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THE ROLE OF THE OBJECTOR IN CLASS ACTION SETTLEMENTS—A CASE STUDY OF THE GENERAL MOTORS TRUCK “SIDE SADDLE” FUEL TANK LITIGATION

Robert B. Gerard* & Scott A. Johnson**

I. INTRODUCTION

In the context of class-action litigation, an “objector” is a class member who formally challenges a proposed class action settlement on the ground that the settlement is not in the best interests of some or all of the class members. Because of the way courts now handle class action settlements, an objector’s role in protecting the interests of the class can be of critical importance. This role can also involve ethical and economic dilemmas that can compromise or bankrupt the objector. For a quick grasp of the complexities involved in the objector’s role, consider the following hypothetical.

A. The ABC Class Action

ABC, a large automobile manufacturer, becomes the target of numerous class actions which allege that some of its vehicles have a design defect that makes them prone to burst into flames in a collision. ABC denies any such defect, but because it has sold millions of the vehicles, it faces potentially ruinous liability if it must recall or repair the vehicles.


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To avoid this result, ABC approaches the plaintiffs' lawyers in one of the class actions and proposes a nationwide settlement. In exchange for dismissal of all claims related to the alleged safety defect, ABC will give each class member a coupon, good for $1000 off the price of a new ABC vehicle. Additionally, ABC will agree to award plaintiffs' attorneys a little more than $9 million in fees. The plaintiffs' attorneys agree to this settlement. The trial court accepts the settlement.

Troubled because ABC has made no attempt to remedy the safety defect and has made no cash payment to class members, and troubled by the apparent conflict of interest created by ABC's willingness to pay such staggering fees to class counsel, some of the class members object to the settlement. They eventually convince a court of appeals to throw out the settlement and remand the case for further proceedings. ABC and class counsel decide to take the settlement to a new forum.

Specifically, they go to a small court in a state where one of the other class actions against ABC had been filed, and where they believe the judge favors class action settlements. ABC then agrees to increase the attorneys’ fee award so that the counsel in the new state can be included, and so that counsel for the objectors can share in the award. Faced with smiling attorneys, all of whom praise the settlement, and with many of the objectors now acting as proponents, the state court issues a judgment approving the settlement. ABC can then take that judgment to all of the other states where the class actions were filed and argue that it must be given full faith and credit, thereby disposing of all claims against it throughout the country.\(^2\)

This arrangement works for almost everyone. ABC has extinguished potentially massive liability, and in so doing has helped encourage future sales of its vehicles to class members who will feel obligated to use the coupons. Class counsel have reaped an award of millions of dollars, without significant work or risk, and counsel for the previous objectors share in that award. The courts have unwieldy and time-consuming litigation removed from their already congested calendars.

This leaves only the class members without any substantial benefit, but no one remains to speak for the class's interests—no one except the objector.

B. The General Motors Class Action

The machinations described above are not the product of the authors' imaginations. Something very close to this is actually occurring in the General Motors Truck "Side-Saddle" litigation, in which the authors have acted as counsel of record to a group of objectors. Consumer activist Ralph Nader, in his recent book entitled No Contest, charged that:

Since 1973, more than thirteen hundred people have been killed in fiery crashes involving pickup trucks that General Motors manufactured . . . . More than 650 of these deaths were caused by fire rather than trauma—that is, the occupant of the truck survived the crash but was burned alive by the subsequent fire. Critics contend that the location of the fuel tanks in these trucks renders them unsafe.

Nonetheless, pursuant to a settlement entered into with class counsel, General Motors appears to have disposed of all class actions brought against it with a "coupon" deal. As described by Mr. Nader:

Under the proposed settlement—a cynical arrangement between corporate and plaintiff lawyers if there ever was one—owners of the trucks would have received only a coupon providing for a $1,000 discount on the purchase of a new GM truck, while their lawyers would have received $9.5 million in cash fees.

Since Mr. Nader wrote his book, the settlement has been modified—the class is still getting only a $1000 coupon, which may have a market value of $100, but class counsel will now receive $26,075,000 in fees! The only remaining impediments to the settlement are two appeals filed by a few groups of remaining objectors. This Essay will review the law related to class-action settlements, the abuses which can occur under that law, and the role of the objector in trying to protect against such abuses. The Essay will then detail the history of the General Motors class action, which serves as a striking example of the problems inherent in class action settlements, and of the necessity—and dangers—of the objector's role.

5. Id. at 195.
II. THE LAW GOVERNING CLASS ACTION SETTLEMENTS

A. FRCP Rule 23

Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") governs federal class actions. Most states have class-action statutes modeled on Rule 23. Rule 23(a) allows a class member to sue as a representative on behalf of the class if:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class.

In addition to satisfying Rule 23(a), parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2) or (3). Specifically, the court must make one of the following findings: (1) that prosecution of separate actions by class members would create a risk of inconsistent and incompatible adjudications or would result in adjudications that would dispose of claims of class members who were not parties to the litigation; or (2) that the party opposing the class has acted or refused to act on grounds generally applicable to the class, making injunctive or declaratory relief affecting the entire class appropriate; or (3) that the questions of law or fact common to the class predominate over questions affecting only individual members, and that a class action is a superior means for the fair and efficient adjudication of the controversy.

Rule 23(e) and the similar state statutes also contain a requirement designed to protect class members against potentially collusive settlements: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in

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7. See, e.g., CAL. CODE CIV. PROC. § 382 (West 1997); LA. CODE CIV. PROC. ANN. art. 594 (West 1960 & Supp. 1997).
8. FED. R. CIV. P. 23(a).
9. See id. at 23(b)(1)-(3).
10. See id.
such manner as the court directs."\textsuperscript{11} The requirement of court approval of class-action settlements raised two issues which have resulted in conflicting decisions in the courts of appeal. First, before a court can approve a settlement, must it initially certify that a class satisfying the requisites of Rule 23(a) and (b) exists, or does the settlement justify imposition of a lesser standard for certifying a class as a "settlement class?"\textsuperscript{12} Second, if a class-action settlement is approved by a court, is the judgment of that court entitled to full faith and credit in all courts of the United States, even if it extinguishes claims that could not have been brought in the court where the settlement was entered?\textsuperscript{13}

B. The Settlement Class Is Rejected

A number of court of appeals decisions have held that a settlement obviates or reduces the need to determine whether a proposed class satisfies the requirements of Rule 23(a) and (b).\textsuperscript{14} Other courts of appeals, notably the Third Circuit, have held that a class cannot be certified for settlement unless certification for trial is warranted—that is, unless Rule 23(a) and (b) are satisfied.\textsuperscript{15}

In \textit{Amchem Products, Inc. v. Windsor},\textsuperscript{16} the United States Supreme Court sided with the Third Circuit. The Court observed that some of the requirements of Rule 23(a) and (b) "demand undiluted, even heightened, attention in the settlement context."\textsuperscript{17} Accordingly, the Court held that, while a proposed settlement "is relevant to a class certification," a settlement class must still satisfy the requirements of Rule 23.\textsuperscript{18}

C. Judgments Approving Settlements Must Be Given Full Faith and Credit

In terms of the role of the objector and the abuses of class-action settlement procedures, the Supreme Court decided a more important
case a year before Amchem. In Matsushita Electric Industrial Co. v. Epstein, the court held that a valid state court judgment approving a class-action settlement is entitled to full faith and credit in all courts of the United States. In that case, Matsushita made a tender offer for the common stock of MCA, Inc., a Delaware Corporation. Matsushita acquired MCA but also acquired two lawsuits. A class action was filed in a Delaware state court against MCA and its directors for breach of fiduciary duty in failing to maximize shareholder value; Matsushita was later named as an additional defendant on a related conspiracy claim.

While that action was pending, an action was filed in a district court in California, alleging that Matsushita violated federal securities laws, over which the federal courts have exclusive jurisdiction. The district court declined to certify the proposed class and granted a summary judgment in Matsushita’s favor. The plaintiffs appealed to the Ninth Circuit Court of Appeals. While that appeal was pending, the parties in the Delaware action negotiated a settlement. In exchange for a global release of all claims arising out of Matsushita’s acquisition of MCA, defendants would deposit $2 million into a settlement fund for pro rata distribution to class members. The Delaware court certified a class for settlement purposes and, after notice to class members and a hearing, the court approved the settlement. The state court’s judgment decreed that the settlement barred all claims, “state or federal,” including the California district court action.

Matsushita then took the Delaware court’s judgment to the Ninth Circuit Court of Appeals and moved to dismiss the case. Matsushita argued that the settlement barred any further prosecution of the federal action, because federal courts had to give the Delaware

20. See id. at 878.
21. See id. at 876.
22. See id.
23. See id.
24. See id.
25. See id.
26. See id.
27. See id.
28. See id.
29. See id.
30. Id.
31. See id. at 877.
judgment “full faith and credit,” pursuant to 28 U.S.C. § 1738.\textsuperscript{32} The Ninth Circuit rejected this argument, but the Supreme Court reversed, stating that:

The Full Faith and Credit Act mandates that the “judicial proceedings” of any state “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.”\textsuperscript{33}

The Court observed that “a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of the Act.”\textsuperscript{34} Further, the Court held that this is true even where “the state court judgment at issue incorporates a class action settlement releasing claims solely within the jurisdiction of the federal courts.”\textsuperscript{35}

III. POTENTIAL FOR ABUSE OF CLASS ACTION SETTLEMENTS

In a concurring opinion in \textit{Matsushita}, Justice Ginsberg foresaw the potential for abuse created by the Court’s holding. She noted the contention made by objectors to the settlement that the Delaware class representatives were willing to extinguish the federal claims “for a meager return to the class members, but a solid fee to the Delaware class attorneys.”\textsuperscript{36} Justice Ginsberg also quoted the Delaware court’s observation that:

[T]he defendants’ willingness to create the settlement funds seems likely to have been motivated as much by their concern as to their potential liability under the federal claims as by their concern for liability under the state law claims which this Court characterized as ‘extremely weak.’\textsuperscript{37}

As Justice Ginsberg implies, the class action settlement presents a strong temptation for collusion between defendants and class counsel. In exchange for an agreement by a defendant to pay a large award of attorneys’ fees, class counsel can agree to settle class claims

\textsuperscript{32} See id.
\textsuperscript{33} Id. (quoting 28 U.S.C. § 1738).
\textsuperscript{34} Id. at 878.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 885. On remand, the Ninth Circuit denied full faith and credit to the Delaware settlement due to deprivation of the absent class members due process right to adequate representation. See Epstein v. MCA, Inc., No. 92-55675, 1997 WL 665545, at 23 (9th Cir. Oct. 22, 1997).
\textsuperscript{37} Matsushita, 116 S. Ct. at 887 (quoting \textit{In re MCA, Inc. Shareholders Litig.}, C.A. No. 11740, 1993 WL 43024, at *6 (Del. Ch., Feb. 16, 1993)).
for less than their true value. Then, that defendant can take the court judgment approving the settlement to every other court of the land and demand that it be given full faith and credit, forcing the dismissal of all other class actions.

In the usual lawsuit with only one or two plaintiffs, there are often divergent interests that protect the plaintiff's rights in a settlement. The plaintiff's counsel has a direct interest in maximizing the client's recovery—to maximize counsel's own fees if it is a contingency case and to satisfy the client who must approve of the settlement.

However, in a class action there is often no such need to satisfy a client. The class may consist of millions of members, many of whom are unaware of the suit, and most of whom do not know, and will never see, class counsel. Further, the desire to maximize fees by maximizing the client's recovery becomes less compelling. If a class has one million members, and they are all paid only $100 in the settlement, the total recovery of the class is $100 million, which allows for a massive fee award if the attorneys receive even a small percentage of the total recovery. Finally, if the award to the class is decreased, the ability and willingness of the defendant to satisfy an award of attorneys' fees may increase.

Accordingly, because a class action can require substantial resources and work if taken to trial, always with a risk of a defense verdict, the pressures for entering into a collusive settlement are powerful. Adding to these pressures is the "reverse auction" phenomenon. If plaintiffs' counsel in a class action take too strident a position in settlement negotiations, the defendant can seek settlement in class actions filed in other jurisdictions. If other counsel are willing to accept the defendant's deal, the parties enter a settlement, and if the court approves it, the defendant has a judgment entitled to full faith and credit. The defendant can then move for dismissal of all other class actions, leaving the counsel who objected to the settlement without any ability to recover attorneys' fees.

IV. THE ROLE OF THE OBJECTOR IN PREVENTING COLLUSIVE SETTLEMENTS

The objector's role in preventing collusive settlements is relatively simple. Rule 23(e) requires that parties to a class action settlement

obtain court approval of the settlement. The objector must, therefore, attempt to convince the court to reject the settlement by showing that the settlement is not in the class's interests or that it is the product of collusion between class counsel and the defendants. As an outsider—someone without a stake in the attorneys' fee award—the objector provides an unbiased view of the settlement to a court that will otherwise see only a smooth presentation by the defendants' attorneys and class counsel claiming that the settlement is fair and reasonable and the product of hard-fought negotiations.

The objector's role can be very costly and risky. Settlement fairness hearings are often heard in remote areas of the country and involve complexities and procedural requirements that usually necessitate representation by counsel. And the objector can be subject to vigorous attack by the proponents of the settlement, who often have a strong financial interest in seeing the settlement approved.

Certain temptations further complicate the objector's role. A defendant attempting to avoid massive exposure, and class counsel looking to receive a huge award of fees, may try to "buy off" the objector—in exchange for cash payment to the objector or his counsel, the objector agrees to withdraw his objections, or even voice approval of the settlement. In light of the uncompensated expenses an objector incurs, the buy-off offer is tempting and often significant.

V. THE GENERAL MOTORS SIDE SADDLE FUEL TANK LITIGATION

The General Motors Pickup Truck Side Saddle Fuel Tank Litigation demonstrates all of the problems above. The final chapter of this litigation has not been written—at least two appeals are pending—but this case involves allegations of a collusive settlement, excessive attorneys' fee awards, forum shopping, and objectors who sold out. Professor John C. Coffee, Jr., of Columbia University School of Law, one of the preeminent national authorities on class actions, observed in a sworn statement:

It is my opinion (and that of other academics known to me)

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42. See generally id. at 1102-15 (discussing the abuse that occurs in settlement fairness hearings which necessitates representation by counsel).
43. See Morrissey, supra note 40, at 1765-66.
that this litigation will attain historic significance (and will be studied in law schools in the future), unfortunately as an paradigmatic illustration of the case with which the existing system of rules regulating class actions can break down and be exploited by attorneys (both for plaintiffs and defendants) who are intent on evading judicial review in other jurisdictions.44

A. The Class Actions

Between 1973 and 1987, General Motors manufactured millions of pickup trucks with side saddle fuel tanks.45 Some allege that the placement of those fuel tanks is a dangerous defect, leaving the trucks vulnerable to fuel fires in the event of a side collision.46 As noted previously, Ralph Nader, in No Contest, charged:

Since 1973, more than thirteen hundred people have been killed in fiery crashes involving pickup trucks that General Motors manufactured . . . . More than 650 of these deaths were caused by fire rather than trauma—that is, the occupant of the truck survived the crash but was burned alive by the subsequent fire. Critics contend that the location of the fuel tanks in these trucks renders them unsafe.47

Consumer class actions seeking damages and/or remediation of the defect were filed against General Motors in numerous state and federal courts.48 General Motors responded to these suits by: (1) removing most of the state court actions to United States district courts, and then (2) filing a motion with the United States Judicial Panel on Multidistrict Litigation (MDL) to transfer all of the federal court class actions to one court for consolidation, pursuant to 28 U.S.C. § 1407.49 The MDL granted General Motors' motion and transferred all of the actions to the United States District Court for the Eastern District of Pennsylvania on February 26, 1993.50

46. See id.
47. NADER & SMITH, supra note 4, at 194 (endnote omitted).
49. See id.
50. See id.
B. The Settlement

On July 19, 1993, despite allegations that neither side had performed any significant amounts of discovery or investigation, General Motors and class counsel informed the MDL court that they had reached a settlement agreement.\textsuperscript{51} Pursuant to the proposed settlement, General Motors would give a "coupon" to the class members.\textsuperscript{52} Class members could only use those coupons for a limited period of time as a $1000 credit toward the purchase of a new General Motors truck.\textsuperscript{53} While ensuring a future market for General Motors trucks, the settlement made absolutely no provision for repair or retrofit of the allegedly dangerously positioned fuel tank on the trucks.\textsuperscript{54} Accordingly, the class members who were sound enough financially to purchase new trucks would receive coupons to use as a credit for a small fraction of the purchase price, while the remaining class members who could not afford to buy a new truck—and the unsuspecting members of the public who would buy the used trucks—were left with vehicles which could allegedly erupt into a fatal fire. But, despite the lack of any direct monetary award to the class members or any provision for repair or retrofit, the settlement provided $9.5 million in attorneys' fees to class counsel.\textsuperscript{55}

General Motors reached a similar settlement with class counsel in a Texas class action which had not been removed to federal court.\textsuperscript{56} That settlement, also involving $1000 coupons, was approved by the trial court but was reversed on appeal because of the lack of adequate notice to class members and the size of the attorneys' fee award.\textsuperscript{57}

C. The Court of Appeals Rejects the Settlement

Approximately four months after the filing of plaintiffs' class-action complaint in the MDL forum, the district court conditionally certified the class for settlement and approved the proposed

\textsuperscript{52} See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d at 780.
\textsuperscript{53} See id.
\textsuperscript{54} See id. at 781.
\textsuperscript{55} See id. at 782.
\textsuperscript{56} See id. at 780 & n.4.
However, the district court's order was appealed to the Third Circuit Court of Appeals, which, on April 17, 1995, issued its decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*. In that decision, the court of appeals ruled that the United States District Court for the Eastern District of Pennsylvania erred in certifying a provisional settlement class, holding that a settlement class must satisfy all requisites for certification under Rule 23, a determination subsequently upheld by the Supreme Court in the *Amchem* case.

More importantly, however, the court of appeals also reversed the MDL court because it determined that, insofar as the class was concerned, the settlement "is not fair, reasonable, or adequate." This determination was based on a number of factors. The court of appeals noted that the settlement "involve[d] only non-cash relief, which is recognized as a prime indicator of suspect settlements." The court observed that class members who received the coupons might purchase General Motors trucks "because they felt beholden to use the certificates . . . . [and therefore] the certificate settlement might be little more than a sales promotion for GM." Further, the court of appeals observed that "[p]eople of lesser financial means will be unable to benefit comparably from the settlement." While the proponents of the settlement claimed that a "secondary market" for the coupons might develop allowing for sale of the coupons, the court found that "there is no assurance that a market will develop." The court of appeals also found that the failure of the proposed settlement to make any provision to remediate the pickup trucks' safety defect, "despite the vociferousness of the arguments for some recall or retrofit in the initial complaint, enhances our conviction that this settlement is inadequate." The negligible value to the class of the proposed settlement was especially troubling to the court of appeals because "class counsel

59. 55 F.3d 768 (3d Cir. 1995).
60. *See id.* at 800.
63. *Id.* at 803.
64. *Id.* at 808.
65. *Id.*
66. *Id.* at 809.
67. *Id.* at 819.
effected a settlement that would yield very substantial rewards to them after what, in comparison to the $9.5 million dollar fee, was little work." Indeed, the court of appeals observed that "the size of the attorneys' fees agreement suggests that GM attached a greater value to the class claims than proponents of the settlement would have us believe." Reviewing all of these factors, the court of appeals concluded that the settlement "is not fair, reasonable, or adequate." Accordingly, the court of appeals vacated the district court's order certifying the provisional class and approving the settlement and remanded the case for further proceedings.

D. The Litigation Moves to Louisiana

Rather than return to the district court as ordered, General Motors and class counsel simply abandoned the MDL court. Specifically, in documents filed with a Louisiana state court, class counsel admitted that in October of 1995—the same month in which the United States Supreme Court denied General Motors' petition for certiorari of the Third Circuit decision—General Motors and class counsel began settlement negotiations in Louisiana.

In 1993 plaintiffs filed a "statewide" class action in the Parish of Iberville, Louisiana, in a small, rural court in the sparsely populated city of Plaquemine. General Motors, on or about May 21, 1993, appealed to the Louisiana Court of Appeal from an order certifying the class, and the case was then allowed to lie dormant for three years. However, after the United States Third Circuit Court of Appeals rejected the settlement, General Motors moved for an order staying its Louisiana appeal and remanding the case to the Louisiana trial court for settlement purposes only.

On or about July 3, 1996, General Motors and class counsel announced that they had agreed to a nationwide settlement in the

68. Id. at 803.
69. Id. at 807.
70. Id. at 818.
71. See id. at 822-23.
74. See id. at *2.
75. See id. at *2-3.
76. See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822-23 (3rd Cir. 1995).
Louisiana action. 78 This settlement included all of the actions transferred to the United States District Court for the Eastern District of Pennsylvania by the MDL and awarded fees to class counsel for the work performed in the district court proceedings. 79 Interestingly, many of the objectors to the settlement in the Third Circuit, including Public Citizen and the Center for Auto Safety, were now proponents of the settlement in Louisiana. 80 Additionally, many of the attorneys who represented those objectors were now among the attorneys who would share attorneys' fees as part of the settlement. 81

E. The $1000 Coupon Settlement Lives Again in Louisiana

The "new" settlement advanced in Louisiana appeared, with the exception of a few changes, almost identical to the settlement rejected by the Third Circuit Court of Appeals. 82 Indeed, one of the class counsel wrote to his clients: "[T]he $1,000 coupon settlement lives again in Louisiana." 83 The new settlement provided only for the same non-cash relief to class members—a $1000 coupon which was good only for a limited period of time as a credit toward the purchase of any new General Motors vehicle, except a Saturn, the previous coupon being only good for new GM trucks and minivans. 84 The class members who either could not afford or did not want to purchase a new General Motors vehicle received no certain benefit from the new settlement. Provisions were added which would supposedly make the coupons easier to sell, but even the settlement proponents claimed that the sale value would only be about $100, and they refused to guarantee any cash value. 85 The new settlement still did absolutely nothing to remediate the purportedly serious safety defect in the trucks. 86

78. See Stern, supra note 51, at A3.
80. See Stern, supra note 51, at A3.
82. See Stern, supra note 51, at A3.
84. See Stern, supra note 51, at A3.
86. See Stern, supra note 51, at A3.
But, the new settlement _tripled_ the amount of attorneys' fees. They would now receive $26,075,000.87

_F. Attempts to Stop the Louisiana Settlement_

To a number of objectors—at least those whose attorneys did not benefit from the new settlement’s fee award—it appeared that General Motors and class counsel were forum shopping.88 General Motors had steered the action to the Third Circuit by removing to the federal courts most of the actions filed in state courts around the country, via a transfer and consolidation order from the MDL.89 But when the Third Circuit would not approve the settlement, General Motors and class counsel attempted to thwart its order by simply making a few arguably insubstantial changes to the settlement and taking it to a different court which would accept it. Relying on the Supreme Court’s decision in _Matsushita_, they could then argue that the settlement had to be given full faith and credit in all courts of the land—including the Third Circuit.90

The objectors responded to this apparent forum shopping by launching a two-fronted attack on the new settlement. First, they filed written objections to the settlement with the Louisiana state court, along with motions to intervene in the action, and eventually appeared at a fairness hearing on November 6, 1996, in Plaquemine, Louisiana.91 Second, they filed an emergency application with the Third Circuit Court of Appeals, seeking an order staying the Louisiana proceedings.92 Specifically, objectors argued that the Louisiana court was attempting to relitigate a previous federal court judgment and was seeking to frustrate the court of appeals’ prior order rejecting the settlement.93 They argued that the All Writs Act94 authorizes a federal court to enjoin state court proceedings in such circumstances.95

89. See _In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig._, 55 F.3d 768, 779 (3d Cir. 1995).
92. See id.
93. See id.
95. See _In re “Agent Orange” Prods. Liab. Litig._, 996 F.2d 1425, 1431 (2d Cir. 1993); _In re Baldwin-United Corp._, 770 F.2d 328, 335 (2d Cir. 1985).
The Third Circuit transferred the emergency applications to the
district court for its consideration.96 District Court Judge William H.
Yohn, Jr., set the applications for hearing on November 20, 1996.97
However, the fairness hearing in Louisiana was set for November 6,
1996.98 It was therefore possible that the Louisiana court could issue
a decision approving the settlement on a nationwide basis before
Judge Yohn had an opportunity to stay the Louisiana proceedings. If
this happened, General Motors and class counsel could argue that the
Louisiana court’s judgment was entitled to full faith and credit in the
Third Circuit, foreclosing any proceedings there.

Informed of these concerns, Judge Yohn agreed to telephone the
Louisiana court and ask it to refrain from issuing any decision on the
settlement until the applications were heard on November 20.99 The
court informed the objectors that the Louisiana court agreed to this
request.100 Still, Judge Yohn had not said when he would issue his
decision on the applications, so the objectors still worried that a
Louisiana judgment could issue before Judge Yohn made his deci-
sion.

In a last ditch attempt to avoid this result and to ensure that the
courts of the Third Circuit had a meaningful opportunity to review
the settlement proceedings, some of the objectors employed a viable,
but seldom used, procedural maneuver. Federal decisional authority
has held that the All Writs Act, in addition to allowing orders enjoin-
ing state court proceedings, also allowed removal of state court pro-
ceedings to the federal court, even where removal would not be al-
lowed under the federal removal statutes.101

Consequently, on November 19, 1996, the objectors filed a notice
of removal of the Louisiana state court proceedings in the closest
U.S. district court, the Middle District of Louisiana (Middle Dis-
trict).102 That same day, the objectors filed an emergency application
with the MDL—it’s jurisdiction only being over federal court ac-
tions—seeking an order transferring the action from the district court

96. See In re Pickup Truck Fuel Tank Prods. Liab. Litig., 1996 WL 683785, at
*3.
97. See id.
98. See id.
99. See id.
100. See id.
101. See, e.g., In re “Agent Orange” Prods. Liab. Litig., 996 F.2d at 1431; Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 863, 865 (2d Cir. 1988).
102. See Declaration of Robert B. Gerard, Esq., at 4, White v. General Motors
in Louisiana back to Judge Yohn of the District Court for the Eastern District of Pennsylvania.\textsuperscript{103}

\textbf{G. Court Approves the Settlement}

The objectors' efforts soon proved futile. On November 25, 1996, District Court Judge Yohn issued an order denying the applications for an emergency stay.\textsuperscript{104} Judge Yohn held that neither the All Writs Act\textsuperscript{105} nor the Anti-Injunction Act\textsuperscript{106} empowered him to stay the Louisiana proceedings.\textsuperscript{107} Then, on December 2, 1996, the United States District Court for the Middle District of Louisiana granted a motion to remand the previously removed proceedings back to the Louisiana state court. The district court held that the only proper court to exercise jurisdiction under the All Writs Act was the United States District Court for the Eastern District of Pennsylvania, and that court had now declined to exercise jurisdiction in its November 25 order denying the applications.\textsuperscript{108}

Finally, on December 19, 1996, Judge Jack T. Marionneaux of the Louisiana state court issued a decision approving the General Motors settlement.\textsuperscript{109} Judge Marionneaux held that a settlement class could be certified without having to satisfy all requirements of Rule 23(a) and (b) and held that the settlement was fair and reasonable.\textsuperscript{110}

\textbf{H. The Aftermath}

An appeal has been filed with the Third Circuit seeking review of the district court's decision denying the applications to stay the Louisiana state court proceedings, or at least enjoining the MDL

\textsuperscript{105} 28 U.S.C. § 1651(a) (1994).
\textsuperscript{106} 28 U.S.C. § 2283 (1996) (stating that a United States court may not grant an injunction of state court proceedings except: (1) as expressly authorized by Congress; or (2) where necessary to aid its jurisdiction; or (3) to protect or effectuate the court's judgment).
\textsuperscript{108} See Ruling on Motions to Strike or for Remand at 4, White v. General Motors Corp., No. 96-7490-A.
\textsuperscript{110} See id.
litigants and their attorneys from participating in the benefits of the Louisiana proceedings. The Third Circuit has heard oral arguments and should issue a decision shortly. An appeal has also been filed with the Louisiana State Court of Appeal, seeking reversal of Judge Marionneaux's order approving the settlement. That appeal is still in the briefing stage.

Barring reversal by one of the courts of appeal, General Motors and class counsel will have successfully accomplished a remarkable *tour de force*. Despite a federal court of appeals’ order rejecting the settlement, General Motors will have limited its liability to class members to the $1000 coupons, and class counsel will receive $26,075,000 in fees. On the other hand, the class, at the time of the Louisiana Fairness Hearing, would get no guaranteed cash payment, and millions of pickup trucks with a potentially life-threatening defect would remain on the road without any attempt at repair.

The objectors to the Louisiana settlement are left with nothing. Despite the significant expenses inherent in attending hearings in Louisiana and Philadelphia, in filing applications and memoranda in the federal and state courts, and in filing the two appeals, the objectors have nothing to show for their efforts—other than their $1000 coupons.

Indeed, counsel for the objectors who filed the notice of removal faced a motion by class counsel purportedly seeking *millions* of dollars in sanctions for the “wrongful removal.” This motion was not filed in the district court having jurisdiction over the removal proceedings but was filed, after the federal court’s remand order, in the state court, where class counsel apparently believed that it had a more sympathetic judge. After a number of hearings and a brief turf war between the federal court and the state court when the federal court learned of the motion for sanctions, class counsel withdrew their motion. However, objectors’ counsel, who receive no payment


in the case, and who were suddenly faced with a million-dollar sanction motion, certainly received a very effective and chilling message about the potential risks of interfering with a high-stakes settlement.

VI. THE ROLE OF THE PUBLIC INTEREST LAW FIRM AND ITS PARTICIPATION IN THE GENERAL MOTORS TRUCK FUEL TANK LITIGATION

The General Motors litigation demonstrated the role of the public interest group as objector. Public Citizen, a group founded by Ralph Nader, was one of the original objectors to the settlement in Philadelphia. However, it later became a supporter of the settlement in the Louisiana proceedings. The chronicle of the evolution of Public Citizen from objector to supporter is, interestingly enough, still available on Public Citizen's Internet web page, entitled "Public Citizen's Involvement in Class Action Settlements." The following quoted excerpt is from that web page:

GM TRUCK CASE (PHILADELPHIA).


B. CASE DESCRIPTION: In settlement of a nationwide class action to obtain repair damages or retrofit of the 5-6 million side-saddle fuel tank GM Trucks, class members were to receive a $1,000 coupon, good for 15 months, toward the purchase of a new GM Truck or minivan. The class included truck owners in all states but Texas. Additionally, class members could transfer the coupon to third parties, but then the coupon was worth only $500 and could not be used in conjunction with the ubiquitous GM rebates and credit deals. There were other restrictions on the $500 coupon which made it virtually worthless. The settling parties' expert himself conceded that 54% of the class members would get nothing at all from the settlement; that expert, however, made statements [that were] demonstrably wrong and our experts (Jack Gillis, Dr. Paul Bloom of Univ. of N. Carolina, and Clarence Ditlow) had the better of the arguments. We believed that no more than 10% of the class members would get any value.
The district court awarded $9.5 million in fees and $500,000 in expenses.

C. PUBLIC CITIZEN INVOLVEMENT: We were the principal objectors—representing ourselves, the Center for Auto Safety, and numerous class members—in the district court (although there were about one-half dozen other objector groups, including various governments (e.g., New York, New York City, Pennsylvania)). We especially took the lead in providing evidence concerning retrofit options and the valuelessness of the settlement to the vast majority of the class.

We were never even served with the fee application, as class counsel decided only to serve GM! There was no hearing on fees and we were, thus, shocked when the court approved the mammoth request. In addition to this problem (and the size of the fee award), there are other peculiarities with the fees that should have been addressed. One example will suffice: After the settlement was struck, several plaintiffs' attorneys who had similar pending state court class actions had their cases magically transferred to the federal action, and they joined in the fee application. They apparently did nothing to improve the settlement or advance their clients' cause. Why did the settling parties do this? . . .

D. STATUS: This settlement was approved by the district court in Philadelphia and was argued on August 11, 1994 before a Third Circuit panel which asked questions for over four hours. A smashing victory was handed down on April 17, 1995. The court rejected the settling parties' claims about the value of the settlement (using many of the arguments we had advanced), questioned a settlement that did nothing to fix the trucks (again using our evidence about retrofit), and severely questioned the fee arrangements. The court also, for more than 60 pages, tightened the standards applicable to settlement class actions. GM (but not class counsel) petitioned the Supreme Court to review the Third Circuit's decision. We drafted the opposition to GM's Supreme Court brief (in which the other non-governmental objectors
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joined). The petition was denied on October 3, 1995. After that, we continued our efforts to participate in the [ongoing litigation] and are working toward a favorable resolution. See discussion of GM Truck Case (Louisiana), . . . below.

E. PCLG CONTACTS: Brian Wolfman, David Vladeck.

GM TRUCK CASE (TEXAS)


B. CASE DESCRIPTION: This is the same case as the Philadelphia GM settlement, except the settlement was to apply only to truck owners in Texas. Thus, the settlement was identical to the one struck in Philadelphia for the other 49 states. One might ask: why did this settlement exist? The only reason we could come up with that made any sense was that the two law firms in the Texas case simply did not want to share the mere $10 million fee in the Philadelphia case. Why did GM agree to this when it could have wrapped up the whole nation, including Texas, in Philadelphia. The only plausible explanation that we can think of is that, by settling separately with the folks in Texas, GM was able to buy off potential opposition in the nationwide case. The two Texas law firms asked for $9 million in fees and about $500,000 in expenses; in other words, almost as much as 25 law firms and dozens of lawyers asked for in the Philadelphia action. Astoundingly, GM did not oppose this extraordinary fee request, and the class counsel did not notify the class of the amount (or even an approximate amount) of the fee that they were seeking.

C. PUBLIC CITIZEN INVOLVEMENT: When we became aware of the GM case in Philadelphia, we were working on very short notice and, with the Center for Auto Safety, wrote objections and developed some nice expert affidavits. Rather than formally enter the Texas case, we simply shipped our brief and evidence down to a consumer lawyer
in Texas who used much of our stuff.

We lost in the trial court, won in a wonderful opinion in the Texas Court of Appeals, and the settling parties' discretionary appeal to the Texas Supreme Court was accepted after being urged to do so in amicus briefs by both the Texas Trial Lawyers' Association and the Texas Association of Defense Counsel. During the merits briefing, we wrote an amicus brief for Public Citizen, Consumers Union, and Consumer Federation of America (we actually did two substantive sections on the settlement and fees, and Steve Baughman of Baron & Budd did an introductory section on class action jurisprudence, which we helped to edit). Our brief was referred to repeatedly in the Texas Supreme Court argument (which we have on tape).

The Texas Supreme Court affirmed and remanded. The Court first held that the Court of Appeals should not have held the settlement to be unfair on the ground that it was a marketing bonanza for GM. The Court believed that the plaintiffs may have gotten nothing in the case if it had gone to trial. The Supreme Court scrapped the settlement nonetheless, holding that counsel has a responsibility to notify the class members of the amount sought in fees, because the clients have an important interest in knowing how the settlement is divided between the relief and fee components. The settlement was thrown out on this ground alone. The Court went on to hold that procedures different from those used by the trial court initially had to be used on remand. First, the Court stated that the class can only be certified for settlement purposes if it can be certified for trial, adopting the Third Circuit's General Motors holding. Second, the settling parties must sustain their burden of proving the fairness of the settlement through live testimony, not simply affidavits. Finally, the Court criticized the fees in the case. It questioned the amount of the fee—which it noted amounted to $1,500 per hour—and demanded an explanation as to why a separate settlement and fee was necessary in addition to the nationwide settlement in Philadelphia.

D. Status: This case was subsumed by the Louisiana GM Truck class action, . . . discussed below.
E. PCLG CONTACTS: Brian Wolfman, David Vladeck.

GM TRUCK CASE (LOUISIANA)


B. CASE DESCRIPTION: This is a nationwide class action involving the same GM truck defects as in the Philadelphia and Texas class actions, described fully ... above.

C. PUBLIC CITIZEN INVOLVEMENT: After the Third Circuit rejected the Philadelphia GM settlement ... and talks to resolve the federal MDL case broke down, plaintiffs’ counsel turned to a dormant Louisiana action, led by attorney Mike Crow of New Orleans. We met with Crow and other plaintiffs’ lawyers, at their request, to express our concerns. A settlement was crafted which, although not entirely to our liking, we decided to support.

On the safety side, the settlement provides $4 million to study vehicle fuel system safety funded by a trustee, wholly independent of GM. Our client, the Center for Auto Safety, was concerned that this fund would provide little [value to] the class members because, under the terms of the settlement, the money could not be used to study vehicles more than five years old (including, therefore, the trucks at issue here). Therefore, the Center, with our assistance, negotiated a companion settlement with class counsel in which $1 million of counsel’s attorney’s fees will fund safety studies intended to lead to develop a fix for to [sic] GM trucks.

In terms of economic value, the settlement provides coupons of up to $1,000 toward the purchase of almost any new GM vehicle. (In the prior settlements, the coupons could only be used to buy trucks and vans.) The principal difference from the Philadelphia and Texas settlements is that steps have been taken to provide a secondary market in the coupons. In fact, two companies have shown considerable interest in participating in the notice efforts and helping to create that market. The certificate is good for 33
months (more than twice as long as the certificate in the prior settlements). During the first 15 months the coupon is transferable through a process that requires endorsement (but not the naming of a specific transferee in advance nor notarization). During the final 18 months the coupon's value is discounted but it becomes a bearer coupon which could easily be sold on a secondary market.

As to attorney's fees, counsel for plaintiffs in all the prior actions and the Louisiana action sought approximately $24 million. We worked out a separate written agreement with class counsel to tie the payment of fees to the class recovery. Thus, as soon as the fee is paid, class counsel will deposit $10 million of that fee in escrow, which can only be withdrawn in full if the plaintiffs can prove that 100,000 class members have transferred their coupons on the secondary market for at least $100 each.

Public Citizen also moved separately for attorney's fees of approximately $215,000 for our work in the Philadelphia and Louisiana cases.

The trial court approved the settlement and the fee request on December 20, 1996. The trial judge asked at that time for briefs from objectors' attorneys on how a $1.2 million fund for payment of objectors' fees should be allocated. The court has yet to rule on that issue.

D. STATUS: Several objectors appealed the settlement approval and a briefing schedule was set in May 1997. No argument date has been set.

E. PCLG CONTACTS: Brian Wolfman, David Vladeck.115

The contrast between Public Citizen's descriptions of the settlements in Philadelphia and Louisiana is striking, and many things are left unexplained. For example:

1. **Real value of the coupon to class members:** Is it still Public Citizen's position that the $1000 coupon will not provide any real relief to ninety percent of the class?

2. Class counsel's attorneys' fees: Public Citizen described the $9.5 million fee award in Philadelphia as a "Mammoth Request." Attorneys' fees in Louisiana now requested and awarded are in excess of $24 million. What is Public Citizen's position now? Notably they are requesting $250,000 in fees for their participation in this coupon settlement.

3. Retrofit of alleged dangerous fuel tanks: Although Public Citizen took the lead in providing evidence concerning retrofit options, the Louisiana settlement does not provide for any retrofit to class members' trucks. However, there is a $4 million fund included within this settlement to study fuel tank safety issues involving vehicles other than those that are the subject of this litigation. Because of the obvious lack of benefit to class members in allowing the use of $4 million of their settlement fund for research on fuel tank safety issues in vehicles not involved in their case, Public Citizen assisted in negotiating a $1 million donation from class counsel's fees to fund a study on fuel tank safety for class members' General Motors Trucks. One can only infer that a retrofit study involving only twenty-five percent of research funds from the post-coupon settlement is akin to the opening of a barn door with an absentee horse. It is difficult to comprehend how Public Citizen can tacitly approve the Louisiana coupon settlement and an award in excess of $24 million in attorneys' fees in light of its prior and successful objections to the Philadelphia and Texas General Motors cases. Certainly, this change of position demonstrates the complexities inherent in the role of the objector.

VII. CONCLUSION: NEED FOR REFORM

As noted above, the final chapter in the General Motors litigation has not been written. An opportunity still exists for the Third Circuit to curtail the use of class action settlement procedures in this case, settlement procedures that on their face create an appearance of impropriety. In the meantime, the authors have some suggestions for reforming this area of the law.

First, the courts have statutory authority over the approval of class action settlements, and the courts should more diligently exercise that authority. A court should act "as a fiduciary who must serve

as a guardian of the rights of absent class members."117 In particular, courts must carefully scrutinize the adequacy and fidelity of the class representatives. As Justice Ginsberg observed, "in the class action setting, adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members."118

Second, attorneys' fee awards to class counsel must undergo closer scrutiny and should more closely reflect both the amount of work actually performed by the attorneys and the benefit to individual class members. Courts must recognize the temptation created by huge awards of attorneys' fees to class counsel. "When the class attorneys succeed in reaping 'a golden harvest of fees' in a case involving a relatively small recovery, the judicial system and the legal profession are disparaged."119

Third, the appointment of a regional class action Special Master or Referee upon each class action filing would help offset the inherent problems of the forum shopping reverse auction. The Special Master or Referee could monitor filings throughout the country, in both federal and state jurisdictions, and make appropriate recommendations, such as:

(1) consolidation of actions;
(2) implementation of an interview and application process for proposed class counsel (including a fee proposal); and
(3) monitoring of objectors to proposed settlements to assure that any proposed payment to them by class counsel and the settling defendant is fair, based upon some tangible added value to class members.

Finally, the assignment of a qualified, independent individual to act as a guardian to protect the interests of the absent class member—much like the appointment of a guardian ad litem in a minor's action—would provide an important safeguard. It would restore a "true client" to a process which otherwise appears to be driven by class counsel's fees and class representative incentives.

Class action litigation serves a valuable and economical role in mass tort and claim cases. However, class actions are easily orchestrated to

supply favorable settlements to wealthy organizations, large fees to
clever and connected counsel, and, unfortunately, less than wholesale
justice to class members' claims. It is our opinion that with the ap-
propriate safeguards, the "client" can return to the table and ask the
appropriate question: "Why have your fees tripled to over $26 mil-
lion when all I still get is this lousy coupon?"