

HARD-LOOK JUDICIAL REVIEW OF CLASS ACTION SETTLEMENTS

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I. INTRODUCTION

Class actions have longstanding roots in the American legal structure, yet they remain controversial and their effectiveness, fairness, and importance are frequently discussed and debated within the legal community. This article will examine the particular issues presented by Rule 23(e)'s requirement that the Court presiding over a class action approve only those proposed settlements that are "fair, reasonable, and adequate."¹ Courts evaluating Rule 23(e) have articulated a number of factors used in interpreting this "fair, reasonable, and adequate" requirement, and in recent years this list of factors seems to have changed. Some commentators have suggested that recent decisions have added to this list, indicating that courts are taking a harder look at proposed settlements. Because there has been relatively little scholarly discussion of the new "hard-look" decisions, this article will address and evaluate some of these recent opinions.

This article argues taking a harder look at settlements is appropriate in light of the policy rationales behind Rule 23 and the very real risk that lawyers will collude in coming to settlement terms, at the expense of injured class members. Part I of this article will outline the history and policy behind Rule 23, and 23(e) specifically, and will examine the "traditional" factors courts articulate in applying 23(e). Part II will examine recent decisions, *In re Dry Max Pampers Litigation*, and *In re NFL Players Concussion Injury Litigation*, that seem to take a more stringent approach to 23(e), and will look at what factors these courts applied. Part III will compare the traditional factors to the new factors articulated in Part II, and will argue that although legal commentators have referred to these factors as "additional" ones, the *Pampers* and *NFL* cases illustrate that hard-look courts are doing more than adding to the already lengthy list of criteria, they are honing in on fairness to unnamed class members, and are therefore wholly shifting the focus in settlement approval. It will argue that this shift is appropriate, as it is in line with the Advisory Committee's interests of protecting unnamed class members from inequitable settlements. Additionally, Part III will articulate a simplified standard which compromises between the traditional test and the hard-look test by baking the old factors into a few

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1. FED. R. CIV. P. 23(e)(2).

key, hard-look factors. Finally, Part IV will conclude by summarizing the above issues and advocating for the simplified standard.

A. History and Overview of Rule 23

The class action serves an important role in our legal system. It is a creature of equity, designed to give large groups of wronged individuals an avenue to collectively sue those responsible for their injuries.² Class action suits are “especially important when each claim is too small to justify the expense of a separate suit,” as the class action mechanism allows relief to be granted for meritorious claims that would otherwise go unfiled, and often puts an end to deceptive commercial practices that would otherwise continue unchecked.³

In early American jurisprudence, class actions were authorized in both state and federal courts.⁴ Justice Story is credited with setting the class action standard in the United States, a standard which was later adopted by the Supreme Court in *Smith v. Swormstedt*.⁵ Additionally, before the creation of Rule 23, states adopted class action mechanisms in their respective procedural codes.⁶ With the adoption of the Federal Rules, Federal Equity Rule 48 originally controlled class actions.⁷ Federal Equity Rule 48 was replaced in 1912 by Equity Rule 38.⁸

Class action provisions were entirely rewritten in 1966, with the adoption of a revamped and lengthened Rule 23.⁹ Rule 23’s 1966 rewriting has been referred to as the “‘big bang’ of modern class-action litigation.”¹⁰ According to some commentators, the new rule “provides significantly better guidance on the measures that may be taken by the court in managing a class action,” although many courts have found it confusing and have criticized it as creating more questions than it

2. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1751, Westlaw (database updated Sept. 2017) [hereinafter WRIGHT & MILLER].

3. *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014).

4. Class actions were originally “authorized in federal courts by the equity rules for suits involving members of a class so numerous that it was impracticable to join them all as parties.” WRIGHT & MILLER, *supra* note 2.

5. WRIGHT & MILLER, *supra* note 2, § 1751; *Smith v. Swormstedt*, 57 U.S. 228 (1853).

6. These early codes “provided that when the question in dispute involved the common or general interest of many persons or when the group was so numerous that it would be impracticable to bring them all before the court, representatives of the class might sue or defend for the benefit of all.” WRIGHT & MILLER, *supra* note 2, § 1751.

7. *Id.*

8. *Id.*

9. *Id.* § 1753.

10. Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 500 (2016).

answers.¹¹ Under the rule, class members certified in a (b)(1) or (b)(2) class are “mandatory” class members, and are bound by the judgement reached, without any option to “opt out” of the class prior to or during the litigation.¹² However, those members certified in a (b)(3) class action receive notice of the action and have the choice to opt out of the litigation, and are therefore not bound by the settlement after they have opted out.¹³

B. The Current Rule 23(e)

The class action mechanism in its present form is complex, and Rule 23 contains numerous subparts designed to guide judges in matters of class certification, categorizing the class, notifying potential class members, and settling the action, among others.¹⁴ Rule 23(e) controls the settlement, voluntary dismissal, or compromise of class actions.¹⁵ This section of the rule underwent a complete rewriting in 2003.¹⁶ Some of the changes 23(e) underwent substantially altered the substance of the rule, while others “merely clarified certain ambiguities.”¹⁷ For example, the rewritten rule made clear that court-approved settlement must occur “when certified class claims, issues or defenses are resolved, not if the settlement involves the individual claims of the putative representatives.”¹⁸ Additionally, it added a requirement that the court hold a hearing before approving a proposed settlement and the settlement must be “fair, reasonable, and adequate” in order for the court to approve it.¹⁹ The changes also added a requirement that the parties file a statement outlining the settlement.²⁰

Rule 23(e)(3) allows the court to refuse to approve a settlement “unless the agreement provides the class members a second opportunity to request exclusion when certification under Rule 23(b)(3) has occurred before the settlement terms are known.”²¹ Finally, Rule 23(e)(4) “confirms the right of class members to object to a proposed settlement and adds a new requirement of court review if the objector formally

11. WRIGHT & MILLER, *supra* note 2, § 1753.

12. FED. R. CIV. P. 23.

13. *Id.*

14. *Id.*

15. FED. R. CIV. P. 23(e).

16. WRIGHT & MILLER, *supra* note 2, § 1753.1.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

withdraws the objections at a later time.”²² Thus, 23(e) makes clear that the judge presiding over the action must take a hands-on approach to all aspects of the litigation, including the resolution and settlement of the case, an area which judges typically leave to the discretion of the parties.

C. Judicial Interpretation of 23(e)

As mentioned above, Rule 23(e) requires that before the court can approve a proposed settlement, it must find the settlement “fair, reasonable, and adequate.”²³ The rule, however, does not indicate what factors a court should use in determining fairness, reasonableness, or adequateness. Over the years, courts developed lengthy lists of factors. Although there is some variation from circuit to circuit, there are a number of “typical” factors that can be found in most circuit tests.²⁴ These include: (1) risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) likelihood of success on merits; (5) opinions of class counsel and class representatives; (6) reaction of absent class members; and (7) the public interest.²⁵

Commentators have suggested that several recent appellate decisions, in a number of circuits, have added new requirements to this list, as courts take a harder look at proposed settlements.²⁶ Judges looking at settlements “make clear that the standard of review is not a ticket to affirmance.”²⁷ This may be due in part to the fact that class action settlements provide fertile ground for objections both from professional and vocal objectors.²⁸ These objections are well-founded, as settlements

22. WRIGHT & MILLER, *supra* note 2, § 1753.1.

23. FED. R. CIV. P. 23(e).

24. *Poplar Creek Dev. Co. v. Chesapeake Appalachia*, 636 F.3d 235, 245 (6th Cir. 2011). Although several cases mention what factors a court should consider in approving a settlement, the seven final factors used by *Poplar Creek* come from *UAW v. GMC*, 497 F.3d 615, 615 (6th Cir. 2007). *UAW*, in turn, cites several cases, all of which lay out a few of the traditional factors. Thus, *UAW* appears to be the first case to lay out all seven in one decision.

25. *See, e.g., id.* at 244. *Poplar* is used simply an example of the various multifactor tests almost all courts have used, until recently.

26. Douglas C. Allen, James C. Martin & M. Patrick Yingling, *Appellate Scrutiny of Class Action Settlements*, FOR THE DEFENSE, Oct. 2015, at 66, 66.

27. *Id.* The cases examined this article (particularly *Pampers* and the Posner decision) are not the only ones taking a hard-look review to class action settlements, as cases across numerous circuits are buckling down on proposed settlements. *See generally* Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157 (9th Cir. 2013); Redman v. Radioshack Corp., 768 F.3d 622 (7th Cir. 2014); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33–34 (1st Cir. 2012).

28. “Professional Objectors are attorneys who, on behalf of nonnamed class members, file specious objections to class action settlements.” John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to do About Them?*, 39 FLA. ST. U. L. REV. 865, 865 (2012). They are widely criticized within the legal community, as many lawyers accuse objectors of filing frivolous

often give little genuine relief to injured class members.²⁹ Appellate courts are therefore “looking hard at the relief that the settlements actually provide to the putative class members, and they do not hesitate to reverse a settlement if the benefits to a class do not measure up” to the injury the class suffered.³⁰

Commentators evaluating these decisions view them as adding to the list of traditional 23(e) criteria. They articulate several hard-look appellate court factors, including “the arms-length nature of the bargain, the adequacy of the relief provided to the class in light of the risks posed by classwide trial, and any indications that self-interest, rather than the class’s interests, influenced the outcome of the negotiations.”³¹ In applying these new factors, appellate courts look particularly hard at three specific issues: “(1) the relief received by the class members; (2) the compensation of class counsel; and (3) any proposed *cy pres* distributions for residual funds.”³² The first two of these factors will be discussed further, however, the third factor, dealing with *cy pres* distributions, is beyond the scope of this article.

*D. Poplar Creek Development Co. v. Chesapeake Appalachia:
Traditional 23(e) Factors*

Poplar Creek Development Co. v. Chesapeake Appalachia, a 2011 case decided in the Sixth Circuit, clearly articulates the seven factors courts typically apply when evaluating proposed settlements under Rule

objections to extract a side payoff from plaintiffs’ counsel, who want to avoid the added expense and delay that objections and appeals add to the suit. *Id.* Class counsel therefore have strong incentive to pay them to withdraw their appeal, avoiding the cost of delay. Although vilified by the legal community, professional objectors can serve an important function in the class action setting. As mentioned elsewhere in this article, plaintiffs’ attorneys often want to settle to receive significant payouts by defendant, and defendants care only about their total liability, not how the amount is split between class members and class counsel. Thus, with both sides advocating for a settlement that gives class members little relief and class counsel large payouts, professional objectors can play an important role in filing legitimate objections to inadequate settlements.

29. Allen, Martin & Yingling, *supra* note 26, at 66.

30. *Id.*

31. *Id.* at 67.

32. *Id.* at 67. Often, a settlement fund will be established by the defendant for the purpose of distributing agreed-upon funds to plaintiff class members. Kathryn Harrigan Christian, D. Matthew Allen & Jaret J. Fuente, *When the Cup Runneth Over: Cy Pres Distributions in Class Action Settlements*, BLOOMBERG BNA (Mar. 11, 2013), <http://www.bna.com/cy-pres-distributions-in-class-action-settlements>. *Cy pres* distributions refer to the distributions made from the funds leftover after the distribution of funds to all plaintiffs. *Id.* They are supposed to be made for the indirect benefit of the class as the “next best use” of class funds. *Id.* They can provide this “indirect” benefit in a number of ways. *Id.* For example, the funds can go towards future price reductions (if what the class sued over was a product), or can be distributed to charitable organizations that provide services to members of the class. *Id.*

23(e).³³ The case examined the meaning of the phrase “wholesale market value” of gas “at the well” in the royalty clause of a contract.³⁴

The case was a consolidation of two related cases.³⁵ Both arose out of a dispute over the rights of lessees and lessors in oil contracts in Kentucky, and resolutions to both revolved around determining whether Kentucky law allowed lessees in a gas contract to subtract post-production gas treatment costs from royalty payments.³⁶ In the first of the two consolidated actions, the “Poplar Creek” action, Poplar filed a class action suit, claiming the defendant, Chesapeake Appalachia LLC, was liable to lessors in Kentucky whom it leased gas rights from.³⁷ Poplar alleged Chesapeake improperly deducted gas treatment costs, the costs needed to make the gas marketable, from royalty payments.³⁸ The District Court granted judgment on the pleadings in favor of Chesapeake, and the Court of Appeals affirmed.³⁹

In the “Thacker action,” plaintiffs Thacker and Rowe sued defendant oil companies (Chesapeake, NiSource, Inc. and Columbia Energy Group) on behalf of a class of Kentucky landowner-lessors who had natural gas leases with the defendants.⁴⁰ In the second action, the District Court approved a settlement, from which a group of “objectors” appealed.⁴¹ The Court of Appeals for the Sixth Circuit affirmed the proposed settlement.⁴²

In affirming the settlement, the Court examined what factors must be considered in evaluating whether a settlement is “fair, reasonable, and adequate.” It articulated the seven factors courts in the Sixth circuit must examine: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.⁴³ The Court also noted that the “most important of the factors to be considered in reviewing a settlement is the probability of success on the merits.”⁴⁴ The Court found this to be true because the likelihood of success on the

33. Poplar Creek Dev. Co. v. Chesapeake Appalachia, 636 F.3d 235 (6th Cir. 2011).

34. *Id.* at 237–38.

35. *Id.* at 237.

36. *Id.* at 238.

37. *Id.*

38. *Id.*

39. Poplar Creek Dev. Co. v. Chesapeake Appalachia, 636 F.3d 235, 238 (6th Cir. 2011).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 244.

44. *Id.* at 245.

merits provides “a gauge from which the benefits of the settlement must be measured.”⁴⁵ If the class had no prospect of winning at trial, a small settlement, or even no relief at all, may be appropriate.

E. Policy Behind 23(e) and Heightened Scrutiny of Settlements: Eubank v. Pella Corp.

In evaluating the policy concerns behind both the 23(e) court-approval of settlement requirement and the added appellate factors, it is important to keep in mind the Advisory Committee’s overarching concern for fairness to the plaintiff class. The rule’s 2003 Advisory Committee notes clarify that this subsection of the rule was amended in 2003 in order to “strengthen the process of reviewing proposed class-action settlements.”⁴⁶ The notes further clarify that “court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.”⁴⁷ The Committee was, and is, concerned with ensuring the settlement is fair to those “silent” members of the class who had no say in the settlement terms.⁴⁸ The notes go on to say that in reviewing the settlement, the “court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate” and these findings “must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.”⁴⁹ With this comment, the Advisory Committee seems to suggest that courts should articulate and apply factors in evaluating settlements, and must describe “in sufficient detail” how exactly those factors bear on fairness, reasonableness, and adequateness.

A major criticism of class action settlements, which makes it an area ripe with controversy, is that there is a significant risk of collusion between parties’ lawyers in order to reach a settlement favorable to them, at the expense of plaintiff class members. Although class representatives in theory have control over their lawyers, in reality they rarely have any meaningful control over the lawyers or any other part of the litigation.⁵⁰ Class counsel are responsible for appointing named representatives, and are therefore unlikely to appoint those who will oppose their control of the litigation.⁵¹ Thus, counsel “ungoverned as a

45. *Poplar Creek Dev. Co. v. Chesapeake Appalachia*, 636 F.3d 235, 245 (6th Cir. 2011).

46. FED. R. CIV. P. 23(e) advisory committee’s note to 2003 amendment.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014).

51. *Id.*

practical matter by either the named plaintiffs or the other members of the class, have an opportunity to maximize their attorneys' fees" at the expense of recovery for the class.⁵² There is little in the way to stop them aside from the named representatives, as the defendant "cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class."⁵³ Additionally, the judge is at a disadvantage because she expects to preside over an adversarial proceeding in which the important facts of the litigation will come to her attention.⁵⁴ She will therefore have a harder time disapproving a settlement that counsel of both plaintiff and defendant advocate for. Thus, there are numerous incentives and little resistance for plaintiffs' attorneys who want to "sell out the class" by agreeing with defendant to reach an agreement giving meager relief to the class and huge attorney's fees to the counsel.⁵⁵

In many, if not most, instances, rigorous judicial oversight is necessary to protect the interests of the class. The harder-look appellate courts are "particularly sensitive to an appearance that the class members' interests have been compromised in favor of class counsel's receipt of an excessive fee award."⁵⁶ In particular, courts examine two key issues relating to attorney compensation and class action settlements: "(1) an excessive disparity between an attorneys' fees award and the relief that the class members will receive from a settlement, and (2) a fee provision that creates incentive for collusion."⁵⁷

Cases in which lawyers abuse their position as class council and collude with defendants, in order to secure enormous fee awards, prove these fears of many class action critics. One of the clearest examples of abuse by class counsel appears in *Eubank v. Pella Corp.*⁵⁸ In *Eubank*, plaintiff class sued the manufacturer of defective windows, Pella Corporation.⁵⁹ The class alleged the "ProLine Series" of windows had a design defect which allowed water to enter through the window's exterior aluminum cladding and damage both the window's wooden frame and the house itself.⁶⁰

52. *Id.* at 720. Additionally, Posner is not alone in criticizing some aspects of the class action. See John C. Coffee, Jr. & Susan P. Koniak, *Rule of Law: The Latest Class Action Scam*, WALL ST. J., Dec. 27, 1995, at 11.

53. *Eubank*, 753 F.3d at 720.

54. *Id.*

55. *Id.*

56. Allen, Martin & Yingling, *supra* note 26, at 69.

57. *Id.* at 68.

58. *Eubank*, 753 F.3d 718.

59. *Id.* at 721.

60. Additionally, two classes were certified by the District Court: one containing those who already replaced the defective windows, and one containing those who had not. *Id.*

Class counsel, Paul Weiss, was the son-in-law to the lead plaintiff, Leonard Saltzman.⁶¹ Moreover, his firm, and he individually, were embroiled in a number of lawsuits.⁶² The “dissolution and descent into open warfare” that consumed his firm, his “articulated financial needs,” and his relationship to the lead plaintiff, made Weiss and his firm inadequate as class counsel.⁶³ Thus, Weiss may have felt an acute financial need to settle the case both before his firm went under, and before he was barred from practicing law.⁶⁴

In addition to being inappropriate as class counsel, Weiss replaced the named representatives who opposed him with ones who agreed not to, and then negotiated a worthless settlement.⁶⁵ It gave lead counsel sole discretion to allocate attorney’s fees, and Weiss planned to allocate 73% (\$11 million) to his own firm.⁶⁶ Weiss argued the case was worth \$90 million to the class, however, the Court of Appeal’s estimate of the actual recovery plaintiffs could expect to receive under the settlement was around \$1 million.⁶⁷ The settlement did not provide monetary relief to the class members, but initiated a procedure for filing a “claim” with Pella.⁶⁸ The procedure involved filling out an extremely complicated 12-13 page application which could be rejected by Pella if filled out incorrectly, and provided for “capped” amounts based on if the consumer filed a claim or agreed to arbitration with Pella.⁶⁹ Thus, it was a case “in which ‘the lawyers support the settlement to get fees; the defendants support it to evade liability; the court can’t vindicate the class’s rights because the friendly presentation means that it lacks essential information.’”⁷⁰

With the Advisory Committee’s goals of fairness to the plaintiff class in mind, and the very real risk of collusion between parties’ lawyers,

61. *Id.*

62. He was accused of defrauding his previous firm by misappropriating funds and of “other misconduct” relating to that firm. *Id.* at 722. He thereafter began a new firm with his wife, which was also involved in a lawsuit. *Id.* Additionally, the Illinois Attorney Registration and Disciplinary Commission wrote a ninety-four-page report recommending the Supreme Court of Illinois suspend Weiss from practicing law for thirty months because of his “repeated misconduct.” *Id.*

63. *Id.* at 722 (quoting an objector to Weiss’s appointment as class counsel).

64. *Eubank*, 753 F.3d at 724.

65. The settlement purported to bind the entire nationwide class, making no distinction between those consumers who had replaced the windows and those who had not. *Id.* at 721.

66. *Id.*

67. *Id.* at 726.

68. *Id.* at 724.

69. Additionally, the “capped” amount for those who filed a claim was \$750, and the capped amount for those who agreed to arbitration was \$6,000. *Id.* at 724–25. Thus, the settlement pushed consumers to arbitration, a process stacked against them, as Pella retained the right to choose the arbitrator. *Id.*

70. *Eubank*, 753 F.3d at 729.

commentators argue courts approaching settlements with a harder-look mentality serve the purpose of 23(e) and protect vulnerable class members from inequitable relief.

II. RECENT DECISIONS AND THE EMERGING “HARD-LOOK” APPROACH TO SETTLEMENT APPROVAL

Recent appellate decisions have reviewed proposed settlements with particular scrutiny. The following section will examine two key hard-look cases, *In re Dry Max Pampers Litigation*, and *In re NFL Players Concussion Injury Litigation*, and will then examine the difference between the above traditional factors and the below hard-look factors.

A. *In re Dry Max Pampers Litigation*

In the case of *In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Cir. 2013), a class of consumers sued Pampers, a P&G subsidiary, for allegedly defective diapers.⁷¹ The class was made of consumers who purchased the “Dry Max” diapers between August of 2008 and October of 2011.⁷² Pampers began marketing these diapers as having “Dry Max technology” in March of 2010, and the Consumer Product Safety Commission began investigating them a short two months later, after receiving reports that the diapers caused severe diaper rash.⁷³ It received 4,700 reports of diaper rash, allegedly caused by the diapers, yet ultimately found there was no connection between diaper rash and Pampers’ Dry Max brand.⁷⁴

Soon after the Commission found no connection between the diapers and rash, parties began settlement negotiations.⁷⁵ The deal, reached in March of 2011, called for P&G to reinstate, for the period of one year, a refund program it had already offered to customers from July 2010 through December 2010.⁷⁶ The program limited refunds to one box of diapers per household, and required consumers to present an original receipt and UPC code from the box the diapers came in.⁷⁷ The settlement called for Pampers to add, for the period of two years, a single sentence to their diaper boxes, instructing consumers to “consult Pampers.com or call 1-800-Pampers” for more information “on common

71. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013).

72. *Id.*

73. *Id.*

74. *Id.* at 715–16.

75. *Id.* at 715–16.

76. *Pampers Litigation*, 724 F.3d at 717.

77. *Id.*

diapering questions such as choosing the right Pampers product for your baby, preventing diaper leaks, diaper rash, and potty training.”⁷⁸ Similarly, it called for Pampers to add basic diaper rash information to their website, for the same period of two years.⁷⁹ Finally, P&G also agreed to donate \$300,000 to a pediatric resident program and \$100,000 to the Academy of Pediatrics to fund a skin-health program.⁸⁰

Under the settlement, class members were treated differently. The named class representatives were to receive an incentive award of \$1,000 per child affected by the diapers.⁸¹ In contrast, unnamed class members received only the benefit of the changes to the Pampers box and website, and the refund program, assuming they still had their receipt and box clipping.⁸² Finally, class counsel was to receive an award of \$2.73 million.⁸³

The settlement was unpopular with the unnamed class members. Three class members objected to the proposed settlement.⁸⁴ One member in particular, Greenberg, wrote a 33-page document outlining why the settlement was unfair, particularly in light of the disparity between counsel’s compensation and the class’s relief.⁸⁵ The district court found the settlement was fair, but did not offer any response to the objections raised by Greenberg.⁸⁶

The Court of Appeals, however, found the trial court abused its discretion in approving the settlement.⁸⁷ It noted that because the Court cannot rely on the adversarial process to protect the interests of the unnamed class members, it must rely on the class representatives and class counsel to uphold their fiduciary obligations.⁸⁸ The Court evaluates whether or not counsel and class representatives act in the class’s best interests by looking for preferential treatment given to named representatives, and perfunctory relief to unnamed members.⁸⁹ Similarly, if high attorney’s fees are to be awarded to counsel, there is a higher likelihood that defendant got a concession on the merits of the case in order to avoid paying more to members.⁹⁰

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Pampers Litigation*, 724 F.3d at 717.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Pampers Litigation*, 724 F.3d at 718.

89. *Id.*

90. *Id.*

Here, it was clear that \$2.73 million was excessive compared to the relief given to the unnamed members of the class, and in light of the fact that counsel “did not take a single deposition, serve a single request for written discovery, or even file a response to P&G’s motion to dismiss.”⁹¹ The Court made clear that the issue “is whether the value of these changes is so great, for unnamed class members, as to render counsel’s \$2.73 million fee reasonable rather than preferential in light of it.”⁹²

The Court found the value to unnamed members did not justify the \$2.73 million award to counsel. With regards to the one box program, the Court found it to be worthless, as consumers would receive no relief unless they saved the receipt and box code, something virtually no one would do.⁹³ The fact that the parties offered no response to Greenberg on this point was “conspicuous” to the Court, in light of the fact that P&G already initiated a refund program, so they should have had ample data on how many consumers actually used it in the months it was offered.⁹⁴ Further, the fact that most consumers already had access to it, as it ended in December 2010, made it even more worthless to them.⁹⁵

The Court found the labelling and website changes were also worthless.⁹⁶ The box language, which would tell consumers to call Pampers to discuss what product is best for their child, was little more than advertising for Pampers.⁹⁷ The website changes, which would give very basic information about diaper rash and would direct consumers to consult their doctors if certain symptoms persisted, had a similarly “negligible” value.⁹⁸ The court found it “would denigrate the intelligence of ordinary consumers (and thus of the unnamed class members) if we concluded that—absent this suggestion from P&G—they would have little idea to ‘see [their] child’s doctor’ if their child’s rash was accompanied by fever or boils” or puss and weeping discharge.⁹⁹ The Court reiterated that settlement fairness must be viewed from the perspective of class members and not from the perspective of the defendant, and it does not matter if the settlement “interferes with defendant’s marketing plans.”¹⁰⁰

The Court emphasized the preferential treatment the \$1,000 incentive

91. *Id.*

92. *Id.* at 719.

93. *Id.* at 718.

94. *Pampers Litigation*, 724 F.3d at 718.

95. *Id.* at 719.

96. *Id.* at 721.

97. *Id.* at 719.

98. *Id.* at 720.

99. *Id.*

100. *Pampers Litigation*, 724 F.3d at 720.

award gave to named representatives. The court noted that class representatives must have common interests with the unnamed members and owe fiduciary obligations to them.¹⁰¹ These obligations are scrutinized with heightened attention in a settlement context. Here, interests were not aligned because “there is no overlap between these deals: they are two separate settlement agreements folded into one.”¹⁰² The \$1,000 would more than compensate parents, so named representatives had no interest in vigorously prosecuting the interests of unnamed members.¹⁰³

B. *In re* NFL Players Concussion Injury Litigation

In *In re NFL Players*, a class of retired NFL players sued the NFL, alleging it failed to inform them of and protect them against the risks of concussions in football by failing to take reasonable actions to protect them from the risk of chronic head injuries.¹⁰⁴ The plaintiffs alleged that the League “ignored, minimized, or outright suppressed information concerning the link between trauma and cognitive damage.”¹⁰⁵ The District Court approved class certification and a settlement for a class of

101. *Id.* at 721.

102. *Id.* at 722.

103. *Id.*; see also *Koby v. ARS Nat’l Services, Inc.*, 846 F.3d 1071, 1074 (9th Cir. 2017), which appears to be another (very recent) hard-look case, and which cites *Pampers* approvingly. In April 2009, a class sued the ARS National Services, Inc., a debt collection agency, under the Fair Debt Collection Practices Act (FDCPA), alleging ARS violated the FDCPA by leaving them voicemails in which the callers did not disclose (1) that they worked for ARS, (2) that ARS is a debt collector, or (3) that the purpose of the call was to collect a debt. *Id.* The named plaintiffs brought the action on behalf of everyone in the US who received a voicemail message from ARS, which failed to disclose that information. *Id.* In total, the class consisted of about four million people nationwide. *Id.* The magistrate approved a settlement in which the named plaintiffs, along with class counsel, got monetary relief, while the remaining four million class members received worthless injunctive relief. *Id.* at 1075. Under the settlement, ARS agreed to pay each of the three named plaintiffs \$1,000, the maximum they could hope to recover under the FDCPA. *Id.* It also agreed to pay class counsel the sum of \$67,500 in attorney’s fees. *Id.* at 1075. The settlement required the class members to give up their right to assert other damages claims against the defendant, in any other class action, and instituted a new phone call procedure, in which the caller had to disclose that they worked for ARS and were calling to collect a debt. *Id.* at 1074. It also agreed to give a *cy pres* distribution in the amount of \$35,000 to a local charity. *Id.* at 1075. Thus, unnamed members received no monetary relief and no other relief aside from the new phone procedure. The court held the magistrate judge overseeing the action abused her discretion by approving the settlement as fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e)(2), as there was no evidence that the injunctive relief had any value to the class members. *Id.* at 1079. In addition to the injunctive relief being worthless to them, to obtain it they had to relinquish their right to seek damages in any other class action. *Id.* The court found there was also no evidence that the absent class members would derive any benefit from the settlement’s *cy pres* award. *Id.*

104. *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 421 (3rd Cir. 2016).

105. *Id.* at 422.

over 20,000 retired players.¹⁰⁶ The class consisted of all living NFL players who retired from professional NFL football before July 7, 2014, and contained two subclasses of players—retired players with no known brain injuries, and players currently injured.¹⁰⁷ Objectors appealed the settlement agreement on a number of grounds.¹⁰⁸ But, of the total 20,000 estimated retired players, only 1% of the total class members chose to opt out.¹⁰⁹

The District Court initially ordered mediation in July of 2013.¹¹⁰ In August 2013, the parties proposed a settlement which provided \$765 million to fund medical exams and offer compensation for player injuries.¹¹¹ In January 2014, the parties sought approval of the settlement.¹¹² The Court denied approval of the settlement because it did not believe the capped fund could adequately provide for all the players' claims.¹¹³ Five months later, the parties came back with a revised settlement which uncapped the \$765 million fund.¹¹⁴ The District Court preliminarily approved the settlement and scheduled a final fairness hearing.¹¹⁵ After the final fairness hearing, members of the class objected to the revised settlement, and the Court held an additional fairness hearing, at which it proposed several other amendments to the settlement in order to benefit class members.¹¹⁶ After this second round of amendments were added, the Court approved the final settlement.¹¹⁷ Objectors then filed separate appeals, which were consolidated.¹¹⁸

Three components made up the final settlement: (1) an uncapped fund which would provide compensation for retired players with proof of certain diagnosis (awarding \$1.5 to \$5 million to each player providing proof of one of several diagnoses); (2) \$75 million Baseline Assessment Program to provide eligible retired players with a “baseline assessment” exam of their brain; and (3) a \$10 million Education Fund to educate

106. *Id.* at 420.

107. *Id.* at 425.

108. *Id.* at 420.

109. *Id.* at 425. Two hundred and two members opted out of the settlement after hearing its terms. *Id.*

110. *Concussion Injury Litig.*, 821 F.3d at 422.

111. *Id.*

112. *Id.*

113. *Id.* 422–23.

114. *Id.* at 423.

115. *Id.*

116. *Concussion Injury Litig.*, 821 F.3d at 423.

117. *Id.*

118. *Id.*

players about injury prevention.¹¹⁹ Under the first component of the settlement, the award received by the player who proved he had one of the brain injuries that entitled him to compensation would be subject to decrease based on (1) the age at which the retired player is diagnosed increases; (2) if he played fewer than five eligible seasons; (3) if he did not get a baseline assessment exam; and (4) if he suffered a severe traumatic brain injury or stroke unrelated to NFL play.¹²⁰ The uncapped fund was to remain open for 65 years, and would allow players to receive supplemental awards in that time, if the player later developed another one of the applicable injuries.¹²¹ The baseline assessment program would be available for any player who played at least half an eligible season, included supplemental benefits, and would last 10 years, with each eligible player being entitled to an exam, regardless of the \$75 million cap.¹²²

The Court of Appeals approved the settlement, and laid out a number of initial presumptions the Court applies in reviewing a settlement. The Court began by reiterating that the inquiry into fairness exists to protect unnamed members from “unjust or unfair settlements affecting their rights when the representatives become fainthearted” before the action is adjudicated, and that, in settlement classes, courts should be even more scrupulous when examining fairness.¹²³ It went on to say an initial presumption of fairness exists when 4 conditions are met, and that all were met here.¹²⁴

Next, the Court laid out the factors it used in approving the settlement. These were: “(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of

119. *Id.*

120. *Id.* at 424.

121. *Id.*

122. *Concussion Injury Litig.*, 821 F.3d at 424–25.

123. *Id.* at 436. A “settlement class” is one in which a court is certifying a class and approving a settlement in tandem.

124. *Id.* The four conditions are: (1) when the negotiations occurred at arms-length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in this form of litigation; and (4) only a small fraction of the class objected. *Id.* Here, all factors were met, triggering the initial presumption of fairness. *Id.*

litigation.”¹²⁵ The settling parties bear the burden of proving all these factors weigh in favor of the settlement.¹²⁶

The Court went on to list the additional six factors the *Prudential Insurance* case added to the list. The Court made clear that although the initial factors are mandatory, these added ones are merely “prudential.”¹²⁷

The Court found all factors here weighed in favor of the settlement, and the District Court therefore did not abuse its discretion in approving it.¹²⁸ Complexity, expense and duration of litigation weighted in favor because the costs of continuing the litigation were significant.¹²⁹ The reaction of the class weighted in favor of approval because only 1% of retired players opted out.¹³⁰ The stage of the proceedings and amount of discovery completed weighed in favor because, although no formal discovery took place, the parties engaged in significant informal discovery which adequately appraised them of the merits of the case.¹³¹ The risk of establishing liability and damages weighed in favor because class members “faced stiff challenges,” as players would have to prove both general and specific causation, showing their injuries did not arise after high school or college football.¹³² The Court found the risk of maintaining the class action through the trial did not need to be considered at length, and that it weighed in favor of the settlement as well.¹³³ The ability of defendant to withstand a greater judgment was

125. *Id.* at 437.

126. *Id.*

127. The Third Circuit added these factors in the case of *Krell v. Prudential Ins. Co. of America (In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions)*, 962 F.Supp. 450 (D.N.J. 1997), in which a group of insured plaintiffs sued their insurance company, alleging deceptive sales practices. The court came up with additional factors because of the “sea-change in the nature of class actions.” *Concussion Injury Litig.*, 821 F.3d at 437. The Court realized it might be useful to expand the Girsh factors to include several permissive and non-exhaustive factors, that could be applied when appropriate, and ignored when not appropriate. *Id.* The six factors are: “[1] the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys’ fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.” *Id.* The court summarized the Prudential factors by saying they all weighted in favor of approving the settlement. *Id.*

128. *Concussion Injury Litig.*, 821 F.3d at 437.

129. *Id.* at 438.

130. *Id.*

131. *Id.* at 439.

132. *Id.* at 439.

133. *Id.* at 440.

“neutral” because the defendants did not cite financial inability in negotiating the settlement amount and even agreed to uncap the award fund.¹³⁴ The range of reasonableness of the settlement in light of the best possible recovery and all risks of litigation weighed in favor because the settlement represented a fair deal to players when compared to the risks of taking it to trial (where defendant had many affirmative defenses it may have won with).¹³⁵

The court found the provision for attorney’s fees was “neutral.”¹³⁶ Counsel and the NFL did not negotiate the issue of fees until after the initial term sheet was signed, and the NFL agreed to an award of up to \$112.5 million, so the award would not come from any fund designated for players or the education fund.¹³⁷ The court found the “fee sailing” provision reasonable, especially in light of the fact that the total possible award to attorneys represented only 10% of what the class would receive.¹³⁸

III. A COMPARISON OF OLD FACTORS WITH NEW: WHAT’S THE DIFFERENCE AND WHICH APPROACH IS BETTER?

The following analysis will argue that the hard-look courts use the more stringent approach to settlement approval to hone in on fairness to class members. These courts do more than simply add factors to the already lengthy list of traditional factors; they shift the focus of class action review. In making this shift, courts seem to go from looking at the litigation broadly (by looking at the discovery engaged in, the likely duration and expense of the litigation, among others) to looking squarely at the fairness to the class members and the compensation they receive under the settlement, compared to the compensation counsel receives.

It concludes by arguing that this approach is appropriate in light of the policy rationale behind Rule 23 and the Advisory Committee’s interest in protecting unnamed members from unfair settlements. Additionally, it will articulate a combined, simplified standard which focuses on a few key factors, while still using the traditional factors as a

134. *Concussion Injury Litig.*, 821 F.3d at 440.

135. *Id.*

136. *Id.* at 441.

137. *Id.* at 444.

138. *Id.* at 447. A “fee sailing” provision is a compromise reached in a class action, between plaintiffs and defendants lawyers, in which a class action defendant agrees not to contest the class lawyer’s petition for attorney’s fees, up to a certain amount. William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TULANE L. REV. 813, 813 (2003). They are criticized because courts assume that when a defendant agrees not to contest an award amount, they are receiving a concession from the plaintiffs’ counsel in some way, at the potential detriment to class members. *Id.*

means of evaluating the new factors. This more focused approach would simplify and clarify the standard to be applied in approving settlements, and would reduce confusion caused by courts applying the laundry list of traditional factors.

There are no clear “sides” between the traditional 23(e) factor approach and the hard-look approach to settlement scrutiny. In approving or rejecting a settlement, the deciding court, whether a traditional-factor or hard-look court, may, but does not always, clearly lay out exactly which factors it looks to in coming to its decision, or which facts bear on which factors. As in *Poplar Creek*, the court may merely list the factors its circuit considers before moving onto the facts of the case and its holding. *Eubank*, a Seventh Circuit case, similarly did not list the factors it used, but suggested that the overarching consideration should be evaluating the conduct of the attorneys. It emphasized that the Court must give “careful scrutiny” to settlements in order to “make sure that class counsel are behaving as honest fiduciaries for the class as a whole.”¹³⁹ In *In re Dry Max Pampers Litigation*, the Court did not list either the traditional or the “additional” factors it looked at in rejecting the settlement, but the opinion itself certainly emphasized two of the three hard-look factors: (1) the relief received by the class members (including preferential treatment to named representatives), and (2) the compensation of class counsel.¹⁴⁰ Finally, in *In re NFL Players Concussion Injury Litig*, the Court did list the factors it examined, and clearly laid out how and why each factor weighed in favor of the settlement. In doing so, it similarly emphasized two hard-look factors: (1) fairness to class members in light of the risks of taking the case to trial, (2) compensation of class counsel. Emphasis on the conduct of and compensation to attorneys makes sense, as 23(e)’s “requirement of fairness may also be interpreted to require that the settlement not be infected by conflict or collusion.”¹⁴¹

With courts varying widely in the level of detail with which they lay out their decision, it is often difficult to parse out exactly what factors made the court decide the way it did. Trial courts at least “are expected to address each factor when granting final approval of a class action settlement so as to produce an adequate record for appellate review.”¹⁴² Of course, at the trial court or appellate court level, the amount of

139. *Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014) (quoting *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004)).

140. See *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013).

141. Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEG. ANALYSIS 167, 190 (2009).

142. WILLIAM RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 13:48, Westlaw (5th Ed., database updated Oct. 2017).

review that goes into each factor, traditional or otherwise, will vary depending on the circumstances of the case, as one treatise suggests “[n]ot every factor must weigh in favor of settlement for the trial judge to grant final approval.”¹⁴³ Instead, the court should “consider the totality of these factors in light of the particular circumstances.”¹⁴⁴ To determine what factors appellate courts use and impose on the lower courts of their jurisdiction, careful scrutiny must be given to the overall focus of the appellate court decisions. In all of the above hard-look decisions, the focus sits squarely on fairness to unnamed class members.

A. The Difference: A Shift in Focus

The clearest difference between the approaches seems to be in a shift from looking at the litigation in the abstract to honing in on fairness to class members, and unnamed members in particular. The traditional factors seem to advocate for looking at the case as a whole. Many factors, such as likely success on the merits, the time and expense of litigation, the amount of discovery conducted by parties, among others, look at the entirety of the case in deciding whether a settlement is appropriate. These tests signal to the trial court that it “should consider all elements of the proposed deal” and “that the required investigation is fact-intensive.”¹⁴⁵ In practice, this can mean a court employing traditional factors has relatively free reign to decide the case the way it wants.¹⁴⁶ The hard-look courts, even those (like *In re NFL*) that use the traditional factors in their analysis, take a more exclusive focus on the relief the settlement grants to the unnamed class members, those whose interests are most likely to be lost if class counsel and named class representatives fail in their fiduciary duties. These courts carefully scrutinize this relief as it compares to the relief of named representatives and class counsel, in order to ferret out signs of collusion between the attorneys or overreaching in the representatives.¹⁴⁷

The *Pampers* case illustrates the above assertions in its clear focus on fairness to unnamed members. In *Pampers*, the most important of the traditional factors would actually point to approving the settlement. As

143. *Id.*

144. *Id.* (quoting *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)).

145. *Macey & Miller*, *supra* note 141, at 172.

146. *Id.*

147. *See also Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269 (6th Cir. 2016). *Gascho* held that the District Court did not abuse its discretion in approving a consumer class action settlement, as it employed the Lodestar method of determining the fairness of attorney’s fees and cross-checked that amount with the percentage-of-the fund calculation. *Id.* at 281–289. Thus, the court acted within its discretion in finding the claims process proposed by the settlement appropriate. The inclusion of “clear sailing” provisions and “kicker clauses,” without more, did not make the settlement unfair. *Id.* at 291.

noted in *Poplar Creek*, courts consider success on the merits (the fourth factor) as the most important factor in evaluating a settlement, as plaintiffs unlikely to win more rightly receive a smaller settlement than those with a high chance of winning the case at trial. The *Pampers* class arguably had little chance of succeeding on the merits. The Consumer Product Safety Commission investigated the reports of diaper rash and concluded there was no connection between the rashes reported and Pampers' Dry Max brand.¹⁴⁸ Yet, the Court in *Pampers* passed over this consideration entirely in its discussion of the settlement. The *Pampers* dissent, authored by Judge Cole, pointed this out in saying the plaintiff's claims had "little to no merit," and in arguing the majority did not apply the *Poplar* criteria, as it is required to do, but instead crafted a new test based on "dicta" found in other circuit courts' opinions.¹⁴⁹

The dissent's criticism of the court seems warranted, as the Court indeed passed over many of the other *Poplar* factors. As to the first factor, although it highlighted the fact that class counsel would receive \$2.73 million under the settlement, and noted that in general defendants are concerned more with their total liability than with the distribution between class members and class counsel, the Court did not discuss whether it believed there was outright "fraud or collusion" between parties.

It ignored the second as well. Although it may be assumed the case would have proved at least somewhat complex, the Court made no mention of the second factor, the estimated complexity of the case, expense, and likely duration of the litigation, were it to go to trial.

As to the third factor, the Court mentioned it without much discussion. It did note that no actual discovery had been conducted by P&G when it noted the parties did not take any depositions or serve any requests for written discovery.¹⁵⁰ It did not, however, indicate in which direction (for approving or disapproving the settlement) lack of discovery weighed in.

As to the fifth factor, the opinions of counsel and class representatives, the Court referenced it indirectly. It discussed how the \$1,000 incentive award to named representatives made them less likely to fulfill their fiduciary duties in the litigation, because the \$1000 made them more than whole for the damage they suffered from the diapers, but did not specifically mention their "opinions" on the settlement. The Court did discuss the reaction of absent class members, the sixth factor, in its discussion of the 33-pages of objections submitted by Greenberg. Finally, the Court did not discuss what the "public interest" of the case

148. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013).

149. *Id.* at 723.

150. *Id.* at 718.

would be.

The Court's lack of discussion is telling. By neglecting the factors it is "supposed" to discuss, it deemphasizes their importance. As mentioned earlier, the Advisory Committee notes after the 2003 amendments to Rule 23 direct courts to lay out, in sufficient detail, what factors they use in evaluating settlements.¹⁵¹ In light of this direction, a court, in choosing not to mention a particular factor, suggests it played little to no role in the decision.

Instead of evaluating any of these broader, traditional factors that gauge the case from a distance, the Court honed in on the issue of absent class members, the "illusory" nature of the relief they would receive under the settlement, the preferential treatment given to named representatives, and the disparity between their illusory relief and the \$2.73 million class counsel would receive. In emphasizing these factors, the Court indicates a shift in the way settlements are valued, and seems to narrow the list of factors instead of adding to it. It narrows the analysis down to: (1) the relief received by unnamed class members; and (2) the compensation received by class counsel.

Eubank similarly ignored or did not discuss many of the traditional factors in its opinion. It did focus heavily on the first factor, risk of fraud or collusion, in its discussion of Weiss as improper, conflicted counsel. As to the second, the complexity, expense and likely duration of the trial, the Court discussed "cost" of the litigation only, and not necessarily the cost of trial and fees. It discussed cost only to rebut Pella's assertion that the settlement was "worth" \$14 million to the class members.¹⁵² It did not discuss the third factor, discovery, or the fourth factor, success on the merits. It touched briefly on the fifth factor, opinions of counsel and class representatives, in its discussion of how Weiss replaced the objecting class members, and in its discussion of how Weiss misrepresented the value of the settlement.¹⁵³ Finally, it did not discuss the reaction of absent class members, the sixth factor, or the public interest, the seventh.

As in *Pampers*, it focused on other factors. It focused on the asserted value of the settlement compared to its actual value, suggesting that this was the driving consideration in rejecting the settlement. It fixated on the conflict of interest class counsel had in representing the class, the essentially worthless relief the settlement would provide class members through the lengthy and confusing "claim" process, and the enormity of the \$11 million fee award compared to the relief granted the class. Thus, as with *Pampers*, it seems to narrow the issues the court considers

151. FED. R. CIV. P. 23(e) advisory committee's note to 2003 amendment.

152. *Eubank v. Pella Corp.*, 753 F.3d 718, 727 (7th Cir. 2014).

153. *Id.*

down to: (1) the relief received by unnamed class members; and (2) the compensation received by class counsel.

In re NFL, while laying out many of the traditional factors in its analysis, still honed in on two hard-look factors: (1) the fairness of the settlement in light of the risks posed by going to trial; and (2) the compensation received by class counsel.¹⁵⁴ It focused heavily on the relief received by the class, rejecting the initial two settlements because it was concerned the capped fund would not provide enough compensation to injured players. Parties negotiated for a total of 10 months on the settlement alone, and the Court carefully reviewed the terms to determine if it would adequately compensate all class members, both now and in the future.

First, in applying the factors used in the Third Circuit, most of which are the same as the factors used in *Poplar*, the Court focused on one of the main concerns of hard-look courts: the adequacy of the relief provided to the class in light of the risks posed by classwide trial.¹⁵⁵ It determined the risk of establishing liability and damages was substantial and therefore weighed in favor of approval because class members needed to prove general and specific causation. So, the court suggested here that the settlement, providing \$1.5 to \$5 million depending on the player's diagnosis, was fair in light of the fact that they may not all be able to prove their time playing in the NFL caused their injuries as opposed to their time playing in college or high school. It similarly determined the range of reasonableness of the settlement in light of the best possible recovery and all risks of litigation weighed in favor of approval because the settlement represented a fair deal to players in light of the fact that taking it to trial would have been risky to players, as "The NFL's pending motion to dismiss and other available affirmative defenses could have left retired players to pursue claims in arbitration or with no recovery at all."¹⁵⁶

Second, it looked at another hard-look concern: any indications that self-interest, rather than the class's interests, influenced the outcome of the negotiations.¹⁵⁷ It addressed this issue through its careful review of the compensation of class counsel, approving the "fee sailing" provision because the fees would not come out of the relief set aside for the injured players in the uncapped fund, the baseline assessment program, or the education fund. Thus, no matter how much the attorneys' received from the litigation, the class members were adequately protected and there was no risk that defendants were concerned solely

154. Allen, Martin & Yingling, *supra* note 26, at 68.

155. *Id.*

156. *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 440 (3d Cir. 2016).

157. Allen, Martin & Yingling, *supra* note 26, at 67.

with total liability, not how liability was split between the class and counsel. It also evaluated counsel's compensation in light of the fact that plaintiffs' counsel and defendants did not negotiate fees until after the terms of the settlement were established. Finally, it determined the fees were reasonable in light of the fact that they represented only 10% of what the class could expect to recover under the settlement.

The Court ultimately found the settlement, which was negotiated for almost a year and revised multiple times, fair in light of the risks of taking the case to trial. The ability of each eligible member to receive a free examination which could entitle him to a damage award of \$1.5 to \$5 million, with the possibility of an increase over time (if additional symptoms manifest), was fair in light of the fact that taking the case to trial was extremely risky. Further, the Court seemed to suggest the attorneys acted in good faith in negotiating the settlement and there was little risk of collusion or overreaching in light of the way in which fees were negotiated. Thus, although the Court evaluated a number of factors individually, it still seemed to narrow the focus of settlement approval to fairness in light of the surrounding circumstances, much like *Pampers* and *Eubank*.

Ultimately, hard-look decisions can be viewed as, not exactly adding to the list of traditionally used factors, but as honing in on one or two key factors relating to relief offered to the class compared to that offered to counsel. These courts are looking primarily at the fairness of the relief the settlement would provide to the class members. Although *In re NFL* evaluated the settlement according to many of the traditional factors, the overall tone and focus of the opinion can be boiled down to two key issues: fairness of the settlement in light of the risks of litigation, and fairness of the compensation to attorneys. *Pampers* similarly focuses on fairness, and particularly emphasizes the importance of relief to the unnamed class members, comparing this relief to the amount the attorney would receive to see if the interests of counsel align with the interests of the class, and if the relief to the class is "worth" the fee award. This analysis is in line with a growing awareness, pointed out by one commentator, that in "class settlements, objectors are frequently claiming misconduct by class counsel, and courts are becoming more receptive to such arguments."¹⁵⁸ While other considerations, such as expected cost and duration of the litigation, still play some role in these decisions, hard-look courts seem to suggest these considerations are not as important as they once were, and are not the main focus of settlement evaluation.

158. Robert H Klonoff, *Class Actions in the Year 2025: A Prognosis*, 65 EMORY L. J. 102, 118 (forthcoming).

B. Looking Forward: Working the Old in with the New

The following subsections advocate for the shift in focus as appropriate and in-line with the Advisory Committee's interest of protecting unnamed class members. Additionally, they will articulate a proposed new standard which combines the old with the new. The final subsection suggests that this new standard could effectively simplify class settlement approval.

1. The "Hard-Look" Approach is Better in Light of the Overarching Concern for Fairness to Unnamed Class Members, the Need to Make Defendants Pay a Meaningful Settlement, and Simplification of the Settlement Review Process

A shift in factors achieves 23(e)'s main purpose. Rule 23(e) exists to ensure that settlements are "fair, reasonable, and adequate."¹⁵⁹ As mentioned earlier, Rule 23 underwent considerable revision in 2003. The Advisory Committee notes spell out that these changes were meant to ensure fairness to unnamed class members, as approval of settlements is "essential" to give voice to those "class members who have not participated in shaping the settlement."¹⁶⁰ Therefore, a "re-focusing" of judicial settlement approval from factors which largely look at the litigation as a whole, to factors which focus on the relief given to members in light of the risks of losing at trial, and the relief granted to unnamed members versus the relief given to named plaintiffs and class counsel, is entirely appropriate and in keeping with the policy behind 23(e).

In addition to achieving the goals of class member fairness, hard-look review solves the issue that "problematic class action settlements not only compensate class members too little; they cost defendants too little."¹⁶¹ If class members receive worthless injunctive relief (as the proposed diaper box changes and website changes in *Pampers* gave), defendants pay virtually nothing.¹⁶² Conversely, if plaintiffs receive

159. FED. R. CIV. P. 23(e)(2).

160. FED. R. CIV. P. 23(e) advisory committee's note to 2003 amendment.

161. Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 906.

162. "When Gillette agrees to a labeling change on a discontinued line of Duracell batteries, it costs the defendant nothing. When ProFlowers offers restricted, non-stackable credits and asks the court to consider them at face value, the defendant saves money and perhaps even sees a net profit. When Kellogg donates food to charities, the donation costs the defendant less than the asserted valuation, and indeed it may cost the defendant nothing if the donation replaces otherwise-intended donations or uses product surplus, and it may serve the defendants' interests for taxes, public relations, or otherwise. When Rexall discourages claims by creating an onerous claims process, it reduces its payouts." *Id.* at 905-06.

meaningful relief for their injuries, defendants pay in a more meaningful way. As mentioned earlier in the article, class actions “serve not only the goal of compensating class members, but also the goals of forcing defendants to disgorge wrongful gains and deterring others from engaging in illegal conduct.”¹⁶³ As one commentator sees it, class action lawyers, when they do their job properly and negotiate a worthwhile settlement, “serve as private attorneys general, and the settlements that they negotiate are public goods.”¹⁶⁴ Viewing the class action in this way, “as a law-enforcement mechanism, we can see that the individual class member’s check for \$3.19 pales in comparison to the value of the class action’s deterrent and disgorgement functions.”¹⁶⁵ Therefore, a key consideration in settlement approval should be this goal of punishing current defendants and deterring future ones. Hard-look review, as compared to the current multifactor tests or to a more lenient form of review, best serves this other function of defendant disgorgement and deterrence. Naturally, when courts evaluate settlements more carefully, as in the hard-look cases discussed in this article, they better catch and reject inequitable or “worthless” settlements. Under hard-look review, if “a proposed settlement includes an injunctive component, the change in defendant’s conduct should address the problems complained of in the plaintiffs’ pleading.”¹⁶⁶ Similarly, if “the settlement includes coupons, credits, or vouchers, they should be stackable and transferrable so that they are *valuable* in both senses of the word (provide value and permit valuation).”¹⁶⁷ Thus, hard-look review has the potential for not only benefitting class members, by ensuring they receive a truly valuable settlement, but also deterring future wrongdoing and punishing current defendants by ensuring they do not “get off easy” with some form of costless injunctive relief.

Finally, the hard-look approach has the potential, if adopted by a majority of circuits, to simplify the process of reviewing a settlement, while also improving it. The list of traditional factors has the potential to “become unwieldy and disorganized” as the “sheer number of factors is a problem” for courts applying traditional tests.¹⁶⁸ Courts applying them often “recite the litany and engage in pro forma analyses,” or as the Court in *Poplar Creek* did, may simply recite the list at the start of the opinion and not touch it again for the rest of the opinion.¹⁶⁹ When

163. *Id.* at 905.

164. *Id.*

165. *Id.*

166. *Id.* at 907.

167. Erichson, *supra* note 161, at 907.

168. Macey & Miller, *supra* note 141, at 172.

169. *Id.*

this happens, the test works to create little more than a “regime of untrammelled discretion.”¹⁷⁰ The court is able to “do its duty” by listing the factors, then can decide the case how it wants.

In light of the issues presented by the lengthy multifactor tests, some commentators call for a more lenient approach to settlement approval, believing a “demanding approach would weed out bad settlements but would also reject good settlements.”¹⁷¹ They believe that stringent scrutiny of settlements would be costly and would make settlement hearings “little different than a trial on the merits, thus obviating the efficiencies inherent in settlement.”¹⁷²

However, the *In re NFL* case proves these fears of costly, trial-like hearings that reject solid settlements are unfounded. Under the hard-look factors, courts will still approve equitable settlements. Parties advocating for them must simply first prove they are, in fact, fair to the class members. Plus, the costs incurred in evaluating and approving an equitable settlement surely are still drastically less than the costs of full-blown trial. By adopting the hard-look approach, which cuts away at the multifactor tests, and instead focuses squarely on fairness to class members (in light of the risks of taking the case to trial) and scrutinizes the actions and compensation of class counsel, courts can follow the Advisory Committee’s intent while simplifying the settlement approval process.

Therefore, hard-look review serves the three-fold functions of: achieving meaningful relief for unnamed members, better deterring future defendants by forcing them to provide that meaningful relief to class members, and simplifying the process of class action settlement review.

2. But, “Traditional” Factors Should Not Be Cast Aside Entirely: Folding the Traditional Factors into a New Standard

Because, as discussed above, there are no “sides” between traditional and hard look courts, the decisions discussed above employ the hard-look” factors in varying degrees. Additionally, none of the courts identify the hard-look factors as “new” or “added” factors. Each of the hard-look cases, however, embraces at least some of the hard-look factors. As outlined above, this shift in focus from the laundry-list of traditional factors to a few key factors has the advantage of simplifying the process of judicial settlement approval, while adhering more closely to the Advisory Committee’s ultimate goal of fairness to the plaintiff

170. *Id.* at 174.

171. *Id.* at 177.

172. *Id.*

class. Thus, a shift is appropriate.

But, because courts have not clearly embraced or identified their opinions as anything new or different, it is hard to see what exactly the new standard is or should be, in its entirety. While *Eubank* and *Pampers* are on the “right track” because they hone in on fairness to the class members, and they carefully evaluate attorney behavior and compensation (with an eye on potential collusion), *In re NFL* appears to be a more “model” decision, because it manages to hone in on key hard-look factors, while working in an analysis of the traditional factors. The following section will propose a uniform standard that courts should apply going forward, by identifying a standard which is cut down to a few key, hard-look factors, but still uses the traditional factors in evaluating and applying the new factors. Thus, the new standard will “bake” the old factors into it.

As explained above, the Court in *In re NFL* listed a number of the traditional factors in its analysis of the settlement proposed by the NFL. It looked at the complexity, expense, and likely duration of the litigation, the reactions of class members, the proceedings and amount of discovery engaged in, among others. But, as explained above, although it looked at the numerous list of factors, the opinion itself still clearly honed in on two key hard-look factors: (1) the fairness of the settlement in light of the risks posed by going to trial; and (2) the compensation received by class counsel.¹⁷³ The Court managed to use old factors, while focusing on fairness and attorney compensation. For example, the Court found that the “stage of the proceedings and amount of discovery completed” weighed in favor of settlement approval because, although no formal discovery took place, the parties engaged in significant informal discovery which adequately appraised them of the merits of the case.¹⁷⁴ This informal discovery appraised them of the difficulties class members would have in proving both general and specific causation, so the settlement presented a fair deal to them in light of these issues.

In re NFL shows that it is possible to bake the old factors in with the new, to create a more coherent and simplified standard that still evaluates the issues central to the traditional test. The standard proposed by this article would have courts focus exclusively on the following factors: (1) the relief the settlement grants to unnamed class members (with particular focus on if named representatives receive incentive awards or are otherwise compensated differently, in a way that suggests they are no longer acting as fiduciaries for the whole), (2) the relief the

173. *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016).

174. *Id.* at 439.

settlement grants to class counsel viewed in comparison to that granted to the class (with an eye on attorney behavior and potential collusion between plaintiffs' counsel and defendant's counsel).

The traditional factors would work into this test because they could be used, instead of as "mandatory" factors courts list at the start of the opinion and never touch again, optionally in evaluating the above factors. The first traditional factor, the risk of fraud or collusion, already plays directly into evaluating the second factor of the test proposed by this article. The second traditional factor, the complexity, expense and likely duration of the litigation, could be used in evaluating the first factor of the above proposed test—the relief the settlement proposes to give the class members. The evaluating court could ask: is the relief fair in light of the complexity of the case and challenges the class faces in proving their injuries? Does the relief adequately compensate them in light of the relatively low (or high) expense of taking the case to trial?

The third traditional factor, the amount of discovery engaged in by the parties, could be used to evaluate both factors of the above proposed test. Under the first factor of the proposed test, much like the *NFL* court did, the evaluating court could ask: did the discovery engaged in adequately appraise both sides of the merit of the case, and is the settlement fair in light of the merit of the case? Under the second factor of the proposed test, the evaluating court could ask: does the relatively little amount of discovery engaged in by plaintiffs' attorney suggest plaintiffs' attorney is colluding with defendant or "selling out" the class just to get a high fee, without actually intending to fight for the plaintiff class?

The fourth traditional factor, the likelihood of success on the merits, could be used by the evaluating court in deciding if the settlement is fair to unnamed members under the first factor of the proposed test. The evaluating court could ask: is the settlement fair to class members in light of their chances (high or low) of winning at trial? High chance of winning at trial suggests the settlement should be robust, while little chance of winning suggests it may be appropriate for the settlement to be modest. Further, under the second factor of the proposed test, the court could ask: does the relatively low chance of plaintiff winning at trial, combined with high counsel fees, suggest collusion? The fifth traditional factor, the opinions of class counsel and class representatives, plays into both factors of the proposed test. If named representatives object to the settlement, but the plaintiffs' attorney strongly advocates for it, the settlement may not be fair and plaintiffs' attorney likely colluded with defendant to reach it. Or, if both counsel and named representatives strongly advocate for it, the settlement may

overcompensate named representatives while providing nominal relief to other class members.

The sixth traditional factor, the reaction of absent class members, again plays into both proposed factors, as strong opposition from absent members suggests unfairness to the class and potential collusion between attorneys. Finally, the seventh traditional factor, the public interest, could be used by an evaluating court in deciding if the settlement is fair in light of broader social factors, and the interest of the public at large.

Ultimately, under the new test, only two key factors would control. But, a court applying the proposed new test could use the traditional factors optionally, in evaluating the new factors. Because of this, the deciding court could use only those traditional factors that are appropriate to apply in any given situation, and could ignore the others (as many courts seem to already do when applying the amorphous and lengthy list of traditional factors). Under this proposal, the traditional factors need not be cast off entirely. But, because of their “amorphous” meanings and the laundry-list nature of the traditional test, working them into the new, simplified, hard-look test is appropriate.

IV. CONCLUSION

There is a trend in recent appellate decisions of taking a hard-look at proposed settlements in class actions. Although these decisions do not come out and clearly articulate the “new” or “additional” factors they use, it is clear there is a shift in settlement review that cuts down on the traditional settlement review factors and instead shifts the focus onto a few, key factors related to fairness to the plaintiff class and attorney compensation. This shift is entirely appropriate in light of the Advisory Committee’s concern with fairness to class members. Further, a shift in focus helps cut away at the lengthy traditional tests which, because of their length and complexity, can be seen as a blank check for courts to approve or disapprove a class settlement as they choose. This article proposes a compromise standard which focuses in on the key factors emphasized by recent decisions, but incorporates the traditional factors into the analysis of the new factors.