Fairness in Class Action Settlements

Catherine Piché

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FOREWORD

To be made effective, class action settlements must be negotiated fairly, be perceived as fair and reasonable by the settlement parties such that they agree to their terms and substance, and be characterized as fair, reasonable and adequate by a court at the occasion of a settlement approval hearing. But how is settlement fairness defined, in a collective litigation context? By which process is the evaluation of fairness made and the approval given by the court? What role does the court correspondingly have, in that context?

This treatise explores the legal policy and reasoning behind the mandatory judicial approval of class settlements, the process by which it is sought and obtained, the currently relevant factors and indicia of settlement fairness which support all decisions to approve, and the roles of the principal settlement actors, particularly the settlement judge. It suggests reform recommendations applicable to these approval processes, roles of the actors and standard of settlement fairness. These recommendations are tested, for their plausibility, against empirical data obtained from the qualitative interviews of seventeen judges conducted by the author in four target jurisdictions that have similar approaches to class action settlement approvals, and where class action litigation activity is heavy: Quebec, Ontario, British Columbia, and the United States federal courts.

* * * * *

I dedicate this work to my three *boys*, who make my life so much more complete and enjoyable : Marc-André, my husband, my strength, my love. Charles et Nicolas, *mes deux coquinous d'amour, merci pour vos câlins et vos rires*.

I acknowledge that portions of the following four background articles, published in law reviews in the last two years, have either been reproduced in the treatise, or have strongly influenced its direction and contents. The law review articles are:

1. Piché, Catherine. "A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness" (2010) 41:1 Ottawa L. Rev. 1.

2. —. "Judging Fairness in Class Action Settlements" (2010) 28 Windsor Y.B. Access Just. 111.

3. —. "The Cultural Analysis of Class Action Law" (2009) 2 J. Civ. L. Stud. 101.

4. —. "The Power of Class Actions" (2009) 2: 1 Critical Issues in Justice and Politics 77.

The Research is up-to-date as of July 13, 2011.

ACKNOWLEDGEMENTS

This thesis project was born out of a courtroom experience; the experience of sitting in a fairness hearing at the Montreal courthouse, listening to oral representations made by counsel regarding a proposed settlement's fairness and reasonableness, and believing that the procedure followed to make such settlements effective has important lacunas that must be addressed.

I wish to first and foremost thank my supervisor, Professor and Dean of Law Daniel Jutras, for his availability and constant support, for his tremendous intellectual investment, and for his rigorous, original and insightful advice for the complete duration of this most challenging project. I am also grateful for his friendship, his mentoring.

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also thank Madam Louise Rolland, formerly at the *Fonds d'aide aux recours collectifs*, for her help gathering crucially important data supporting my initial preparatory groundwork.

I warmly thank each of the seventeen judges who participated in my interviews, and who gave time and energy to enthusiastically support my project. While I cannot name them for reasons of confidentiality, I sincerely hope that at least some of them will read the thesis – and this acknowledgement – and appreciate once again my tremendous gratitude. Without each of you, this project would not have seen the light of day. Thank you, *merci*.

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My parents, Marie and Jacques, raised me thinking that I should never back down, and that I should only seek to give the best of myself in any project. This is it; I have given the best of myself. *Maman, papa, merci pour votre support indéfectible et pour m'avoir appris à persévérer.* Thanks to my sister, Geneviève, already a doctor in psychology and professor, who was a great inspiration to me and whom I wholly admire. Thanks to Guillaume, my brother, who supported me in ways unimaginable through his smiles, energy, and positive attitude.

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> *[l]ife is itself a process, and by making process the center of our attention we are getting closer to the most enduring part of reality. For that reason [...] the recommended emphasis on procedures for solving conflicts will not tend simply to suppress those conflicts, but will promote their just solution. If we do things the right way, we are likely to do the right thing.*[1]

INTRODUCTION

How can judges *do things the "right way"*, to quote Lon L. Fuller, in approving class action settlements, such that *the "right thing" is done*? In other words, what fair processes of negotiation, evaluation and approval of these settlements should be followed, to achieve fair outcomes in the out-of-court resolution of class action litigation?

To be made effective, class action settlements must be negotiated fairly, be perceived as fair and reasonable such that the settlement parties agree to their terms and substance, and be characterized as fair, reasonable and adequate by a settlement judge at the occasion of a fairness hearing. But how is settlement fairness defined, in a collective litigation context, and by which process is the fairness evaluation made and the approval given by the settlement judge? What role does the adjudicator judge correspondingly have, in that context?

Once approved judicially, proposed class settlements automatically bind all class members who did not opt out from the class action. They also simultaneously annihilate each of the class action members' rights to present their case at trial, and have their *day in court*. Accordingly, they, in essence, "[threaten] perhaps the most central tenet of the civil justice system – that a court will not decide a person's dispute without giving her a chance to tell her side of the story".[2]

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1. Lon L. Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. Legal Educ. 189, 204 (1948).
2. Steven C. Yeazell, *From Medieval Group Litigation to the Modern Day Class Action* (New Haven, Conn.: Yale U. Press, 1987) ["Yeazell, Medieval Group Litigation"].

Today, the most likely outcome of North American class action litigation is settlement.[3] Only a small fraction of all class actions (certified or not) go to trial, a rate consistent with non-class litigation.[4]

Also see Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard L. Rev. 353 at 372-73 ["Fuller, Forms"] ("The essence of the rule of law consists in being assured of your day in court. Courts can be counted on to make a reasoned disposition of controversies,[...] you cannot be fair in a moral and legal vacuum. [...] adjudication cannot function without some standard of decision, either imposed by superior authority or willingly accepted by the disputants. Without such a standard the litigants' participation through reasoned argument loses its meaning.").

3. It is very difficult to obtain statistics that are more than anecdotal in the field. For older sources, see Ward K. Branch & John C. Kleefeld, "Settling a Class Action (or How to Wrestle an Octopus)" in *Canadian Institute Conference on Litigating Toxic Torts and Other Mass Wrongs* (Toronto: Canadian Institute, 2000) at Tab XVI, 8-10; Willging et al., "Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules", 1996, available at http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/ $File/rule23.pdf, at 60 (where the authors found that the majority of certified class actions resulted in settlements. The percentage of certified class actions that ultimately settled ranged from 62 % to 100 %, while settlement rates for uncertified cases ranged from 20 % to 30 %.) ["Willging & al., Empirical Study"]. See also Janet Cooper Alexander, "Do the Merits Matter? A Study of Settlements in Securities Class Actions" (1991) 43 Stan. L. Rev. 497 at 567; Sylvia R. Lazos, "Abuse in Plaintiff Class Action Settlements: The Need for a Guardian during Pretrial Settlement Negotiations" (1985) 84 Mich. L. Rev. 308 at 308. In Quebec, the Fonds d'aide aux recours collectifs publishes annual reports with statistics about class action activity: Fonds d'aide aux recours collectifs, Rapport annuel 2008-09, online: http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2008-2009.pdf. In its latest report (the 2009-2010 Report, which was released prior to the treatise submission, does not include such information relative to the settlement numbers), the Fonds indicates that close to 30 % of cases are settled or discontinued at the authorization stage (with 27 % authorized, 20 % rejected and 23 % cases pending), while close to 33 % are settled or discontinued at the trial (with 17 % granted motions, 11 % rejected, and 40 % cases pending), see Report, *ibid* at pp. 16 and 18. These statistics are not entirely reliable for this treatise' purposes because they consider the number of cases still pending, as opposed to drawing conclusionary percentages from the number of cases resolved per year. For Quebec statistics, see Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice – Impact et évolution* (Cowansville: Yvon Blais, 2006) at 35 ["Lafond, Rôle du juge"] ("Les jugements finaux dans un recours collectif restent pourtant peu nombreux. La majorité des recours collectifs prennent fin par la conclusion d'une entente de règlement hors cour. [...] plus de trois dénouements favorables sur quatre (85 %) épousent la forme d'un règlement."). On October 26, 2010, the internal statistics of the Class Action Chamber of the Montreal Superior Court indicate that in 2009, 30 % of all class action cases that ended during that year were cases that settled, and 63 % were cases that either settled or were discontinued. (Information obtained on October 26, 2010).

4. Admin. Office of the U.S. Courts, 2007 Judicial Facts and Figures tbl. 4.10, available at http://www.uscourts.gov/judicialfactsfigures/2007/Table410.pdf, cited in Samuel Issacharoff & Robert H. Klonoff, "The Public Value of Settlement" (2009) 78 Fordham Law Rev. 1177 (where the authors explain that "between 2000 and 2007, only 1.3 % to 4.1 % of civil cases filed in federal district courts reached trial." And also that similarly in the class action context, "the overwhelming majority of actions certified to proceed on a class-wide basis... result in settlements."); Nicholas M.

When a class settlement does occur, and courts are required to approve it, there is a general tendency for them to approve it without substantive changes.[5] Arguably, this tendency is in keeping with a certain inclination toward or preference for out of court settlements, as opposed to often lengthy and complex traditional court adjudication.[6] This trend results from a combination of different factors: notably, the high and prohibitive costs of litigation, increasingly

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Pace, "Class Actions in the United States of America" (Dec. 2007), report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007, available at <http://www.law.stanford.edu/display/images/dynamic/events_media/USA__National_Report.pdf> at 91 ("Evidence suggests that the rate of trial may be lower than what might be seen in non-class litigation involving similar claims and defenses. Evidence also suggests that outcomes other than trial or settlement are involved in a larger fraction of class actions than in non-class litigation. In only those cases with certified class actions, class settlements are by far the most common result."); W.A. Bogart, Jasminka Kalajdzic and Ian Matthews, "Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?" (Dec. 2007), report also prepared in context of same conference, available at http://www.law.stanford.edu/library/globalclassaction/PDF/Canada_National_Report.pdf at 21 ("Few statistics are available on the number of cases that settle, either before or after certification or the common issues trial. Anecdotally, it appears that less than 5 % of all class actions go to trial, a rate that is consistent with ordinary litigation. Over the last five years, however, the number of cases determined by way of summary judgment or motions to strike the pleadings on the grounds they disclose no cause of action has increased. The settlement rate, therefore, is diminishing slightly."). Also see generally John C. Coffee Jr., "Class Wars: The Dilemma of Mass Tort Class Actions" (1995) 95 Colum. L. Rev. 1343 ["Coffee, Class Wars"]. Also interesting and important was U.S. District Court. N.D. of Ill. Judge Ruben Castillo's statement at a Canadian Bar Association Conference in Montreal on October 29, 2010, that 89 % of all Federal Court cases are settled in the United States.

5. See e.g. Thomas E. Willging et al., "An Empirical Analysis of Rule 23 to Address Rulemaking Challenges (1996) 71 N.Y.U. L. Rev. 74 at 141 (where the authors conducted an empirical analysis of Rule 23 in four American judicial districts and found that "[a]pproximately 90 % or more of the proposed settlements were approved without changes.") ["Willging & Al., Empirical Analysis"]. In Canada, there exists no such authority to my knowledge. However, I can affirm, based on an extensive review of Canadian class action settlements conducted in the context of my doctoral treatise project, that Canadian courts do similarly tend to approve settlements without changes, and in fact do so quasi-automatically. This information is anecdotal, however, and is not supported by statistical evidence.
6. In fact, the recent decade has seen a gradual decline in trial rates and a corresponding increase in the number of out of court settlements. See e.g. Marc Galanter & Mia Cahill, " 'Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 Stan. L. Rev. 1339 at 1387 (where the authors then evaluate that 95 % of cases in the U.S. federal system are resolved prior to trial). In Canada, see Donalee Moulton, "Vanishing Trials: Out-of-Court Settlements on the Rise", The Lawyers Weekly (October 17, 2008) online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=784>. For statistics on the Canadian decline in trial rates, see e.g. conference papers from the Canadian Forum on Civil Justice, available at <http://cfcj-fcjc.org/publications/itf-en.php>; Pierre Noreau, "La justice est-elle soluble dans la procédure? – repères sociologiques pour une réforme de la procédure civile" (1999) 40 Cahiers de droit 33.