No. 01-

IN THE

Supreme Court of the United States

DAVID R. JANSEN, WILLIAM J. LORENCE, and N. PETER KNOLL,

Petitioners,

v.

US BANK NATIONAL ASSOCIATION, ND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may approve, over objection, a class action settlement and award of attorneys' fees and expenses without providing a reasoned explanation of its decision?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners David R. Jansen, William J. Lorence, and N. Peter Knoll were objecting class members and intervenors in the district court and appellants in the court of appeals.

The respondents in this Court, all of whom were appellees in the court of appeals, are:

> Defendants US Bank National Association, ND, formerly known as First Bank of South Dakota, N.A.; US Bancorp Insurance Services, Inc.; and US Bancorp, formerly known as First Bank Systems;
>
> and
>
> Plaintiffs James D. Koenig, on behalf on himself, and the class of similarly situated consumers; Phillippa Saunders, on behalf of herself and others similarly situated; Barbara A. Mans; Michael J. Mans, individually, and on behalf of all others similarly situated; Chris Somers, individually, and on behalf of a class of all others similarly situated; Anne Bergman; Kathryn Rosebear, on their own behalf and on behalf of all others similarly situated; Jane Korn; Robert Madoff, on their on own behalf and on behalf of all others similarly situated; Brent Johnson; Bill Rooney, individually, and on behalf of all others similarly situated; Daniel P. Mallove; Timothy Gaillard; Cynthia Gaillard; and Mary Scalise.

Anne Knoll was an intervenor in the district court.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The district court's unpublished orders preliminarily and finally approving the proposed settlement and entering a final judgment are reproduced herein as Appendices B and C (pages B1-B6 and C1-C4). The Eighth Circuit's corrected opinion affirming the district court will be published in F.3d, is currently available at 2002 WL 1063956, and is reproduced herein as Appendix A (pages A1-A5). The Eighth Circuit's denials of petitions for rehearing and rehearing *en banc* are

unpublished and are reproduced as Appendices E and F (pages E1 and F1).

JURISDICTION

The Eighth Circuit issued its initial opinion on January 15, 2002, a corrected opinion on January 25, 2002, and orders denying petitions for rehearing and rehearing *en banc* on March 12, 2002. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

This case involves the approval of settlement agreements in class action cases pursuant to Federal Rule of Civil Procedure 23(e), which provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to members of the class in such manner as the court directs.

It also involves Federal Rule of Civil Procedure 54(d)(2), which provides, in relevant part:

> (A) Claims for attorneys' fees and related non-taxable expenses shall be made by motion * * *
>
> (C) * * * The court shall find the facts and state its conclusions of law as provided in Rule 52(a) * * *.

STATEMENT OF THE CASE[1]

This case involves a class action on behalf of banking and credit card accountholders of the defendants US Bancorp and its subsidiaries (collectively the "Bank"), alleging that the Bank unlawfully supplied confidential customer account information to unaffiliated third parties for marketing purposes.

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[1] Unless otherwise noted, the facts are taken from the Eighth Circuit and district court opinions, attached as Appendices A through C, and from the Stipulation of Settlement, attached as Appendix D.

The suit consists of ten consolidated class actions, the first of which was filed three days after the Minnesota Attorney General Mike Hatch sued the Bank alleging that such disclosure of confidential information violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and Minnesota statutes prohibiting false advertising and deceptive trade practices. *See Hatch* v. *US Bank*, Civ. No. 99-872 (D. Minn., filed June 8, 1999); *Koenig* v. *US Bank National Association, ND*, Civ. No. 99-891 (D. Minn., filed June 11, 1999).

On June 30, 1999, the Bank settled with the Minnesota Attorney General, agreeing to certain injunctive and monetary relief. More than 35 other States later joined that settlement.

Following the settlement of the Minnesota Attorney General's suit, this consolidated class action quickly settled before the end of 1999. The preliminary order approving that settlement was entered on July 5, 2000. App. B1.

Excluding amounts paid by the Bank under its settlement of the Minnesota Attorney General's suit, the settlement in this case provided that the Bank would pay a total of $3.5 million dollars, with up to $1.25 million of that going toward class counsel fees, up to $40,000 going toward class counsel expenses, and $10,000 going to the named class representatives. The remaining approximately $2.2 million was to be distributed among up to 4 million class members based upon the submission of convoluted claim forms that sought to distinguish among various class members and, in particular, created disparate recovery standards as between checking and credit card accountholders.

Following notice of the proposed settlement, approximately 70 unnamed class members, including petitioners Knoll, Jansen, and Lorence, filed objections. In addition to filing written objections, petitioners also appeared at the fairness hearing to reiterate various of their objections in person. Those objections included, *inter alia*, concerns over: The unequal and less favorable treatment of credit card holders as

compared to checking account customers; the extremely low amounts expected to be paid to class members filing claims; the complete lack of anticipated payment to the vast majority of class members; the unwieldiness of the claims procedure for payments; the tremendous disparity in recoveries between named class representatives and other class members; and the excessive and non-itemized attorneys' fees and expenses, particularly given the lack of any significant litigation in this case, the path-clearing suit and settlement by the Minnesota Attorney General, and the early settlement in this case.

The district court's order and final judgment approving the settlement contained a total of four conclusory sentences referencing the objections and the fairness of the settlement and award of attorneys fees and expenses:

> [T]he Court, in making its determination, has considered the remarks of the three individuals [*sic*] objectors appearing at the hearing.
>
> * * *
>
> The Stipulation of Settlement is approved as fair, reasonable, adequate and in the best interests of the Class. The written and oral comments of the objectors were not sufficient to lead the [C]ourt to conclude that the settlement was not fair and adequate or to cause the Court to reject the settlement.
>
> * * *
>
> Class Counsel are awarded attorneys' fees and reimbursement of expenses in the aggregate amount of $1,250,000 in fees and $40,000 in expenses, which sums the Court finds to be fair and reasonable and shall be paid in accordance with the Stipulation.

App. C2-C4. Those sentences constituted the entirety of the district court's "reasoning," and its full answer to the many objections.

Petitioners intervened and appealed, arguing, *inter alia*, that the settlement was not fair, reasonable, and adequate, that the attorneys' fees and expenses were excessive and unsupported, and that the district court had failed to support its decision with reasoned findings and conclusions.

The Eighth Circuit, after rejecting a challenge to petitioners' standing, affirmed. Once again, the "reasoning" offered in support of the reasonableness of the settlement, fees, and expenses was exceedingly thin:

> We also find the district court adequately stated its reasons for approving the settlement agreement and the fee award by stating on the record that the agreement was fair and reasonable and by rejecting the objectors' arguments.

App. A4. Perhaps recognizing the frivolousness of that finding, the court of appeals bolstered its result by denying any obligation for a district court to provide reasoned findings and instead placed the entire burden of demonstrating that the result was *un*fair on petitioners:

> Besides, the intervenors have not shown the record establishes that the agreement was unfair. *See DeBoer* [v. *Mellon Mortgage Co.*], 64 F.3d [1171,] 1177 [(CA8 1995)] (in absence of specific findings regarding fairness of settlement, this court assumes district court did not abuse its discretion unless record establishes to contrary).

Id.

Turning to the fees and expenses, the court of appeals simply approved them in the abstract, again without regard for the lack of findings by the district court:

> [T]he $1.25 million fee award represents approximately 36% of the settlement fund. We have approved the percentage-of-recovery methodology to evaluate attorneys' fees in a common-fund settlement such as this, *see Petrovic* v. *Amoco Oil Co.,* 200 F.3d 1140, 1157

> (8th Cir. 1999), and we find no abuse of discretion in the district court's awarding 36% to class counsel who obtained significant monetary relief on behalf of the class, *see id.* at 1156 (district court's decisions regarding attorneys' fees in class action settlement will generally be set aside only upon showing of abuse of discretion; to recover fees from common fund, attorneys must demonstrate that their services were of some benefit to fund or enhanced adversarial process).
>
> * * *
>
> [W]e find the $40,000 cost award to class counsel for their out-of-pocket expenses was appropriate, *see Keslar* v. *Bartu,* 201 F.3d 1016, 1017 (8th Cir. 2000) (per curiam) (finding no abuse of discretion in $17,000 cost award when case settled for $70,000) * * *.

App. A5. In reaching such *de novo* conclusions, the Eighth Circuit offered no analysis of whether the district court correctly exercised its discretion or considered the relevant substantive factors governing fees and expenses. Indeed, the court of appeals gave no apparent consideration whatsoever to the specific facts in this case that might support or refute the fees and expenses awarded.

Petitioners sought rehearing and rehearing *en banc*, both of which were denied. App. E1 & F1.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Eighth Circuit's holding that a settlement approval may be affirmed notwithstanding the absence of any explanation by the district court of its reasoning in approving the settlement, attorneys' fees, and expenses, conflicts with decisions from other circuits, is in tension with the holdings of this Court, and presents an important national issue concerning class-action settlements that should be addressed by this Court.

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM NUMEROUS OTHER CIRCUITS.

The Eighth Circuit has adopted a rule of review that *assumes* a district court properly exercised its discretion in approving a settlement and award of fees and expenses, even in the complete absence of any reasoned explanation by the district court. That rule conflicts with the rule in the Third, Fifth, and Ninth Circuits, which require a meaningful and reasoned explanation from a district court and which will not accept mere boilerplate settlement approvals. *See, e.g.*, *Eichenholtz* v. *Brennan*, 52 F.3d 478, 488 (CA3 1995) ("in order to provide for meaningful appellate review, a district court must explain its reason for approving a class action settlement agreement"); *Bryan* v. *Pittsburgh Plate Glass Co. (PPG Indus., Inc.),* 494 F.2d 799, 804 (CA3) ("It is essential in [class action settlement] cases such as this that the district court set forth the reasoning supporting its conclusion in sufficient detail to make meaningful review possible; use of 'mere boilerplate' language will not suffice.") (citation omitted), *cert. denied,* 419 U.S. 900 (1974); *Maher* v. *Zapata Corp.*, 714 F.2d 436, 455 (CA5 1983) (district court "must state its reasons for approving [settlement of a shareholders' derivative suit] and should examine a proposed settlement in light of the objections raised to it, and set forth with sufficient detail a reasoned response to them, including supportive findings of fact and conclusions of law as may be necessary, so that an appellate court, in the event of an appeal, will have a basis for conducting a meaningful review of the exercise of the district court's discretion."); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212, 218 (CA5 1981) ("[T]he district court judge must 'undertake an analysis of the facts and the law relevant to the proposed compromise,' and he must 'support his conclusions by memorandum.' * * * 'A "mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law" will not suffice.'") (citations omitted), *cert. denied,* 456 U.S. 998

(1982); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (CA9 2000) ("'Assessing a settlement proposal requires a district court to balance a number of factors' * * *. The district court must show that it has explored these factors comprehensively to survive appellate review.") (citation omitted).[2]

The same courts, plus the Sixth, Tenth, and Eleventh Circuits have likewise required reasoned explanations from district courts for awards of attorneys' fees and expenses. *See, e.g.*, *Gunter* v. *Ridgewood Energy Corp.*, 223 F.3d 190, 196 (CA3 2000) ("Notwithstanding our deferential standard of review, it is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion. * * * [I]f the district court's fee-award opinion is so terse, vague, or conclusory that we have no basis to review it, we must vacate the fee-award order and remand for further proceedings. * * * For us to act as seers and to attempt to soothsay what was on the district court's mind when setting a fee award is a waste of judicial resources. Moreover, if a district court does not fulfill its duty to apply the relevant legal precepts to a fee application, it

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[2] The Second Circuit has recognized, with seeming favor, the majority rule, but has not formally adopted it as its own. *See Plummer* v. *Chemical Bank*, 668 F.2d 654, 659 (CA2 1982) ("Some Circuits have held that the district court must make findings of fact and conclusions whenever the propriety of a settlement is in dispute. [citing cases from Second, Fifth, and Ninth Circuits.] If Title VII class settlements are to be treated henceforth as injunctions for purposes of appeal, * * * it would seem that findings and conclusions should be made with respect to every controverted settlement in order to permit intelligent review.") (citations omitted). The D.C. Circuit has likewise expressed a desire for evidence of reasoned analysis by district courts. *Pigford* v. *Glickman*, 206 F.3d 1212, 1217 (CADC 2000) ("The appellate court is not to substitute its views of fairness for those of the district court and the parties to the agreement, * * * but is only to determine whether the district court's reasons for approving the decree evidence appreciation of the relevant facts and reasoned analysis of those facts in light of the purposes of Rule 23.") (citation omitted).

abuses its discretion by not exercising it."); *Piambino* v. *Bailey*, 610 F.2d 1306, 1328 (CA5) ("'The court should enter findings of fact and conclusions of law setting out the basis for the fee award and adequately presenting the issue for further appellate review should this be necessary.'") (citation omitted), *cert. denied,* 449 U.S. 1011 (1980); *Bowling* v. *Pfizer, Inc.*, 132 F.3d 1147, 1151-52 (CA6 1988) ("'It remains important * * * for the district court to provide a concise but clear explanation of its reasons for the fee award.' * * * Fees aside, it does not appear that Judge Spiegel or the trustees made any particularized inspection of class and special counsel's expense request. A simple rubber stamp is insufficient.") (quoting *Hensley* v. *Eckerhart,* 461 U.S. 424, 437 (1983)); *Powers* v. *Eichen*, 229 F.3d 1249, 1256, 1258 (CA9 2000) ("[T]he district court must specify its reasons for approving a particular attorneys' fees award so that we may conduct meaningful review. * * * Many of the factors discussed at the hearing may have supported the fee award, but the district court never stated the grounds on which it ultimately relied. * * * Because the district court failed to specify adequately the basis for its decision, it abused its discretion."); *Brown* v. *Phillips Petroleum Co.*, 838 F.2d 451, 454 (CA10) ("the district court must 'articulate specific reasons for fee awards to give us an adequate basis' * * * to review the reasonableness of the percentage and thus the reasonableness of the fee award.) (citation omitted), *cert. denied,* 488 U.S. 822 (1988); *Camden I Condominium Assoc., Inc.* v. *Dunkle*, 946 F.2d 768, 775 (CA11 1991) ("In order to facilitate this court's review * * * the district court should articulate specific reasons for selecting the percentage upon which the attorneys' fee award is based. The district court's reasoning should identify all factors upon which it relied and explain how each factor affected its selection of the fund awarded as fees.").

In contrast to the broadly accepted requirement for district courts to articulate their reasoning, the Eighth and the First

Circuits excuse the absence of reasoned findings by the district court and either assume the proper exercise of discretion or make their own – effectively *de novo* – determination of the reasonableness of a settlement and related matters. *See, e.g.*, *DeBoer* v. *Mellon Mortgage Co.*, 64 F.3d 1171, 1177 (CA8 1995) ("In the absence of specific findings regarding the fairness of the settlement, we must assume that the district court did not abuse its discretion unless the record establishes the contrary. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson,* 390 U.S. 414, 437 (1968) (remand not necessary where 'the record contain[s] adequate facts to support the decision of the trial court to approve the proposed compromises')."), *cert. denied,* 517 U.S. 1156 (1996); *Van Horn* v. *Trickey*, 840 F.2d 604, 607 (CA8 1988) ("[I]f the record contains facts supporting the district court's approval of the settlement, 'a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based.'") (quoting *Protective Comm.,* 390 U.S. at 437); *United States* v. *Comunidades Unidas Contra la Contaminacion*, 204 F.2d 275, 279-81 (CA1 2000) (quoting *Protective Committee* and, confronted with a "conclusory recitation in the decree" electing its own review of the record to make the determination lacking below, citing *Van Horn*).[3]

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[3] The Seventh Circuit has somewhat inconsistent holdings on the necessity of articulated reasoning in various contexts. *Compare In re American Reserve Corp.*, 841 F.2d 159, 162 (CA7 1987) ("bankruptcy judge must also give the reviewing court 'some basis for distinguishing between well-reasoned conclusions arrived at after comprehensive consideration of all relevant factors, and mere boilerplate approval * * * unsupported by evaluation of the facts or analysis of the law.' [*Protective Comm*., 390 U.S. at 434.] In other words, the bankruptcy judge must make findings and explain his reasoning sufficiently to show that he examined the proper factors and made an informed and independent judgment."); *Armstrong* v. *Board of School Directors*, 616 F.2d 305, 315 (CA7 1980) ("the district court must clearly set forth in the record its reasons for approving the settlement in order to make meaningful appellate review possible"), *over-*

Given the substantial split regarding the necessity of reasoned decisions when approving settlements, attorneys' fees, and expenses, and the Eighth Circuit's persistent adherence to the minority position, this issue is appropriate and ripe for review.

II. THE FAILURE TO REQUIRE DISTRICT COURTS TO ARTICULATE THEIR REASONING CONFLICTS WITH DECISIONS OF THIS COURT AND MAKES REVIEW FOR ABUSE OF DISCRETION IMPOSSIBLE.

This case also warrants review because the decision of the Eighth Circuit conflicts with the decisions of this Court and with basic principles of appellate review. In particular, it conflicts with this Court's repeated emphasis on the need for reasoned and articulated decision making at the trial level in order to facilitate appellate review. And it *de facto* substitutes *de novo* review for abuse-of-discretion review on issues where both the right and the obligation to exercise discretion rests with the district court.

District court approval of class-action settlement agreements, attorneys' fees, and expenses is subject to review for abuse of discretion. A district court's discretion in these areas, while generally broad, must be exercised within a legal framework that sets forth the various factors for determining the reasonableness and propriety of a settlement, attorneys' fees, and expenses. When considering whether a settlement is

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ruled in part on other grounds by Felzen v. *Andreas*, 134 F.3d 873 (CA7 1998), *aff'd by an equally divided court*, 525 U.S. 315 (1999); *and In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 n. 44 (CA7) ("The trial court, however, does have a duty to members of the class and to the reviewing court to assess, if not decide, the issues of law which weigh heavily in the [settlement fairness] calculus and to consider the most probative evidence bearing on those issues."), *cert. denied,* 444 U.S. 870 (1979), *with McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 428 (CA7 1977) (quoting language from *Protective Committee* regarding reluctance to reverse solely based on court's failure "'adequately to set forth its reasons'").

fair and reasonable, for example, a "district court must consider a number of factors in determining whether a settlement is fair, reasonable, and adequate: the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the settlement." *Van Horn*, 840 F.2d at 607 (citing *Grunin* v. *International House of Pancakes,* 513 F.2d 114, 124 (CA8), *cert. denied,* 423 U.S. 864 (1975)). Similarly, when considering requests for class attorneys' fees and expenses, a district court must take into account a variety of factors, including

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. * * * In mainstream [common-fund] cases, such as this one, we have also suggested that district courts cross-check the percentage award at which they arrive against the "lodestar" award method, which is normally employed in statutory fee-award cases.

Gunter, 223 F.3d at 195 n. 1. And even application of the lodestar method involves considerable analysis. *Id*. In the absence of a reasoned explanation of the district court's treatment of those various factors, it is simply impossible to ascertain whether a district court even has *exercised* its discretion, much less whether it abused that discretion.

In the face of this self-evident problem with the lack of district court findings and analysis, the Eighth Circuit generally relies on a single sentence in this Court's decision in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*:

> If, indeed, the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based.

390 U.S. 414, 437 (1967). The Eighth Circuit then converts that suggested reluctance into a presumption of sound decision making notwithstanding the lack of articulated reasoning, and effectively undertakes *de novo* review if necessary to support that presumption. *See* App. A4; *DeBoer*, 64 F.3d at 1177; *Van Horn*, 840 F.2d at 607.

The trouble with that approach is that the *Protective Committee* language is pure *dicta* and says far less than the Eighth Circuit takes it for. Far more significant than that *dicta* is this Court's extensive discussion and actual holding in *Protective Committee* regarding the central importance of clearly articulated analysis by district courts. As this Court explained: "It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." 390 U.S. at 434. This Court proceeded to remand the case because the record left the Court "completely uninformed as to whether the trial court ever evaluated the merits of the causes of actions held by the debtor, the prospects and problems of litigating those claims, or the fairness of the terms of compromise." *Id*. at 440.

This Court has similarly emphasized, in the specific context of attorneys' fees, that it "remains important * * * for the district court to provide a concise but clear explanation of its reasons for the fee award." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983). Federal Rule of Civil Procedure 54(d)(2) confirms and memorializes the importance of such an explanation by requiring district courts to make findings of fact and

conclusions of law in support of fee awards. Such guidance from this Court and the Federal Rules in the context of settlements and fee awards is far more telling than the *dicta* relied upon by the Eighth Circuit, and conflicts with the decision in this case.

The Eighth Circuit's approach also suffers from the defect of distorting the fundamental nature of abuse-of-discretion review. Regardless of whether the record contains facts that might support the district court's *result*, such facts will, in most cases, tell a reviewing court nothing about whether the trial court properly exercised its discretion in reaching that result. The very nature of such discretion implies that there is a broad range of potentially *permissible* results from an appellate perspective, and that it is up to the trial court to exercise its judgment as to which potentially permissible result is the one that will be approved in a particular case.

By looking directly to the record itself, rather than to the district court's analysis of the record, a reviewing court violates the fundamental principle that it

> is not to substitute the views of fairness for those of the district court and the parties to the agreement, * * * but is only to determine whether the district court's reasons for approving the decree evidence appreciation of the relevant facts and reasoned analysis of those facts in light of the purposes of Rule 23.

Pigford, 206 F.3d at 1217 (citation omitted). As the Fifth Circuit has correctly recognized, where

> the district judge has failed to support his approval of the settlements by adequate evaluation of the facts and analysis of the law, we lack a basis for reviewing his discretion. * * * Thus, were we at this juncture to affirm the approval of the settlements, we would not be reviewing the district court's exercise of discretion but, rather, exercising our own discretion on the basis of the

> record before us. This is not our function, and we therefore must remand to the district court.

Corrugated Container, 643 F.2d at 218 (citation omitted).

III. THIS CASE RAISES IMPORTANT NATIONAL ISSUES THAT SHOULD BE RESOLVED BY THIS COURT.

The divergent views in the courts of appeals regarding the necessity of reasoned findings and conclusions by district courts when they approve class action settlements and fees presents an important issue that affects the substantial rights of many millions of potential class members. The need for diligence by the district courts is at its peak in the context of class action settlements because there is nobody else watching out for the interests of unnamed class members. "It is no secret that in 'seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence.'" *Kaplan* v. *Rand*, 192 F.3d 60, 67 (CA2 1999) (citation omitted). Such mutual indulgence can be expected to continue through the joint efforts of the defendants and class counsel to persuade the court to approve their settlement agreement and fees. In order for appellate courts to be able to detect and guard against such mischief, the district court must provide its reasoning and hence an adequate basis for review of its discretion.

An effective appellate process is thus part and parcel of the essential procedural protections afforded to unnamed class members. The appeals process "induc[es] trial court judges to make fewer errors because of their fear of reversal." Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 408-11, 425-26 (1995). The available data indicates that fairness hearings in district courts tend to be exceedingly brief and generally do not result in changes to settlements crafted by the named parties. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 & n.14 (1995)

(empirical evidence suggests that "courts have little ability or incentive to resist [proposed] settlements"; data shows median hearing lengths in two districts of 38 and 40 minutes); Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 58 (1996) ("Approximately 90% or more of the proposed [class] settlements were approved without changes in each of the four districts."). Fairness hearings in some courts are "typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel" in which the district courts "engage in paeans of praise for counsel or lambaste anyone rash enough to object to the settlement." Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46-47 (1991). The requirement that a district court explain itself sufficiently for appellate review acts as an important check on the tendency of a district court just to go along with the program once the primary litigants lay down their arms.

Finally, in addition to the basic importance of this issue to class action litigation, it is also especially appropriate that this Court resolve the matter because much of the current confusion stems from nearly 35-year-old *dicta* in this Court's *Protective Committee* decision, and hence those courts following that language likely will not budge absent further word from this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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