

## COMMENTARY ON *CLASS SETTLEMENTS UNDER ATTACK*

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In *Class Settlements Under Attack*, Professors Samuel Issacharoff and Richard Nagareda proffer “a cohesive framework for establishing the finality of class actions under the real-world conditions of settlement.”<sup>1</sup> Their framework addresses three key questions concerning class settlement review: Where should judicial review of the settlement take place? What due process concerns can be raised in the course of such a review? And what form should the challenge take?<sup>2</sup> Their insightful article performs a great service by setting forth so comprehensively and thoughtfully the range of questions implicated by the question of finality in the context of class settlements, and I have learned a great deal from their treatment of these issues. The space constraints of this Commentary, though, counsel me to compress my praise for the article’s many strengths and to focus my remarks on some remaining questions that occur to me.

Like the supporters of the Class Action Fairness Act (CAFA), Issacharoff and Nagareda ground their proposal in the concept of the “anomalous court.”<sup>3</sup> For CAFA supporters, the concern was the “anomalous” state courts—also termed “judicial hellholes”—that were willing improperly to certify a nationwide class action. CAFA addresses this concern by “mak[ing] it much easier for defendants to remove to federal court proposed nationwide class actions involving high-stakes, state law claims originally filed in state court.”<sup>4</sup> But, as Professor Tobias Wolff has pointed out, by failing to provide for removal by class members, CAFA leaves such members at the mercy of collusive class settlements in anomalous state courts.<sup>5</sup> Collateral at-

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<sup>1</sup> Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1651 (2008).

<sup>2</sup> See *id.* at 1655 (“[P]roper preclusion in the class action setting flows from proper coordination of what we term the ‘where,’ ‘what,’ and ‘how’ of class settlement review.”).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1663.

<sup>5</sup> See Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2039 (2008) (noting that CAFA “offers no

tacks provide one means of addressing the concern about collusive class settlements. Issacharoff and Nagareda, however, argue that reliance on collateral review as a means of policing collusive class settlements recreates the problem of the “anomalous court” in a different posture, because some courts may be willing to take anomalously hostile views of the validity of a challenged class settlement.<sup>6</sup>

Recalling the debate over the strength and implications of the evidence concerning anomalously certification-friendly state courts,<sup>7</sup> I am prompted to wonder how much evidence currently exists concerning the existence of anomalously settlement-hostile state courts. The article’s focus on the need to disempower anomalous *state* courts would be curious unless there were evidence that state courts are more likely than federal courts to render anomalous decisions on collateral attacks of class action settlements. It is intriguing in this regard that, with respect to intraclass conflicts, the case the authors single out for criticism is *Stephenson v. Dow Chemical Co.*—a decision rendered not by a state court but by the U.S. Court of Appeals for the Second Circuit.<sup>8</sup>

It is possible, in any event, that not much rides on the authors’ focus on the possibility of anomalous *state* court (as opposed to *federal* court) collateral-attack decisions, because at this juncture in the article the authors do not appear to argue for a significant change in existing law. As they note, when the rendering forum is a federal court, that court can enforce its judgment through the use of antisuit injunctions to bar collateral challenges. Thus, as they put it, “the existing law of judicial federalism disempowers the ability of an anomalous

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mechanism by which absent class plaintiffs can act independently of class counsel to move their lawsuits into federal court”).

<sup>6</sup> See Issacharoff & Nagareda, *supra* note 1, at 1670 (“The problem . . . is that the search for an anomalous forum might allow collateral attacks on class settlement to bust not only bad class judgments, but also good ones.”).

<sup>7</sup> Compare, e.g., Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1516 (2005) (“[T]here is doubt that the data supports [CAFA’s] wholesale jurisdictional shift.”), and David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1294 (2007) (suggesting that “[s]tates’ responses to magnet jurisdictions in their midst” indicate the “questionable” nature of assertions concerning the “need for a federal solution to class action abuse at the state level”), with, e.g., John H. Beisner & Jessica Davidson Miller, *They’re Making a Federal Case Out of It . . . in State Court*, 25 HARV. J.L. & PUB. POL’Y 143, 204 (2001) (“By assembling another substantial body of data confirming that certain state courts have become ‘magnets’ for multi-state and nationwide class actions, the Manhattan Institute research further demonstrates the need for federal legislation to address current anomalies in the federal diversity jurisdiction statute.”).

<sup>8</sup> See Issacharoff & Nagareda, *supra* note 1, at 1687-89 (citing *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001)).

state court to authorize a collateral attack on a federal court class judgment.”<sup>9</sup>

Thus, in my view, the authors’ more momentous prescription concerns the content, rather than the venue, of collateral review. They would cabin the scope of collateral review, providing such review only for “structural problems that target either the power of the rendering court to act or the integrity of the judicial process for objection before that court.”<sup>10</sup> The authors assert that “performance defects” (e.g., flaws in class counsel’s performance that lead to inadequate settlement terms for class members) ordinarily should not be cognizable on collateral review. So long as there was “a full and fair opportunity to raise” such defects in the original class proceeding, they argue, collateral review of performance defects should be unavailable.<sup>11</sup>

The authors’ reliance on a distinction between structural defects (such as intraclass conflicts or lawyer conflicts of interest) and performance defects seems to me to overlook an epistemic problem. It is not always easy to draw the line between structural conflicts that matter and those that do not. Courts can and do examine the terms of a class settlement for clues concerning the nature and significance of any asserted structural conflicts.<sup>12</sup>

Interestingly, the authors themselves suggest that courts can rely on the settlement’s terms to explain away a structural conflict. As they assert, “the particular content of the settlement chosen, when it is known, properly informs the inquiry into whether an asserted difference within the class should matter for structural purposes.”<sup>13</sup> The authors do not state explicitly whether their framework would permit the use of settlement terms as evidence to *establish* (rather than *rebut*) assertions of structural conflict.<sup>14</sup> If the authors mean to exclude the

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<sup>9</sup> Issacharoff & Nagareda, *supra* note 1, at 1670.

<sup>10</sup> *Id.* at 1713.

<sup>11</sup> *Id.* at 1719.

<sup>12</sup> For instance, the Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627 (1997), focused on “the terms of the settlement [and] the structure of the negotiations” when reviewing the question of intraclass conflicts. Explaining its agreement with the Third Circuit’s finding on the intraclass conflict issue, the Court noted: “[T]he terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants’ liability. For example, . . . the settlement includes no adjustment for inflation; only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no compensation.” *Id.*

<sup>13</sup> Issacharoff & Nagareda, *supra* note 1, at 1695.

<sup>14</sup> The authors draw “two . . . implications” from their view of intraclass conflicts. One is that “distinctions drawn by the class settlement . . . cannot render the class representation inadequate where no structural conflict existed at the time of the class

use of settlement terms as evidence of structural conflict, their view that settlement terms can “dissipate structural conflicts within the class”<sup>15</sup> might seem to function as a one-way ratchet. If the authors would concede that evidence concerning settlement terms can help establish (as well as mitigate) structural conflict, such a concession would underscore the difficulty of drawing a bright line between performance defects and structural defects.

The authors’ discussion of settlement terms that might dissipate structural conflicts is nonetheless intriguing. In light of the authors’ emphasis on the value of finality in class litigation, it is interesting to ask whether one could devise settlement features that could obviate a class structure problem without diminishing the judgment’s finality. Back-end opt-out rights, as the authors recognize, would not meet such a test.<sup>16</sup> The other example mentioned by the authors—conditioning attorneys’ fees on “the actual operation of the settlement regime over time”<sup>17</sup>—seems more promising in this regard, in the sense that it would not impair finality but might align counsel’s incentives with those of the class members, based on the ultimate results under the settlement. A regime that restricts judicial review of class settlements (as the authors advocate) should give particular attention to other ways of policing the quality of class settlements, and—as the authors note—tying attorney compensation more tightly to attorney performance could be a step in that direction.

More generally, the authors model their suggested approach to collateral review of structural defects on the doctrine of issue preclusion. They argue that “the existence of a determination by the rendering court” on the relevant structural-defect issue “properly may trigger preclusion” in the context of a collateral challenge.<sup>18</sup> They carefully note that their proposal departs from traditional issue-preclusion doctrine by rejecting “a conventional conception of ‘party’ status, whereby the plaintiff in a collateral attack can be bound only by the rejection of a structural objection that she herself has raised in the rendering court.”<sup>19</sup> What matters, they contend, is not who raised the

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judgment.” The second is that “design features of the class settlement might . . . dissipate structural conflicts within the class.” *Id.* at 1685.

<sup>15</sup> *See id.*

<sup>16</sup> *See id.* at 1694 (“It is true, of course, that settlements that preserve a great deal of litigant autonomy may not actually yield peace.”).

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

<sup>18</sup> *Id.* at 1716.

<sup>19</sup> *Id.*

defect, but what the rendering court did with the issue: the rendering court must “articulate the alleged [structural] defect and explain why it is not disabling.”<sup>20</sup> As others have noted,<sup>21</sup> it seems odd to apply issue preclusion to the very determination of whether the class member should be bound by the judgment.

But beyond that, it seems important to ask precisely how the authors’ proposed standard would work. The authors suggest that the standard would serve an information-forcing function, “effectively creating an incentive for settling counsel to build a body of evidence to elicit and support the rendering court’s determination of structural defects with the potential to form the grounds for collateral attack.”<sup>22</sup> The authors do not specify how much evidence settling counsel must provide in order to get the benefit of the proposed preclusion rule. What if settling counsel provide some *but not all* of the available evidence on the relevant structural-conflict issue, and what if the collateral challenger seeks to adduce a much stronger body of evidence on the same structural-conflict issue? Would a collateral challenge be allowed in that situation? If not, then the authors’ proposal might merely create an incentive for settling counsel to submit a minimum amount of evidence on possible structural conflicts—just enough to form the basis for a preclusion argument, but not enough to inform fully the rendering court’s determination of the issue.

The authors’ contribution of this article greatly enriched the participants’ discussion of the Symposium topic—the Class Action Fairness Act—by providing a deeply textured account of class settlement review in the post-CAFA world. But it seems useful to ask to what extent CAFA itself supports the authors’ proposals concerning preclusion in the context of class settlements. Though the authors periodically suggest that their preclusion proposals address CAFA’s policy concerns and apply the statute’s underlying purposes,<sup>23</sup> they wisely

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<sup>20</sup> *Id.* at 1717.

<sup>21</sup> As an example, *see id.* at 1716 n.208, Professors Issacharoff and Nagareda cite the *Epstein II* court’s reasoning: “The individual objectors who voluntarily appeared at the fairness hearing were not authorized by the absentees to represent their interests, nor were they certified by the state to do so. Their appearance at the hearing did not bind anyone but themselves to an adjudication of adequacy of representation.” *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1242 (9th Cir. 1997), *superseded by* 179 F.3d 641 (9th Cir. 1999).

<sup>22</sup> Issacharoff & Nagareda, *supra* note 1, at 1718.

<sup>23</sup> *See, e.g., id.* at 1651-52 (“[T]he policy implications of collateral challenge raise many of the same concerns as animated [CAFA].”); *id.* at 1655 (asserting that both CAFA and discussions of finality of class settlements “focus, in substantial part, on how

stop short of claiming strongly that CAFA itself supports their prescriptions. As Professor Lonny Hoffman suggested during the Symposium discussion, one should be wary of reading CAFA to support policy initiatives that the statute itself does not reach.

As the authors note, CAFA “devotes little discussion to th[e] subject” of class settlement review.<sup>24</sup> But of the scant evidence that can be drawn from CAFA, at least as much would seem to weigh against the authors’ preclusion proposals as in favor of them. CAFA purports to show solicitude not just for the problem of the anomalous forum, but also for the quality of class settlement terms. The statutory findings express concerns about coupon settlements, exorbitant attorneys’ fees, and inequities among plaintiffs.<sup>25</sup> Section 1712 addresses coupon settlements by imposing strictures on attorneys’ fees and setting requirements for judicial scrutiny.<sup>26</sup> Section 1713 requires special findings before a court approves a settlement that would result in a net loss to a class member.<sup>27</sup> Section 1714 imposes restraints on settlements that discriminate among class members based on geography.<sup>28</sup> And, notably, to enforce section 1715’s requirements concerning notice to federal and state officials, section 1715(e) specifically authorizes collateral challenges in the event that the required notice is not provided.<sup>29</sup> There is no reason to think that section 1715(e)’s collateral-challenge provision is directed only to cases of structural conflict; and indeed, it may be most useful in cases where the defects are performance related, since those are among the cases in which one might expect that notice to federal and state officials could produce salutary objections during the settlement-approval process.

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to address the problem of the anomalous court in a world of national markets”); *id.* at 1659 (advocating a framework for collateral review “that simultaneously accounts for the differing meanings of inadequate representation, the fiduciary role of the court on direct review, and the provision of a federal forum in CAFA for class actions of national significance”); *id.* at 1659 (contending that “greater preclusion should flow from use of the congressionally preferred forum”); *id.* at 1722 (“[O]nce Congress has interceded to determine the forum in which cases of national import should be adjudicated, doctrines that permit any court to revisit class judgments at any time . . . lose whatever core justification they may once have enjoyed.”).

<sup>24</sup> *Id.* at 1660.

<sup>25</sup> 28 U.S.C. § 1711 note (Supp. V 2005).

<sup>26</sup> *Id.* § 1712.

<sup>27</sup> *Id.* § 1713.

<sup>28</sup> *Id.* § 1714.

<sup>29</sup> *Id.* § 1715.

Thus, CAFA itself does not, in the end, seem to lend strong support to the authors' vision concerning the scope of collateral review. If anything, by leaving class members vulnerable to the possibility of collusive state court settlements, CAFA may underscore the advisability of preserving a less constricted form of collateral review.<sup>30</sup>

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<sup>30</sup> It is possible that the availability of other protective mechanisms might help to allay this concern. *See, e.g.,* Wolff, *supra* note 5, at 2131 (arguing that if courts adopt his proposals "regarding antisuit injunctions, . . . then the occasions for entertaining collateral challenges will diminish").