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REFLECTIONS ON THE FLYING BUTTRESSES OF  
CLASS ACTION SETTLEMENT APPROVAL

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# REFLECTIONS ON THE FLYING BUTTRESSES OF CLASS ACTION SETTLEMENT APPROVAL

Linda S. Mullenix\*



## ABSTRACT

*Since the advent of the modern class action rule in 1996, class actions have long settled. Yet for more than five decades, class action settlements remained a backwater of class action jurisprudence. This changed in the 1990s, when issues relating to settlement classes dominated the federal legal landscape. The Supreme Court effectively resolved the controversy over settlement classes in its landmark decisions in Amchem Prods. Inc. v. Windsor and Ortiz v. Fibreboard Prods. at the end of the twentieth century.*

*The Court's imprimatur on settlement classes opened an era of expansive use of settlement classes, which was accompanied by proliferating problems relating to*

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\* Morris and Rita Atlas Chair in Advocacy, The University of Texas School of Law. This Article is in honor of Professor Rhonda Wasserman on her retirement from the University of Pittsburgh Law School. Professor Wasserman is one of the country's leading experts in complex procedure and civil litigation. Her many articles discussing issues in complex litigation are models of procedural scholarship. She has engaged with cutting edge problems in ways that have advanced the conversation in current debates. I have used her excellent scholarship in my teaching and my students have benefitted from her many insights. She is a model friend and colleague; she has been cordial and courteous even where we have disagreed.

*the substantive and procedural fairness of settlement agreements. These problems garnered the attention of the practicing bar, the federal judiciary, and the rulemakers. In 2003 and 2018, the Advisory Committee on Civil Rules enacted sweeping changes to Rule 23(e) governing judicial approval of class action settlements.*

*This Article argues that the twenty-first century amendments to Rule 23(e) encouraged the creation of an entire cottage industry of external expert witness support to shore up the settling parties' burden of proof at Rule 23(e) fairness hearings. Although parties employed various such experts in the 1990s, the rule amendments accelerated the routine use of these experts in the twenty-first century, as well as the judicial acceptance and embracement of this testimony.*

*The Article canvasses six types of party-retained expert testimony in support of class certification and settlement approval: (1) the notice vendor, (2) the fee expert, (3) the class certification expert, (4) the settlement fairness expert, (5) the ethics expert, and (6) the neutral mediator. The Article focuses on the peculiar development of recourse to mediators in support of final settlement approval.*

*The Article evaluates the value added and benefits to the judicial system of the deployment of these external experts, contrasted with the problems endemic to their use. The Article concludes with thoughts on addressing the challenges presented by external expert testimony with recommendations for improvements to the status quo of routine judicial deference to party-retained external support.*

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## INTRODUCTION

As those who labor in the vineyards of complex litigation appreciate, class action litigation has become a settlement practice. It is well-known and documented that class actions are rarely litigated,<sup>1</sup> so class action attorneys are effectively settlement negotiators. It is fair to suggest that over the span of six decades since the 1966 amendment of Rule 23, class action practice has shifted focus to the role of settlement.

For the better part of five decades, class settlement remained a quiet backwater of class action litigation. But with the emergence of increased deployment of settlement classes in the mass tort litigations of the 1990s, problems relating to class action settlements percolated to the Supreme Court for resolution.<sup>2</sup> At the turn of the twenty-first century, the significant role of class action settlements commanded center stage in procedural discourse. The paradigm shift to the centrality of settlement classes induced the Advisory Committee on Civil Rules to extensively revisit and rewrite the Rule 23 provisions dealing with class action settlements.

Although extensive academic literature has addressed the jurisprudence of settlement classes,<sup>3</sup> the academic community has paid scarce granular attention to what goes on in the class action end game: namely, how judges evaluate the Rule 23 fairness requirements to provide their judicial imprimatur to a negotiated agreement proffered by the settling parties.

As the central role of class action settlement has evolved, the Advisory Committee amended Rule 23(e) twice in the twenty-first century to put more teeth into the settlement approval process.<sup>4</sup> As a consequence of the development of more robust settlement approval requirements, attorneys have adjusted their practice in

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<sup>1</sup> See, e.g., ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTIPARTY LITIGATION: CASES AND MATERIALS 415 (2d ed. 2006) (“Relatively few class actions actually go to trial; most settle, either after the certification decision or as the trial approaches.”); Joshua H. Haffner, *When the Class Action Case Does Not Settle*, PLAINTIFF MAG., Jan. 2015, at 1 (describing a class action that went to verdict as a “rare beast”).

<sup>2</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997).

<sup>3</sup> See generally Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951 (2014) (arguing class actions should never be certified solely for purposes of settlement); Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006) (arguing the unconstitutionality of the settlement class).

<sup>4</sup> The Advisory Committee on Civil Rules amended Rule 23(e) in 2003 and 2018. See discussion *infra* Section I.B.

interesting ways to assure that a judge will not scuttle their negotiated settlement at the eleventh hour after protracted litigation.

It is well to remember, in thinking about the settlement approval process, that both plaintiff and defense attorneys are aligned in interest in securing judicial approval of a negotiated deal, so both are aligned in interest to produce a strong evidentiary record when seeking judicial approval. The settling parties, then, have become collaborators in using an array of adjuncts and judicial surrogates to support their efforts in settlement approval.

This Article reflects on the recent development by settling attorneys of innovative means to offer evidentiary support for the fairness, adequacy, and reasonableness of a proffered settlement. It discusses the evolution of the settling parties' use of an array of "flying buttress" witness testimony in support of satisfaction of the Rule 23(e) requirements for settlement approval. The Article focuses on the increasing anomalous use of one adjunct: the neutral mediator.

Part I briefly sets out context for appreciating the evolving regulatory and jurisprudential thinking relating to class action settlements. It notes the lackadaisical inattention by attorneys and courts to class action settlements prior to the 1990s, during an era before the advent of the modern concept of a settlement class. The discussion then shifts to illustrate how issues relating to settlement classes that emerged during the 1990s heyday of mass tort litigation forever changed the role of settlements in resolving class litigation. This section ends with commentary on the Advisory Committee's signal revamping of Rule 23(e) in 2003 and 2018, and the significance of those changes for the ways in which settling attorneys approached the settlement approval process.

Part II turns attention to class attorneys' innovative use of external adjunct witness testimony to shore up their evidentiary offers of proof at judicial settlement approval hearings. This Section begins with an architectural digression on the engineering concept of the flying buttress and explains why the recent use of these types of witness testimony effectively function as flying buttresses in support of class settlements. This Part discusses the ways in which courts conduct fairness hearings at the back end of class litigation, and attorneys' use of various adjuncts' reports and testimony to assist the courts in their fairness assessments.

Part III focuses specifically on settling parties' increasing use of mediators as adjuncts in support of settlement fairness. It canvasses the role of mediators in class action settlement and the ways in which mediators function in the settlement process. It discusses the types of information mediators supply to the court in support of satisfaction of the Rule 23(e) settlement criteria. This Section considers the judicial reception to mediators' reports and the special constraints on mediators' testimony to provide meaningful information to the court in support of settlement.

Part IV assesses the merits and weaknesses in the use of these adjuncts in the judicial evaluation of settlements. The commentary suggests that the heightened fairness requirements embodied in the Rule 23(e) amendments spawned a veritable cottage industry in flying buttress class action supporters. This portion of the Article asks readers to reflect whether these developments have enhanced the judicial fairness process or instead have proved decorative window-dressing for a pre-ordained approval process and outcome.

The Article concludes by suggesting that the academic community and the judiciary might more carefully reflect on what Rule 23(e) has engendered with the now routine use of flying buttress witness testimony in the settlement fairness process. The law has long disparaged the notion of “trial by affidavit”; it is fair to ask whether the way in which fairness hearings are conducted has created a regime of “settlement by affidavit.” It is legitimate to ask whether, for the same reasons the law eschews trial by affidavit, we ought to rethink settlement by affidavit. The Article challenges readers to contemplate whether alternative means might better assist the courts in their job of evaluating the fairness, adequacy, and reasonableness of proposed class action settlements—an admittedly difficult prospect.

## I. THE EVOLUTION OF CLASS ACTION SETTLEMENT APPROVAL

### A. *Twentieth-Century Class Settlement Approval Practice*

For more than six decades, class actions have always settled. The historical evolution of judicial appreciation of class settlements, however, spans decades of relative inattention arcing to a twenty-first century era of increasingly robust regulatory measures, inspired by the advent of the settlement class device in mass tort litigation in the 1990s.

The original class action rule that Congress enacted in 1938 included a barebones provision that no class action could be dismissed or compromised without judicial approval.<sup>5</sup> The original rule providing the drafters’ relative lack of concern about class settlements was manifested in the 1937 Adoption Advisory Committee Note to Rule 23(c), which said absolutely nothing about class action settlements;

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<sup>5</sup> FED. R. CIV. P. 23(c) (1940) stated: “Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule, notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is defined in paragraphs (2) or (3) of subdivision (a), notice shall be given only if the court requires it.”; see John G. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705, 706 (1997).

instead, the Advisory Note merely cited a law review article.<sup>6</sup> Notably, the original Rule 23(c) provision made no reference to “settlement,” an omission that subsequently would inspire a minor academic and rulemaking kerfuffle that was not remedied until 2003.<sup>7</sup>

The 1966 Rule 23 amendments, which ushered in the modern age of class actions, moved the “dismissal or compromise” provision of original Rule 23(c) to a new Rule 23(e).<sup>8</sup> Similar to its antecedent provision, the extensive 1966 Advisory Committee Note explicating the new rule wasted little energy on class settlements.<sup>9</sup> Simply, the Note commented that “Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.”<sup>10</sup> As a further indication of the extent to which class settlements were not on the radar screen of the rulemakers, the extensive commentary by the primary architect of the 1966 amendments contained no discussion of settlement.<sup>11</sup> Again, the language of the Rule 23(e) provision made no reference to “settlement,” and also did not require a judicial hearing to assess the substantive or procedural fairness of a proposed settlement.<sup>12</sup>

In this historical context, then, courts and attorneys for the better part of five decades paid scant attention to the judicial role in class action settlement, an era that one scholar characterized as constituting judicial passivity in the settlement process, with overwhelming judicial deference to attorney fee requests.<sup>13</sup> It was not an

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<sup>6</sup> FED. R. CIV. P. 23 Advisory Committee’s note on 1937 adoption (citing Chester B. McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder’s Suit*, 46 YALE L.J. 421, 433–34 (1937)) (suggesting that courts be given discretionary authority to decline approval of a settlement in shareholder litigation where directors acted oppressively or fraudulently; “[i]f . . . the court has doubts as to the open-mindedness of the directors, it may disregard entirely the assent of the corporation, and, after examining all the circumstances, reach an independent decision on the fairness of the settlement”).

<sup>7</sup> See *infra* notes 33–42 and accompanying text.

<sup>8</sup> FED. R. CIV. P. 23(e) (2000) (amended 2003).

<sup>9</sup> See FED. R. CIV. P. 23 Advisory Committee’s note to 1966 amendment.

<sup>10</sup> *Id.*

<sup>11</sup> For a comprehensive discussion of the 1966 Rule 23 amendments, see Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967).

<sup>12</sup> FED. R. CIV. P. 23(e) (2000) (amended 2003).

<sup>13</sup> John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 n.14 (1995) (noting that in 83–84% of settlements, the court awarded the exact amount of requested attorney fees; “[a]gain, because such deference in turn invites attorneys to make excessive demands, this finding in particular suggests a pattern of judicial passivity at the settlement stage”).

uncommon practice for courts to approve settlements on paper submissions by the settling parties; some courts rarely held hearings to assess the substantive or procedural fairness of class action settlements.<sup>14</sup> If courts did hold fairness hearings, these tended to be relatively short, *pro forma* non-adversarial affairs.<sup>15</sup> A Federal Judicial Center empirical study of federal class action settlement procedures between 1992–1994 found that courts approved over 85% of settlements without any changes and that the median length of a fairness hearing was about forty minutes.<sup>16</sup> Reflecting on the findings of this study, a prominent class action scholar noted: “[s]uch expedition seems inconsistent with careful judicial scrutiny of the settlement’s fairness.”<sup>17</sup>

The landscape of class action settlements and the role of Rule 23(e) began to shift significantly in the early 1990s, in the heyday of the resolution of large-scale mass tort class actions. Famously, the attempted nationwide settlement of all asbestos claims in the *Georgine* litigation brought into sharp focus the issues relating to the innovative use of the settlement class.<sup>18</sup> Although the *Georgine* litigation eventually would bring the debate over settlement classes to a head, it was by no means the first litigation in which objectors questioned the legitimacy of the settlement class device.<sup>19</sup>

The proposed *Georgine* settlement class embodied the central characteristics of this new procedural device; namely, a lack of judicial class certification at the litigation outset, the parties’ negotiated settlement in absence of prior class

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<sup>14</sup> *Id.* at 1348.

<sup>15</sup> See Susan P. Koniak & George M. Coben, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1104–05 (1996) (noting that fairness hearings typically were non-adversarial proceedings “making it relatively easy to hide abuse from the court”; suggesting that fairness hearings were more akin to *ex parte* proceedings than adversarial ones). For those old enough to remember the age of so-called “drive-by” class certifications, the cursory settlement approval process in these years replicated a kind of “drive-by” approval procedure. See Gregory C. Read, *Stand Up and Be Counted*, 67 DEF. COUNS. J. 423, 424 (2000) (describing phenomenon on the drive-by certification problem spanning the 1980s through the end of the 1990s).

<sup>16</sup> Coffee, *supra* note 13, at 1348 n.14.

<sup>17</sup> *Id.*

<sup>18</sup> See *Georgine v. Amchem Prods. Inc.*, 157 F.R.D. 246, 285–86 (E.D. Pa. 1994) (describing the nationwide asbestos settlement class). See generally Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995) (articles and commentary on issues raised by the *Georgine* settlement class).

<sup>19</sup> See *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989) (discussing the legitimacy of a settlement class and noting that Rule 23 equitable basis supported concept of settlement class).

certification, the simultaneous filing of a class complaint, motion for class certification, and motion for settlement approval, at the backend of litigation.<sup>20</sup> Objectors challenged this relatively unorthodox procedure on various grounds, contending that the settlement class was unconstitutional, that Rule 23 did not provide for such a settlement class, and questioning the standards that courts should apply in certifying settlement classes at the backend.<sup>21</sup>

Confronted with this procedural unicorn, the Third Circuit took the appellate lead in setting the settlement class debate.<sup>22</sup> After self-consciously debating the merits and drawbacks of settlement classes, the Third Circuit held that settlement classes were legitimate and that settlement classes had to satisfy all the Rule 23(a) and Rule 23(b) requirements for class certification.<sup>23</sup> In so concluding, the court conceded that Rule 23 did not explicitly authorize settlement classes, but that courts could interpret various provisions to support this conclusion.<sup>24</sup>

One year after upholding the settlement class concept, the Third Circuit—citing its own rule—ratified the settlement class in *Georgine*.<sup>25</sup> As controversy over the settlement class continued, the Supreme Court laid the debate to rest in its *Amchem* and *Ortiz* decisions, affirming the legitimacy of the settlement class.<sup>26</sup> The Court agreed that settlement classes had to satisfy all the Rule 23(a) and Rule 23(b) requirements for class certification, except the requirement to demonstrate the manageability of the settlement class.<sup>27</sup> Consistent with the Third Circuit's assessment, the Court also noted that Rule 23 did not explicitly provide for the settlement class concept.<sup>28</sup>

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<sup>20</sup> *Georgine*, 157 F.R.D. at 257–61.

<sup>21</sup> *Amchem Prods., Inc. v. Georgine*, 83 F.3d 610, 617–18 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997).

<sup>22</sup> *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 779, 792–93 (3d Cir. 1995).

<sup>23</sup> *Id.* at 778.

<sup>24</sup> *Id.* at 792.

<sup>25</sup> *Georgine*, 83 F.3d at 617.

<sup>26</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997).

<sup>27</sup> *Alchem Prods., Inc. v. Georgine*, 83 F.3d 610, 619–20 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997).

<sup>28</sup> *Id.* at 624–25.

The Supreme Court's legitimization of the settlement class at the end of the twentieth century unleashed a new era in class action litigation, inspiring a "meteoric" rise in settlement class filings in the twenty-first century.<sup>29</sup> With the advent of this new era of settlement classes, federal judges were now called upon to exercise their Rule 23(e) authority to approve the flood of settlement classes on their dockets. An unintended consequence of the Court's approval of settlement classes was to percolate an entire array of new concerns about judicial supervision and approval of settlement classes (which commentators characterized as passive and deferential to the settling attorneys).<sup>30</sup> These concerns inspired the sweeping amendment of Rule 23(e) to meet the challenges of settlement classes.<sup>31</sup>

*B. Providing for a More Robust Class Settlement Approval Process*

1. The 2003 Amendment to Rule 23(e)

With the flourishing of settlement classes in the post-*Amchem* era, increasing concerns and problems relating to settlement classes also flourished, commanding the attention of the profession, the academy, and judiciary in the early twenty-first century. It became increasingly apparent that the barebones 1966 Rule 23(e) provision was inadequate with managing the new age of settlement classes and their attendant controversies.<sup>32</sup>

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<sup>29</sup> Redish & Kastanek, *supra* note 3, at 546 (citing *In re The Prudential Ins. of Am. Sales Pracs. Litig.*, 148 F.3d 283, 289–90 (3d Cir. 1998)); *In re Cincinnati Radiation Litig.*, No. C-1-94-26, 1997 U.S. Dist. LEXIS 12960 (S.D. Ohio Aug. 4, 1997) ("Not surprisingly, then, the growth of the settlement class actions as a means of disposing of modern complex claims has been meteoric."). Redish and Kastanek attribute this rise in the use of settlement classes to the Court's removal in *Amchem* of the most difficult hurdle to class action certification—namely, relaxation of the Rule 23(b)(3) requirements. Redish & Kastanek, *supra* note 3, at 547 n.6.

<sup>30</sup> See Brian Wolfman, *Judges! Stop Deferring to Class-Action Lawyers*, 46 U. MICH. J.L. REFORM CAVEAT 80, 81 (2012); Memorandum from David F. Levi, Chair, Advisory Comm. on the Fed. Rules of Civ. Proc., to Honorable Anthony J. Scirica, Chair, Standing Comm. on Rules of Prac. and Proc. 123–29, 163–216 (May 20, 2002), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV5-2002.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV5-2002.pdf) [<https://perma.cc/3WPD-PD45>].

<sup>31</sup> See Memorandum from David F. Levi, Chair, Advisory Comm. on the Fed. Rules of Civ. Proc., to Honorable Anthony J. Scirica, Chair, Standing Comm. on Rules of Prac. and Proc., *supra* note 30.

<sup>32</sup> See *id.*; Coffee, *supra* note 13, at 1357.

In 2002, the Advisory Committee on Civil Rules recommended to the Standing Committee on Practice and Procedure a pervasive rewriting of Rule 23(e).<sup>33</sup> Effective on December 1, 2003, the Rule 23(e) amendments embodied the judiciary's response to numerous concerns that developed in the post-*Amchem* era of settlement classes.<sup>34</sup> The simple, prior Rule 23(e) was now replaced with a more detailed rule setting forth multiple provisions for attorney duties in the settlement process, as well as several judicial responsibilities in the conduct of settlement approval.<sup>35</sup>

For the first time in its history, Rule 23 included the language of "settlement."<sup>36</sup> The signal provisions of the amended Rule 23(e) included recognition that courts played a role in the settlement, dismissal, or compromise of certified classes, only.<sup>37</sup> The amended Rule 23(e) required reasonable notice to class members of a dismissal,

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<sup>33</sup> See Memorandum from David F. Levi, Chair, Advisory Comm. on the Fed. Rules of Civ. Proc., to Honorable Anthony J. Scirica, Chair, Standing Comm. on Rules of Prac. and Proc., *supra* note 30, at 123–29.

<sup>34</sup> Compare FED. R. CIV. P. 23(e) (2006) (amended 2009) (providing more detailed rules than the prior version of Rule 23(e)), with Memorandum from David F. Levi, Chair, Advisory Comm. on the Fed. Rules of Civ. Proc., to Honorable Anthony J. Scirica, Chair, Standing Comm. on Rules of Prac. and Proc., *supra* note 30, at 123–29, 163–216 (collecting numerous comments and objections to proposed Rule 23(e) amendments).

<sup>35</sup> Numerous commentators on the proposed Rule 23(e) provisions noted that the Advisory Committee was simply codifying pre-existing common law that had developed in the settlement class process; other commentators disagreed with this assessment. See Memorandum from David F. Levi, Chair, Advisory Comm. on the Fed. Rules of Civ. Proc., to Honorable Anthony J. Scirica, Chair, Standing Comm. on Rules of Prac. and Proc., *supra* note 30, at 163–216.

<sup>36</sup> FED. R. CIV. P. 23(e) (now titled: "Settlement, Voluntary Dismissal, or Compromise").

<sup>37</sup> FED. R. CIV. P. 23(e)(1)(A) (2006) (amended 2009). A controversy developed concerning the ability of defense attorneys to make Rule 68 offers of judgment in the class action context. Daniel A. Zariski et al., *Mootness in the Class Action Context: Court-Created Exceptions to the Case or Controversy Requirement of Article III*, 26 REV. LITIG. 77, 94 (2007). Defense attorneys often sought to defeat class litigation by "picking off" class representatives with settlement offers under Rule 68. As indicated above, the original Rule 23(e) stated that "[a] class action shall not be dismissed or compromised without the approval of the court." FED. R. CIV. P. 23(e) (2000) (amended 2003). Courts interpreted this language as a modification of Rule 68 and refused to permit individual settlement offers that defense lawyers extended under Rule 68 because that resolution would terminate the class action. Zariski et al., *supra*, at 96. The Advisory Committee on Civil Rules amended Rule 23(e)(1)(A) to read: "[t]he court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a *certified class*." FED. R. CIV. P. 23(e)(1)(A) (2006) (amended 2009) (emphasis added). By implication, courts would play no role in approving individual settlements extended to individual class representatives prior to class certification.

compromise, or proposed settlement of a settlement class.<sup>38</sup> The rule provided, for the first time, that courts conduct a hearing in order to accomplish its task of approving a proffered class action settlement.<sup>39</sup>

The court imposed on the settling parties seeking judicial approval a duty to identify any side agreements made in connection with the proposed settlement.<sup>40</sup> Also, for the first time, the amended rule made explicit the concept that class members could be afforded a second opportunity to opt out of a class, and that the court could direct that notice be provided of this option.<sup>41</sup> Finally, the amended rule specifically incorporated a provision permitting any class member to object to a proposed settlement, on the condition that objections could be withdrawn only with court approval.<sup>42</sup>

## 2. The 2018 Amendment of Rule 23(e)

It is fair to suggest that the 2003 Rule 23(e) amendments engendered more professional and judicial attention to the class settlement process. But in the ensuing decade, the class action landscape provided fertile ground for new and old discontents with settlement classes and the judicial approval process. In the space of a decade, the Advisory Committee on Civil Rules again placed revision of Rule 23(e) on its agenda.<sup>43</sup>

The Advisory Committee again made sweeping amendments to Rule 23(e), effective December 1, 2018, to address granular issues in the settlement approval process that had developed since the 2003 amendments.<sup>44</sup> As a consequence, Rule 23(e) became even lengthier and more detailed.

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<sup>38</sup> FED. R. CIV. P. 23(e)(1)(B) (2006) (amended 2009).

<sup>39</sup> FED. R. CIV. P. 23(e)(1)(C) (2006) (amended 2009).

<sup>40</sup> FED. R. CIV. P. 23(e)(2) (2006) (amended 2009).

<sup>41</sup> FED. R. CIV. P. 23(e)(3) (2006) (amended 2009).

<sup>42</sup> FED. R. CIV. P. 23(e)(4)(A), (B) (2006) (amended 2009).

<sup>43</sup> See generally Richard Marcus, *Once More Unto the Breach? Further Reforms Considered for Rule 23*, JUDICATURE, Summer 2015, at 57 (discussing further Rule 23 reforms on the Advisory Committee agenda). Since 1996, Professor Marcus has served as Associate Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States. *Id.* at 65 n.3.

<sup>44</sup> See generally Rhonda Wasserman, *The New, Improved Class Action Rule: The December 2018 Amendments to Rule 23*, 90 PA. BAR ASS'N Q. 182 (2019) (thoroughly canvassing all 2018 Rule 23 amendments and discussing Advisory Committee reasons for the changes and additions).

The 2018 amendments effectuated six important changes to Rule 23(e):<sup>45</sup> (1) requiring preliminary or provisional settlement approval at the front-end of litigation before notice to the class,<sup>46</sup> (2) clarification that such preliminary settlement approvals were not immediately appealable,<sup>47</sup> (3) substantive and procedural standards for assessing fairness of class settlements,<sup>48</sup> (4) combined

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<sup>45</sup> *Id.* at 183; see also Andre Regard, *The Five Changes to Rule 23 Every Class Action Attorney Needs to Know*, A.B.A. J. (Mar. 21, 2019), <https://www.americanbar.org/groups/litigation/committees/consumer/practice/2019/five-changes-to-rule-23-every-class-action-attorney-needs-to-know/> [<https://perma.cc/PS7R-6RV3>]; Judicature Staff, *Guidance on New Rule 23 Class Settlement Provisions*, JUDICATURE, Fall/Winter 2018, at 63.

<sup>46</sup> FED. R. CIV. P. 23(e)(1)(A) (“*Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.”).

<sup>47</sup> FED. R. CIV. P. 23(f) (“*APPEALS.* A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States’ behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”).

<sup>48</sup> FED. R. CIV. P. 23(e)(2). The rule provides the following:

*Approval of the Proposal.* If the proposal would bind class members, the court must approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;
- (C) the relief provided for the class is adequate, taking into account:
  - (i) the costs, risks, and delay of trial and appeal;
  - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims;
  - (iii) the terms of any proposed award of attorney’s fees, including timing of payment;
  - (iv) any agreement required to be identified under Rule 23(e)(3);and
- (D) the proposal treats class members equitably relative to each other.

notice of preliminary settlement approval and class certification,<sup>49</sup> (5) electronic means of providing notice,<sup>50</sup> and (6) limitations on objectors.<sup>51</sup>

Rule 23(e) has gone from saying virtually nothing about class action settlements for five decades, to now providing a richly detailed regulatory regime governing settlement classes. As they had with the 2003 Rule 23(e) amendments, class action attorneys paid attention: the lawyers began modifying their litigation strategies and conduct in the shadow of impending heightened Rule 23(e) settlement requirements. Enter the age of the flying buttress witness support in the settlement approval process.

## II. THE FLYING BUTTRESSES OF MODERN CLASS ACTION SETTLEMENT APPROVAL

### A. *A Very Short Digression on Flying Buttresses*

Those of a certain age may remember the obligatory first-year college survey course in the history of art, taught from the famous H.W. Janson's *A Short History*

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<sup>49</sup> FED. R. CIV. P. 23(e)(1)(B). The rule provides the following:

*Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by a proposal if giving notice is justified by the partes' showing that the court will likely be able to:

- (i) approve the proposal under Rule 23(e)(2); and
- (ii) certify the class for purposes of judgment on the proposal.

<sup>50</sup> FED. R. CIV. P. 23(c)(2)(B) (“[T]he court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.”).

<sup>51</sup> FED. R. CIV. P. 23(e)(5):

*Class Member Objections.*

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds of the objection.

(B) *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

- (i) forgoing or withdrawing an objection, or
- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

of Art.<sup>52</sup> We have Professor Janson to thank for introducing us to the concept of the flying buttress, complete with many photographs of Gothic cathedrals to bring home the point.

Technically, a flying buttress is an architectural feature that “consists of an arched structure extending from the upper part of a wall to a massive pier in order to convey the outward thrust of [usually] the stone.”<sup>53</sup> Apparently, the flying buttress was developed during late antiquity but flourished during the Gothic architecture period: its most outstanding example in the Notre Dame de Paris.<sup>54</sup>

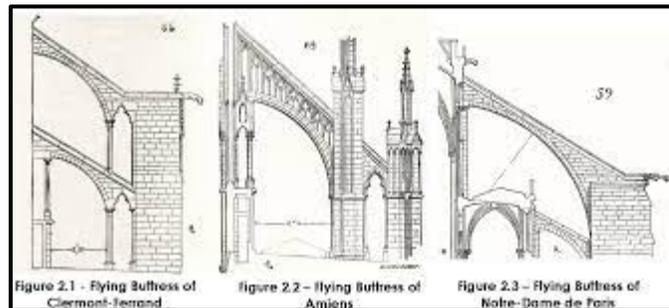


Figure 1: Flying Buttresses<sup>55</sup>

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<sup>52</sup> H.W. JANSON, HISTORY OF ART (Milton S. Fox ed., 1st ed. 1962). Jansen’s book became one of academe’s largest selling texts in history (to the envy of every other textbook writer). At the time he died in 1982, translators issued the book in fourteen languages; it sold well over two million copies. See John Russell, *Prof. H.W. Janson is Dead at 68; Wrote Best-Selling ‘History of Art,’* N.Y. TIMES, Oct. 1, 1982, at 44, <https://www.nytimes.com/1982/10/03/nyregion/prof-h-w-janson-is-dead-at-68-wrote-best-selling-history-of-art.html> [<https://perma.cc/C8JC-9VRU>]. Although Janson’s text on the history of art was standard for generations of college students, Janson’s text rightly has come under many contemporary attacks for its Euro-centric focus, as well as its sexist bias in its exclusion of women artists. See Randy Kennedy, *Revising Art History’s Big Book: Who’s In and Who Comes Out?*, N.Y. TIMES, Mar. 7, 2006, at 1, <https://www.nytimes.com/2006/03/07/arts/design/revising-art-historys-big-book-whos-in-and-who-comes-out.html> [<https://perma.cc/G892-726M>].

<sup>53</sup> JAMES STEVENS CURL, A DICTIONARY OF ARCHITECTURE 113 (1999).

<sup>54</sup> See John James, *Evidence for Flying Buttresses Before 1180*, 51 J. SOC’Y ARCHITECTURAL HISTORIANS 261 (1992). Constructed around 1180, well, over many years, Westminster Cathedral in London provides another outstanding example of the flying buttress. *Id.*

<sup>55</sup> Richard D.Y. Kim, *Analysis of Architectural Geometrics Affecting Stress Distributions of Gothic Flying Buttresses*, 3 figs. 2.1, 2.2 & 2.3 (2016) (Master’s thesis, Kansas State University) (Core).

In vaulted buildings, the builders intended the flying buttress to relieve outer walls of the pressure of lateral thrust forces of the vault.<sup>56</sup> In addition to relieving the external walls of weight and pressure, flying buttresses also served another important function in Gothic cathedral; by locating the structural support to external walls, the flying buttress allowed for greater openness in the cathedrals' vast, vaulted internal spaces.<sup>57</sup> Stated differently, the flying buttress freed the Gothic cathedrals from the internal clutter of ugly supporting beams, pillars, and arches, allowing for the visual impact of grandeur.<sup>58</sup>

### B. *The Flying Buttresses of Class Actions*

One can scarcely doubt that the new heightened settlement requirements introduced by the Advisory Committee as part of the 2003 and 2018 amendments to Rule 23(e) radically changed both attorney and judicial thinking—as well as conduct—about the settlement approval process. The amendments signaled an end to the era of perfunctory settlement approval. The rule amendments sent a clear message elevating the seriousness of the judicial supervision over settlement agreements and the concomitant burdens on settling parties to demonstrate the substantive and procedural fairness of their proposed deals.

Courts have always employed judicial adjuncts in class action procedure: most notably the role of magistrate judges in supervising motions practice, court-appointed experts to advise the court, or special masters designated with specific delimited tasks.<sup>59</sup> Although the proliferation and appointment of these well-

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<sup>56</sup> Civil engineering students at Princeton University provided a highly entertaining two-minute video demonstration on the physics of the flying buttress by using students as the flying buttresses. See *Physical Demonstration of Flying Buttresses in Gothic Cathedrals*, PRINCETON UNIV., <https://casce.princeton.edu/teaching-resources/active-learning/physical-demonstration-flying-buttresses-gothic-cathedrals> [https://perma.cc/8JEM-VPET] (last visited Sept. 26, 2022).

<sup>57</sup> *Id.*

<sup>58</sup> The most famous epigram relating to flying buttress is attributed to Winston Churchill who, upon being asked his views on religion, is reported to have stated, “I am not a pillar of the church, but a buttress—I support it from the outside.” Jonathon Van Maren, *Winston Churchill: A Surprising Champion of Christian Heritage*, EUR. CONSERVATIVE (Feb. 3, 2022), <https://europeanconservative.com/articles/essay/winston-churchill-a-surprising-champion-of-christian-heritage> [https://perma.cc/T9DW-9KTY].

<sup>59</sup> See FED. R. CIV. P. 53 (describing special masters); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2125 (2000) (“And judges, formerly identified as solo actors rendering judgments, now have a wide array of roles (manager, settler, conciliator), assisted by a staff of adjuncts, offering a range of dispute resolution services.”). See generally Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989) (criticizing the proliferation of judicial use of adjuncts generally in civil litigation); ACAD. OF CT. APPOINTED MASTERS,

recognized judicial adjuncts has inspired some controversy,<sup>60</sup> the academic literature and the legal profession have paid little attention to the concurrent proliferation of flying buttress external support witnesses that settling parties typically deploy in support of settlement approval.

Flying buttress adjuncts are different in nature from the traditional judicial adjuncts that have long been a part of the class action landscape. Like the flying buttresses of Gothic architecture, flying buttress class action witnesses are employed to externally support the weight of, as well as relieve the pressure on, the internal structure of settlement agreements.

Like the external aesthetic enhancement that flying buttresses provide for the internal beauty of the Gothic cathedral, so too does the external support provided by these flying buttress witnesses permit greater appreciation of the internal beauty of proffered settlement agreements. To paraphrase Winston Churchill, these flying buttress witnesses are not pillars of the settlement agreement—but support it from the outside.<sup>61</sup>

The Rule 23(e) amendments in 2003 and 2018 spurred the settling parties' tactical deployment of a small army of flying buttress witnesses. Rule 23(e) fairness proceedings became more elaborate affairs, requiring extensive documentation from the settling parties. Motions for settlement approval turned into prodigious, lengthy texts, supported by multiple testamentary exhibits consisting of reports and affidavits from flying buttress witnesses.

### 1. The Commercial Notice Vendor

The Advisory Committee on Civil Rules amended the class action notice requirements in 2003 and 2018.<sup>62</sup> Rule 23(c) notice requirements for damage class actions now contain the general standard of “best notice that is practicable under the

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APPOINTING SPECIAL MASTERS AND OTHER JUDICIAL ADJUNCTS: A HANDBOOK FOR JUDGES AND LAWYERS (2d ed. 2009), <https://www.uww-adr.com/zupload/zgraph-content/uploads/pdfs/acambenchmark-11-20-09.pdf> [<https://perma.cc/R32N-DAZ3>]. For an empirical study and contemporary analysis of the use of judicial adjuncts in multidistrict litigation, including the use of adjuncts involved in MDL class and non-class aggregate settlements, see Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129 (2020).

<sup>60</sup> See Burch & Williams, *supra* note 59, at 2133–34.

<sup>61</sup> See Van Maren, *supra* note 58.

<sup>62</sup> See discussion *supra* Section I.B.

circumstances,” and sets forth a detailed list of what notice must include, stated clearly and concisely in “plain, easily understood language.”<sup>63</sup>

The Rule 23(c) enhanced notice requirements engendered what has become the obligatory use of commercial notice vendors to testify to the satisfaction of the Rule 23(c) notice requirements, as well as broader satisfaction of the constitutional due process basis for class notice.<sup>64</sup> The affidavits and expert reports by commercial notice vendors typically contain a boilerplate recitation of the qualifications of the vendor, followed by the ways in which the notice plan satisfies the Rule 23(c) requirements.<sup>65</sup> Thus, the supporting affidavits indicate the provisions for individual notice, publication methods, other notice methods, as well as the reach of the notice plan, the notice content, and an opinion indicating why the notice plan will be effective in reaching class members and informing them of their rights.

Commercial notice vendors play a role not only at the preliminary approval stage of class litigation, but also at the final fairness hearing, when the notice experts

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<sup>63</sup> FED. R. CIV. P. 23(c)(2)(B)(i)–(vii). The 2003 revision permitted judges, in their discretion, to order notice be provided to class members in Rule 23(b)(1) and (b)(2) class actions. *See* FED. R. CIV. P. 23(c)(2)(A) Advisory Committee’s note to 2003 amendments. The 2018 amendment authorized, for the first time, notice by electronic means. *See* FED. R. CIV. P. 23(c)(2)(B) Advisory Committee’s note to 2018 amendments. *See generally* Elizabeth M.C. Scheibel, Student and Faculty Article, #Rule23 #ClassAction #Notice: Using Social Media, Text Messaging, and Other New Communications Technology for Class Action Notice and Returning to Rule 23(C)(2)(B)’s “Best Notice Practicable” Standard, 42 MITCHELL HAMLINE L. REV. 1331 (2016) (discussing the history of notice in class action procedure, with an emphasis on the 2003 amendments concerning notice); Todd B. Hilsee et al., *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359 (2005) (discussing the difficulties and problems in affording notice compliant with Rule 23(c) requirements written by a professional notice vendor).

<sup>64</sup> *See, e.g.*, Flynn v. Sony Electronics, Inc., No. 09-CV-2109-BAS(MDD), 2015 WL 128039, at \*1 (S.D. Cal. Jan. 7, 2015) (describing the plaintiffs’ hiring of Kurtzman Carson Consultations to design and disseminate a notice plan); *see also* Notice Design and Implementation, KINSELLA MEDIA, <https://kinsellamedia.com/Services/Notice-Design-Implementation?portalid=0> (last visited Sept. 30, 2022); FED. JUD. CTR., JUDGES’ CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE at 1–2, [https://www.fjc.gov/%20public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](https://www.fjc.gov/%20public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf) [<https://perma.cc/C3R7-V32C>] (suggesting that judges require the settling parties to submit a notice plan “from a qualified professional” or rely on the judge’s own expert report).

<sup>65</sup> *See, e.g.*, Affidavit of Todd B. Hilsee on Notices and Notice Plan, Brooks v. GAF Materials Corp., No. 11-CV-983, 2013 WL 9235111 (D.S.C. July 1, 2013) (expert report and affidavit on notice plan); Declaration of Katherine Kinsella, *In re* Western States Wholesale Nat. Gas Antitrust Litig., No. MDL-1566, 2009 WL 5427426 (D. Nev. July 15, 2009) (expert report and affidavit on notice plan).

reappear to support the parties' settlement again.<sup>66</sup> The quality and nature of their testimony will differ at each stage of class litigation. The burden on notice vendors at the preliminary approval process is to demonstrate to the court that a proposed notice plan satisfies the Rule 23(c) requirements; at the back end, the notice vendor must demonstrate the success of the notice program.<sup>67</sup>

## 2. The Fee Petition Expert

Rules 23(e) and (h) task judges with approving attorney fees in most settled class actions.<sup>68</sup> Typically, the court will not receive the attorney fee petition until the final fairness hearing, when the parties may include the petition as part of the settlement documentation.<sup>69</sup> However, in the past, some courts were tasked with approving a class settlement in the absence of the fee petition at the fairness hearing, where the parties represented that they would furnish the fee request later.<sup>70</sup>

Unless the court appoints its own expert to assess the attorney fee request,<sup>71</sup> the courts and the settling parties chiefly rely on the testimony of retained fee experts.<sup>72</sup>

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<sup>66</sup> Gregory A. Markel & Giovanna Ferrari, *Settling Class Actions: Process and Procedure*, THOMSON REUTERS: PRAC. L., <https://us.practicallaw.thomsonreuters.com/3-541-8765> [<https://perma.cc/89RG-2CTV>] (last visited Oct. 1, 2022).

<sup>67</sup> See FED. JUD. CTR., *supra* note 64, at 7.

<sup>68</sup> FED. R. CIV. P. 23(e)(2)(C)(iii) (In approving a settlement, the court must consider "the terms of any proposed award of attorney's fees, including timing of payment."); FED. R. CIV. P. 23(h) (describing procedures for awarding attorney fees).

<sup>69</sup> *Class Actions: Notice Requirements*, THOMSON REUTERS: PRAC. L., <https://us.practicallaw.thomsonreuters.com/w-004-0998> [[perma.cc/RH44-RJUN](https://perma.cc/RH44-RJUN)] (last visited Oct. 1, 2022).

<sup>70</sup> Since the Rule 23(e)(2)(C)(iii) provision added in 2018, settling parties can no longer postpone furnishing the court with an attorney fee request. Rule 23(h)(2), as amended in 2003, provided objectors with the opportunity to object to proposed attorney fees after the full fee motion is on file with the court. See FED. R. CIV. P. 23(h)(2) Advisory Committee's note to 2003 amendment ("In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.").

<sup>71</sup> See *In re Prudential Ins. Am. Sales Prac. Litig.*, 148 F.3d 283, 330 (3d Cir. 2002) (describing district court's appointment of an independent fee examiner to assist the court by analyzing the fairness of the lead counsel's fee request).

<sup>72</sup> There is a large literature on attorney fees in class litigation, authored by many of the same academics who supply expert reports, declarations, and affidavits in support of attorney fees requests. See, e.g., Charles Silver, *A Survey of Empirical Fee Awards in Class Actions*, 81 *ADVOCATE* 34 (2017) (discussing class action fee award studies by Professors Theodore Eisenberg and Geoffrey Miller, Brian Fitzpatrick, and Michael Perino); Lynn A. Baker et al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 *COLUM. L. REV.* 1371 (2015).

The leading class attorney fee experts primarily consist of a relatively small universe of law professors who repeatedly appear in support of attorney fee requests, some of whom research and write about class action attorney fees, and others who do not, but instead rely on the expertise of their colleagues.<sup>73</sup>

Like the reports supporting class action notice requirements, the reports and affidavits of the fee experts follow a boilerplate format. After an attestation of expertise and the number of cases in which the expert had reviewed fee requests, the affidavits typically set forth the prevailing standards for assessing the fairness of fee petitions.<sup>74</sup> The affiant then indicates his review of the fees in the settled litigation, assesses these fees in the context of the prevailing circuit standard, and concludes that the fee requests are within the range of reasonableness as evidenced by approved fee requests in other litigation, as well as empirical studies of class attorney fees.<sup>75</sup>

As indicated above, prior to the amendment of Rule 23 that inspired a regime of heightened scrutiny of settlement classes, judges usually paid deference to

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<sup>73</sup> The academic law fee experts who repeatedly file reports in support of fee requests include Professors John C. Coffee, Jr., Brian Fitzpatrick, Sam Issacharoff, Robert Klonoff, Arthur Miller, Geoffrey Miller, William Rubenstein, and Charles Silver. The Westlaw database on expert reports & affidavits lists numerous reports, affidavits, and declarations submitted by these fee experts, extending over several decades. *See, e.g.*, Affidavit of John C. Coffee, Jr., *Ausa Life Ins. v. Dwyer*, No. 93 Civ. 6830 (WCC) (S.D.N.Y. Aug. 18, 1995), 1995 WL 17963114. Other professors, now deceased, have supplied the court with affidavits in support of fee petitions, including Professors Theodore Eisenberg and Edward Sherman. *See, e.g.*, Declaration of Theodore Eisenberg, *Abney v. Vilsack*, No. 110-CV-01026 (D.D.C. Aug. 8, 2011), 2011 WL 9707576.

<sup>74</sup> *See, e.g.*, Declaration of Theodore Eisenberg, *Abney v. Vilsack*, No. 110-CV-01026 (D.D.C. Aug. 8, 2011), 2011 WL 9707576. Prior to the Rule 23 amendments in 2003, attorney fee standards varied among circuits, as each circuit had its own methodology for assessing attorney fee requests. The 2003 amendment of Rule 23 added a new provision on attorney fees: Rule 23(h). *See* FED. R. CIV. P. 23(h) Advisory Committee's note to 2003 amendment. Rule 23(h) recognized the various means for determining attorney fees and, without endorsing any particular methodology, gave judges discretion to review petitions according to any of the recognized methodologies. FED. R. CIV. P. 23(h).

<sup>75</sup> *See, e.g.*, Declaration of Brian Fitzpatrick, *Ajose v. Interline Brands, Inc.*, No. 14-CV-01707 (M.D. Tenn. July 20, 2018), 2018 WL 10878540; Declaration of Robert H. Klonoff Relating to Class Certification and Fairness Issues in the Proposed *Halliburton* and *Transocean* Settlements, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. 10MD02179 (E.D. La. Aug. 5, 2016), 2016 WL 7441289 [hereinafter Declaration of Robert H. Klonoff]; Declaration of Professor Geoffrey Miller, *In re Checking Acct. Overdraft Litig.*, No. 2036 (S.D. Fla. Oct. 19, 2012), 2012 WL 6900752 [hereinafter Declaration of Professor Geoffrey Miller]; Rep. or Affidavit of Charles Silver, *In re UnitedHealth Group PSLRA Litig.*, No. 06-CV-01691 (D. Minn. Jan. 25, 2009), 2009 WL 1034220; Expert Report of Professor Charles Silver Concerning the Reasonableness of Class Counsel's Request for Award of Attorneys' Fees, *In re Enron Corp. Sec. Litig.*, No. H-01-3624 (S.D. Tex. Jan. 8, 2008), 2008WL 827994.

attorney fee requests and rarely questioned fee requests.<sup>76</sup> In the twenty-first century, the Rule 23 amendments relating to attorney fees in class settlement have given rise to a cottage industry of flying buttress fee declarants who supply expert testimony in support of the reasonableness of fee petitions. Judges rely on these reports and declarations and, like the pre-amendment era, pay deference to attorney fee requests. Unless an objector appears and successfully challenges an attorney fee motion, judges rarely reject or modify fee requests.<sup>77</sup>

### 3. The Class Certification Expert

Another flying buttress support at both preliminary and final settlement approval is the deployment of an expert to assist the court in satisfying itself that the proposed settlement class is suitable for certification under the class action implicit and explicit requirements.<sup>78</sup> The courts and commentators have questioned the use of such expert testimony; if a judge considers satisfaction of class certification requirements to be a purely legal question, then the court will eschew such proffered testimony.<sup>79</sup>

Notwithstanding the controversy surrounding the use of flying buttress class certification experts, this practice has flourished in federal and state courts.<sup>80</sup> The

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<sup>76</sup> See Coffee, *supra* note 13.

<sup>77</sup> See, e.g., Johnson v. NPAS Sols., 975 F.3d 1244 (11th Cir. 2020) (rejecting objectors' challenges to attorney fee request).

<sup>78</sup> See Fogarazzo v. Lehman Bros., No. 03 Civ. 5194, 2005 WL 361205, at \*1 (S.D.N.Y. Feb. 16, 2005) (discussing use of class action certification expert witness testimony); see also Dwight J. Davis et al., *Expert Opinion in Class Certifications: Second Circuit Revisits, Disavows In re Visa Check and Joins Majority Rule*, 74 DEF. COUNS. J. 253, 254–55 (2007) (“In recent years, the artillery of choice for class action attorneys at the certification stage is the utilization of expert testimony to either establish or challenge the requirements for class certification.”) [hereinafter Davis et al., *Expert Opinion in Class Certifications*]; Dwight J. Davis & Karen Kowalski, *Use and Misuse of Expert Opinions at the Class Certification Stage*, 69 DEF. COUNS. J. 285, 285, 290 (2002) (canvassing the use of class action certification experts and the limitations on what such expert can offer as opinions) [hereinafter Davis & Kowalski, *Use and Misuse of Expert Opinions*].

<sup>79</sup> See Schenek v. FSI Futures, Inc., No. 94 Civ. 6345 (CSH), 1998 WL 427625, at \*4 n.6 (S.D.N.Y. July 28, 1998) (“The question whether to certify class is one of law, resting in district court’s discretion, and falling outside the usual legitimate boundaries of expert opinion testimony.”). Davis et al., *Expert Opinion in Class Certifications*, *supra* note 78, at 253 (“Arguably, the use of certain types of expert opinion at this stage of class litigation is inappropriate altogether, but nevertheless it has become an increasingly common practice.”).

<sup>80</sup> See generally Susan L. Saltzstein & Julie E. Cohen, *Litigating Expert Testimony at the Class Certification Stage*, THOMSON REUTERS: PRACTICAL L. (Jan. 26, 2021), <https://us.practicallaw.thomsonreuters.com/w-022-2438> [<https://perma.cc/HP2S-PD3J>].

introduction by plaintiffs' attorneys of testifying class certification experts, beginning in the late 1990s, induced defense attorneys strategically to proffer counter-experts.<sup>81</sup> Thus, like the proliferation of notice and fee experts, class settlements engendered another cottage industry of flying buttress class certification experts.

Not surprisingly, the universe of testifying class certification experts consists primarily of—but not exclusively—the same cohort of repeat academic attorney fee experts.<sup>82</sup> The reports, affidavits, and declarations proffered by class certification experts rely on authority gained from academic research, teaching, and publications relating to class action procedure.<sup>83</sup> Like the fee request reports, the class certification declarations follow a standard template.<sup>84</sup> After an attestation of the declarant's expertise, the reports indicate materials reviewed, class certification standards in the jurisdiction, and application to the proposed class certification motion pursuant to implicit requirements, as well as to Rule 23(a) and (b) provisions.<sup>85</sup> These reports, declarations, and affidavits conclude that the proposed class action is suitable for certification under prevailing class action jurisprudence.<sup>86</sup>

#### 4. The Class Settlement Fairness Expert

Rule 23(e), since 2003, has required that the court make a finding that a proffered class settlement is fair, adequate, and reasonable.<sup>87</sup> Judges rarely employ

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<sup>81</sup> See Davis & Kowalski, *Use and Misuse of Expert Opinions*, *supra* note 78, at 295. The author has provided declaration and affidavit testimony in opposition to motions for class certification, always in response to a plaintiffs' retained class expert in support of class certification. The fact that plaintiffs' attorneys hire class action experts to offer expert opinions on the suitability of a class action for certification, the plaintiffs' attorneys call into existence a defense rebuttal expert witness.

<sup>82</sup> See *supra* note 73. Some retired judges may offer expert opinion testimony in support of class certification based on their experience of class litigation while on the bench.

<sup>83</sup> See, e.g., Declaration of Professor Geoffrey Miller, *supra* note 75.

<sup>84</sup> Many of the class certification reports also contain sections relating to the reasonableness of the attorney fee requests. See sources cited *supra* note 75.

<sup>85</sup> See, e.g., Declaration of Robert H. Klonoff, *supra* note 75; Expert Report and Affidavit of Edward F. Sherman, *In re Farmers Ins. Fera Litig.*, No. CIV-03-158-F (W.D. Okla. Jan. 24, 2006), 2006 WL 352424; Expert Report of Professor Charles Silver on Class Certification, *Witt v. Chesapeake Expl., L.L.C.*, No. 2-10-CV-22 (E.D. Tex. Mar. 1, 2011), 2011 WL 5521850.

<sup>86</sup> See sources cited *supra* note 85; see also Declaration of Professor Samuel Issacharoff in Support of Final Certification of Settlement Class, *Grove v. Principal Mut. Life Ins.*, No. 4-97-CV-90224 (S.D. Iowa Feb. 8, 2001), 2001 WL 36253156.

<sup>87</sup> See Declaration of Robert H. Klonoff, *supra* note 75.

outside independent experts, special masters, or magistrate judges to assist the court in determining whether a proposed settlement satisfies fairness criteria.<sup>88</sup> Instead, by default, courts have come to rely on the testimony of party-retained experts to demonstrate how and why settlements satisfy Rule 23(e)'s fairness requirements.<sup>89</sup>

Prior to the 2018 amendment of Rule 23(e), settling parties engaged testifying experts to support the fairness of the agreement. In accomplishing this task, these fairness experts examined the proposed settlement and assessed it in the context of the circuits' differing standards to evaluate fairness.<sup>90</sup> In 2018, the Advisory Committee on Civil Rules amended Rule 23(e) to simplify the list of criteria by which a court should assess a settlement's fairness—reducing the list to four factors.<sup>91</sup>

In common with class certification experts, the universe of experts testifying to the fairness of proposed settlements consists primarily of—but not exclusively—the same cohort of repeat academic experts who routinely opine on both class certification as well as attorney fee requests.<sup>92</sup> Sometimes, the expert reports will

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<sup>88</sup> Jade Brewster, *A Kick in the Class: Giving Class Members a Voice in Class Action Settlements*, 41 W. ST. U. L. REV. 1, 12 (2013). Brewster explains the following regarding outside independent experts:

Judges have the ability at the preliminary settlement stage to have “a court-appointed expert or special master review the proposed settlement terms, gather information necessary to understand how those terms affect absent class members, and assist the judge in determining whether the fairness, reasonableness, and adequacy requirements for approval are met,” but this option is rarely exercised by the judge. And at the final settlement stage, judges again can “retain a special master or a magistrate judge to examine issues regarding the value of nonmonetary benefits to the class and their fairness, reasonableness, and adequacy,” but this, like the other powers of the judge, is also infrequently used.

*Id.* See generally MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004) (recommending judicial appointment of an outside expert or special master to aid the court in assessing settlement fairness).

<sup>89</sup> See Expert Report of Professor Charles Silver on the Proposed Class Action Settlement, *O'Neal, Inc. d/b/a O'Neal, Jones & Feldman Pharms. v. Fed. Ins.*, No. CA 7-03-CV-102-D (N.D. Tex. Feb. 12, 2010), 2010 WL 2469318.

<sup>90</sup> Prior to 2018, each federal circuit had, as a matter of class action common law, developed a list of criteria for assessing the fairness of a settlement. In addition to the circuit standards, the Federal Judicial Center's Manual for Complex Litigation (Fourth) also set forth a laundry list of facts that judges might use to assess settlement fairness. See MANUAL FOR COMPLEX LITIGATION §§ 21.61–.62 (4th ed. 2004).

<sup>91</sup> See *supra* note 48 and accompanying text.

<sup>92</sup> See *supra* note 73. Some retired judges may offer expert opinion testimony in support of class certification based on their experience of class litigation while on the bench.

combine opinions on class certification, settlement fairness, and the reasonableness of attorney fee requests in a single declaration or affidavit.<sup>93</sup> The reports, affidavits, and declarations proffered by fairness experts rely on authority gained from academic research, teaching, and publications relating to fairness criteria.

Like the fee request reports, the class certification declarations follow a standard template.<sup>94</sup> After an attestation of the declarant's expertise, the reports indicate materials reviewed, class certification standards in the jurisdiction, and application to the proposed class certification motion pursuant to implicit requirements as well as Rule 23(a) and (b) provisions.<sup>95</sup> These reports, declarations, and affidavits conclude that the proposed class action is suitable for certification under prevailing class action jurisprudence.<sup>96</sup>

## 5. The Legal Ethics Expert

An additional flying buttress of the modern class action is the testimony of ethics experts. The appearance of ethics experts is perhaps the inevitable development resulting from dubious or unprofessional conduct by class action attorneys, in some cases leading to judicial or bar sanctions for their conduct in conducting and settling class litigation.<sup>97</sup> Also, ethical issues have bearing on the

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<sup>93</sup> See, e.g., Declaration of Robert H. Klonoff, *supra* note 75; Declaration of Professor Samuel Issacharoff in Support of Approval of Settlements, Plan of Allocation and Petition of Lead Couns. for an Award of Attorneys' Fees and Reimbursement of Expenses, *In re* Cendant Corp. Litig., No. 98-1664 (WHW) (D.N.J. June 19, 2000), 2000 WL 35749302 (Expert Report and Affidavit); Declaration of Professor William B. Rubenstein in Support of Settlement Approval and Fee Petition, *In re* Wal-Mart Wage and Hour Emp. Pracs. Litig., No. 2:06-CV-00225-PMP-PAL (D. Nev. Oct. 1, 2009), 2009 WL 6541372 (Expert Report and Affidavit).

<sup>94</sup> See, e.g., Declaration of Brian T. Fitzpatrick, *In re* Checking Acct. Overdraft Litig., No. 1:09-MD-02036-JLK (S.D. Fla. Jan. 7, 2015), 2015 WL 1560519 (Expert Report and Affidavit); Declaration of Brian T. Fitzpatrick, *Harris v. Associated Bank, N.A.*, No. 1:09-MD-02036-JLK (S.D. Fla. Jan. 28, 2013), 2013 WL 1401312.

<sup>95</sup> See, e.g., Declaration of Robert H. Klonoff, *supra* note 75; Affidavit of Edward F. Sherman, *In re* Farmers Ins., No. CIV-03-158-F (W.D. Okla. Jan. 24, 2006), 2006 WL 352424; Expert Report of Professor Charles Silver on Class Certification, *Witt v. Chesapeake Expl., L.L.C.*, No. 2:10-CV-22-TJW (E.D. Tex. Mar. 1, 2011), 2011 WL 5521850.

<sup>96</sup> See *supra* notes 93–94.

<sup>97</sup> *Ky. Bar Ass'n v. Chesley*, 393 S.W.3d 584 (Ky. 2013). See generally Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477 (2003) (discussing failure of the Model Code of Professional Responsibility or the Model Rules of Profession Conduct to deal specifically with ethics of class action lawyers); Sheila B. Scheuerman, *Mass Tort Ethics: What Can We Learn from the Case Against Stanley Chesley*, 23 WIDENER L.J. 243 (2013) (discussing attorney ethical issues in aggregate litigation).

ability of a court to determine settlement fairness to the extent that this inquiry embraces issues relating to attorney conduct during the class representation and settlement.

The ethics expert, then, provides external support, advising the court that the class attorneys have engaged in “laudable conduct that has significant potential to improve the conduct of class litigation . . . .”<sup>98</sup> The settling parties draw their ethics experts from a small cohort of professors of professional responsibility, who the parties retain repeatedly to opine on ethical questions.<sup>99</sup>

Ethics experts, then, may provide testimony on issues ranging from the adequacy of class representation,<sup>100</sup> fiduciary and ethical duties to class members,<sup>101</sup> attorney conflict rules,<sup>102</sup> and the duty of loyalty to clients,<sup>103</sup> among other professional responsibility issues.

### III. MEDIATORS AS ASSURERS OF SETTLEMENT FAIRNESS

#### A. *The New Role of Mediators in the Class Settlement Process*

Mediation has long played a role in class action litigation.<sup>104</sup> In some instances, the court or the parties have used mediation in the traditional sense, to permit mediators to broker a classwide settlement. Some courts order mediation early in class proceedings.<sup>105</sup>

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<sup>98</sup> See Declaration of Charles Silver, *In re Landry’s Seafood Rests.*, No. Civ. A. H-99-1948 (S.D. Tex. Sept. 23, 1999), 1999 WL 34767770.

<sup>99</sup> See, e.g., Declaration of Prof. Bruce A. Green, *Zirkin v. Quanta Cap. Holdings, Ltd.*, No. 07 Civ. 851 (RPP) (S.D.N.Y. May 3, 2007), 2007 WL 1891252.

<sup>100</sup> *Id.*

<sup>101</sup> See, e.g., Expert Report of Bruce A. Green, *Glass v. Ranger Entrepreneurs, L.P.*, No. 20245-NC (Del. Ch. Mar. 15, 2004), 2004 WL 5371238.

<sup>102</sup> See, e.g., *In re Sunpoint Sec., Inc.*, No. 99-6073 (Bankr. E.D. Tex. Dec. 11, 2002), 2002 WL 34543344.

<sup>103</sup> See, e.g., Expert Report of Professor Charles Silver, *Whiteside v. Atlanta Cas. Co.*, No. 4:07-CV-87 (CDL) (M.D. Ga. Feb. 18, 2008), 2008 WL 2950458.

<sup>104</sup> See *Developments in the Law: Class Actions*, 89 HARV. L. REV. 1318, 1384 (1976) (early discussion of problems relating to mediation of class action litigation).

<sup>105</sup> See, e.g., Plaintiff’s Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement, Provisional Certification of Class and Approval of Notice, *Morgan v. Richmond School of Health and Technology, Inc.*, Case No. 3:12-CV-00373 (E.D. Va. 2005) (describing court-ordered mediation in educational fraud and misrepresentation class litigation).

But in recent years, the role of mediators in class litigation has taken a different direction.<sup>106</sup> The amendments to Rule 23(e) in 2003 and 2018, instituting a heightened approval regime, have encouraged attorneys to act strategically in the shadow of a future settlement fairness hearing and to turn to the creative use of mediators.<sup>107</sup>

Class action attorneys on both sides of the docket know that in an extremely high percentage of class litigation, the parties eventually will settle the action.<sup>108</sup> Post 2003 and 2018, defense attorneys involved in class litigation recognized that the settlement approval process had become more complex—with a concomitant increase in costs to settling parties to meet the new burdens of proof at settlement.<sup>109</sup> Defense attorneys also recognized that, in common with class attorneys, settling parties have a great interest in accomplishing global peace and securing judicial approval.<sup>110</sup>

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<sup>106</sup> See generally James R. Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 Y.B. ON ARB. & MEDIATION 162 (2013) (comprehensive discussion critical of new role for mediators in class action litigation; “[t]his article argues that this approach to mediator participation (and haphazard delivery and uncritical acceptance of mediator evidence) is an abdication of judicial fiduciary duty to ensure that proposed class action settlements are fair to absent class members”). Coben notes that there is sparse commentary on the use of mediators in class litigation, but what little there is encourages mediators to be actively involved in seeking approval for the settlements they broker. See *id.* (citing Richard T. Seymour, *Mediating Class Actions: A Plaintiff Lawyer’s View*, in HOW ADR WORKS 389–411 (Norman Brand ed., 2002); Margaret L. Shaw & Linda R. Singer, *Settlement, Post-Settlement, and More: Issues in Mediating Class Action Cases*, 23 ALTS. TO HIGH COST LITIG. 61 (2005)).

<sup>107</sup> See generally Howard M. Erichson, *The Dark Side of Consensus and Creativity: What Mediators of Mass Disputes Need to Know About Agency Risks*, 88 FORDHAM L. REV. 2155 (2020) (discussing role of mediators in settling class actions and other mass disputes).

<sup>108</sup> *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 466 (D. Wyo. 1995).

<sup>109</sup> See Liv Kiser & Joe Regalia, *Rule 23’s New Amendments: A New Era for Class Actions?*, ABA BUS. L. SECTION (Feb. 7, 2019), <https://businesslawtoday.org/2019/02/rule-23s-new-amendments-new-era-class-actions/> (noting that the Advisory Committee Note to Rule 23(e) suggests involving a mediator or other neutral party to support fairness inquiry might help); *Increased Scrutiny Means Increased Costs: Amended Rule 23 and Class Settlement Approval*, JONES DAY (Mar. 2019), <https://www.jonesday.com/en/insights/2019/03/increased-scrutiny-means-increased-costs> [<https://perma.cc/BP28-T5QH>] (recommending that “[p]arties should consider formalized settlement or mediation settings to better demonstrate the settlement is the product of arm’s-length negotiations”).

<sup>110</sup> JONES DAY, *supra* note 109; see David J. Goldsmith, *Expert Q & A on Class Action Settlements and Developments in Class Action Practice: A Plaintiff-Side Perspective*, THOMSON REUTERS: PRACTICAL L. (May 23, 2022), [https://content.next.westlaw.com/practical-law/document/I0fe5f1dad6a311e79bef99c0ee06c731/Expert-Q-A-on-Class-Action-Settlements-and-Developments-in-Class-Action-Practice-A-Plaintiff-Side-Perspective?viewType=FullText&transitionType=Default&contextData=\(sc.Default\)](https://content.next.westlaw.com/practical-law/document/I0fe5f1dad6a311e79bef99c0ee06c731/Expert-Q-A-on-Class-Action-Settlements-and-Developments-in-Class-Action-Practice-A-Plaintiff-Side-Perspective?viewType=FullText&transitionType=Default&contextData=(sc.Default))

Thus, attorneys on both sides of the docket have realized the value of retaining mediators early in the class settlement process for the purpose of shoring up proof at the fairness hearing.<sup>111</sup> In this scenario, parties do not necessarily retain mediators with an expectation that the mediators will broker a settlement. This understanding is consistent with the notion that class action attorneys on both sides of the docket typically want to maintain control over the content and implementation of a settlement agreement and not yield such power or authority to a mediator.

Instead, the use of mediators is an anticipatory or offensive strategic effort to provide testimony to the court to satisfy the judge that a proposed settlement is fair, adequate, reasonable, and free of collusion.<sup>112</sup> As one commentator has noted, the use of mediator testimony has become routine in almost every case, and not simply to rebut class action objections relating to collusion or other class litigation unethical conduct.<sup>113</sup>

### *B. The Nature of Mediators' Testimony in Support of Settlement Approval*

As indicated above, judges welcome the testimony of mediators in support of class settlement approval. Parties involve mediators particularly to provide testimony that settlement agreements are not the product of fraud, overreaching, or collusion.<sup>114</sup> Some mediators further comment on the substantive and procedural fairness of the settlement itself.<sup>115</sup>

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&firstPage=true [https://perma.cc/42JH-ZL4L] (recommending use of mediators “ideally known to the court”).

<sup>111</sup> See Erichson, *supra* note 107, at 2156–59.

<sup>112</sup> Cf. Jeff Kichaven & Jay McCauley, *Mediators, When the Court Comes Calling, Remember: It's Not Your Business to Declare this Settlement to Be Fair*, 27 ALTS. TO HIGH COST LITIG. 115 (2009).

<sup>113</sup> See Coben, *supra* note 106, at 165; see also Shaw & Singer, *supra* note 106, at 72 (noting that “with increasing frequency, the parties or the court may want the mediator to testify at the fairness hearing”).

<sup>114</sup> See *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298 (S.D. Fla. 2005) (mediator’s submission to the court testifying that settlement was free of collusion; counsel acted ethically; negotiations conducted at arm’s length); Coben, *supra* note 106, at 165 (citing Seymour, *supra* note 106) (“The mediator can provide a direct response to class members claiming improper collusion between the plaintiffs and the defendant in the settlement by testifying to the arms-length character of the negotiation and the vigor with which the parties pursued their competing goals.”).

<sup>115</sup> See Coben, *supra* note 106, at 173–74 (citing examples of mediators commenting on the fairness of settlements).

Mediators furnish the court with this testimony by affidavit, report, or declaration. Compared with the testimony of other class action experts in support of class certification, settlement fairness, attorney fees, or professional ethics, mediators' testimony tend to be sparse models of brevity.<sup>116</sup> The mediators' declarations follow a simple template.

Thus, the typical mediator's report to the court will set out: (1) the mediator's qualifications and retention by the parties; (2) the number of times the mediator met with the parties in-person or by other communication; (3) that the settlement negotiations were conducted at arm's-length by highly experienced and capable counsel; (4) that the litigation involved numerous extremely complex and difficult legal and factual issues; (5) that the settlement was not a product of fraud, over-reaching, or collusion; (6) that the attorneys conducted themselves in an ethical

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<sup>116</sup> See, e.g., Declaration of Kenneth R. Feinberg in Support of Motion for Preliminary Approval of Class Action Settlements with British Airways and Virginia Atlantic Airways, *In re Int'l Air Transp. Sircharge Antitrust Litig.*, No. 06-CV-01793 (N.D. Cal. Mar. 17, 2008), 2008 WL 849666. Feinberg's declaration consisted of seven short paragraphs, the first four of which set out qualifications:

1. I am an attorney licensed to practice law in the District of Columbia, Massachusetts, New York and various State and Federal Courts throughout the Nation. I am the managing partner and [f]ounder of The Feinberg Group LLP. I have been a mediator and arbitrator in thousands of disputes for the past twenty five years, including this litigation. I make this declaration pursuant to 28 U.S.C. § 1746.
2. Exhibit A is a true and correct copy of my resume.
3. Exhibit B is a true and correct copy of the resume of The Feinberg Group.
4. I make this Declaration on Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlements with British Airways and Virgin Atlantic Airways. Except as otherwise stated, I have no personal knowledge of the facts stated below.
5. As the agreed mediator in this matter, I can state that the settlements are the product of vigorous, arm's length hard-fought negotiations that lasted for over one year.
6. I presided over negotiations from the beginning and was frequently called upon to resolve issues on which the parties could not reach agreement.
7. I acted at all times as a fair and impartial neutral, assisting the parties in achieving compromises which would likely not otherwise have been possible. I swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

*Id.* See also Declaration of the Honorable Edward A. Infante (Ret.) in Support of Plaintiff's Motion for Final Approval of Settlement, *In re Payment Card Interchange & Merch. Disc. Antitrust Litig.*, No. 05-5075 (E.D.N.Y. Apr. 11, 2013), 2013 WL 3246643 (thirteen paragraph mediator's report and affidavit).

manner, engaging in exceptional legal work on both sides; and (7) that the settlement is fair, adequate, and reasonable.<sup>117</sup>

Most often, the mediators state their opinions regarding the ethical dimensions of the settlement process as well as the settlement fairness in conclusory fashion or, as a commentator has noted, “opinion-infused subjective declarations.”<sup>118</sup>

### C. *Judicial Reception of Mediator Testimony in Support of Settlement Approval*

Judges have widely accepted and praised the increased use of the offices of mediators as flying buttresses in support of settlement approval.<sup>119</sup> As a commentator has noted, “mediation carries an imprimatur of fairness.”<sup>120</sup> In an exhaustive empirical study of more than 200 judicial opinions referring to and relying on mediators’ reports in support of class settlements, judges typically have described mediators and their efforts with glowing praise.<sup>121</sup> The general theme of judicial acceptance and reliance on mediator testimony is one of near universal deference to

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<sup>117</sup> See, e.g., Declaration of Kenneth R. Feinberg in Support of Plaintiffs’ Motion for Preliminary Approval of the Settlement with Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A., *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13-CV-07789 (S.D.N.Y. Jan. 28, 2015), 2015 WL 4992650 (mediator’s expert report and declaration); Declaration of Eric Green in Support of Class Action Settlement, *Gulbankian v. MW Mfrs.*, Nos. 10-CV-10392, 12-CV-30122 (D. Mass. Apr. 22, 2014), 2014 WL 12575360 (mediator’s expert report and declaration); Declaration of Eric D. Green, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-md-1720 (E.D.N.Y. Apr. 11, 2013), 2013 WL 3246644; Declaration of Rodney A. Max, *Clark v. Experian Info. Sols., Inc.*, No. 8-00-CV-1217-24 (D.S.C. Aug. 22, 2003), 2003 WL 24901461 (mediator’s 12 paragraph expert report and affidavit).

<sup>118</sup> Coben, *supra* note 106, at 191; see sources cited *supra* note 117.

<sup>119</sup> See, e.g., *Speaks v. U.S. Tobacco Coop., Inc.*, 324 F.R.D. 112, 140 (E.D.N.C. 2018), *rev’d sub nom.* *Sharp Farms v. Speaks*, 917 F.3d 276 (4th Cir. 2019) (rejecting objections because the settlement was mediated by an experienced mediator who served with honor and distinction as federal judge for many years); see Coben, *supra* note 106, at 182–85 (citing numerous examples of enthusiastic judicial reception of mediator’s qualifications and mediator’s role in class proceedings).

<sup>120</sup> Erichson, *supra* note 107, at 2161; see Coben, *supra* note 106, at 169 (noting judicial tendency to impute a presumption of fairness where mediator facilitated an arms-length negotiation).

<sup>121</sup> Coben, *supra* note 106, at 169–75, 183–86.

the mediators' conclusory opinions.<sup>122</sup> Class action mediators "are members of a small fraternity highly respected by the judiciary."<sup>123</sup>

Notwithstanding the widespread praise of mediator testimony in support of settlement approval, some courts have expressed skepticism over the role that judges and parties have encouraged mediators to play in the class action arena.<sup>124</sup> In rejecting approval of a preliminary class settlement, a district court judge noted "[i]t is no answer to say that a private mediator helped frame the proposal."<sup>125</sup> In the face of manifest unfairness in the settlement proposal, the judge indicated that "the mediator's stamp of approval meant nothing."<sup>126</sup>

Other courts have pointed out that mediator testimony in support of settlement approval does not relieve the court of its independent duty to review both the substantive and procedural terms of a settlement, as well as attorney fee petitions.<sup>127</sup> And at least one judge discounted mediator testimony where the court suggested that the parties duped the mediator concerning negotiation trade-offs.<sup>128</sup>

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<sup>122</sup> *Id.* at 175–91.

<sup>123</sup> *Id.* at 182 ("Though class action judicial opinions typically say little about the mediation process beyond . . . summary statements[,] . . . the opinions are chock full of superlatives when it comes to describing the mediator and his or her qualifications.").

<sup>124</sup> See *Kakani v. Oracle Corp.*, Case No. C06-06493, 2007 WL 1793774, at \*11 (N.D. Cal. June 19, 2007) ("It matters little to the mediator whether a deal is collusive as long as a deal is reached. Such a mediator has no fiduciary to anyone, much less those not at the table. Plaintiffs' counsel has the fiduciary duty. It cannot be delegated to a private mediator.").

<sup>125</sup> Coben, *supra* note 106, at 188. Coben notes: "To date, California federal district court judge William Alsip is the only jurist to so explicitly state an obvious truth—the complete lack of private mediator responsibility for class action settlement outcome." *Id.*

<sup>126</sup> *Id.* at 189; see also *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) (holding the mere presence of a neutral mediator is not dispositive of whether a settlement is fair, adequate, and reasonable; vacating district court settlement approval).

<sup>127</sup> See *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011) (disregarding mediator Ken Feinberg's declaration in support of class settlement); *In re Mfrs. Life Ins. Premium Litig.*, No. 1109, 96-CV-230 BTM (AJB), 1998 WL 1993385, at \*9 (S.D. Cal. Dec. 21, 1998) (relying on *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1030 (9th Cir. 1998)).

<sup>128</sup> See Coben, *supra* note 106, at 189 (citing *Acosta v. Trans Union, LLC*, 243 F.R.D. 377 (C.D. Cal. 2007)).

*D. The Problems with Mediator Testimony in Support of Settlement Approval*

The use of mediators as flying buttress support in the settlement approval process has received little critical attention.<sup>129</sup> There are several reasons for this. Plaintiff and defense attorneys who engage in class action settlement are aligned in interest in seeing that their negotiated settlements obtain judicial approval. Consequently, they are united in interest in deploying mediators as further support for the fairness, adequacy, and reasonableness of their settlements. Class action attorneys, then, are an unlikely source of critical scrutiny of mediation reports.

As indicated above, the cohort of mediators who are repeat players in the class settlement universe belong to a small and admired fraternity.<sup>130</sup> As the overwhelming body of judicial decisions citing mediators' declarations indicate, judges extend great deference and praise to the mediators and their efforts.<sup>131</sup> This is especially true where former judges undertake a new career as a mediator.

Moreover, the 2018 Advisory Committee Note, which suggested the use of mediators in the settlement process,<sup>132</sup> further bolsters judicial reception to the presence of mediators at the time of settlement approval. Hence, the judiciary is unlikely to cast a critical eye on the use of mediators as support in the settlement process. The mediators' declarations, attesting to the key criteria for settlement approval, make the judge's job easier to accomplish.

Nonetheless, the use of mediators as flying buttress support in the settlement approval process raises two central concerns: (1) judges' uncritical deference to the mediators' opinions and conclusions, and (2) professional mediation standards that inhibit the ability of judges to probe the underlying basis for or veracity of the mediators' conclusions.

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<sup>129</sup> *Id.* at 165.

<sup>130</sup> To the extent that this small fraternity includes academic law professors, they similarly are unlikely to cast a critical eye on their own practice.

<sup>131</sup> See Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 183–84 (2009) (noting the “lenient scrutiny” that judges give to class counsel and the experts—including mediators—that they employ).

<sup>132</sup> See FED. R. CIV. P. 23(e)(2) Advisory Committee's note to 2018 amendment.

## 1. The Problem of Judicial Deference to Class Action Mediators

As discussed above, judicial deference to mediators' reports concerning the settlement process is well-documented through judges' enthusiastic, reflexive embrace of settlement mediators and their reports to the court.<sup>133</sup> As a consequence of judicial deference to mediators, "[c]ourts routinely treat the involvement of a mediator as a signal that all is well with the settlement."<sup>134</sup>

Judicial deference to settlement mediators is manifested not only through reflexive acceptance and approval of mediators' reports as evidence of settlement fairness, but also in defensive protection of mediators against objectors' challenges.<sup>135</sup> When an objector appeared to challenge a settlement as collusive, a district court judge treated the objectors' challenge as a personal attack on the mediator who had submitted a report to the court.<sup>136</sup> Professor Howard Erichson has opined that "[t]his sort of 'any rejection of an unfair settlement would impugn the integrity of the mediator'" mentality is dangerous.<sup>137</sup> Where a judge decides to approve a settlement, Professor Erichson contends that the question is not whether the judge thinks highly of the mediator, but whether the settlement treats class members fairly.<sup>138</sup>

## 2. The Problem of Professional Constraints on the Role of Mediators

There are several problems with the use of mediators in support of settlement approval that touch on ethical issues rather than any outright legal constraint. First, one should note that the negotiating parties recruit the mediator to defend the

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<sup>133</sup> See *supra* notes 119–23; Coben, *supra* note 106, at 175–88; Erichson, *supra* note 107, at 2161–63.

<sup>134</sup> Erichson, *supra* note 107, at 2161. Erichson suggests that "[t]he judge's confidence in the trustworthiness of the mediator as an individual, or the judge's confidence in mediation in general, may translate into trust regarding the fairness of the settlement." *Id.*

<sup>135</sup> *Id.* at 2162.

<sup>136</sup> *Speaks v. U.S. Tobacco Coop., Inc.*, 324 F.R.D. 112, 140 (E.D.N.C. 2018).

<sup>137</sup> Erichson, *supra* note 107, at 2162.

<sup>138</sup> *Id.*

settlement that the parties have brokered.<sup>139</sup> The retention often occurs in anticipation of a settlement.

Unlike other testifying experts in the settlement approval process, mediators are subject to several constraints concerning the information they may include in a report to the court, as well as the conclusions that mediators may draw from their observations. Most prominently, various confidentiality strictures prohibit mediators from disclosing information that they obtain during the mediation.<sup>140</sup> Several state laws similarly prohibit mediators from disclosing information, except with party consent.<sup>141</sup>

In addition, the Uniform Mediation Act, which has been adopted by several states and the District of Columbia, prohibits mediators, in reports to the court, from making a ruling that is the subject of the mediation.<sup>142</sup> Courts are prohibited from considering evidence that a mediator's report is in violation of this prohibition.<sup>143</sup> Mediators are simply permitted to report whether the mediation has occurred or terminated, whether the parties reached a settlement, and attendance at mediation sessions.<sup>144</sup>

The implications of these professional constraints are readily apparent. First, these constraints explain why so many mediators' reports are brief and consist of routine, boilerplate recitations of the mediators' credentials, the number of mediation sessions, and the parties' and mediators' attendance. Second, these constraints also explain why many mediation reports are evidence-free—because mediators need to refrain from revealing confidential information obtained during the mediation. What is so striking about mediators' reports is what they do not say.

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<sup>139</sup> See, e.g., Coben, *supra* note 106, at 166 (demonstrating an instance where the negotiating parties recruited the mediator to defend the settlement).

<sup>140</sup> Coben, *supra* note 106, at 166. The Model Standard of Conduct for Mediators provides that “[a] mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, *unless otherwise agreed to by the parties* or required by applicable law.” *Id.* (quoting MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard V(A) (AM. ARB. ASS'N ET AL. 2005)).

<sup>141</sup> *Id.* (citing state statutes).

<sup>142</sup> Coben, *supra* note 106, at 166–67 (citing UNIF. MEDIATION ACT § 7(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2001)).

<sup>143</sup> *Id.* (citing UNIF. MEDIATION ACT § 7(c) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2001)). Coben notes that there are no sanctions for mediators who violate these constraints. *Id.* at 167 n.37.

<sup>144</sup> *Id.* at 167 (citing UNIF. MEDIATION ACT § 7(b) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2001)).

Third, the professional constraints on mediators perversely encourage mediators to make sweeping conclusory statements about the lack of party collusion and settlement fairness without offering evidentiary support for the conclusions. To the extent that mediators offer ultimate opinions on the fairness of settlements, this transgresses the professional constraint that they do not do so. And, because mediators' reports are not subject to cross-examination or rebuttal, judges take these reports at face value as proof in support of the asserted conclusions. One critic has characterized the judicial reliance on mediators' reports as "the illusion of truth: proof via repeated assertions."<sup>145</sup>

#### **IV. CLASS ACTION SETTLEMENT APPROVAL: AN APPRAISAL OF THE USE OF FLYING BUTTRESS SUPPORT IN ACCOMPLISHING THE GOALS OF FAIRNESS, ADEQUACY, AND REASONABLENESS**

##### *A. The Benefits of Flying Buttress Support in Settlement Approval*

One may view the modern deployment of an array of external expert testimony provided during the Rule 23(e) settlement approval process as a positive enhancement to assure compliance with the heightened settlement requirements in the twenty-first century. There are several reasons why the proffer of external, expert testimony assists judges in their supervisory and managerial class action responsibilities, particularly at settlement.

First, federal and state judges are generalists. They oversee a broad range of substantive lawsuits on their dockets that litigants pursue employing different procedural auspices. There is little reason or expectation that a judge will have expertise in class litigation, let alone class certification or settlement requirements.<sup>146</sup> Concomitantly, there is little expectation that judges will keep up to date on the rapidly changing class action jurisprudential landscape. While a small cohort of judges have developed considerable expertise in class and other aggregate litigation, most judges do not routinely manage this type of complex litigation. The same holds true for the magistrate judges who assist their federal counterparts.

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<sup>145</sup> Coben, *supra* note 106, at 167–74. Coben describes in detail the consequences of the professional constraints on the nature and scope of what mediators may do, namely: (1) mediator participation as proof of non-collusive, arms-length bargaining, and (2) the unassailability of mediator opinion on settlement quality. *Id.*

<sup>146</sup> This fact is compounded by the presence of more mature members of the bench who may have attended law school decades ago, during quite different eras of class action litigation and jurisprudence.

Second, federal and state judges have limited resources to call upon to assist in managing class litigation or informing views on the suitability of class certification in any instance, or the ultimate fairness of a proffered settlement. Federal judges have considerable dockets comprised of an array of substantive lawsuits. To the extent that magistrate judges and law clerks support their judges, this internal support is spread thin across all cases on the judge's docket.

Third, of necessity in class litigation, judges must rely on party initiation and prosecution of the litigation. The special problem inherent in the settlement approval process is the fact that former adversaries are aligned in the interest of persuading the judge to approve their settlement. Thus, in absence of external examination and reviews, judges must default to accepting the self-serving attestations of the settling parties that everything is fine with a proffered settlement agreement.<sup>147</sup>

Fourth, as Professor Howard Erichson has noted, mediators as adjuncts to the settlement process bring a lot to the room in terms of their skill sets and values in helping negotiating parties to resolve their disputes.<sup>148</sup> According to Erichson, mediators establish trust, cooperation, and rapport among the parties, bring creativity to the settlement process, encourage openness to new solutions, and help to achieve consensus.<sup>149</sup>

Fifth, the Federal Judicial Center, as well as the Advisory Committee on Civil Rules, has encouraged federal judges to employ mediators and other experts to assist in the judges' management and settlement approval of class litigation.<sup>150</sup> Thus, federal judges fairly derive support for the use of external experts through the federal judiciary's official imprimatur.

Considering all these concerns, the recourse to external expert advice is beneficial to the overall judicial responsibilities in the resolution of class litigation.

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<sup>147</sup> To an extent, the appearance of objectors at least flag for the judge that the settlement may have problems and be unfair to class members. However, as is well known and reported that objectors rarely appear in most routine class litigation and are successful in approximately 1% of cases in which they raise objections. Azra Alagic, *Objectors—The Reality of Objecting to Class Action Settlements*, CLASS ACTION CLINIC (Sept. 1, 2020), <https://classactionclinic.com/2020/09/01/objectors-the-reality-of-objecting-to-class-action-settlements/> [https://perma.cc/LX37-P4L7]. Consequently, it is fair to suggest that objectors play a minor role in assisting judges in the settlement approval process.

<sup>148</sup> Erichson, *supra* note 107, at 2156.

<sup>149</sup> *Id.* at 2156–57.

<sup>150</sup> See BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* 16 (2005) (“If [judges] have doubts about any of the issues raised in this section, [they should] consider appointing an expert or special master to review and evaluate the proposed settlement.”); *id.* at 28.

By its very nature, external expert testimony purportedly is neutral and independent of the parties. Experts are experts precisely because they have had the time and resources to research and study the problems that adhere in class litigation and settlement. Experts bring to the table a depth of knowledge and evidence that judges have neither the background, time, nor resources to accomplish in the often-compressed schedules of class litigation.

### *B. Problems and a Critique*

The twenty-first century development of the class action preliminary approval process—codified in the 2018 Rule 23(e) amendments—has muddied the waters of class certification and settlement approval. Because a court must tentatively approve a proposed class settlement at the front end of litigation, the flying buttress testimony offered at this stage of proceedings is necessarily based on an incomplete record. In theory, the judge will have another opportunity to review satisfaction of the rule’s requirements at the back-end fairness hearing. But as some courts and commentators have observed, the likelihood of a judge’s rejection of a settlement previously approved as a preliminary matter is not likely to occur.<sup>151</sup>

This renders the submissions of flying buttress testimony in support of class certification and preliminary settlement approval of dubious value. Examples abound that illustrate this problem. For example, because a court may tentatively approve a class settlement at the front end of litigation, a court will only be in the position to review a proposed notice plan that the parties have not yet implemented. The court supplies its imprimatur on a notice plan not yet executed but based on self-serving, conclusory attestations that the notice plan meets Rule 23(c) and (e) requirements.

As part of the preliminary approval process, the court must order that the parties give notice to the class, which requires that the notice give the class members information about proposed attorney fees. In circular fashion, the flying buttress declarants point to the notice of proposed attorney fees as an indication of the reasonableness of the proposed settlement, as well as the reasonableness of the fees. Yet, relying on an attorney fee proposal at the preliminary approval stage is dubious because the attorneys will not formalize their fee petition until the final fairness hearing.

The use of expert fee declarants suggests additional concerns. There is a small universe of repeat experts who for decades successively file affidavits, relying as authoritative support their own previous testimony or the testimony of their

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<sup>151</sup> See *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 673936, at \*3 (D.D.C. Jan. 27, 2000).

colleagues. An even more interesting phenomenon is the ratchetting effect of fee research and testimony—that is, academic fee experts who publish successive empirical studies justifying an ever-rising range of fee reasonableness. And, as is true for notice expert reports, reports of fee experts are rarely, if ever, subject to challenge.<sup>152</sup>

As indicated above, the use of testifying academic experts on class certification issues is a dubious and challenging practice. In forming their opinions concerning the suitability of a proposed class action for certification, the testifying class certification expert typically relies on information supplied by the plaintiff's attorneys. Class certification experts do no independent research concerning the underlying facts that are necessary to form conclusions about the Rule 23(a) and Rule 23(b) requirements. Consequently, expert reports filed in support of class certification most often resemble an additional brief in support of the plaintiff's motion for class certification.

In addition, and more germane, the use of external class certification experts trenches on the domain of the judge. While the attorneys offering such expert testimony argue that class certification is a mixed matter of fact and law, many judges consider the assessment of class certification to be a pure legal question that the law assigns to the judge; moreover, they are perfectly capable of resolving the certification issue, without the need for an outside academic expert.

Analysts might level similar criticism at expert reports filed in support of the fairness, adequacy, and reasonableness of proposed settlements. Again, these academic experts base their conclusions on a review of the settlement documents with no independent knowledge or investigation concerning how the parties accomplished the settlement. These experts may, in turn, rely on the sworn reports of settlement mediators, in a kind of piggybacking or daisy-chaining of unsubstantiated authority. In addition, academic fairness experts frequently rely for their conclusions on their previous involvement with past settlements, again daisy-chaining authority from one settlement to another.

Finally, the use of testifying ethics experts to support the propriety of attorney conduct suffers from the same problems endemic to these external reporters: the reliance of the testifying expert on factual recitations of the parties as conveyed to the expert.

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<sup>152</sup> See Coffee, *supra* note 13.

One critic has had the pluck to identify a hot-button issue surrounding the proliferating cottage industry of flying buttress support for class action litigation and settlement: the lucrateness of this business. Commentators have observed that the universe of these experts tends to consist of small cohorts of fraternal colleagues.<sup>153</sup> The settling parties hire these experts, sometimes well in advance of an actual agreement. This is especially true for the experienced professional class of class litigators, who are well-aware of the fraternity of testifying experts.

What is little noted is that well-paid expert fees incentivize the fraternity of testifying experts to author reports that support class certification, settlement fairness, and the propriety of attorney fees and ethics. Parties will not rehire an expert who reaches any possible contrary conclusion;<sup>154</sup> hence, repeat player experts populate the class action landscape. Although the experts purport to be neutral and independent, there is an unspoken understanding among all the actors that the expert will deliver for the parties. In this regard, the relationship between the settling parties and their retained experts resembles regulatory capture.

### C. *Recommendations for Reform*<sup>155</sup>

The use of expert witness testimony—especially of class settlement mediators—has not been subject to a good deal of critical scrutiny. Commentators who have identified problems with the status quo use of mediators have offered two recommendations to address identified concerns. Thus, one critic has suggested that judges delegate to special masters the role currently performed by mediators.<sup>156</sup> A second commentator has suggested that it would be helpful if mediators became more mindful of the risks that adhere in their performance of settlement mediation.<sup>157</sup>

The core problems with the proliferation of flying buttress witnesses in support of settlement approval include, but are not limited to: (1) the inherent lack of objectivity of party-retained experts, similar to regulatory capture; (2) the costs associated with retention of multiple authorities, expenses that ultimately are passed

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<sup>153</sup> See *supra* notes 73, 82, 99, 130 and accompanying text.

<sup>154</sup> See Coben, *supra* note 106, at 186. Commenting on mediators: “Only the [mediator’s] paycheck is potentially linked to settlement approval; class action mediators who do not successfully assist parties to settle cases are unlikely to be hired.” *Id.*

<sup>155</sup> No doubt upsetting to everyone (attorneys, mediators, judges, and academics).

<sup>156</sup> Coben, *supra* note 106, at 191–93. While the appointment of special masters would be an improvement over the current regime of multiple testifying experts, this auspice would be subject to well-known problems with judicial appointments of special masters; chiefly, the tendency of judges to appoint friends and colleagues to these positions.

<sup>157</sup> Erichson, *supra* note 107, at 2163 (“The hope that drives this Essay is that awareness of this risk will better position mediators to embrace the opportunity and suppress the threat.”).

on and borne by defense clients, giving free rein and incentive to plaintiffs' attorneys to hire multiple such experts; (3) the ingrown, closed fraternity of repeat player experts filing boilerplate, uncontested reports, affidavits, and declarations; and (4) reflexive judicial deference to flying buttress testimony.

If one proceeds from an assumption that the status quo regime of party deployment of multiple experts in external support of class litigation is less than desirable (and not likely to be cured by mindfulness), then perhaps a complete rethinking may be in order. If they need advice on settlements, then judges ought to outsource advice to truly independent auspices, rather than party-retained experts. The Federal Judicial Center, the Administrative Office of the United States Supreme Courts, or the Rand Center for Civil Justice could capably provide the independent advice now furnished by the cottage industry of flying buttress external experts. Reformers might accomplish a root-and-branch approach to diminishing or eliminating the role of external party-retained experts in the following fashion:

- (1) The Federal Judicial Center and/or the Administrative Office of the United States Courts should create and curate a databank on class action attorney fees in settled class actions. This databank should be readily available to judges, magistrate judges, and law clerks to assist the court in evaluating the reasonableness of fee petitions submitted by class attorneys.
- (2) The research staff at the Federal Judicial Center or the Administrative Office of the United States Courts, upon judicial request, could file a report on fee request based on its collected data.
- (3) As a consequence, judges should put an end to the use of external expert fee testimony by party-retained and hired experts. Judges should refuse to enter such testimony as part of the class certification record or to support the fairness of the settlement.
- (4) The Federal Judicial Center and/or the Administrative Office of the United States Courts should create and curate a databank of class action settlement in settled class actions. This databank should include settlement values, as well as PDF copies of settlement documents, to provide comparative information across types of cases and settlements. This databank should be readily available to judges, magistrate judges, and law clerks to assist the court in evaluating the reasonableness of settlement proposals submitted by the settling parties.
- (5) The research staff at the Federal Judicial Center or the Administrative Office of the United States Courts, upon judicial request, could file a report assessing the fairness, adequacy, and reasonableness of a proposed settlement, based on its collected data.

- (6) As a consequence, judges should not permit external expert witness testimony in support or opposition to satisfaction of the Rule 23(e) fairness standards by party-retained and hired experts. Judges should refuse to allow such testimony to be entered as part of the class certification record or to be used to support the fairness of the settlement.
- (7) As a further consequence, judges should not permit the use of mediators' testimony in support or opposition to satisfaction of the Rule 23(e) fairness standards by judicially appointed or party-retained and hired mediators. Judges should refuse to allow such testimony to be entered as part of the class certification record or to be used to support the fairness of the settlement.
- (8) Judges should not permit expert witness testimony in support or opposition of class certification. Judges should refuse to allow such testimony to be entered as part of the class certification record. The plaintiffs carry the burden of satisfaction of class certification requirements and the defendants can rebut such arguments. Judges are entirely capable of resolving class certification motions based on the parties' briefing submissions and arguments to the court, if requested.
- (9) Judges should refer ethical questions that might arise in relation to attorney conduct during class litigation to appropriate state bar ethics panels for advice and resolution. Judges should not permit expert witness testimony concerning ethical issues by party-retained and hired expert witnesses.
- (10) The Federal Judicial Center and/or the Administrative Office of the United States Courts should create and curate a databank consisting of class action notices. This databank should be readily available to judges, magistrate judges, and law clerks to assist the court in evaluating whether proposed notice at the preliminary approval stage comports with previously approved notice.
- (11) At the preliminary approval stage, the research staff at the Federal Judicial Center or the Administrative Office of the United States Courts, upon judicial request, could file a report on proposed notice plans based on its collected data.
- (12) Judges should limit notice vendor reports, at final class settlement approval, to reporting such data and information to apprise the court of the success of the notice program.

## CONCLUSION

It is well to observe that flying buttresses have vanished from the modern architectural vernacular. Apart from the medieval gothic churches that dot the Europe landscape and that church builders transplanted to the United States in imitation, one does not see many modern flying buttresses. While changes in aesthetic sensibilities have much to do with the disappearance of the flying buttress (although flying buttresses do have their contemporary fans), the more mundane explanation lies in advances in building materials. The medieval architects built their gothic cathedrals with two primary materials: wood and stone. To achieve the airy flights afforded to internal cathedral vaults, the medieval architects relied on the compressive strength offered by external stone flying buttresses.

The development of modern architectural materials solved the problem that confronted the medieval cathedral builders. Concrete came to substitute for stone, and concrete reinforced with steel rebar provided the strength to build modern skyscrapers. The modern concept of tensile strength prevailed over the medieval need for the compressive strength of weighted stone. The use of steel, then, provided the considerable tensile strength so that modern architects no longer needed concrete flying buttresses to transmit loads to the ground.

It is time to reconsider whether the edifice that is the class action settlement process continues to need the array of costly flying buttresses to externally support the approval outcome and provide light inside the settlement cathedral. The judicial settlement approval process no longer needs the compressive strength that external experts provide. In the latter part of the twenty-first century, judges have modern procedural and administrative materials more than sufficient to provide the tensile strength to independently sign off on the agreement that is at the centerpiece of the modern aggregate litigation.



*Figure 2: The Thurgood Marshall Judicial Center, Washington, D.C.*