

2020

## The Dark Side of Consensus and Creativity: What Mediators of Mass Disputes Need to Know About Agency Risks

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### Recommended Citation

Howard M. Erichson, *The Dark Side of Consensus and Creativity: What Mediators of Mass Disputes Need to Know About Agency Risks*, 88 Fordham L. Rev. 2155 (2020).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol88/iss6/4>

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# THE DARK SIDE OF CONSENSUS AND CREATIVITY: WHAT MEDIATORS OF MASS DISPUTES NEED TO KNOW ABOUT AGENCY RISKS

*Howard M. Erichson\**

## INTRODUCTION

Mass disputes often require a skilled mediator to help parties arrive at a resolution. The importance of settlement in general, the importance of collective settlement in particular, and the difficulty of achieving complex settlements without facilitation all point toward the need for mediators. Justice in mass disputes often requires negotiated resolutions to soften the hard edges of all-or-nothing adjudications. And justice in mass disputes demands collective processes to level the field between numerous claimants and a defendant or group of defendants. Given the difficulty of resolving disputes with many competing interests, skilled facilitation by a mediator may be essential to arrive at a sound outcome.

But without careful attention to agency risks, mediators may inadvertently become part of the problem rather than part of the solution. By looking for aligned interests among those at the negotiating table, and by empowering lawyer-negotiators who speak on behalf of large groups of claimants, mediators may exacerbate agency risks and undermine claimants' access to justice.

This Essay looks at how mediators describe their role, and it asks whether—in negotiations to resolve mass disputes—the mindset and skill set of mediators may sometimes exacerbate rather than mitigate risks of self-serving conduct by lawyers. The Essay applies general concerns about class settlements and nonclass settlements to the particular problem of mass dispute mediation. The term *mass disputes*, for purposes of this Essay, refers both to class actions and to nonclass mass litigation. In mass disputes, large numbers of claimants—consumers, employees, citizens, municipalities, merchants, or others—assert factually related claims against a defendant or

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\* Professor of Law, Fordham University School of Law. This Essay was prepared for the Symposium entitled *Achieving Access to Justice Through ADR: Fact or Fiction?*, hosted by the *Fordham Law Review*, Fordham Law School's Conflict Resolution and ADR Program, and the National Center for Access to Justice on November 1, 2019, at Fordham University School of Law. Thanks to the *Fordham Law Review* for hosting this Symposium on access to justice and alternative dispute resolution, and thanks to Samara Perlman for helpful research assistance.

group of defendants. The term includes not only enormous disputes but also multiclaimant disputes that are merely big; they may involve millions of claimants or merely hundreds. For purposes of this Essay, what is essential to the definition of mass dispute is that each claimant, as a practical matter, lacks meaningful control over the handling of the claim and, especially, lacks meaningful control over the settlement negotiation process, which is largely controlled on the claimants' side by a lead lawyer or group of lead lawyers.

The starting point is to be clear about the value of mediated collective settlements as a way to resolve mass disputes. While this Essay raises concerns that mediators' mindsets and skill sets may work to the disadvantage of claimants in mass disputes, it should not be taken as dismissive of the importance of settlement in general, of collective settlement in particular, or of mediation to facilitate the negotiation of satisfactory resolutions and thus to help parties achieve justice through mass collective settlements. Rather, it should be taken as a cautionary exploration of risks that mediators should keep in mind. The best answer to the concerns raised in this Essay is a mediator armed with clarity about these risks.

### I. WHAT DO MEDIATORS BRING TO THE ROOM?

What, in general, makes mediators valuable? Mediators bring a set of skills and values that help negotiating parties resolve their disputes. Skilled mediators establish rapport and earn the confidence of the negotiating parties. They bring *creativity* in thinking about solutions, and they are open to the creative ideas brought by the negotiating parties. Above all, they find overlapping interests among the negotiating parties to help the negotiating parties achieve *consensus*.

JAMS, a leading alternative dispute resolution provider, markets its mediation services by saying that "JAMS neutrals are on the case long before the day of mediation and don't consider their job done until settlement is achieved."<sup>1</sup> It says that its mediators achieve the goal of settlement by establishing rapport and pursuing creative solutions that bring parties together:

Using their extraordinary interpersonal skills, JAMS mediators listen closely to all perspectives, quickly evaluate party dynamics and establish rapport, leaving ample time for them to focus on . . . pursuing creative,

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1. *The JAMS Mediation Process*, JAMS, <https://www.jamsadr.com/mediation> [<https://perma.cc/6PVH-LGFM>] (last visited Apr. 12, 2020). On achievement of settlement as the measure of success, see Ava J. Abramowitz, *Toward a Definition of Success in Mediation*, DISP. RESOL. MAG., Summer 2018, at 23, 24 ("We know intuitively that if the parties leave the table angrier than when they sat down and with no settlement in hand, the mediation was a failure. On the flip side, we know that if the parties come to an agreement, successfully implement that agreement, and feel that the mediator was 'fair,' we have a success.") and Alexander Oddy, *What Is the Definition of Success in Mediation?*, WOLTERS KLUWER: KLUWER MEDIATION BLOG (Dec. 1, 2011), <http://mediationblog.kluwerarbitration.com/2011/12/01/what-is-the-definition-of-success-in-mediation-2/> [<https://perma.cc/3292-N2BM>] ("If mediation leads to settlement on the day then it has plainly succeeded on any view.").

collaborative solutions that are consistent with the facts of the case and geared toward preserving mutual interests and ongoing relationships.<sup>2</sup>

Other mediators similarly emphasize the importance of establishing trust and rapport.<sup>3</sup> Legendary mass dispute mediator Francis McGovern, speaking about two other legendary mass dispute mediators—Kenneth Feinberg and Eric Green—described trust as the key factor: “[T]he word that comes to mind for me is ‘trust.’ That is to say, what Ken can do and what Eric can do is create trust on the part of all of the parties, all of the factors, and all of the people involved.”<sup>4</sup>

In addition to the importance of establishing rapport and trust, mediators emphasize the importance of creativity and openness to new solutions. Feinberg once described it this way: “You also need doggedness, flexibility and creativity. I often say, ‘There’s always more than one way to get to ‘yes.’” I’m always looking for a different way to get the parties to recognize that compromise can be reached.”<sup>5</sup> Further, he explained, “I think what I try to bring is an enthusiasm and a doggedness. And like Francis says, creativity to try to get everybody to yes.”<sup>6</sup>

Mediators use rapport and creativity in the service of helping the negotiating parties reach a consensus. The project of reaching consensus, to a large extent, depends on finding overlapping interests. “What you’re trying to do with settlement,” McGovern explains, “is move up in the ‘Northeast quadrant’ to try to satisfy each side as much as possible for the various issues that they consider the most important.”<sup>7</sup> Feinberg puts it this way:

The ability of the neutral . . . in getting all of the various players . . . to buy into the process gets to the point of innovation. It is the skill of the neutral, hopefully with the help of a judge or at least with the acquiescence of a judge, to convince all of the interested parties that it is in their parochial

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2. *Id.*

3. See, e.g., Stephen B. Goldberg, *Mediators Reveal Their Essential Techniques for Successful Settlements*, ALTERNATIVES TO HIGH COST LITIG., May 2006, at 81, 81 (“If the mediator is unable to develop rapport, it matters little how proficient the mediator is with the many tactics that are espoused in the mediation literature and taught in mediator training—success in bringing disputing parties to a resolution of their dispute is unlikely. This conclusion emanates from surveying experienced mediators on how they accounted for their successes. The overwhelming response given by more than 75% of the respondents was that the key element in successful mediation is developing rapport with the parties.”).

4. *A Facilities Roundtable: Feinberg, Green and McGovern Analyze Their Own Approaches to Intractable Disputes*, ALTERNATIVES TO HIGH COST LITIG., Sept. 2019, at 113, 126 [hereinafter *Roundtable*].

5. Tom Fox, *How to Be a Good Mediator*, WASH. POST (Nov. 28, 2012), [https://www.washingtonpost.com/national/on-leadership/how-to-be-a-good-mediator/2012/11/28/8e834602-3974-11e2-8a97-363b0f9a0ab3\\_story.html](https://www.washingtonpost.com/national/on-leadership/how-to-be-a-good-mediator/2012/11/28/8e834602-3974-11e2-8a97-363b0f9a0ab3_story.html) [<https://perma.cc/9CKW-NE4T>] (interviewing Kenneth Feinberg).

6. *Roundtable*, *supra* note 4, at 126.

7. *Id.* at 123.

interest to be as creative in coming up with some sort of global remedy that, to me, defines the success of the neutral.<sup>8</sup>

As described by these mediators, the mediation process helps parties arrive at a resolution by generating a spirit of trust, cooperation, and creativity in finding mutually satisfactory terms.

## II. WHO IS IN THE ROOM?

These skills and values allow mediators to help negotiating parties reach resolutions. They allow mediators to bring the room to a consensus. But who is in the room where it happens?<sup>9</sup> When a mediator helps the negotiating parties find creative solutions and thereby reach a consensus, who are the *negotiating parties*? Not the millions of claimants in a massive class action. Not the 50,000 claimants in a mega-mass tort dispute. Not even the three hundred claimants in a merely big multiplaintiff litigation. Rather, those in the room, along with the defendants' representatives and the mediator, are likely the lead lawyers appointed (or self-appointed) to negotiate on behalf of the mass of claimants.<sup>10</sup> Depending on the dispute, these might be claimants' counsel, multidistrict litigation (MDL) leadership counsel, class counsel, interim class counsel, or putative class counsel.

Note that the reality of mass settlement negotiations does not correspond with the unthinking language courts and the media often use to describe them. When announcing or recounting mass settlement deals and the negotiating processes that led to them, judicial opinions and media accounts often state that "the parties" negotiated in such and such a way and that "the parties" agreed to such and such terms. In reality, *the parties* did no such thing. While, in light of the control many large defendants exercise over their lawyers, one might reasonably say that *defendants* negotiated and agreed to certain terms, one cannot say that *claimants* in mass disputes exercise the same sort of participation and control. Thus, rather than say that "the parties" negotiated a deal, it would usually be more accurate to say that a defendant

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8. *Id.* at 124. In the same roundtable discussion, Eric Green explained where creative ideas come from: "So I think you get a lot of these great ideas that can be put into play from the parties, the lawyers, the judge, colleagues, and others." *Id.* at 125.

9. *Cf.* LIN-MANUEL MIRANDA, *The Room Where It Happens*, on HAMILTON: AN AMERICAN MUSICAL (Atl. Records 2015) (expressing Aaron Burr's frustration at having been excluded from the negotiation that resulted in a compromise creating a national bank and moving the nation's capital).

10. Indeed, even in nonmass dispute settings, clients cede much control in mediation to the attorneys. *See* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 4-5 (2001) ("The parties are still responsible for making the final decision regarding settlement, but they are cast in the role of consumers, largely limited to selecting from among the settlement options developed by their attorneys. Indeed, it is the parties' attorneys, often aided by mediators who are also attorneys who assume responsibility for actively and directly participating in the mediation process, invoking the substantive (i.e., legal) norms to be applied and creating settlement options.").

negotiated the deal with claimants' counsel or a subset of claimants' counsel.<sup>11</sup>

In a mass settlement negotiation, where do interests overlap among those who are actually at the negotiating table? In particular, what interests do defendants share with claimants' negotiating counsel? Incentives matter. Even if attorneys imagine themselves immune from anything that would interfere with perfectly loyal representation to clients, it would be naïve to think that attorney incentives, particularly fee incentives, disappear when attorneys negotiate settlements. Moreover, the diffusion of client interests and lack of client control in mass representation leaves mass disputes particularly vulnerable to settlements driven by lawyer interests. Thus, this invites the question: in what ways do the interests of claimants' negotiating counsel in mass disputes converge with the interests of defendants?

First, they share an interest in closure. In the class action setting, this may mean expanding the class definition to give the defendant more protection from liability at low cost to the defendant.<sup>12</sup> For a defendant, a broader class definition means that more class members are bound by the settlement, and therefore fewer persons have claims they can assert against the defendant in the future. For class counsel or putative class counsel, a broader class definition expands the size of the franchise; it represents pure upside. An expanded class definition brings claimants into the deal who otherwise were not represented by this particular lawyer. Even if the added class members get little or no real benefit, the expanded definition benefits the negotiating lawyer by making the defendant more willing to agree, potentially bringing a few more dollars into the total deal, and potentially expanding the class counsel's fee.

Similarly, in the nonclass setting, claimants' negotiating counsel and defendants share an interest in closure. In nonclass aggregate settlements, defendants often prefer deals that are as comprehensive as possible to protect the defendant from facing future claims.<sup>13</sup> Defendants thus benefit from high-pressure tactics to force claimants to participate in a deal. For example, defendants may prefer a term that requires claimants' counsel to inform clients that the lawyer will withdraw from representing any claimant who declines to participate in the settlement. Just as defendants benefit from maximizing claimant participation, so do claimants' lawyers. Maximum settlement participation allows claimants' counsel to earn fees and move on to other work. Moreover, mass settlements often are negotiated by lawyers who do not represent all of the claimants in litigation, such as lead negotiating lawyers among leadership counsel in an MDL. For such lawyers, a larger deal may mean larger fees from the work on the deal, while the negotiating

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11. *See generally* ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* (2019).

12. *See* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 *NOTRE DAME L. REV.* 859, 893–97 (2016).

13. *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 *CORNELL L. REV.* 265, 270–74 (2011); D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 *FORDHAM L. REV.* 2175, 2182 (2017).

lawyers would not have the central role in litigating claims on behalf of claimants who decline to participate in the settlement.

Second, claimants' negotiating counsel share with defendants an interest in maximizing the apparent size of the deal, particularly in class actions. Specifically, they share an interest in maximizing the ratio of the apparent value of the deal to its actual cost to defendants. For a defendant to get the protection from liability that a class settlement provides, the court must approve the settlement by finding it "fair, reasonable, and adequate."<sup>14</sup> Maximizing the apparent value of the deal helps to garner judicial approval. Likewise, for class counsel to earn fees from a class settlement, they need the court to approve the deal and thus share an interest in maximizing the deal's apparent value. Moreover, class counsel's fees generally correspond to the value of the deal, so the lawyers have an even more direct interest in exaggerating the size of the deal. Thus, when the negotiating parties are the defendant and putative class counsel, certain types of provisions may appear as win-win options even though they offer little or no value to the class members. For example, *cy pres* remedies, in which funds go to charitable organizations, may expand the apparent but not actual value of a settlement for the class members.<sup>15</sup> Similarly, settlement terms in the form of coupons, vouchers, or credits provide an opportunity for putative class counsel to exaggerate the size of a proposed settlement by valuing the term at face value rather than real value.<sup>16</sup>

Third, there are settlement terms that may seem appealing in mediation because one side wants the term and the other side does not object. That is, plaintiffs' counsel may have little incentive to object to terms favored by defendants, and defendants may have little incentive to object to terms favored by plaintiffs' counsel. Class settlement claims processes that impose hurdles for individual class members to assert claims, for example, may appeal to defendants by reducing total payouts and may face little objection from class counsel if the settlement may plausibly be presented to the court as having a high face value.<sup>17</sup> Clear sailing agreements, in which defendants agree not to object to class counsel's fee request to the court, appeal to class counsel and may face little objection from defendants if such an agreement eases the deal.<sup>18</sup>

Finally, not only do claimants' counsel and defendants share certain interests, they also share certain disinterests. If a settlement of a certain total dollar amount will achieve closure of a certain scope of claims, neither the defendant nor claimants' counsel necessarily possesses sufficient incentive to exercise care in how that total settlement amount gets allocated among the claimants. Again, to be clear, the point is not that one expects lawyers to violate their ethical duties. Lawyers owe ethical duties of loyalty, diligence,

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

15. See Erichson, *supra* note 12, at 882–89.

16. See *id.* at 878–82.

17. See *id.* at 889–92.

18. See *id.* at 901–03.

and competence to each of the clients they represent.<sup>19</sup> One hopes that claimants' lawyers in mass disputes take seriously these obligations as they relate to achieving fair compensation for each client based on the strength of each client's claims. But even as one acknowledges these ethical duties, one can recognize that incentives matter. For the most part, claimants' lawyers' compensation does not depend upon achieving a careful and fair allocation of settlement funds. Rather, their compensation in mass disputes generally depends on, first, getting defendants to agree to settlement terms and, second, maximizing the total size—or at least the total apparent size—of the settlement that the court will use to determine a class counsel fee or common benefit fee.

### III. MEDIATION AS THREAT AND OPPORTUNITY

Thus, in various ways, the interests (and disinterests) of defendants facing mass liability overlap with the incentives of the lawyers who negotiate on behalf of large numbers of claimants. Without a mediator, this creates a risk of settlements that treat claimants unfairly. The question is whether, with a mediator, we should expect things to work out better.

In light of the significant aligned interests between claimants' negotiating counsel and defendants in mass disputes, and in light of the mindset of mediators to build consensus by helping negotiating parties to see overlapping interests and to seek creative solutions, a natural question is how mediators apply their skills. Do they help the negotiating "parties"—that is, those in the room, which means the claimants' negotiating counsel and representatives for the defendants—get to "yes" with the sort of creative solutions that, in too many mass settlements, seem to benefit counsel and defendants without providing sufficient benefits for claimants or class members? Or do they provide a check on such impulses?

Mediation carries an imprimatur of fairness. Courts routinely treat the involvement of a mediator as a signal that all is well with a settlement.<sup>20</sup> As James Coben explains, citing his research that turned up over two hundred such cases, "with increasing frequency, judges assert that the involvement of a mediator in class action mediations is proof that the resulting settlements were negotiated free of collusion and fraud."<sup>21</sup> The participation of a mediator emboldens judges to approve proposed class action settlements and to encourage and facilitate nonclass aggregate settlements. The judge's confidence in the trustworthiness of the mediator as an individual, or the judge's confidence in mediation in general, may translate into trust regarding the fairness of the settlement. But if mediation may facilitate deals that serve

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19. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2018) (competence); *id.* r. 1.3 (diligence); *id.* r. 1.7 (conflicts of interest).

20. See James R. Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 Y.B. ON ARB. & MEDIATION 162, 162 (2013) ("It is becoming a matter of routine for federal and state judges to cite the involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties.").

21. *Id.* at 168.

the aligned interests of plaintiffs' counsel and defendants, despite the best intentions of the mediator, the court's trust in the fairness of mediated outcomes may be misplaced. The trustworthiness and skills of the mediator may not be a reliable signal of the fairness of the settlement.

In one settlement class action in which objectors raised concerns about whether they had been treated fairly, the district judge rejected these concerns in part based on the fact that the dispute had been mediated by "an experienced mediator who served with honor and distinction"<sup>22</sup> as a federal district judge for many years:

In arguing that the parties and their counsel colluded, objectors essentially suggest that Judge Bullock was too blind to see collusion at the tip of his nose during the mediation, or that Judge Bullock was part of the collusion. The court rejects these insulting, baseless arguments accusing the parties, class counsel, defense counsel, or Judge Bullock of collusion. Judge Bullock . . . facilitated a two-day intense mediation that resulted in the proposed settlement. If the parties were going to collude or attempt to collude, the last person they would have asked to serve as a mediator is Judge Bullock. Judge Bullock is as smart and honorable as the universe is large. He would not and did not participate in a collusive mediation or permit one to take place in front of him.<sup>23</sup>

The court treated the objectors' argument as if it were a personal attack on the mediator and thus leapt to the defense of the mediator. This sort of "any rejection of an unfair settlement would impugn the integrity of the mediator" mentality is dangerous. When a judge decides whether to approve a class settlement, the question is not whether the judge thinks highly of the mediator but rather whether the settlement itself treats class members fairly. Given the agency risks in negotiating class and mass settlements, courts must be open to the possibility that even with an honorable and experienced mediator, the process may produce a settlement that treats absent claimants unfairly. On appeal, the Fourth Circuit reversed the district court's approval of the settlement class action.<sup>24</sup> Regarding the district court's comments about the mediation, the court of appeals pointed out the district judge's flawed premise: "the court appears to have regarded the allegations of collusion as an attack on the mediator himself and his integrity and intelligence."<sup>25</sup> Noting that the mediator did not have all the relevant information about the objectors' concerns, the court of appeals concluded that "the district court abused its discretion in rejecting the possibility of collusion based on the presence of the mediator."<sup>26</sup>

Regarding the fairness of mass settlements, the word *collusion* tends to obscure more than it reveals. The issue is rarely the sort of nefarious cooperation conjured up by the word collusion; rather, the issue is the

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22. *Speaks v. U.S. Tobacco Coop., Inc.*, 324 F.R.D. 112, 140 (E.D.N.C. 2018), *rev'd sub nom. Sharp Farms v. Speaks*, 917 F.3d 276 (4th Cir. 2019).

23. *Id.*

24. *Sharp Farms v. Speaks*, 917 F.3d 276, 281 (4th Cir. 2019).

25. *Id.* at 291.

26. *Id.* at 292.

alignment of interests between class counsel or mass counsel and defendants, and the danger that this set of interests may influence some of the settlement terms that counsel propose and accept.<sup>27</sup> Even so, the Fourth Circuit's basic point is sound: the participation of a mediator, in itself, does not guarantee the fairness of the settlement.

#### CONCLUSION

In sum, mediation presents both a threat and an opportunity for access to justice in mass disputes. The complexity of mass settlement negotiations makes mediation the norm. Judges often name mediators in class actions, MDLs, and other mass disputes, and mediators frequently play a central role in bringing mass disputes to negotiated resolutions. To the extent mediators convert the potential power of aggregation into meaningful relief for otherwise powerless claimants, they enhance access to justice. Even with the strength of collective representation, parties may find it impossible to break through impasses and see through complexity without the assistance of a skilled third-party neutral. But to the extent mediators exacerbate the agency risks in mass settlement negotiations, they stand as a barrier to access to justice. The easiest path to settlement in a mass dispute involves exploiting the alignment of interests between plaintiffs' counsel and defendants. A mediator who is occupationally predisposed to search for overlapping interests may encourage negotiators to follow a path to what looks like a successful negotiated resolution without fully recognizing that the resolution may benefit plaintiffs' lawyers and defendants more than it benefits the plaintiffs themselves.

The threat is that striving for consensus (among those in the room) and embracing creativity (by those in the room) may be precisely what empowers negotiating counsel to the detriment of the great mass of claimants. The opportunity is that a mediator may be well positioned to steer settlement discussions away from the sort of provisions that mutually benefit class counsel or mass counsel and defendants but not the claimants. The hope that drives this Essay is that awareness of this risk will better position mediators to embrace the opportunity and suppress the threat.

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27. I have raised this point previously in the context of discussing the Seventh Circuit's decision in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014):

Importantly, the court did not use the language of *collusion*. Rather, it used the language of *self-interest*. The fruitful question, Judge Posner understood, is not whether there was a nefarious conspiracy between the defendant and class counsel. Rather, looking at the actual terms of the settlement, the question is whether class counsel negotiated in the best interests of the class, as opposed to negotiating a deal that would appeal to the defendant, appear satisfactory to an uninquisitive judge, and serve class counsel's self-interest.

Erichson, *supra* note 12, at 871; *see also* Coben, *supra* note 20, at 164–65 (“The inquiry of collusion is concerned both with ‘overt misconduct by the negotiators’ as well as ‘incentives for the negotiators to pursue their own self-interest and that of certain class members,’ incentives that are ‘implicit in the circumstances and can influence the result of the negotiations without any explicit expression or secret cabals.’” (footnote omitted) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003))).