Class Action Settlements: Issues and the Importance of Judicial Oversight*

*Estelle Hurter***

Abstract
Like ordinary civil matters, most class actions settle before trial. However, unlike ordinary civil matters, the representative nature of the class action and the consequential risk of collusive practices to the detriment of the absent group members, have led the leading class action jurisdictions to require court approval of all settlements. Various criteria have been developed (mainly by courts) in order to assess whether a proposed settlement meets the required fairness standard. This article briefly examines the concerns regarding collective settlements; the various sets of criteria used by leading class action jurisdictions; and presents a set of criteria for possible consideration and adoption by South African courts when in future confronted by the need to develop local assessment criteria.

INTRODUCTION

The much prized individualistic character of the adversarial system of civil procedure that firmly places the power to initiate and conduct litigation in the hands of litigants, also allows litigants to dispose of a dispute as they please. This is achieved mostly by way of settlement (also referred to as compromise[1]). Should parties wish to have such settlement entered as a judgment or order, it appears that the court cannot refuse to do so simply because it does not approve of the terms, or views them with some suspicion.[2] It can thus be said that the court is, generally speaking, not concerned with the terms of the settlement because it is a matter for the parties.

---

* This article is based on work supported financially by the National Research Foundation. Any opinion, findings and conclusions or recommendations expressed in this material are those of the author and therefore the NRF does not accept any liability in regard to them.

** BA LLM LLD, Professor of Law, Department of Criminal and Procedural Law, University of South Africa.

1 David Foskett (ed), *Foskett on Compromise* (Sweet & Maxwell 2015) para 1-01 defines compromise as 'the settlement of a dispute by mutual concession or a coming to terms, or arrangement of a dispute, by concessions on both sides.'

2 See *Bruce v Worthing BC* (1994) 2 HLR 228 where Staughton LJ expressed it thus: 'In our adversarial system a judge who is asked to make a consent order should do so, provided that the parties are of full age and understanding and that the order is not illegal, immoral or so equivocal as likely to give rise to further dispute.'

Class actions, like ordinary civil matters, may be settled, and the widely held view that most ordinary civil cases settle,[3] is also held in respect of class actions.[4] Although parties to a class action settle for some of the same reasons advanced in ordinary litigation (such as to avoid the risk and expense of a trial), other factors also play a role. Thus, in class actions plaintiffs may, for example, wish to obtain at least partial compensation sooner rather than later, while defendants may wish to avoid (or at least contain) the prospective damage to their corporate image and to dispense with as many claims possible at the same time for various economic reasons. However, the role of the court in class action settlements is significantly altered, as without exception, court approval of the settlement agreement is required in all leading common-law jurisdictions with well-developed and formal class action regimes in place.[5] Consequently, unlike the position in ordinary civil matters where the settlement outcome is mostly kept confidential, class action settlement agreements are subjected to intense judicial scrutiny. Justification for such scrutiny is sought in the unusual characteristics of the class action, particularly in respect of absent class members[6] who have not opted out, many of whom would be unaware of the proposed settlement and its provisions.[7] Yet, despite the requirement of judicial oversight, critics of the settlement process often raise concerns regarding possible corruption and abuse by various role players.

Although it would appear that these concerns are by and large overstated,[8] they nevertheless appear to have raised enough disquiet to inspire legislative measures that over time have been incorporated into class action regimes to avoid such potential abuses. Up to this point no South African court has been confronted with the question of its role in a class action settlement,

---

3 Foskett (n 1) para 1-02. See also *Zamora v Clayborn Contracting Group* 47 P 3d 1056 (Cal 2002) 1064 where it is stated that 'most' cases settle and that courts rarely set aside settlement agreements.

4 See eg Craig Jones, *Theory of Class Actions* (Irwin Law Inc 2003) 46; Fleming James, Geoffrey Hazard, John Leubsdorf, *Civil Procedure* (5 edn, Foundation Press 2001) 663; Bruce Hay and David Rosenberg, '"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy' (2000) 4 Notre Dame LR 1377.

5 See eg s 33V Federal Court of Australia Act 1976 (Cth) ('FCA'); s 35 Class Proceedings Act RSBC 1996 c50 (British Columbia) ('BCAct'); s 29 Class Proceedings Act 1992 SO 1992 c6 (Ontario) ('CPA'); r 23(e) Federal Rules of Civil Procedure ('FRCP').

6 This term refers to the class members not personally before court. These members are represented by a representative party who brought the action on behalf of those members as they are similarly situated. However, these members may be included in the action without their express consent and may not even be specifically known, but they will nevertheless be bound by the outcome of the proceedings unless they choose to opt out.

7 Class member numbers are often very large and members may be widely dispersed, resulting in no or virtually no contact with the class lawyers.

8 See eg Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing 2004) 393. The author further correctly points out that the concerns regarding potential abuse of class action settlements are by no means restricted to class action jurisprudence.

but this will no doubt sooner or later happen, and the court will be called upon not only to develop guidelines for a settlement process, but also to consider its role in this process. To this end, a review of the practice of the leading foreign class action regimes (in particular the United States, Canada and Australia) may prove helpful to provide valuable insight into what is required to establish an effective future settlement practice for South Africa, even in the absence of comparable South African class action legislation.

CONCERNS RELATING TO THE SETTLEMENT OF CLASS ACTIONS

Settlement is an attractive proposition in class actions, as class actions typically are complex, protracted and often involve thousands or even millions of claims worth large sums of money. These factors undoubtedly increase the risk and expense[9] normally associated with class action litigation. The benefits of an individual settlement depend largely on the point of view of the particular role player involved, be it the representative lawyer, the defendant, or the judge and the justice system, as will be seen below.

Because of these diverse interests at play in the settlement context, critics have been quick to argue that while collective litigation promises empowerment, it has become a 'tool for disempowering' plaintiffs in many instances, allowing deals to be struck that serve the interests of defendants and plaintiff lawyers at the expense of the plaintiffs.[10] This disempowerment manifests itself in a vast array of settlement features,[11] such as non-transferable coupons (offered instead of cash payments) and burdensome claims procedures.[12]

The concerns raised by critics are conveniently considered with reference to mainly two aspects, namely the timing of the settlement, and the role of the court. The timing question inevitably raises the question *who* stands to benefit from the settlement, as economic factors obviously provide powerful incentives to settle. Because the absent members are not before court and reliance is placed on the representative to act in their best interests, a further question for consideration is whether the settlement benefits all members equally (or at all).

---

9 Ward Branch, James MacMaster and John Kleefeld, 'Class Action Settlements: Issues and Approaches' (2002) 4 <www.static.l.sqspcdn.com/static/f/299713/3665774/…/classactions_settlements(1).pdf> accessed 6 August 2017, point out that this is because the stakes in class actions are typically higher than in individual litigation.

10 Howard Erichson, 'Aggregation as Disempowerment: Red Flags in Class Action Settlements' (2016) 2 Notre Dame LR 860. Others have used stronger terms, and warned that the process lends itself to 'corruption and abuse': see eg Hay and Rosenberg (n 4) 1377; John Coffee, 'Class Wars: The Dilemma of the Mass Tort Class Action' (1995) 95 Columbia LR 1343 (describing certain settlements as sell outs of class members).

11 Id Erichson 873; Id Coffee 1367; Jamie Cassels and Craig Jones, *The Law of Large-scale Claims* (Irwin Law Inc 2005) 379–389.

12 A detailed discussion of these features can be found in the literature referred to in (n 11).

Timing of the Settlement

It is of course possible to settle a matter on an individual basis before the commencement of an action, and depending on a potential defendant's risk assessment of a particular matter, may prevent large-scale litigation ensuing. Matters that are settled before the commencement of an action are thus, from a purely economic point of view, the most beneficial, as fast relief at the most cost-effective stage may be obtained for both the potential plaintiffs and the defendants.[13] As settlement is achieved prior to the commencement of proceedings, it falls beyond the scrutiny of the court.[14]

After commencement of the action two distinct situations are encountered: settlements prior to certification, and settlements after certification (where certification is required).

Settlement Prior to Certification

Concern over collusion has been raised in the United States in particular, and mostly in the mass tort context.[15] In these matters, the plaintiff's attorney typically has a list of any number of cases that are represented on an individual basis. Critics contend that the self-interest of plaintiff lawyers and defendants provides the incentive to negotiate a settlement, and that the interests of plaintiffs (proposed class members) are not served. Through settlement, the defendant would be able to avoid the effect of aggregation that a class action would have, and it would provide the protection of reputation and the protection against bad publicity that could lead to loss in public support (and thus dwindling financial returns). For a class lawyer, where the proposed class consists of meritorious as well as non-meritorious cases, settlement may provide an easy solution for disposing of all matters in one fell swoop. In such instance, the concern is that the terms of settlement may not benefit all class members equally, and absent class members, with no knowledge of the settlement, may be prejudiced by the discontinuance of the action, especially if the settlement fund is distributed on a first-come first-served basis and the fund is exhausted.[16] In addition, it is contended that prejudice to members is compounded by the fact that these matters are invariably taken on by lawyers on a contingency fee basis, and that

---

13 A typical example of a claim that would lend it to such early settlement would be a claim for wrongful dismissal where the class size is relatively small, the damages easily quantifiable and the members readily identifiable.

14 See eg s 29(1) CPA (Ontario); s 33V (read with s 33C) FCA (Australia); rule 23 e(1)(A) FRCP (United States), which regulate settlement iro proceedings *commenced*.

15 Coffee (n 10) 1378. Mass torts occur either due to single, mass accidents, or (more generally), due to defective or hazardous products, toxic exposure or misrepresentation in, for example, advertising or securities. Mass tort claims are often substantially diverse in respect of the value of individual claims within the class: Jones (n 4) 9.

16 Coffee (n 10) 1376.

this compensation, which is paid out of the settlement fund, constitutes a substantial portion of such fund.

Concerns have also been raised that lawyers may settle meritorious claims for amounts far below their actual worth and so cause would-be plaintiffs to collect too little by way of compensation[17] (often referred to as sweetheart-settlements). Paradoxically, some commentators have raised the opposite concern and complained that 'blackmail settlements' coerced defendants into settlements with threats of risky and costly litigation. These settlements recover more than the claims are worth, and even cases with little merit may be compensated.[18]

A phenomenon that originated in the United States, and which has been viewed by critics as having the potential to lead to inadequate class recoveries[19] as well as sell-outs of mass tort victims,[20] is the settlement class action. In such an action the defendant and would-be class lawyer, after reaching an agreement in terms of which the claims are settled on a class wide basis, jointly approach the court for class certification. The class is certified as a class action for the purpose of settlement alone, and means that should the matter not settle in class action mode, or if certification is denied, the claims of the plaintiffs will have to be individually litigated.[21]

While it has been applauded as one of the 'most realistic and efficient means available' for realising compensation to victims of mass tort,[22] serious constitutional concerns[23] and concerns relating to legal ethics and the responsibilities of a lawyer[24] have been raised. The latter concerns relate to possible conflict of interest due to the large, diverse number of plaintiffs represented by one lawyer, and the high legal fees generated by settlement class actions.

---

17 Hay and Rosenberg (n 4) 1377.

18 In the well-known case *In re Rhone-Poulenc Rover Inc* 51 F 3d 1293 1299 (7th Cir 1998) the court pointed out that the prospect of facing certain bankruptcy were it to lose a class action trial, might have led the defendant to pay a large settlement in order to avoid such a trial. The court of appeals overturned a certification order to prevent the plaintiffs from using this threat to obtain a settlement to which they were not entitled. See also *AT & T Mobility LLC v Concepción* 563 US 333 350 (2011): 'Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.'

19 Hay and Rosenberg (n 4) 1397.

20 Carrie Menkel-Meadow, 'The Ethics of Mass Torts Settlements: When the Rules Meet the Road' (1995) 80 Cornell LR 1198.

21 Erichson (n 10) 952; Hay and Rosenberg (n 4) 1397; Martin Redish and Andrianna Kastanek, 'Settlement Class Actions: The Case-or-controversy Requirement, and the Nature of the Adjudicatory Process' (2006) 73 The University of Chicago LR 546.

22 Nikita Pastor, 'Equity and Settlement Class Actions: Can there be Justice for all in Ortiz v Fibreboard' (2000) 3 American University LR 774.

23 Id 810–814, relating to due process and the absence of a live dispute (*contra* the adverseness requirement of Article III): Redish and Kastanak (n 21) 547–550.

24 Pastor (n 22) 814–815.

Settlement after Certification

Although the settlement dynamics change due to the disappearance of the certification risk, the concerns regarding collusion (or self-interest[25]) and inflated attorneys' fee awards are also raised here. Critics contend that although the plaintiffs and their negotiating attorneys' positions are strengthened by obtaining certification, a defendant may nevertheless manage to reach a class wide settlement with 'cooperative plaintiffs' attorneys',[26] leading to so-called structural collusion[27] in terms of which the defendants reach settlement agreements on favourable settlement terms. As this may lead to the alignment of the defendant's interests with that of the plaintiff attorney, the perceived problem is that such a settlement may not serve the class members by not providing value. Consequently critics have catalogued various features[28] that either bulk up the settlement (making it appear larger than it is)[29] or serve to create more business for the class action lawyer while giving the defendant a broader protection against liability,[30] or reduce the defendant's settlement costs.[31]

Although it has been argued (based on a data study) that claims that lawyers reap outsized portions of settlements may be exaggerated,[32] Mayer Brown LLP,[33] after a study of a sample set of putative consumer and employee class action lawsuits filed in or removed to federal court in 2009, concluded that very little benefit accrued to the putative class on settlement. They also concluded that *cy-pres* awards and injunctive relief served primarily to

---

25 In *Pearson v NBTY* 772 F3d 778 787 (7th Cir 2014) Judge Posner did not use the term 'collusion', but instead referred to 'self-interest' which more accurately addresses the crux of the concern: the disregard of the interests of class members.

26 See Ontario Law Reform Commission, *Report on Class Actions* (1982) Vol 1 146; Coffee (n 10) 1362.

27 Coffee (n 10) 1354.

28 See (n 11).

29 Such as by seeking structural changes (for example changes to an admissions policy or to product labels); or structuring a *cy-pres* remedy (in terms of which funds are not distributed to members, but to some charitable organisation); or offering coupons or credits (for example if they are non-transferable, non-stackable or subject to onerous restrictions they are of little use and may even generate a profit for the defendant: Cassels and Jones (n 11) 380 offer an example of free movie tickets as compensation while knowing the ensuing purchase of snacks and drinks will offset losses and possibly bring in more.

30 For example, by expanding the class definition: the bigger the class, the bigger the lawyer's franchise, and the defendant benefits from the *res iudicata* result at a reasonable price.

31 Erichson (n 10) 905–906.

32 Brian Fitzpatrick, 'An Empirical Study of Class Action Settlements and their Fee Awards' (2010) 4 Journal of Empirical Legal Studies 830. The study covered *all* class actions approved by federal judges over the period 2006–2007. He found that approximately fifteen per cent of the total amount awarded ($5 billion of the $33 billion) went to class action lawyers, which was far less than the portion of settlements that contingency-fee lawyers receive in individual litigation (which is usually at least thirty-three per cent).

33 Mayer Brown LLP, 'Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions' (2013) <https://www.mayerbrown.com/files/.../DoClassActionsBenefitClassMembers.pdf> accessed 6 August 2017.

inflate attorneys' fee awards while providing little or no benefit to the class members.[34] However, in the absence of a comprehensive empirical study in respect of *all* class action settlements, and over a significantly long period, evidence proving or disproving the contentions regarding attorneys' fees is absent and comments made are thus purely speculative.

The Role of the Court

The rise in the number of individual mass tort cases pre-1990 in particularly the United States placed considerable strain on the justice system. The prospect of an unending stream of such individual and almost identical cases as well as backlogs in courts was unacceptable for trial courts. However, their reaction to this possibility has come under criticism and has become a cause for concern as they have often been accused of judicial self-interest and of judicial preference for class settlements.[35] Coffee[36] also argues that while courts have rejected doubtful settlements in certain cases, courts have accepted 'suspicious signs of collusion' in mass tort personal injury cases, and quotes Judge Posner in the *Rhone-Poulenc Rorer* case[37] acknowledging the fact that the sheer number of asbestos cases exerted a 'well-nigh irresistible pressure to bend the normal rules'.

The approval of class action settlements in United States jurisprudence remains a source of concern to many critics as it is not seen to serve the interests of absent class members, despite various subsequent class action reforms.[38]

RESPONSE TO CONCERNS

Statutory Measures

The response of all major foreign class action regimes to the concerns described above is the statutory requirement of judicial oversight of settlement agreements.

With the exception of Australia where certification is not a necessary preliminary procedural hurdle in class action proceedings,[39] court approval is required in respect of settlement agreements reached prior

---

34 A RAND study of insurance class actions found that attorneys' fees amounted to an average of forty-seven per cent of the total class action pay-outs, taking into account benefits actually claimed and distributed, rather than theoretical benefits measure by the estimated size of the class, Nicholas Pace, *Insurance Class Actions in the United States* (Rand Institute for Civil Justice 2007) <http://www.rand.org/pubs/monographs/MG587-1.html> accessed 6 August 2017.

35 See eg Coffee (n 10) 1462–1463; Erichson (n 10) 908.

36 ibid Coffee.

37 *In re Rhone-Poulenc Rorer Inc* 51 F3d 1293 1304 (7th Cir 1995).

38 Erichson (n 10) 907–909 and sums it up as follows: 'Old habits die hard. The American judicial mind set is geared toward adversarial expectation, promotion of settlement, and the presumption that a settlement negotiated by seemingly adversary counsel represents fair value.'

39 Peter Cashman, *Class Action Law and Practice* (The Federation Press 2007) 7.

to certification (Ontario[40]) after certification (USA[41] and Ontario) or at the time of certification (so-called certification for settlement purposes). Although there is no specific legislative provision for the latter, and is in fact a judicial innovation,[42] judicial approval of the settlement is required since *Amchem Products Inc v Windsor*.[43] In this matter the United States Supreme Court held that the settlement agreement must comply with all the certification requirements of Federal Rule 23(a) and (b),[44] except that which requires a court to inquire whether the case, if tried, would present intractable management problems (since there will be no trial).[45] Contrary to the majority of Canadian legislation, court approval may not be necessary for a settlement reached prior to certification[46] in British Columbia.

Assessment standards do not vary significantly. In the United States, the assessment standard is 'fair, reasonable, and adequate',[47] and in Australia, it is 'fair and reasonable'.[48] By contrast the Canadian standard is not statutorily established, but judicially developed, and is determined by whether the settlement is 'fair, reasonable and in the best interests of the class as a whole.'[49] Although it is generally accepted that fairness is not a 'standard of perfection'[50] (after all a settlement is achieved by mutual concession) and the settlement need not be perfect in every aspect, yet it must fall within a 'range of reasonableness'.[51] Clearly such determination is where the challenge lies for courts.

---

40 Section 29(1) CPA.

41 FRCP 23(e)(1)(A).

42 Joseph Rice and Nancy Davis, 'Judicial Innovation in Asbestos Mass Tort Litigation' (1997) 33 Tort & Insurance LJ 145; Note, 'Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23' (1996) 109 Harvard LR 831 fn 24.

43 521 US 591 (1997).

44 Id 610.

45 Id 620.

46 Section 35 (read with section 1) BC Act, requiring approval in a 'class proceeding', ie a proceeding 'certified as a class proceeding'. See also *Edmonds v Actton Super-Save Gas Stations Ltd* [1996] BCJ No 2050 (SC) (QL) quoted by Branch and others (n 9) 8.

47 FRCP 23(e)(1)(c).

48 Section 33V FCA.

49 This generally accepted standard was laid down in *Dabbs v Sun Life Assurance Co of Canada* (24 Feb 1998) (Ont Gen Div) (*Dabbs (1)*) para 10–13; *Dabbs v Sun Life Assurance Co of Canada* (1998) 40 OR (3d) 429 (Ont Gen Div) (*Dabbs (2)*).

50 ibid *Dabbs (1)* para 30.

51 Branch and others (n 9) 21, based on *Dabbs (2)* (n 49) para 30.

Despite the elasticity of the standards, no statutory guidance is given to the courts in exercising the required discretion.[52] It has thus been up to the courts to develop over time the criteria that should be used in this regard. The lists of criteria in the various jurisdictions are not identical, but the Canadian, and in particular the Australian courts, have clearly been influenced by the criteria used by the United States courts.[53] These lists are not exhaustive, nor are all factors listed of equal weight—depending on the demands of the case, some may be given greater weight than others.[54]

Currently the United States are considering the following factors:[55]

- The complexity, expense and likely duration of the litigation;
- The reaction of the class to the settlement;
- The stage of the proceedings and the amount of discovery completed;
- The risks of establishing liability;
- The risks of establishing damages;
- The risks of maintaining the class action through the trial;
- The ability of the defendants to withstand a greater judgment;
- The range of reasonableness of the settlement fund in light of the best possible recovery; and
- The range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Canadian jurisprudence[56] has identified the following factors:

- the likelihood of recovery or success;
- the amount and nature of discovery evidence;
- the settlement terms and conditions;
- the recommendation and experience of counsel;
- the future expense and likely duration of litigation;
- the recommendation of neutral parties, if any;

---

52 A recent proposal to amend FRCP 23(e)(2) entails that the new rule would list factors for consideration by a court in making its assessment, and would include the adequacy of representation and relief; whether all class members are treated equitably; and if the settlement was the product of arm's length negotiations. This proposed list would not eliminate the existing court developed factors, but supplement them; see Ben Seessel, Christine Stoppard and Kristin Shepard, 'A Not-so-modest Proposal: Class Action Changes could have Big Impact' (15 March 2017) <www.classifiedclassaction.com> accessed 6 June 2017.

53 Mulheron (n 8) 399. See also Manitoba Law Reform Commission, *Class Proceedings* Report No 100 (January 1999) 93, where it is stated that the criteria to serve as guidance to courts should ideally be 'an amalgam' of the criteria set out by the Australian Law Reform Commission and those applied by Sharpe J in *Dabbs (1)* (n 51).

54 Catherine Piché, 'A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness' (2009–2010) 1 Ottawa LR 30.

55 *Re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation* 55 F 3d 768 785 (3rd Cir 1995). See also *In re Prudential Insurance Co America Sales Practice Litigation Agent Actions* 148 F 3d 283 316–324 (3rd Cir 1998).

56 *Dabbs (2)* (n 49); *Gilbert v Canadian Imperial Banks of Commerce* [2004] CanII 34176 (ON SC).

- the number of objectors and nature of objections;
- the presence of good faith and the absence of collusion.

Contrary to the Canadian position, the Australian courts have, in developing approval criteria, in effect adopted the 'nine factor test'[57] of the United States courts and added a further factor, namely 'the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceedings.' These criteria have been consolidated in Practice Note 17.[58]

The creativity of the courts in the focus jurisdictions have thus yielded a vast array of factors for consideration, amplified by various practice directions such as those contained in the *Manual for Complex Litigation*.[59]

Assessing the Proposed Settlement

The role class action legislation expects the court to play during the assessment process is far removed from that to which a court in an adversarial system is traditionally accustomed to. The court is required to set aside its role as passive, neutral adjudicator, and instead adopt an activistic, managerial one to become the protector of absent class members.[60] For this reason, the task of the courts in the relevant foreign jurisdictions has often been described as 'onerous'.[61]

Assessing whether to approve or dismiss a proposed settlement is a daunting task. Not only are the assessment standards vague and thus difficult to apply, but the court is presented with a 'product of negotiation between self-interested parties'[62] which has to be assessed without the benefit of all the information that would normally have been extracted during a conventional adversarial litigation process. To compound matters, the court must, while trying to protect the interests of absentees, simultaneously bear in mind public policy that favours the pre-trial settlement of civil

---

57 See eg *Williams v FAI Home Security Pty Ltd (No 4)* (2000) ALR 459 465–466; [2000] FCA para 19–20.

58 Representative Proceedings commenced under Part IV A of the Federal Court of Australia Act 1976 (hereinafter Practice Note CM 17) para 11.2.

59 Federal Judicial Center, *Manual for Complex Litigation* (4 edn, 2004) <https://www.fjc.gov/publications> accessed 13 December 2017. See para 21.62, which sets out some fifteen factors that may bear on review of a settlement.

60 Jonathan Molot, 'An Old Judicial Role for a New Litigation Era' (2003) 113 Yale LJ 51 argues that as plaintiffs' attorneys stand to receive large fee payments and defendants stand to see an end to litigation, neither have incentives to argue on behalf of such class members whose rights might be adversely affected by a proposed settlement. Consequently, the court often has to put forward arguments themselves, instead of evaluating arguments by litigants.

61 See eg *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104; [1999] ATPR 42 670.

62 Sylvia Lazos, 'Abuse in Plaintiff Class Action Settlements: The Need for a Guardian during Pretrial Settlement Negotiations' (1985) 84 Michigan LR 322; Richard Marcus, 'America's Dynamic and Extensive Experience with Collective Litigation' in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes* (Edward Elgar 2013) 155–156.

cases.[63] This clearly requires a delicate balancing act, because while an overly zealous scrutiny of settlement terms may discourage settlement, a too strong leaning towards judicial self-interest may result in a superficial assessment of the proposed settlement.

The court also finds itself in an invidious position in having to assess the contents of the settlement while having to rely heavily on the evidence placed before it by the lawyers for the applicant for this purpose. With the 'adversarial void'[64] created by the unified front presented by the parties after settlement, when decidedly one-sided arguments are presented in support of the settlement, the only other assistance may come from objections by class members, if any.[65] It would appear that the respondents at this point rarely do more than express their support.[66]

Furthermore, the court's powers are constrained, as it has only the authority to approve or disapprove the settlement,[67] although it may suggest changes (which may necessitate a review process anew).[68] However, to be able to consider a proposed settlement fully and fairly, the court must be in a position to understand fully the effect of the agreement on absent members and to detect any form of collusion. To this end, useful additional guidelines have been included in the Australian Practice Note CM 17 and the US *Manual for Complex Litigation,* which are clearly designed to ensure that the judge has sufficient information to do so. In Australia it has become practice for the applicants' lawyer to provide the court with an affidavit addressing each and every listed factor contained in Practice Note CM 17, and to which is attached a written opinion on the fairness and reasonableness of the proposed settlement that focusses on the prospects of success of the litigation.[69] In similar vein, the *Manual for Complex Litigation* requires the applicant to explain why the proposed settlement is preferable to the continuation of the litigation for absentees, and in considering those affected by the settlement, an expert may be appointed under Federal Rule of Evidence 7006 to provide a neutral assessment or special counsel to represent the interests of absentees. Over and above the factors for review

---

63 McCarthy Tétrault, *Defending Class Actions in Canada* (CCH Canadian Ltd 2002) 147–148; Lazos (n 62) 321.

64 *Kidd v Canada Life Assurance Co* [2013] ON SC 1868 para 122. See also Lazos (n 62) 322.

65 While it may serve as an indicator that the settlement is fair and reasonable, lack of objections (or the small number of objectors) should not necessarily be equated with acquiescence, as they may have been unaware of its existence or terms or may not have understood its terms, etc: see Piché (n 54) 36–37; Michael Legg, 'Class Action Settlements in Australia – the need for Greater Scrutiny' (2014) 2 Melbourne University LR 595.

66 Michael Legg, 'Mass Settlements in Australia' in Hodges and Stadler (n 62) 187.

67 *Patterson v Stovall* 528 F 2d 108 111 (7th Cir 1976); Piché (n 54) 45–46.

68 *Manual for Complex Litigation* (n 59) para 13.14; Branch and others (n 9) 22.

69 Legg (n 66) 186. This opinion is requested to be kept confidential through an order and not served on the respondent to maintain the client's legal privilege that attaches to the advice.

mentioned above, the *Manual* also contains a list of matters that courts have examined in determining the weight accorded factors.[70]

Taken at face value, these measures appear to assist a judge to apprise him or her of 'all facts necessary for an intelligent and objective opinion'[71] to assess whether a proposal falls within a 'range of reasonableness'. With this determination it must also be recognised that an acceptable settlement includes a 'range of possible resolutions',[72] even if it provides a lower compensation (provided it is in the best interests of the class members and if this is the best possible recovery) when compared to the alternative risks of the costs of litigating the matter to trial.[73] It would thus appear that the hoped-for outcome is that a settlement should overall be fair.

The question that arises at this point is whether judicial oversight adequately addresses the concerns described under 'Statutory Measures' above?

However, it would appear that in other jurisdictions outside the United States (US), notably Australia and Canada, class action and settlement abuses do not attract the same academic and/or popular attention. Cassels and Jones[74] point out that there are strong indications that judicial oversight has been effective in minimising (if not eliminating altogether) the abuses of the class action proceeding, and that no article has been written describing any class action settlement as 'blackmail', 'let alone any suggestion that the problem is endemic as has been suggested of the US.' A similar sentiment has also been expressed elsewhere.[75] In fact, it appears that there is a high degree of uncertainty regarding the extent to which blackmail actions are a problem in mass tort cases, even in the US.[76] Furthermore, the three characteristics of US litigation that may explain any sub-optimal settlement by defendants, namely the reliance upon the jury trial in high-stakes litigation; non-compensatory damages; and the posting of an appeal bond,[77] are unique to the US.

---

70 *Manual for Complex Litigation* (n 59) para 21.62. Some of these matters include whether the named plaintiffs are the only class members to receive monetary relief or which is disproportionally large; the settlement amount is much less than the estimated damages incurred by members; nonmonetary relief (such as coupons or discounts) is unlikely to have much (or any) value to the class.

71 *Weinberger v Kendrick* 698 F 2d 61 (1983) US 74.

72 Piché (n 54) 44–46.

73 *Dabbs (2)* (n 49) 439–440.

74 Cassels and Jones (n 11) 388.

75 Branch and others (n 9) 26; Jasminka Kalajdzic, 'Class Actions and Settlement Culture in Canada' in Hodges and Stadler (n 62) 146.

76 Cassels and Jones (n 11) 386.

77 In the case of a loss at trial, this is required in some states.

However, certain matters that relate to the assessment process do cause unease. First, public policy[78] favours settlement of all civil litigation (thus also class actions), the reason being that settlement avoids the expense and length of a trial and benefits the court system by reducing the docket burden, preserving scarce judicial resources. While settlement also provides certainty and finality to class members and benefits defendants in respect of *res iudicata*,[79] the peculiar features of class actions must be acknowledged. Absentee members do not themselves control the conduct of litigation, but rely on representatives and class lawyers—yet they are bound by agreements not personally concluded. Also, their interests may differ from the defendant, the class representative and lawyers, posing certain ethical challenges.[80] Unfortunately, the heavy reliance by the court on lawyer recommendations regarding the proposed settlement (especially in arm's-length negotiations)[81] has led to the 'quasi-automatic judicial approval' of settlements and less intense scrutiny of settlement terms.[82] If public policy favouring settlements is allowed to become the main reason for settlement approval, the danger to the interests of absentees is self-evident, and cannot be supported, as this may lead to accusations that courts approve unfair and collusive settlements.

A second aspect for concern is the approach in reviewing settlements with a 'strong initial presumption' of fairness when negotiated at arm's length by experienced lawyers.[83] Again, given the fact that the court exercises a fiduciary duty[84] with regard to absentees and the aligning of interests of plaintiff and defendant lawyers after reaching a negotiated settlement, the important review obligation of the court with such a presumption is clearly inappropriate,[85] and contra the sentiment expressed in the *Dabbs (2)* case[86] which requires the serious scrutiny of a settlement and to view it 'with suspicion'. It is submitted that such a presumption cannot be reconciled with the more inquisitorial role required of a judge in class action proceedings and implied by the guidelines that have been developed.

---

78 See eg *JM v WB* 71 OR (3d) 171 [2004] OJ No 2312 (CA) para 65 which refers to the 'overriding public interest' in encouraging settlement as the 'additional and powerful reason' to support the settlement in this particular matter; *Cotton v Hinton* 559 F 2d 1326 (5th Cir 1977) ('an overriding public interest in favour of settlement').

79 Piché (n 54) 49.

80 See Jasminka Kalajdzic, 'Self-interest, Public Interest and the Interests of the Absent Client: Legal Ethics and Class Action Praxis' (2011) 49 Osgoode Hall LJ 1.

81 Piché (n 54) 38.

82 Id 50; Kalajdzic (n 75) 141–142.

83 Piché (n 54) 50–51.

84 *Reynolds v Beneficial National Bank* 288 F 3d 277 (4th Cir 2002) 280.

85 Kalajdzic (n 75) 143.

86 *Dabbs (2)* (n 49) 439–440.

RECOMMENDATIONS FOR THE DEVELOPMENT OF A SOUTH AFRICAN SETTLEMENT APPROVAL PROCESS

The South African Law Commission[87] (SALC) recommended that the settlement, discontinuance or abandonment of a class action should require the prior approval of the court. Consequently, section 14 of the proposed draft Bill[88] contained in the Commission's report requires the prior approval of a settlement in respect of 'an action commenced'. An action is defined as 'any proceeding instituted in a court whether by way of summons or notice of motion.'[89] Since no reference is made to a class action (ie an action which after certification being granted may proceed as a class action) but simply to any proceeding instituted/commenced, it appears that the Commission in the draft legislation envisaged that approval would be required in respect of a settlement reached both pre- and post-certification.[90]

As seen above, although the standards and factors considered for review and approval of settlements in foreign jurisdictions vary to some degree, the shared objective of judicial scrutiny of a proposed settlement in general is to ensure that its terms are broadly fair to the class members whose interests the court is duty bound to protect. The fact that the class action procedure in South Africa is as yet not statutorily regulated, is not seen as a stumbling block towards our courts developing the procedure further by adopting similar standards and fairness criteria. In fact, as was seen above, the Ontario courts have done so very successfully, and so far in the South African class action jurisprudence, there has been nothing to suggest that our courts would not be up to achieving the same result. It is therefore recommended that the South African courts accept the above recommendation of the SALC and adopt the practice of court approval of all settlements, but expressly in respect of 'any proceeding commenced and any proceeding certified as a class action' to ensure scrutiny of *all* settlements.

As to the basic standard according to which a court has to perform the required scrutiny, it is submitted that 'fair and reasonable' would suffice.[91] Although 'fairness' has elsewhere[92] been separated into *substantial fairness* (considering the probabilities of eventual success of the action if litigated compared to the settlement terms) and *procedural fairness* (considering the process by which the settlement was reached, ie focussing on the role of

---

87 Report, *Recognition of Class Actions and Public Interest Actions in South African Law* (Project 88, 1998) Recommendation 25 para 5.20.8.

88 ibid ch 6.

89 ibid: see s 1 of the proposed draft Bill.

90 This is the preferable interpretation, given the concerns expressed regarding possible collusive practices and which may give rise to, for example, 'sweetheart' and 'blackmail' settlements.

91 Including 'in the (best) interests of the class' would not appear to assist in establishing the standard, as it is difficult to envisage a situation contrary to the interests of the class will not be sufficiently covered by the fairness standard.

92 See eg Piché (n 54) 31–32.

the representative and whether it resulted from arm's-length negotiations), fairness is generally understood to call for like class members to be treated alike,[93] and forms a core aspect of the standards of all foreign jurisdictions. 'Reasonable' implies a considered judgment after analysing the claims and the manner in which the settlement responds to those claims, thus leaving no room for arbitrary or intuitive determinations.[94] Reasonableness also allows for a range of possible resolutions.[95]

Although one is cognisant of the warnings against the shortcomings of listing factors to be considered or offering guidance in applying the given standard (the so-called factor tests),[96] their usefulness cannot be underestimated in offering courts a helpful reminder to scrutinise every aspect of the proposed settlement and in opening up various avenues of enquiry to the court so that the parties come to realise that there is no automatic approval of a proposed settlement. There is a proliferation of factors that can be found in practice notes, practice manuals, advisory committee notes[97] and jurisprudence. A great many of these factors in foreign jurisdiction jurisprudence overlap due to a 'high degree of cross-fertilisation' without necessarily adopting the precise wording,[98] or are broken up into separate factors or even presented in an expanded form, making it near impossible to present a list of factors with no overlap.

As a starting point[99] the following factors (mostly drawn from those that are more prevalent and familiar in such jurisprudence as set out above[100]) are submitted (with explanation) as factors for possible consideration by our courts. Their aim is not only to address the most important concerns raised by critics of class action settlements, but also to enable courts to obtain as much information as possible to assess the fairness and adequacy of the proposed settlement:

- *the terms and conditions of the proposed settlement;*

---

93 See eg *US Manual for Complex Litigation* (n 59) para 21.62: 'a comparative analysis of the treatment of class members vis-à-vis each other and vis-à-vis similar individuals'; *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468 para 5: 'achieve a broadly fair division of the proceeds, treating like group members alike'; Jonathan Macey and Geoffrey Miller, 'Judicial Review of Class Action Settlements' (2009) 1 Journal of Legal Analysis 169.

94 Piché (n 54) 45–46; *US Manual for Complex Litigation* (n 59) para 21.62; Macey and Miller (n 93) 169.

95 *Dabbs (2)* (n 49) para 30.

96 Macey and Miller (n 93) 171–174. See also 'Statutory Measures'.

97 Such as the US Advisory Committee on Civil Rules. Their extensive list has been reproduced in Macey and Miller (n 93) 171 fn 16.

98 Mulheron (n 8) 399. See also Cashman (n 39) 366.

99 It is considered that suggesting a limited list may be more useful at this point because a more extensive list would run the risk of overlapping and of being considered unwieldy. Due to the nature of the factors, some degree of overlap is inevitable as is also evident from the suggested factors that follow.

100 See 'Statutory Measures'.

Settlements are the result of *compromise*, and consequently courts evaluate the settlement in its totality[101] and accept that a fair settlement must fall within a range of reasonableness[102] to ensure that a settlement adequately compensates diverse membership interests,[103] after discounting the 'risks and costs of litigating the case to trial'.[104] A settlement should not be rejected because another negotiator could have achieved a better settlement.[105]

- *the costs, likely duration of litigation if approval is not given, and the complexity of the action;*
  This factor has been considered highly relevant in all important foreign jurisdictions.[106] It is not only the effect of *legal* costs on the interests of class members that are considered, but also the benefit of receiving compensation sooner, rather than later. In *Amchem*[107] the Supreme Court noted in connection with a large number of asbestos victims that '[m]ost saliently, for the currently injured, the critical goal is generous immediate payments.'
- *the amount of the settlement and the likelihood of success in the class action;*
  The courts are concerned about the value[108] of the settlement to class members, especially in the event of nonpecuniary relief, and scrutinise such settlements more intensely.[109] Also, in classes where illnesses and injuries arise over a very long period, later claimants should

---

101 *Figueroa v Sharper Image Corporation* 517 F Supp 2d 1292 1362 (Fla Dist Ct 2007); *Hanlon v Chrysler Corporation* 150 F 3d 1011 1026 (9th Cir 1998) ('The settlement must stand or fall in its entirety.'); *ACCC v Chats House Investments Pty Ltd* 71FRC 250 258 (1996).

102 *Dabbs (2)* (n 49) 439–440.

103 *Dabbs (1)* (n 49) para 11, 14 requiring that the interests of a particular member not be valued more than that of the class as a whole. See also *Sawatsky v Société Chirurgicale Instrumentation Inc* (1999) 71 BCLR (3d) 51 (SC) para 19; *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322 para 30–31.

104 *Dabbs (2)* (n 49) 439–440.

105 *Re Corrugated Container Antitrust Litigation* 643 F 2d 195 212 (5th Cir 1981).

106 Mulheron (n 8) 401. See also Cashman (n 39) 367; *In re Prudential Insurance Company of America* (n 55) para 18.

107 See (n 43) 625–626. See also *Killough v Canadian Red Cross Society* (2001) 91 BCLR (3d) 309 (SC) para 27.

108 Erichson (n 10) 908, quotes from Judge Alsup's standard order which he issues when settlement negotiations in an action before him starts and in which he explains that he will analyse the adequacy of the settlement in terms of its actual benefit to the class: 'In the proposed settlement, what will absent class members give up versus what will they receive in exchange, i.e. a cost-benefit analysis?' See also *Polar International Brokerage Corporation v Reeve* 187 FRD 108 114 (SD NY 1999) where the only value for the class was the reassurance that their rights had not been violated. This was described by the court as 'virtually worthless'.

109 *In re General Motors Corporation Pick-Up Truck* (n 55) 803—'the fact that a settlement involves only non-cash relief … is recognised as a prime indicator of suspect settlements.'

not receive 'inadequate compensation by then-existing realities'.[110] Although judges in examining all aspects of settlements should have regard to the merits of the action, they should not 'prejudge the merits of the case'.[111]

- *the recommendation and experience of class lawyers;*
  This factor has been recognised by courts in the focus foreign jurisdictions and are given great weight when following arm's-length settlements negotiations,[112] as the courts consider them not to be in a position to substitute their judgment for that of honest, competent lawyers[113] who have determined that the settlement represents 'a fair and realistic appraisal' of their clients' chance of ultimate success.[114]
- *the reaction of the class to the settlement, the number of objectors (if any) and the nature of the objections;*
  While the views of class members regarding a proposed settlement are regarded as relevant and 'entitled to great weight'[115] the lack of objections has been seen as non-opposition and a factor pointing towards a settlement being fair and reasonable,[116] with a high number of objections signalling that it is not fair or reasonable.[117] However, courts have cautioned against constructing silence as approval.[118]
- *the presence of good faith, arm's-length bargaining and the absence of collusion;*
  This group of factors focusses on the negotiating process and the importance of settlements that are 'achieved through arm's-length negotiations by counsel with the experience and ability to effectively

---

110 In *Georgine v Amchem Products Inc* 157 FRD 246 278 (ED Pa 1994) a low inflation factor was a major concern to the court.

111 *Re Compact Disc Minimum Advertised Price Anti-trust Litigation* 216 FRD 197 211 (Me Dist Ct 2003).

112 *Re Michael Milkin and Associates Securities Litigation* 150 FRD 46 66; *Luevano v Campbell* 93 FRD 66 88 (DDC 1981) ('considerable weight').

113 *Nunes v Air Transat AT Inc* [2005] CanLII 21681 (ON SC) para 7; *Cotton v Hinton* 559 F 2d 1326 1330 (5th Cir 1977); the trial court should be 'hesitant to substitute its own judgment for that of counsel'.

114 *Siegel v Realty Equities Corporation of New York* 1973 US Dist LEXIS 12499 (NY Dist Ct 1973) quoted in Piché (n 54) fn 46. See also *Dabbs* (1999) 40 OR (3d) 429 (Gen Div) para 32 in which the high reputation of the class lawyers was considered.

115 *Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd* (2006) 74 OR (3d) 758 (ON SC) para 179.

116 *Clime Capital Ltd v Credit Corp Group Ltd [No 3]* [2012] FCA 218 para 23. See also *King v AG Australia Holdings Ltd* [2003] FCA 980 para 11 where the court took into account the fact that no written objections were received and no objector appeared at the hearing.

117 *Figueroa* (n 101) 1328.

118 *In re General Motors Corp Pick-Up Truck* (n 55) 813. See also *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* [200] FCA 1029 para 23 in which Finkelstein J noted that it is 'dangerous to assume that silence equals assent as class members with only a very small stake in the action have little incentive to object.'

represent the class's interests',[119] and not the result of fraud or collusion. The degree and nature of communications with class members during litigation by class lawyers and the class representative and the information regarding the dynamics of, and the positions taken by the parties during the negotiations and conveyed to the court, should assist the court in assessing good faith and the absence of collusion.[120] US courts appear to use a presumption in favour of the settlement once 'sufficient discovery has been provided and the parties have bargained at arms-length.'[121]

- *the adequacy of the proposed process of distribution of settlement benefits;*
  Australian jurisprudence requires not only assessment of the settlement sum, but also the structure and workings of the scheme by which that sum is proposed to be distributed among the class members,[122] so that there is a 'broadly fair division of the proceeds, treating like group members alike.'[123] This factor has also been taken into account by Canadian courts,[124] and forms one of the fifteen factors contained in the US *Manual for Complex Litigation*,[125] indicating that in determining its weight (relative to other factors) courts have examined whether 'particular segments of the class are treated significantly differently from others.' Ultimately '[a]n allocation formula need only have a reasonable, rational basis.'[126]
- *the opinions and/or recommendation from any independent expert;*
  An Australian court has relied on the opinion of an independent cost expert to assess the reasonableness of the costs and disbursements of class lawyers,[127] and an independent economist provided evidence regarding overcharge in a Canadian price-fixing case.[128]
- *the opinions of opposing party lawyers.*
  Australian courts have taken an innovative step by suggesting in *Multiplex Shareholder Settlement*[129] that the respondent's lawyers should also bear some responsibility for furnishing the court with the

---

119 *Figueroa* (n 101) 1321.
120 *Parsons v Canadian Red Cross Society* 40 CPC 151 (4th Cir 1999) para 72.
121 *General Motors Corp Pick-Up Truck* (n 57) 796.
122 *Darwalla Milling* (n 103) para 41.
123 *Camilleri* (n 93) para 37–39. Practice Note CM 17 (n 58) para 11.4 requires that the affidavit in support of the settlement approval application must set out the means of distributing settlement funds.
124 See eg *Killough v Canadian Red Cross Society* [2001] 91 BCLR (3d) 309 (SC) para 24.
125 See (n 59) para 21.62: '13. the fairness and reasonableness of the procedure for processing individual claims under the settlement.'
126 *In re Nasdaq Market-Makers Antitrust Litigation* 2000 WL 37992 (SD NY 2000) quoted by Macey and Miller (n 93) 190.
127 *Courtney v Medtel Pty Ltd [No 5]* (2004) 212 ALR 311 322.
128 *Eidoo v Infineon Technologies AG* [2014] ON SC 6082.
129 [2010] FCA 1029 para 4.

necessary information regarding the merits of the case, and to bring to the court's attention obstacles to recovery and the benefits of the proposed settlement. No similar approach has been evident in other class action jurisdictions, but could certainly assist the court by filling the adversarial void to some extent.

CONCLUSION

Settlement of a class action has vividly been likened to wrestling an octopus.[130] Whether class action settlements are as daunting appear to depend much upon the jurisdiction in which they occur. In Canada the experience with settlements has been described as 'quite positive' and, 'sweetheart' and 'blackmail' settlements do not appear to be a problem,[131] unlike the less enthusiastic view held by critics in the United States.

Ultimately it is the protection of the interests of absent class members that is of paramount importance in the settlement process, considering that they will be bound by the settlement. This task falls heavily on the court that has to ensure that its scrutiny of the proposed settlement results in fair compensation of class member claims. Simply because the lawyers for the respective parties have agreed to settle, fairness cannot be assumed. Nor should the court be tempted to rubber-stamp a settlement in order to dispose of complex and risky litigation.[132] To this end, the use of listed fairness criteria, while non-exhaustive and open to criticism, serve a useful purpose by alleviating 'the tightrope walk between accepting the negotiated compromise in the light of the complexity and risks of further litigation … and taking into consideration the legal position of the parties.'[133]

The challenge for South African courts will be to formulate criteria that will adequately establish the parameters of the 'zone of reasonableness' within which a settlement must fall.

---

130 Branch and others (n 9) 26.

131 ibid.

132 Michael Faure, 'CADR and Settlement of Claim – A Few Economic Observations' in Hodges and Stadler (n 62) 58; *US Manual for Complex Litigation* (n 61) para 13.11.

133 Hodges and Stadler, 'Introduction' (n 62) 19.