to take their money in the first place and none to order them out of federal court in Illinois.[53] Nonetheless, and difficult as it may be for you to believe, the Alabama judge decided to treat Dexter's federal complaint for damages as if it were a 60(b) motion to vacate the settlement for fraud filed in state court.[54] That judge transformed the federal complaint into a state motion. He then conducted some sort of *ex parte* hearing and in effect decided the issues in the federal complaint. Surprise, surprise, he found that there was no fraud in the original settlement.[55] Armed with this interesting decision, the lawyers then went back to federal court and filed a motion to dismiss the appeal pending in the Seventh Circuit because the state court had already decided the matter. The Seventh Circuit denied that request, but said it would consider the effect of the 1996 Alabama decision when it took up the appeal itself. Never lacking in energy, the class lawyers, or one of them, then went back to Alabama and sued Dexter, his wife, the other named representative, and the law firms representing Dexter (Schnader, Harrison, Segal & Lewis of Philadelphia and Wildman, Harrold, Allen & Dixon of Chicago) for having brought the federal suit.[56]

So this is American justice in the real world: Dexter and his lawyers, including my dear friend Ralph Wellington—the lead counsel for

51. *Id.* (discussing this doctrine).

52. Hoffman v. BancBoston Mortgage Corp., v. Kamilewicz, No. CV 912-1880 (Cir. Ct. Mobile Cty., Ala., Jan. 30, 1996) [hereinafter Hoffman II].

53. Their argument, which I believe is correct, is that the case that allows state courts to take jurisdiction over nationwide class actions, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), is premised on the concept that a foreign state court can "benefit" a person who does not have minimum contacts with the state, but cannot impose liability upon those people in the absence of minimum contacts.

54. *Hoffman II*, *supra* note 52.

55. *Hoffman II*, *supra* note 52.

56. The actual claims in this Alabama suit include malicious prosecution and abuse of process. The defendants in that case—Dexter, his co-plaintiffs, and his lawyers—have filed motions to dismiss in that action, but no decision has yet been reached.

Dexter in this matter—are now being sued in Alabama for $25 million. The good news is that the suit Dexter brought in federal court, its dismissal by the district court notwithstanding, has fired a warning shot that all class lawyers and their counterparts on defense teams would be wise to heed. That shot has been rendered more potent by the fact that nine attorneys general have filed an amicus brief with the Seventh Circuit, arguing Dexter's suit against those he alleges harmed him should be allowed to proceed.[57] Perhaps, lawyers will heed this warning shot and think twice about abusing the class action settlement device.

I don't know what will happen to Dexter's suit. More troubling, I do not know whether the Alabama courts will once again impose their strange form of justice on Dexter, holding him liable for having tried to assert his right to fight back. But, as I conclude these remarks near the end of this conference devoted to legal ethics in today's world and in the future, I want to say that I have been very proud to work with the lawyers at Schnader, Harrison *et al.*, and the lawyers at Wildman, Harrold *et al.*, and the lawyers in the state attorneys general offices, all of whom are fighting against lawyer abuse. I am also proud to have worked with the lawyers on Senator Cohen's staff, helping them to draft legislation, which Senator Cohen has introduced as the Plaintiffs Class Action Protection Act. That legislation would provide that state attorneys general get notice of all class action settlements, that the notice in class action suits be written in the English language, not legalese, and in type-size that people can easily read.

Lawyers may have created this problem, but some lawyers are working to solve it—working in the best tradition of the bar, working to see justice done and to thwart those who would perpetrate injustice.

Thank you for your attention.

57. The attorneys general who joined Dexter in his fight are from the following states: Arkansas, Florida, Illinois, Maine, Nevada, New Hampshire, New Mexico, Oklahoma and Vermont. The Vermont and New Hampshire offices took the lead in this effort.