Circuit Court for Baltimore City
Case No. 24-C-16-003894

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2609

September Term, 2017

CONSUMER PROTECTION DIVISION

v.

CRYSTAL LINTON, ET AL.

Meredith,
Berger,
Nazarian,

JJ.

Opinion by Nazarian, J.
Dissenting Opinion by Berger, J.

Filed: April 22, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Settlements may not reflect a full measure of justice—they're usually driven by practical considerations such as finite resources, uncertain outcomes, and time. In disputes among private parties, we leave it to them to decide if half (or even four percent of) a loaf is better than none. In class actions, though, a court must find the settling plaintiffs had an opportunity to understand the terms of the settlement (and to object or opt out) *and* that the result is fair. The notice and fairness hearing procedures in Maryland Rule 2-231 scale the normal process of lawyers advising clients and clients deciding what to do, and they serve as a check on class counsel's potentially conflicting interest in getting a(ny) deal done.

The class action settlement at issue here involves vulnerable people who were poisoned by lead in their homes. Before they ever saw television ads for Access Funding, LLC ("Access"), they had the right to receive hundreds of thousands or millions of dollars over time as damages for their injuries. When they responded to Access's ad, they received fraudulent and conflicted financial "advice," and Access induced them into agreeing to assign their revenue streams to Access for pennies on the dollar in cash. Now, as a condition of a settlement meant to redress the fraud, class members must agree to assign to Access their full rights to restitution, all in exchange for a four percent lump-sum payment. This includes their rights to restitution the Consumer Protection Division of the Office of the Maryland Attorney General (the "Division") and the United States Consumer Financial Protection Bureau (the "Bureau") might recover. The settlement also would release Access and its affiliates and principals from liability for public restitution claims.

It is not our role to revisit whether this settlement represents a good deal, or even a good deal under the circumstances. Our role is to review the decision to approve the settlement and determine whether the right law and procedures were applied and, ultimately, whether the Circuit Court for Baltimore City abused its discretion in reaching its decision. We affirm the circuit court's decision to allow the Division to intervene. And with a couple of caveats and reservations that we discuss below, the process begetting this settlement was fair. But because the settlement interferes with the Division's and Bureau's enforcement authority, and because settlements are all-or-nothing packages, we reverse the judgment and remand for further proceedings consistent with this opinion.

I. BACKGROUND

In 2012, Lee Jundanian, Michael Borkowski, and Raffi Boghosian founded Access, a structured settlement factoring company that "offer[ed] [] recipients of structured settlements the opportunity to transfer a portion of their future payment streams in exchange for a discounted immediate lump sum." *Consumer Fin. Prot. Bureau v. Access Funding, LLC*, 281 F. Supp. 3d 601, 603 (D. Md. 2017). Done fairly and with full information, there is nothing intrinsically wrong with this sort of transaction. But Access wasn't looking to do business with sophisticated consumers—it marketed its services to victims of lead poisoning. Access placed billboards in Baltimore City, advising victims that they could "Get Cash For [Their] LEAD PAINT Settlement," and ran ads on late-night television. And the marketing worked: between 2013 and 2015, Access obtained judicial approval to acquire 163 structured settlements from 100 victims, and obtained

$33.8 million in future payment rights (with a present value of approximately $25.5 million) in exchange for $7.7 million in cash.

Under Maryland Code (1974, 2013 Repl. Vol., 2018 Cum. Supp.), § 5-1102 of the Courts & Judicial Proceedings Article ("CJ"), structured settlement payment rights cannot be transferred without court approval. Among other things, the court must find that the transferor "received independent professional advice concerning the proposed transfer[.]" CJ § 5-1102(b)(3). But an adviser is not "independent" if they are, among other things, "affiliated with or compensated by the transferee[.]" CJ § 5-1101(d)(2). When people responded to Access's ads, Access referred them to Charles Smith, a lawyer (his financial qualifications don't appear in the record). In their petitions for approval of the transfers, Access represented that Mr. Smith had provided the transferors with independent professional advice. In fact, Access had paid Mr. Smith for each victim he "advised," more than $50,000 overall, according to the Division. Mr. Smith also practiced law with Access's former attorney, Anuj Sud.[1] None of this was disclosed by Access to the targets of the offers.

On June 5, 2015, Maryalice Rose, a lead poisoning victim, filed a complaint against Mr. Smith and his firm, CES Law Group, LLC, in connection with the sale of her structured settlement to Access. Mr. Smith had been the one to provide Ms. Rose "independent professional advice" before she agreed to transfer her structured settlement.

[1] Mr. Sud has since been disbarred. *Att'y Grievance Comm'n of Md. v. Sud*, 457 Md. 395 (2018).

When Ms. Rose learned that Smith was on Access's payroll and did not qualify as an independent adviser, she filed suit. The Division then initiated an eight-month investigation into Access's operations.

In May 2016, after completing its investigation, the Division filed suit against Access and its related entities, Access's executives, and Mr. Smith. The Division alleged that Access had violated the Maryland Consumer Protection Act ("MCPA") by failing to inform the victims that it was affiliated with Mr. Smith and that Mr. Smith was not an independent adviser. The Division contended that Access also violated the MCPA by converting future rights to payment into cash on grossly unfair terms, and by misleading victims about their rights under Maryland law. The Division demanded (1) monetary restitution and restitution of property for the victims; and (2) a declaratory judgment that the transfers were void *ab initio* because they were procured by fraud.[2]

On July 6, 2016, Crystal Linton filed suit in the Circuit Court for Baltimore City against Access on behalf of 100 victims who sold their structured settlements (the "Class" or the "Class Members"). The Class alleged claims of negligence, misrepresentation, fraud, constructive fraud, and civil conspiracy against Access, Access Holding, LLC; En Cor, LLC; Assoc, LLC; Reliance Funding, LLC; Mr. Smith; CES Law Group, LLC;

[2] The Division's suit remains pending in the Circuit Court for Baltimore City. *Consumer Protection Division v. Access Funding, LLC*, No. 24-C-16-002855 (referred to as "*CPD v. Access Funding*"). On November 21, 2016, the Consumer Financial Protection Bureau ("CFPB") filed a similar suit alleging federal causes of action against Access Funding, its related entities, and its executives. *Consumer Financial Protection Bureau v. Access Funding, LLC*, No. ELH-16-3759 (referred to as "*CFPB v. Access Funding*"). That case is pending in the United States District Court for the District of Maryland.

Mr. Sud; and Sudlaw, LLC (collectively referred to as the "Class Action Defendants"). The Class argued in its complaint that Access defrauded the victims by representing that Mr. Smith provided independent professional advice, and that Access induced them to sell their structured settlement rights by offering unlawful incentives that were not disclosed in the various circuit court petitions. The Class did not name Mr. Jundanian, Mr. Boghosian, or Mr. Borkowski as defendants.

On August 19, 2016, Access filed petitions to compel arbitration. It argued that the structured settlement transfer agreements contained mandatory arbitration provisions. The Class did not oppose the petitions to compel arbitration; rather, the Class and Class Action Defendants sought a stay jointly so they could have time to negotiate a settlement.

On December 13, 2016, a senior judge held an extended mediation with the Class and the Class Action Defendants. Both the Division and the CFPB declined invitations to attend the mediation. After the mediation, the Class reached a settlement in principle with the Class Action Defendants.

On March 28, 2017, the settling parties filed a Joint Motion for Preliminary Approval of Class Action Settlement. The proposed agreement provided, among other things, a settlement fund of $1.1 million, from which the Class's attorneys would receive $330,000 in fees. The proposed settlement bars the Class from "receiving any benefits from any lawsuit or arbitration proceeding arising out of or related to any of the Released Claims," and compels the Class to "irrevocably assign and transfer . . . any recovery based on the equitable remedies of restitution, disgorgement of profits or damages obtained by

[the CFPB or the Division] for the benefit of each Settlement Class Member." Moreover, the settlement releases all of the Class's claims against the Class Action Defendants, as well as any claims against Messrs. Jundanian, Boghosian, and Borkowski (even though none of them was named in the suit).

On April 13, 2017, the Division filed a motion to intervene, and the circuit court granted the motion on June 15. Four days later, the Division filed a motion asking the court to stay class certification and approval proceedings for 180 days so that the Division could pursue its restitution case. Access opposed the motion, and argued that a stay would exhaust its $1 million "declining limits" insurance policy.[3] After a hearing on July 25, 2017, the circuit court denied the motion. The court observed that the Division faced "a high bar" in proving its restitution theory and expressed the concern that if it granted the stay, but the Division nonetheless failed to obtain restitution for the Class, "the [insurance] money will be all gone and then the [Class] will be left with nothing."

The Division then submitted objections to the Notice of Class Action Settlement and the Joint Motion for Preliminary Approval of Class Action Settlement. On September 20, 2017, the circuit court held a hearing to consider whether to approve the settlement preliminarily, and to evaluate the proposed notice. At the hearing, the Division articulated several concerns. *First*, the Division asserted that the notice was "written for an audience of lawyers, [and] not for an audience . . . [of] people who have limited education, who are

[3] In a declining limits policy, the insured party's costs incurred in defending litigation reduce the available limits of the policy to pay damages.

not financially sophisticated, and who are victims of lead poisoning." *Second*, the Division argued that the notice did not adequately inform the victims of the total financial harm they incurred. *Third*, the Division contended that the notice did not advise the victims effectively that they were foregoing claims to future payments.

After hearing arguments from each side, the circuit court observed that the notice must "be objective . . . [so that the victims] understand what the settlement involved and what the [Division's] case involved, just the facts, what the options are, and not anyone's recommendation to accept the settlement. . . . So[,] I do want just an objective notice sent." The circuit court directed the parties to make several revisions in response to the Division's concerns. The settling parties later submitted a revised version of the proposed notice.

On September 28, 2017, the circuit court entered a Preliminary Approval Order. The court found that the "proposed notice constitutes the best notice that is practicable under the circumstances" because it sufficiently described the nature of the class action, the terms and binding effect of the settlement, and each victim's right to opt out. The court approved the proposed opt-out form, then certified the class preliminarily, granted preliminary approval of the settlement, and scheduled a fairness hearing for February 2, 2018.

On December 22, 2017, the Division filed a motion for partial summary judgment in its case, *CPD v. Access Funding*, and sought a declaration that 104 structured settlement transfers were void *ab initio*. That same day, the Division filed a motion opposing class

certification and objecting to the proposed settlement. On January 17, 2018, the Division filed a motion to defer the fairness hearing until after its summary judgment motion was resolved. The court permitted the Division to argue its motion at the February 2, 2018 fairness hearing, and after hearing argument, denied the motion and proceeded with the fairness hearing.

At the fairness hearing, the court directed each party's counsel to present arguments and proffer facts so that it could determine whether the settlement was "fair, adequate and reasonable." The parties didn't offer testimony, and the court didn't require any, but relied on argument and counsel's representations. The court asked the parties if the Class Action Defendants had any money other than the insurance policy to redress the Class's injuries, and counsel for Access stated that Access and its related entities had "no assets" and were "basically insolvent." Counsel for Mr. Smith represented that Mr. Smith had sworn in an affidavit that he had only a "few thousand dollars" other than the assets he held with his wife as tenants by the entireties.

The court then inquired into Mr. Sud's financial wherewithal. Class Counsel stated that Mr. Sud had pleaded guilty to a federal crime and was "facing up to five years [in prison]" in addition to $250,000 in fines and penalties. At first, the court was not persuaded that Mr. Sud's guilty plea prevented him from redressing the Class's injuries, on the grounds that Mr. Sud "may have $5 million" in assets and could theoretically pay both criminal fines and damages to the Class. In response, Class Counsel argued that Mr. Sud had a strong defense to the conspiracy asserted against him because he had

provided legal advice in the scope of his employment. Counsel for the Division urged the court to consider the financial resources of Mr. Jundanian, Mr. Borkowski, and Mr. Boghosian, even though the three executives were not defendants in the class action, but the court declined to do so.

The court also considered whether the Class could obtain a more favorable remedy if the court declined to approve the proposed settlement. Counsel conceded that the class action "might not be successful" because Access's structured settlement transfer agreements contained provisions that obligated Class Members to arbitrate their claims individually and that litigating serial claims would deplete the Access's declining limits insurance policy. Counsel asserted, therefore, that the settlement was in the Class Members' best interests.

On February 9, 2018, the circuit court issued a Final Approval Order. In the twenty-eight-page order, the court certified the Class, approved the settlement, and awarded counsel for the Class $330,000 in attorney's fees. The Division filed this timely appeal. The Class Members and Access filed a cross-appeal, in which they contend that the circuit court should not have granted the Division's motion to intervene.

II. DISCUSSION

On appeal, the Division poses six questions that boil down to whether the circuit court erred in certifying the class and approving the settlement.[4] We take them in reverse

[4] The Questions Presented listed by the Division in its brief are:

> 1. In certifying and approving a class action settlement that compensates class members in an amount equivalent only to about

4% of the financial harm they suffered as a result of their transactions with Access Funding, did the circuit court err in declining to require the submission of evidence to support its factual findings, including its findings that defendants-appellees are insolvent?

2. In approving a class settlement that purports to "release" Access Funding's principals, not only from any liability to class members, but also from liability to two government agencies with claims pending against them, did the circuit court err in holding that it had "no basis" to consider whether the "released" principals have financial resources to satisfy a judgment on, or contribute to a settlement of, the claims from which they were "released"?

3. Did the circuit court abuse its discretion in approving, through a judicial opinion drafted for it by counsel, a class settlement in which (a) absent class members, more than 70% of them victims of lead poisoning, receive compensation equivalent only to four cents for each dollar of financial harm they [suffered], (b) the amount of the settlement fund is less than available insurance proceeds and the defendants would not make any direct contribution to the settlement fund, and, (c) Access Funding would purportedly be "released" from making any restitution through pending lawsuits filed by the Division and the CFPB?

4. Did the circuit court err in granting approval to a private class settlement that (a) purports to "release" the defendants and their principals, without the consent of the Division, from claims for restitution previously filed against them by the Division, where the Court of Appeals has held that restitution, when sought by the Division, is a *public* remedy requiring those who have violated the CPA to disgorge unlawfully—acquired money and property, and (b) requires class members to transfer back to Access Funding any payment rights that are restored to them, without compliance with Maryland's structured settlement transfer law?

5. Did the circuit court abuse its discretion in awarding $330,000 in attorneys' fees to class counsel, where counsel sought no discovery and engaged in no litigation adverse to Access Funding after filing their complaint; admitted that their class claims, had they been adjudicated, likely would have been barred by the defendants' unanswered petitions to compel arbitration; recovered only $750,000 of the $17.7 million in total financial harm incurred by class members; and obtained this "recovery" principally by

order, hold that the settlement interfered with the public enforcement authority, and offer some observations on the fairness of the approval process and where this decision leaves everyone. Because, however, we couldn't reach any of those issues if the circuit court had erred in allowing the Division to intervene, we address that first.

Overall, we "review a trial court's decision regarding whether to certify a class action for an abuse of discretion." *Creveling v. Gov't Emps. Ins. Co.*, 376 Md. 72, 90 (2003). And "[w]hen reviewing a trial court's decision to approve a class action settlement, there is a strong presumption in favor of finding a settlement fair." *Shenker v. Polage*, 226 Md. App. 670, 684 (2016) (citations and quotations omitted). "We afford the trial court's decision substantial deference, and reverse only upon clear showing that the court abused its discretion," *id.* (citations omitted), although we review *de novo* the legal standards the court used. *Creveling*, 376 Md. at 90 ("[W]hether the trial court used a correct legal standard in determining whether to grant or deny class certification is a question of law that we review *de novo*."). The court abuses its discretion if it "acts without reference to any guiding rules or principles," or "the ruling under consideration is clearly against the logic and effect of facts and inferences before the court." *Sindler v. Litman*,

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"settling" the separate, pending claims of the Division and the CFPB.

6. Did the circuit court err in approving a settlement notice that used complex legal jargon, failed to inform absent class members of the implications of the settlement, and did not include an opt-out form, and then in subsequently approving the settlement despite class counsel's failure to make themselves available at the phone number identified in the settlement notice for class members to ask questions about the settlement?

166 Md. App. 90, 123 (2005) (citations and quotations omitted). To warrant reversal, then, the judgment of the circuit court must be "beyond the fringe of what the court deems minimally acceptable." *Id.* (cleaned up).

A. The Circuit Court Correctly Allowed The Division To Intervene.

Before addressing the settlement itself, we must address the Class Members' and Access's argument, in their cross-appeal, that the Division never should have been allowed to intervene. We agree with them that the court didn't state whether it was allowing the Division to intervene as of right, Maryland Rule 2-214(a), or permissively. *Id.*, 2-214(b). We review interventions as of right *de novo* and permissive interventions for abuse of discretion. *Doe v. Alternative Medicine Maryland*, 455 Md. 377, 414 (2017). Either way, the court did not err in allowing the Division to intervene.

The main arguments against intervention flowed in the circuit court, and flow here, from the core contention that the Division had no interest in the settlement because the only interests at stake—the Class Members' rights to recover from Access—are entirely private. For reasons we discuss in greater depth in the next section, that premise fails. The Consumer Protection Act authorizes a range of potential remedies, including restitution, for violations of the Act, and authorizes the Division to enforce the Act and seek those remedies. The Division had standing to identify and assert any conflicts between the terms of the settlement and the Division's enforcement authority, and those conflicts were not for counsel for the class and Access to resolve, but for the court.

In addition, the Class Members and Access contend that the Division's motion to

intervene was untimely, a decision we also review for abuse of discretion. *Doe*, 455 Md. at 414. And although the circuit court was frustrated with some of the Division's decisions and the timing of some of its filings, it rejected claims that the motion was untimely. We see no abuse of discretion in that decision, not least because the Division had filed its separate action before the class complaint was filed in this case. We agree with the Division that although the fact of its intervention may have slowed the resolution of this case, the timing of its intervention motion didn't, and in any event that the court decided correctly to allow the Division to participate directly.

B. The Settlement Interferes With The Division's And Bureau's Enforcement Authority.

The point of settlements is to settle, and the Class Action Defendants understandably sought in this agreement to achieve total peace. But parties can only settle their own claims—they can't settle the claims of those who aren't parties to the agreement or otherwise not theirs to settle. The Division and the Bureau weren't parties to the settlement and their rights to seek restitution was not something the Class could bargain away. And because the settlement effectively preempted a major portion of the pending claims being pursued by the Division and the Bureau when it assigned any benefit from those actions to Access and the Class Defendants—*i.e.*, the targets of the agencies' enforcement efforts—the judgment approving the settlement must be reversed.

The Maryland Consumer Protection Act allows both the Division and individual consumers to bring claims against violators and authorizes different remedies for each. And although the Division's claims and the Class Members' claims both arise under the

Maryland Consumer Protection Act, they flow from different sections and fulfill different purposes. Whether a complaint originates with a consumer, Maryland Code (1975, 2005 Repl. Vol.), § 13-401(a) of the Commercial Law Article ("CL"), or the Division itself, *id.*, § 13-204(2), the Act authorizes the Division to investigate, *id.*, § 13-401(b)(1), and pursue alleged violations of the Act. The Division can attempt to negotiate a resolution, *id.*, § 13-402, or hold a public hearing to determine whether violations have occurred. *Id.*, § 13-403. Then "[i]f, at the conclusion of the hearing, the Division determines on the preponderance of the evidence that the alleged violator violated [the CPA], the Division shall state its findings and issue an order requiring the violator to cease and desist from the violation and to take affirmative action, *including the restitution of money or property*. *Id.*, § 13-403(b)(1)(i).[5] Consumers either can rely on the Division to prosecute the claim or can seek *damages* on their own, *id.*, § 13-408;[6] filing a complaint doesn't foreclose any other remedies. *Id.*, § 13-401(e).

Under the Consumer Protection Act, restitution and damages are not the same remedy, even if the process of calculating them might (and often does) lead to the same result. Damages are, well, damages, and compensate a party for their losses. Restitution

[5] The Attorney General also can submit disputes to arbitration. CL § 13-404. The Division has subpoena power, *id.*, § 13-405, and can seek injunctive relief in addition to restitution, *id.*, § 13-406, and civil and criminal penalties. *Id.*, §§ 13-410, 13-411. We recognize that nothing in the settlement precludes the Division or the Bureau from pursuing cease-and-desist orders, injunctive relief, investigation costs, or civil or criminal penalties.
[6] Prevailing consumers also can recover attorney's fees. *Id.*, § 13-408(b).

also, but primarily, seeks to prevent bad actors from being enriched unjustly—an enforcement purpose properly commended to public authorities, not private plaintiffs:

> Professor Dobbs has contrasted restitution to a damages action, saying (Dobbs, *Law of Remedies* § 4.1 at 224 (1973)):
>
> > "The damages remedy is to compensate the plaintiff and it pays him, theoretically, his losses. *The restitution claim, on the other hand, is not aimed at compensating the plaintiff but at forcing the defendant to disgorge benefits it would be unjust for him to keep* . . . .
> >
> > "Restitutionary recoveries often amount to about the same as the plaintiff's losses, and thus serve many of the compensatory purposes served by a damages recovery. The justification lies, however, in the avoidance of unjust enrichment on the part of the defendant."

Consumer Protection Div., Office of the Attorney Gen. of the State of Md. v. Consumer Publishing Co., 304 Md. 731, 776 (1985) (*quoting Prosser & Keeton on Torts* § 105 at 730–31 (5th ed. 1984)) (emphasis added); *see also Edmond v. Consumer Protection Division , Office of the Attorney Gen. of the State of Md., (In re Edmond)*, 934 F.2d 1304, 1310 (4th Cir. 1991) ("Maryland law has construed the restitution provision of the [Consumer Protection] Act to embody the state's interest in disgorging the benefit from the violator."); *cf. U.S. Dep't of Housing & Urban Dev. v. Cost Constr. Mkt'g & Sales Mgt. of Va.*, 64 F. 3d 920, 928 (4th Cir. 1995) ("To restate the proposition, ***as long as the government's interest in enforcing a debt is penal in nature, it is immaterial that injured persons may receive compensation for pecuniary loss***.") (emphasis in original)). The Class Members, as individuals, each had the right to pursue damages against Access and

the other defendants, and were free to agree, individually or collectively, not to pursue those claims. The right to seek restitution, however, lies with the Division, and the Class Members never had a restitution claim to settle (they had a damages claim instead).

Of course, the settlement doesn't say in so many words that the public agencies can't seek restitution, nor does it release Access or the other Released Parties from public restitution claims in so many words. But it accomplished the same effect when it required "each Settlement Class Member who has not opted out of the proposed settlement [to] irrevocably assign and transfer to the Defendants any and all benefits or recoveries, including any recovery based on the equitable remedies of restitution, disgorgement of profits or damages obtained by the Bureau in the Bureau's Lawsuit or the Division in the Division's Lawsuit for the benefit of each Settlement Class Member." That mechanism directly thwarts the Division's ability to combat unjust enrichment. And in the context of these allegations, it's more than a little ironic: the remedy for people who were duped into assigning their structured settlements now must *assign back to the defendants* anything that public enforcement authorities could recover in restitution, disgorgement, or damage.

The Settling Parties and the dissenting opinion point to *California v. IntelliGender*, 771 F.3d 1169, 1171 (9th Cir. 2014), a case that "sits squarely at the intersection of the Class Action Fairness Act ("CAFA") and a sovereign's right to bring an enforcement action to protect its citizens from unscrupulous, fraudulent, or harmful business practices." In that case, a federal district court approved a class action settlement of a series of CAFA claims before the State of California filed a state law enforcement action, and the Ninth

Circuit held that the State's restitution claims should have been enjoined. *Id*. at 1179–82. As here, the court recognized the State's right to pursue other remedies, notwithstanding the class action settlement. Even so, the court found that the State's action "insofar as it seeks restitution for individual members of the [settlement class], may be enjoined under its continuing jurisdiction to enforce and administer the [settlement]." *Id*. at 1179. The Ninth Circuit viewed the situation primarily through a *res judicata* lens, though: it compared the rights of the settlement class and those of the victims whose rights would be vindicated by the State's restitution claims, found them in privity, and, importantly, viewed as identical the relief sought in the two actions. *Id*. at 1179–80. The court also recognized (*citing Herman v. S.C. Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998), a case we discuss next) that a private settlement doesn't act as *res judicata* against a state acting in its sovereign capacity. *IntelliGender*, 771 F.3d at 1177–78. But aside from the fact that the class action settlement there was fully approved before the state brought suit—a key difference from this case—the relief sought in the two cases here is not the same, even where it overlaps. The Ninth Circuit didn't recognize (or in any event didn't discuss) any difference between the federal and California restitution remedies at issue in *IntelliGender*, but treated them as identical in kind, if not necessarily in amount. 771 F.3d at 1177–78.[7]

[7] The dissent also discusses *In re Baldwin-United Corp*., 770 F.2d 328 (2d Cir. 1985), a case cited by none of the parties, for the core principle that the Class Members are the only real parties in interest because state agencies' enforcement rights derive from their private injuries. As in *IntelliGender*, the Multi-District Litigation settlement in *Baldwin-United* had been reached before any of the state enforcement agencies had initiated their

Like the Division and Bureau, we see a closer analogy in the Eleventh Circuit's analysis in *Herman*. There too, the Secretary of Labor declined to participate in a negotiation to settle a class's ERISA claims, and the private parties reached an agreement, that a trial court approved, before the Secretary filed an enforcement action. *Herman*, 140 F.3d at 1417. The court held that *res judicata* did not bar the Secretary from pursuing restitution and other relief "because the Secretary was not a party to the [class action] settlement and has national public interests separate and distinct from those of the [class's] private litigants." *Id.* at 1424. More so than *IntelliGender*, *Herman* focused on the Secretary's public interest in deterring violation of ERISA and the fact that the Secretary was not a party to a prior class action settlement between plan beneficiaries and the defendants. *Id*. at 1423–24. Its holding was consistent, the court said, with "the well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests." *Id*. at 1425 (citing cases). And just as we are concerned with upholding the structural integrity of the Maryland Consumer Protection Act, the court was concerned

cases, and the Second Circuit affirmed a trial court injunction *against new actions* that was "necessary or appropriate in aid of the [federal] court's jurisdiction." 770 F.2d at 335-40. The court was concerned primarily in that case with the prospective interference by state agencies with the settlement that already had been reached and approved. And beyond that important difference in posture, the court viewed the state enforcement claims as entirely derivative of the private damages claims. *Id*. at 336–37 ("Were this not the case, the finality of virtually any class action involving pendent state claims could be defeated by subsequent suits by the states asserting rights derivative of those released by the class members."). That is not how the Maryland Consumer Protection Act treats either category of claims, even if they overlap as a practical matter.

in *Herman* with protecting against allowing private settlements to thwart the statute's remedial purposes:

> The ERISA enforcement scheme, carefully constructed by Congress, is undermined if private litigants can sue ERISA violators first, reach a settlement, and bar the Secretary's action. The terms of the [class] private settlement illustrate why this result is not what Congress intended, or provided, in ERISA. The [class] settlement recovered from [the corporate defendant] only a small fraction of the Plan's $80 million in assets lost in the stock purchase. The private plaintiffs released and dismissed with prejudice [two defendants] despite having alleged serious ERISA violations against them and even though they made a negligible contribution to the settlement. Since only the Secretary can assess civil penalties, none were paid.
>
> While private plaintiffs understandably may be willing to compromise claims to gain prompt and definitive relief, the [class] settlement does not further the broader national public interests represented by the Secretary and reflected in Congress's delegation of ERISA enforcement powers to the Secretary. The national public interest in deterrence of asset mismanagement suffers if private parties can release claims against ERISA violators for negligible financial recovery and thereby immunize plan trustees and "parties in interest" from ERISA violations. Furthermore, the public treasury is ill-served by denying the Secretary the opportunity to assess civil penalties, expressly authorized by Congress to deter ERISA violations, as well as the occasion to ensure that the Plan receives full value for the millions of dollars in tax subsidies.

Id. at 1425–26 (footnote omitted).

At the risk of appearing to reduce these important principles to a turf battle, the differences in these cases, and between us and the dissent, seem to turn on the sources of the respective claim and who is interfering with whom. In the cases the dissent finds persuasive, the private class action settlements preceded any state enforcement actions

and, importantly, the courts viewed the prospective state enforcement proceedings as pursuing identical or entirely derivative claims. In those contexts, the finality concern is a reasonable one, and the class plaintiffs aren't giving away anything the state could have gotten separately. But here, as also in *Herman*, the public and private claims are not identical, and the private settlement, if given primacy, would intrude on the State's independent enforcement authority. We see nothing preventing the two sets of claims and interests from existing in parallel—for example, in a private settlement that resolves only the individuals' right to pursue damages under CL § 13-408 and doesn't interfere with the Division's ability to seek restitution and other remedies. Nor does anything prevent a global resolution of public and private claims. This settlement, however, brings the private interests into conflict with the public interests in an irreconcilable way.

We do not scuttle this settlement gladly or lightly. We acknowledge that Access's declining-limits insurance policy may be the only concrete set of assets realistically available to fund a recovery, and that the private claims may not be able to settle unless everything settles. But those are precisely the challenging dynamics that public enforcement authorities must consider all the time, and they, unlike private litigants, are charged with weighing those realities in the service of the public interest. Whether or not the Division and Bureau can achieve a better result—something that remains to be seen—it was not appropriate for the settlement to include terms that resolved or interfered with their enforcement authority, including their ability to seek restitution. For that reason, the circuit court's decision approving the settlement must be reversed.

B. Observations On The Settlement Process And Aftermath.

Our decision on the public claims resolves the appeal, but we recognize that the decision to approve the settlement represents a substantial body of work by the parties and the trial court. We recognize as well the possibility that the parties may attempt on remand to negotiate a new settlement or otherwise to resolve these claims. For that reason, we offer observations in response to some of the Division's objections to the procedural and substantive fairness of the settlement. We are not attempting to address everything the Division has raised on appeal.

Class action settlements must be approved by the circuit court. Md. Rule 2-231(h). Although the Maryland Rules do not specify a standard for courts to apply when reviewing class settlements, Federal Rule of Civil Procedure 23(e), "the federal analogue to [Md.] Rule 2-231(h)," provides useful direction. *Shenker*, 226 Md. App. at 682. Federal Rule of Civil Procedure 23(e)(2) provides that a court may approve a settlement upon finding that the settlement is fair, reasonable, and adequate. We explained in *Shenker* that courts are tasked with "evaluat[ing] proposed class action settlements in two steps: *first*, by evaluating the procedural fairness of the settlement process, and *second*, by evaluating the settlement's substantive fairness and adequacy." *Id.* at 683–84.

1. Overall, The Settlement Was Procedurally Fair.

The Division challenges the sufficiency of the notice and argues that the Class and the Class Action Defendants negotiated the settlement without taking discovery or introducing any evidence. We treat those assertions as challenges to the procedural

fairness of the settlement process.

The Division argues *first* that the Class Action Defendants did not provide the Class sufficient notice of the terms and implications of the settlement agreement and that the notice was confusing and difficult for cognitively-impaired victims to understand. A notice of settlement in a class action satisfies due process when it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford[s] them an opportunity to present their objections." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (*quoting Mullane v. Centr. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950)). At a minimum, "[t]he notice should describe the action and the plaintiffs' rights in it." *Id.*

We don't agree that the proposed notice "constitutes the best notice that is practicable under the circumstances." At the September 20, 2017 hearing, the court acknowledged the Division's objections to the notice and directed that the notice "be objective . . . [so that the recipients] understand what the settlement involved and what the [Division's] case involved, just the facts, what the options are, and not anyone's recommendation to accept the settlement." There was extensive back-and-forth between the court and the parties during the hearing, and the court directed the parties to make several revisions to the notice to address the Division's concerns.[8]

[8] For instance, when the Division noted that the Class Members may be confused about the Division's role in *CPD v. Access Funding*, the court directed the parties to add the following sentence: "If you would like more information about the Attorney General's lawsuit, you may contact Christopher Waldt."

Ultimately, the parties submitted a revised version of the notice. The revised version fairly discussed the nature of the pending class action suit and prospective class, sufficiently summarized the terms of the settlement, and described in detail the related state and federal actions and informed prospective Class Members that their participation in the settlement would preclude them "from receiving any financial benefit from the lawsuits brought by the Division or the [CFPB.]" But the Division also asked the court to require the notice to inform prospective members that the settlement amount is equivalent to only 4% of each prospective member's loss, and in this regard the Division has a point. If, as the court stated, the purpose of the notice was objectivity, language describing the extent of the Class's financial compromise would serve that purpose, even if it might dissuade recipients from agreeing to the settlement. The decision not to require the Division's specific proposal was not "clearly against the logic and facts and inferences before the court," *see Sindler*, *supra*, 166 Md. App. at 123 (cleaned up), but the notice should have contained some sense of what the Class Members were agreeing to forgo. By itself, this may not rise to an abuse of discretion, but we flag it for the circuit court and the parties on remand.

Second, and citing *Vassalle v. Midland Funding, LLC*, the Division argues that the notice was deficient because it failed to inform recipients of "their most significant ground of objection," *i.e.*, that the settlement impaired their ability to recover future payments from Access. 708 F.3d 747, 759 n.2 (6th Cir. 2013). We disagree. After summarizing the allegations in *CPD v. Access Funding* and *CFPB v. Access Funding*, *see supra* n. 2, the

notice stated expressly that the settlement "precludes Class Members from receiving any financial benefit from the lawsuits brought by the Division or the [CFPB.]" The notice further provided that the settlement releases the Class Action Defendants "from further liability, which means the Defendants cannot be sued again for the transfer of structured settlement payments." *Vassalle* was a much more extreme case—that notice failed altogether to "explain the fact that the release of claims impair[ed] the class members' ability to vacate the allegedly fraudulent judgments[.]" 708 F.3d at 759. This notice informed prospective members that the settlement releases all claims arising out of their previous structured settlement transactions with Access, and that settling the class action would result in "a full release from further liability, which means the Defendants cannot be sued again for the transfer of structured settlement payments[.]"

Third, the Division argues that the notice did not provide a method for prospective Class Members to opt out from the settlement. But the Joint Motion for Preliminary Approval of Class Action Settlement included three exhibits—(1) a draft preliminary approval order; (2) a proposed notice of the settlement; and (3) an exclusion request form—and the Preliminary Approval Order in which it "approve[d] the form and content of the Opt-Out Form attached as Exhibit 3 to the Stipulation of Settlement." And the fact that at least one prospective Class Member opted out, using the exclusion form contained in the approved Notice, supports the circuit court's finding that an opt-out form was included. And although the form, as approved, contained a few minor grammatical and spelling errors, we see no ambiguities in the instructions.

Fourth, the Division contends that the settling parties violated Md. Rule 2-231(e), which requires that notice be given "in the manner the court directs." In the Preliminary Approval Order, the court approved the proposed opt-out form that the Class and the Class Action Defendants appended to their joint motion. The Division argues that the opt-out form that Mr. Ramsel submitted differs from the form the court previously approved. And it's true that the two forms contain minor formatting alterations, but the content and substance of the forms are indistinguishable, and the only potentially substantive difference is the addition of the mailing deadline of December 12, 2017.[9] The deadline was left blank in the proposed opt-out form, but the court directed in the Preliminary Approval Order that all exclusion requests be "postmarked no later than December 12, 2017," and the opt-out form was distributed in the manner the court directed.

Fifth, the Division contends that the timing of the settlement warrants "judicial skepticism" because it was negotiated without discovery. During the settlement proceedings, the attorneys for both the Class and the Class Action Defendants argued that the timing of the settlement was fair and the amount of the settlement was adequate because the Class Action Defendants were insolvent and their insurance policy provided the only source of recovery. The Division asserts that the settling parties' reliance on these two factors was improper because the settling parties did not engage in formal discovery or introduce any evidence. The Division further relies on *Reynolds v. Beneficial Nat'l*

[9] The only other modifications were changes to certain words. For example, "I WISH TO BE EXCLUDED" was changed to "I WANT TO BE EXCLUDED."

Bank, 288 F.3d 277 (7th Cir. 2002), and argues that the court should have considered whether the settlement was the product of collusion.

To determine whether a settlement was the "result of good faith bargaining at arm's length[,]" courts look at "the posture of the case at the time settlement is proposed, the extent of discovery that has been conducted, and the circumstances surrounding the negotiations[.]" *Shenker*, 226 Md. App. at 687 (cleaned up). Although settling a class action at an early stage may "rais[e] questions of possible collusion[,]" an early settlement may nonetheless be reasonable if the settling parties engage in an "informal discovery" process. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). In short, class action plaintiffs should be sufficiently informed "on the strengths and weaknesses of the claims" so that they have the "ability to determine the fairness of the settlement." *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 113 (S.D.N.Y. 1999).

In our view, the court did not abuse its discretion in finding that the timing of the settlement was fair. The suit was filed on July 6, 2016. At the mediation six months later, the Class and the Class Action Defendants exchanged documents and negotiated for ten hours before ultimately agreeing to a settlement in principle (the Division and the CFPB declined invitations to attend). On March 28, 2017—more than three months after the mediation and eight months after filing the complaint—the Class and the Class Action Defendants filed a joint motion requesting the circuit court to approve the settlement preliminarily. The Division correctly points out that the presence of a neutral mediator is not on its own dispositive, but it can be persuasive. *See In re Bluetooth Headset Prods.*

Liab. Litig., 654 F.3d 935, 948 (9th Cir. 2011) ("[T]he mere presence of a neutral mediator, though a factor weighing in favor of a finding of non-collusiveness, is not on its own dispositive[.]"). And the timing of the settlement was fair and reasonable in light of the Class Action Defendants' declining limits on its insurance policy. Counsel for the Class Action Defendants proffered at various hearings that the insurance policy was a "declining limits" policy, meaning that costs incurred in defending litigation decrease the amount the Class could ultimately receive. In their opposition to the Division's motion to stay settlement proceedings, Access attached a table providing that as of June 19, 2017, Access and its related entities had a policy limit of $1 million and had expended $257,787.37 in defense costs, leaving $754,212.63 remaining to fund the settlement. The court expressed its concern at the July 25, 2017 hearing that if it stayed the settlement proceedings, and the Division nonetheless failed to obtain restitution for the Class, "the [insurance] money will be all gone and then the [Class] will be left with nothing."

Although the Division takes issue with the lack of a formal discovery process, the Division had investigated Access for eight months before filing its complaint and didn't offer any evidence refuting the settling parties' assertions. The Division's suit was pending for more than thirteen months before the Division's motion to intervene was granted, and it could have submitted evidence between June 15, 2017, the date it intervened, and February 2, 2018, the date of the fairness hearing. In short, the record supports a finding that the settlement was not the product of collusion and that the court did not abuse its discretion in finding that the settlement approval process was

procedurally fair.

2. We Offer No Views On Whether The Settlement Was Substantively Fair.

"In evaluating the adequacy of a proposed settlement, the trial court should 'weigh the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement.'" *Shenker*, 226 Md. App. at 688 (*quoting In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983)). In doing so, the trial court must consider five factors that, collectively, allow the court to see whether the agreement falls into the range of outcomes that is fair to the parties under the circumstances:

> (1) [T]he relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

Id. (*quoting In re Montgomery Cty. Real Estate Antitrust Litig.*, 83 F.R.D. 305, 316 (D. Md. 1979)).

The circuit court performed this balancing against a set of terms and conditions that, we now have held, includes claims that the Class was not entitled to settle. As such, the balance comprising the agreement has been disrupted to the point where we should not, and will not, opine on the relative fairness of what remains, including the size of the class recovery and the attorneys' fee award. On remand, the parties can decide whether, and if so on what terms, they wish either to settle anew or to proceed with the litigation, and the circuit court can decide whether any new deal is fair on its own terms.

We would be remiss if we didn't express concern at the ninety-six-percent discount that this settlement required Class Members to take on the value of their claims. Although that isn't quite nothing, *compare Frank v. Gaos*, ___ U.S. ___, No. 17-961 (March 20, 2019) (*per curiam*) (Thomas, J., dissenting) (arguing that *cy pres*-only class settlement should not have been certified), it would have left these vulnerable plaintiffs with an extremely small fraction of the value they would have had if they had never called Access in the first place. We also have concerns about the depth of the record on which the circuit court had to analyze the settlement's financial fairness and the court's decision to decline altogether to consider whether any assets of Messrs. Jundanian, Borkowski, and Boghosian—all of whom were getting releases—were available to fund the settlement. Courts are permitted to rely in this context on the representations of counsel rather than requiring a full-blown evidentiary presentation. *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 643 (1997). In this case, the court relied almost entirely on representations, and for critically important issues, most notably the existence, or not, of financial resources to pay claims. On the other hand, the Division didn't put any conflicting evidence before the circuit court either. It argued, there and here, that the Settling Parties' presentations weren't sufficient, but didn't offer or identify documents, testimony, evidence, or even pending discovery on which the court could have found the presentations disputed. The way Access treated its customers, for its own benefit, provides ample reason to be skeptical of unsupported representations it might make to the court about its finances. And yet despite a months-long investigation and subpoena power, the

Division could only express skepticism, and couldn't yet back it up. We won't go so far as to say that the key premises of the settlement bargain—the declining limits policy, the cost of individual arbitrations, and the lack of other resources—were undisputed. But it's also not obvious how the circuit court could have supported the findings the Division sought on the record before it at the fairness hearing. Should the parties attempt to settle anew, they and the circuit court can address all of these questions then.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.

Circuit Court for Baltimore City
Case No. 24-C-16-003894

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2609

September Term, 2017

CONSUMER PROTECTION DIVISION

v.

CRYSTAL LINTON, ET AL.

Meredith,
Berger,
Nazarian,

JJ.

Dissenting Opinion by Berger, J.

Filed: April 22, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

I, respectfully, dissent. I agree with the majority that private parties may not settle a government agency's pending claim without the agency's consent. Where I part ways with the majority, however, is with respect to the Consumer Protection Division's claim that the settlement agreement in this case is illegal. In essence, the majority holds that a settlement is illegal when a class of plaintiffs -- fully informed class members in this case -- release their right to obtain restitution from the Consumer Protection Division (the "Division"). Indeed, the majority reasons that restitution is *always* a public remedy when sought by the Division, and, therefore, plaintiffs may never release their right to obtain it from the Division.

In my view, the "restitution" sought by the Division in the instant case is personal and private to the Class Members. Accordingly, I am persuaded by the reasoning of the Second and Ninth Circuits, which have concluded that where a remedy sought by the government is personal to plaintiffs in a class action, the plaintiffs may release their right to obtain that remedy. *See California v. IntelliGender, LLC*, 771 F.3d 1169 (9th Cir. 2014); *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985). Further, because I would affirm the circuit court's comprehensive order approving the settlement agreement in its entirety, I am compelled to address all of the issues raised by the Division in its appeal. I will first discuss the legality of the release contained in the settlement agreement.

I. **The Settlement Agreement is Not Illegal.**

In *CPD v. Access Funding*,[10] the Division is seeking restitution of money and property for the Class. Section 3.2 of the Stipulation of Settlement, however, bars the Class Members from "receiving any benefits from any lawsuit or arbitration proceeding arising out of or related to any of the Released Claims." As such, even if the Division succeeds in *CPD v. Access Funding*, Section 3.2 prohibits the Class Members from obtaining restitution. While this release has significant consequences, it is neither illegal nor unusual. Indeed, it is well established that "a settlement agreement may involve the release of not only the claims presented in the class action, but also claims arising out of the identical factual predicate." *In re MI Windows & Doors, Inc., Prods. Liab. Litig.*, 860 F.3d 218, 225 (4th Cir. 2017) (citations and quotations omitted).

In arguing that the Class Members could not lawfully release their right to recover restitution in *CPD v. Access Funding*, the Division relies almost exclusively on the Court of Appeals' opinion in *Consumer Protection Division Office of the Attorney General v. Consumer Publishing Co., Inc.*, 304 Md. 731 (1985). While the majority only mentions this case in passing, I shall discuss it in detail based on the Division's extensive reliance in its briefs.

In *Consumer Publishing*, the Division used its statutory powers to issue a cease and desist order against an offending company and further require the company to provide

[10] The Division's suit remains pending in the Circuit Court for Baltimore City. *Consumer Protection Division v. Access Funding, LLC*, No. 24-C-16-002855 (referred to as "*CPD v. Access Funding*").

consumers with refunds as restitution. 304 Md. at 739-41. The issue on appeal was whether the Division was authorized to issue a general restitution order without proof that the consumers relied on the company's misrepresentations. *Id.* at 775. The Court of Appeals held that "the Division may enter a general order of restitution without proof of purchaser reliance, as long as the order provides a mechanism for processing individual claims." *Id.* Nevertheless, the Court vacated the Division's order because the order did not provide a claim processing procedure. *Id.*

Indeed, such a procedure is necessary because some of the consumers may not be entitled to refunds and "[s]ome of [the] consumers may not want refunds." *Id.* at 781. As such, the Court held that it was improper for the Division to "simply require the mailing of refunds to all Maryland consumers who bought Company products during a certain period." *Id.* *See also Consumer Prot. Div. v. Morgan*, 387 Md. 125, 166 (2005) (interpreting *Consumer Publishing* to hold that the Division may "issue a general order of restitution without proving an individual consumer's reliance, but may not award restitution to the individual consumer without a showing of individual reliance.").

In my view, the Division misstates the applicability of the Court of Appeals' decision in *Consumer Publishing*. Indeed, the Court neither addressed settlement agreements nor releases.[11] To the extent the Court's holding applies, the Division may certainly exercise its statutory authority by bringing a "public enforcement proceeding[.]"

[11] It is telling that the Division failed to present us with any other Maryland authority in support of its undeveloped theory that a settling plaintiff may not release a claim for restitution.

See Consumer Publishing, 304 Md. 731 at 778 (citations, quotations, and brackets omitted). In doing so, the Division may demand that Access "disgorge benefits it would be unjust" to retain -- i.e., the structured settlement payment rights that Access purchased. *Id.* at 776. The Division may not, however, distribute those future payment rights to the Class Members because the Class Members were notified of the Division's pending restitution suit but, nevertheless, opted to settle the class action and release their right to obtain a future remedy. *See State v. Andrews*, 73 Md. App. 80, 87 (1987) ("A procedure similar to that which was conducted in *Consumer Publishing* should be implemented here so that purchasers may be notified of their right to obtain a refund[.]").

Furthermore, courts in other jurisdictions have treated class action settlements as having preclusive effect over government agencies when the agencies seek restitution for the settling class. For instance, in *California v. IntelliGender, LLC*, 771 F.3d 1169, 1174-75 (9th Cir. 2014), a class of plaintiffs sued a manufacturer of fetal prediction tests. The class alleged that the manufacturer violated California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. *Id.* The parties ultimately settled the class action. *Id.* Thereafter, the State of California brought an enforcement action against the manufacturer and sought civil penalties, injunctive relief, and restitution on behalf of the aggrieved consumers. *Id.* at 1175. The manufacturer contended that the State's action was barred by *res judicata* because the class members previously released their claims through the settlement. *Id.* In rejecting the manufacturer's argument, the district court ruled that the State could proceed with its claims for penalties, injunctive relief, and restitution. *Id.* at 1175-76.

On appeal, the United States Court of Appeals for the Ninth Circuit initially held that the State's claims for penalties and injunctive relief were not barred by *res judicata*. *Id.* at 1177. In doing so, the Ninth Circuit relied on "the well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests." *Id.* (quoting *Herman v. S.C. Nat'l Bank*, 140 F.3d 1413, 1425 (11th Cir. 1998)). The court concluded that the State's claims for penalties and injunctive relief were "brought on behalf of the people," and therefore, "implicat[e] the public's interest as well as private interests." *Id.* at 1178.

Nevertheless, the court held that the State's claims for restitution were barred by *res judicata* because the State was, in effect, seeking to "recoup [the consumers'] personal economic loss rather than 'vindicate broader governmental interests[.]'" *Id.* at 1179 (quoting *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 923 (9th Cir. 2003)). Permitting the claims for restitution to advance would improperly allow the State to "seek[] a double (or at least better) recovery." *Id.* at 1180. Accordingly, the court reasoned that such a holding would divest defendants of any "incentive to agree to any settlement," thereby "undermin[ing] … our legal system and undercut[ting] [the] purpose … of class action settlements." *Id.* at 1181. The court further observed that its holding "does not deprive the State of the ability to protect its citizens" because the State may nonetheless "seek civil penalties and broad injunctive relief against" the manufacturer. *Id.* at 1182.

The majority endeavors to distinguish *IntelliGender* by citing to *Herman*, *supra*, 140 F.3d 1413, for the proposition that class action settlements are patently unlawful when

they attempt to preclude a government agency's claim for restitution.[12] I, respectfully, disagree. In *Herman*, the Eleventh Circuit addressed whether the United States Secretary of Labor was precluded from pursuing an ERISA enforcement action on behalf of aggrieved individuals who had previously settled their claim. The Eleventh Circuit was not asked to determine the legality of the settlement agreement. The court held that the United States Secretary of Labor "is not bound by prior private litigation when the Secretary files an independent action to address ERISA violations." *Herman*, *supra*, 140 F.3d at 1424. The court emphasized that "the Secretary's national public interests in bringing an ERISA enforcement action are wholly distinct and separate from those of private litigants who seek to redress individual grievances or recoup plan losses for their personal benefit as plan beneficiaries." *Id.*

Indeed, under the circumstances of *Herman*, the Secretary's right to bring an enforcement action was "public" because the "enforcement of the ERISA statute … ensure[s] the financial stability of billions of dollars of assets which in turn have a monumental effect on not only the Treasury of the United States, but on the national economy and commerce as well." *Sec'y U.S. Dep't of Labor v. Kwasny*, 853 F.3d 87, 95 (3d Cir. 2017) (citations and quotations omitted). In my view, the ERISA enforcement scheme is vastly different from the framework of the Maryland Consumer Protection Act. While the Division has several enforcement mechanisms under the MCPA that may be characterized as "public," the right to seek individual economic relief is not one of them.

[12] In its initial brief, the Division referenced *Herman*, *supra*, in a passing parenthetical citation with no independent analysis.

Compare Herman, *with Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 923 (9th Cir. 2003) (holding that the Secretary's public interests are not implicated when she seeks to redress an individual's personal economic loss), *cert. denied*, 541 U.S. 1030 (2004).

The majority further distinguishes *IntelliGender* by observing that the "Ninth Circuit didn't recognize (or in any event didn't discuss) any difference between the federal and California restitution remedies at issue … but treated them as identical in kind[.]" In my view, the majority understates the similarities between restitution in Maryland and California. In *Consumer Publishing*, the Court of Appeals expressly relied on California law and analogized the Division's right to seek restitution to the State of California's right to seek restitution under CAL. BUS. & PROF. § 17535. 304 Md. at 779 (citing *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660 (Cal. 1983)). Notably, in *IntelliGender*, the State of California sought restitution under the same statute. 771 F.3d at 1174. Critically, the Ninth Circuit held that the State of California was precluded from obtaining restitution under § 17535 because the State was seeking to recover the settling class members' personal economic rights. *IntelliGender*, *supra*, 771 F.3d at 1179.

Nevertheless, the majority relies heavily on the fact that "the Division's claims [for restitution] and the Class Members' claims … flow from different sections" of the Maryland Consumer Protection Act. *Compare* § CL 13-403(b)(1), *with* CL § 13-408. Accordingly, the majority holds that the Division's claim for restitution is inherently public because the statutes "fulfill different purposes." Critically, however, the United States Court of Appeals for the Second Circuit expressly rejected this notion in *In re Baldwin-United Corp.*, *infra*, 770 F.2d 328, 341-42 (2d Cir. 1985) ("Although only the state can act

under the state statute, its claim is essentially derivative. Any recovery would not go to the state but ultimately to the [class] plaintiffs … who are the real parties in interest.”).

Finally, the majority reasons that *IntelliGender* is not persuasive because of a subtle procedural distinction. The majority explains that “a key difference” between this case and *IntelliGender* is that in *IntelliGender*, “the class action settlement … was fully approved before the state brought suit.” In my view, this distinction is immaterial. Indeed, the Second Circuit dealt with a similar procedural background in *Baldwin-United*, *supra*, 770 F.2d 328.

In *Baldwin-United*, approximately 100,000 holders of annuities sued twenty-six brokers in a consolidated multidistrict class action. *Id.* at 331. The class alleged violations of federal securities laws. *Id.* During the course of the litigation, eighteen of the brokers stipulated settlements with the class. *Id.* at 332. Before the district court granted preliminary approval, forty state attorneys general learned about the proposed settlements. *Id.* After deliberating at a meeting of the National Association of Attorneys General, the state attorneys general concluded that the proposed settlements did not adequately compensate the class. *Id.*

As a result, several of the state representatives attempted to negotiate with the defendants to obtain a larger recovery for the class. *Id.* Nevertheless, the representatives were unsuccessful.[13] *Id.* Thereafter, the Attorney General of New York sent the defendants

[13] Unlike the attorneys general in *Baldwin-United*, the Division declined an invitation to attend a lengthy negotiation that was mediated by a venerable senior judge. By skipping the mediation, the Division missed an opportunity to discuss the case and learn potential negotiating points. In addition, the Division lost a significant opportunity to see

a notice of his intent to sue for restitution on behalf of the class. *Id.* at 332-33. The district court enjoined the imminent New York action and other potential state actions. *Id.* at 333.

On appeal, the Second Circuit affirmed the district court's grant of the injunction, stating:

> [N]o defendant in the consolidated federal actions … could reasonably be expected to consummate a settlement of those claims if their claims could be reasserted under state laws, whether by states on behalf of the plaintiffs or by anyone else, seeking recovery of money to be paid to the [class] plaintiffs. Whether a state represented itself to be acting as a 'sovereign' in such a suit or described its prayer as one for 'restitution' or a 'penalty' would make no difference if the recovery sought by the state was to be paid over to the [class] plaintiffs.
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> * * *
>
> **It is true, as the State of Maine points out, that there may be some laws not available to private plaintiffs that enable a given state to bring proceedings seeking restitutionary damages for the benefit of certain of its citizens.** *See, e.g.*, Me. Rev. Stat. Ann. tit. 5, § 209 (Supp. 1984-85) (providing that in an action brought by the state to declare a practice unlawful the court may "make such other orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason" of the unlawful practice "any moneys or property … which may have been acquired by means of such method"). **However, the invocation of such a restitutionary remedial provision does not cause the claim to lose its representative character. Although only the state can act under the state statute, its claim is essentially derivative. Any recovery would not go to the state but ultimately to the plaintiffs-investors in the federal action, who are the real parties in interest.**

the documents that the Class Action Defendants disclosed at the mediation, which the Division now claims do not exist.

Id. at 336-37; 341-42 (emphasis added). Importantly, like the Ninth Circuit in *IntelliGender*, the Second Circuit observed that the injunction did not undermine the statutes' remedial purposes because the states could exercise their statutory rights to levy civil or criminal penalties. *Id.* at 341. Indeed, the court noted that the states could pursue those alternative statutory remedies so long as they are not "used by the state as a means of coercing the defendants into increasing a civil settlement offer to persons who might be represented by the state." *Id.*

In my view, it was not illegal for the Class Members to release their right to obtain restitution because the release does not, as the majority holds, "thwart the statute's remedial purposes." While restitution is viewed, at times, as a public remedy, the Division's "public interest does not justify giving the [Class] two chances to receive make-whole relief." *EEOC v. Jefferson Dental Clinics, PA*, 478 F.3d 690, 699 (5th Cir. 2007).

Moreover, the settlement does not prohibit the Division from protecting the public interest. While the settlement precludes the Division from extracting greater payments for the personal benefit of the Class Members, the Division is free to exercise its statutory authority and vindicate public interests. Importantly, the Division has several statutory tools to protect Maryland citizens. For example, the Division may levy civil penalties under CL § 13-410 or criminal penalties under CL § 13-411. The Division may further issue a general order of restitution and demand that Access disgorge its rights to future settlement payments.

To clarify, I would not hold that private parties may settle a government agency's pending claim without the agency's consent. Rather, I would conclude that where a remedy

is personal to plaintiffs in a class action, the plaintiffs may, under the circumstances of this case, release their right to obtain that remedy even if the agency recovers it in a separate suit. I, therefore, would hold that the circuit court did not err in concluding that the release contained in Section 3.2 of the Stipulation of Settlement is lawful.

The majority further holds the settlement is against public policy because Section 3.3 of the agreement compels Class Members to assign any future recovery to the Class Action Defendants. The Division did not raise this argument in its appeal. Rather, the Division asserted that the settlement is unlawful because Section 3.3 circumvents CJ § 5-1102, which requires judicial approval of an attempted transfer of structured settlement payment rights. In my view, Section 3.3 does not compel the Class Members to transfer structured settlements. By contrast, the provision requires the Class Members to transfer any proceeds that the Class Members obtain from the Division's suit in *CPD v. Access Funding*. Accordingly, under these circumstances, I would hold that the circuit court did not abuse its discretion in approving the settlement.

II. <u>The Circuit Court Did Not Abuse its Discretion by Certifying the Class.</u>

I next address the Division's contention that the circuit court abused its discretion in certifying the Class. The Division asserts that the Class failed to meet its burden in proving that its attorneys fairly and adequately protected the Class' interests. The Division further argues that the attorneys had no experience litigating class actions and that the court found facts based on proffers rather than admissible evidence.

The party seeking class certification bears the burden of proving that the proposed class meets the following four requirements: "(1) the class is so numerous that joinder of

all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Md. Rule 2-321(a). On appeal, the Division argues only that the Class' attorneys did not fairly and adequately protect the Class' interests. Consequently, it is unnecessary to address the requirements of numerosity, commonality, or typicality.

To determine whether attorneys adequately represent a class, courts consider, among other things, "the vigor of counsel, experience, and diligence." *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 741 (2000). In finding that the Class' attorneys "have the experience and the resource[s] necessary for adequate class representation[,]" the circuit court considered the qualifications of Brian Brown, Esq., Leah Barron, Esq., Byron Warnken, Esq. and Raymond Marshall, Esq. With regards to Mr. Brown, the circuit court observed in the Final Approval Order that he has "been a trial lawyer in private practice for over thirty years [and] has tried lead paint cases in both state and federal court … for the past fifteen years." In concluding that Ms. Barron adequately represented the Class, the court relied on an affidavit in which Mr. Brown averred that Ms. Barron "has ten years of experience" and "has represented many clients in class-actions in the past." In addition, the court noted that "Mr. Marshall has been selected by his peers for the past three years for inclusion in *Best Lawyers in America* in the area of commercial litigation, and he has been recognized as a *Maryland Super Lawyer*."

Furthermore, the circuit court stated that it evaluated "the work that Class Counsel [had already] done in investigating potential claims" and assessed "the resources counsel

ha[d] committed." The court made these findings based on several billing invoices and affidavits. For example, Mr. Marshall provided in an affidavit that by February 1, 2018, his law firm had spent more than 359 hours on the case. Moreover, by the time the court detailed its findings in the Final Approval Order, the court had previously conducted four lengthy hearings and reviewed a number of substantive motions and pleadings. Put simply, the court observed firsthand each attorney's ability to adequately represent the Class. In my view, the circuit court did not abuse its discretion in certifying the Class.

III. The Circuit Court Did Not Abuse its Discretion by Approving the Settlement.

The majority notes, in *dicta*, that Maryland courts must analyze a proposed class action settlement by reviewing both the procedural and substantive fairness of the proposed settlement. I, of course, agree. Where I part ways with the majority is with some of the concerns expressed by the majority, particularly as to the trial court's finding that the agreement was substantially fair. I address these contentions in turn, starting with the procedural fairness of the settlement agreement.

A. The Settlement Was Procedurally Fair.

In its appeal of the circuit court's order approving the settlement agreement, the Division raises an endless supply of arguments that the settlement process was not procedurally fair. For instance, even though a prospective member of the Class opted out of the settlement, the Division asserts that the notice of settlement did not contain an exclusion form. The majority, in *dicta*, correctly rejects the Division's arguments. Ultimately, the majority explains that "the record supports a finding that the settlement was

not the product of collusion and that the court did not abuse its discretion in finding that the settlement approval process was procedurally fair."

Nevertheless, the majority does not address the Division's remaining argument that the Class' attorneys did not make themselves available to answer any of the Class' questions. Because I would affirm the circuit court's order in its entirety, I am compelled to discuss this assertion.

In the circuit court proceedings, the Division made this same argument and in support of that contention, filed an affidavit from its Chief Investigator. In the affidavit, the Chief Investigator, Christopher M. Waldt, averred that between October 25, 2017 and December 19, 2017, he called the telephone number listed on the notice seventeen times and received a "busy signal" each time. In response, the Class' attorneys submitted an opposition addressing the allegations of the Chief Investigator. In the opposition, Messrs. Brown, Warnken, and Marshall swore "under the penalties of perjury" that they each received several "phone calls from [C]lass [M]embers with questions about the proposed settlement." The circuit court rejected the Division's argument, finding that "the evidence indicates that the putative Class Members had no difficulty contacting Class Counsel."

In short, there is no evidence in this record that the attorneys for the Class failed to make themselves available to answer questions. By contrast, the Notice of Class Action Settlement instructed recipients to call a phone number that was listed in the notice if they had any questions. In addition, the notice included the law firm addresses and phone numbers of Messrs. Brown, Marshall, and Warnken. Consequently, recipients of the notice could contact the attorneys by dialing any of the other three phone numbers, by visiting the

offices, or by sending a letter to any of the firms' mailing addresses. The fact that the Division's Chief Investigator -- an individual with no fiduciary relationship to the Class -- failed to reach an attorney when he tried calling just one of the four listed phone numbers has no bearing on whether the attorneys spoke with the Class Members. Accordingly, I would hold that the circuit court did not abuse its discretion in approving the notice.

B. The Settlement Was Substantively Fair.

While the majority expresses no views on the substantive fairness of the settlement agreement, I am compelled to address it because I would affirm the circuit court's determination that the settlement was substantively fair.

The Division argues that the settlement is unfair and inadequate because it releases valuable claims in exchange for an amount that compensates the Class Members for only 4% of their total financial loss. "In evaluating the adequacy of a proposed settlement, the trial court should 'weigh the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement.'" *Shenker v. Polage*, 226 Md. App. 670, 688 (2016) (quoting *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983)). The trial court must consider the following factors:

> (1) [T]he relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

Id. (quoting *In re Montgomery Cty. Real Estate Antitrust Litig.*, 83 F.R.D. 305, 316 (D. Md. 1979)).

In its consideration of the five factors as applied to the settlement, the circuit court focused primarily on the pending motions to compel arbitration, the Class Action Defendants' declining limits insurance policy, and the limited assets the Class Action Defendants could contribute towards a judgment. With respect to defenses, the court made clear that the pending motions to compel arbitration represented a significant "procedural hurdle[.]" Indeed, counsel for the Class conceded at the fairness hearing that the class action "might not be successful" because Access included arbitration provisions in the structured settlement transfer agreements. If the petitions to compel arbitration were granted, counsel for the Class acknowledged that the Class Members would be obligated to arbitrate their claims individually. In addition to creating uncertainty as to how different arbitrators would rule, litigating 100 arbitration proceedings could result in greater litigation costs and thereby reduce the available limits of the declining limits insurance policy to pay damages.

In addition, the circuit court properly considered the importance of the Class Action Defendants' declining limits insurance policy in evaluating the likelihood that they could satisfy a substantial judgment. The record before the circuit court clearly demonstrates that the Class Action Defendants were paying defense costs through its insurance policy. Indeed, in the Final Approval Order, the circuit court recognized that while the insurance policy contained $1,000,000 in coverage, "the payment of defense costs erodes the amount of coverage provided by the policies, which diminishes payments to Class Members." Furthermore, the circuit court acknowledged that the Class Action Defendants "[do not] have assets which would significantly increase the total settlement amount." In making

this finding, the circuit court noted that Smith's only recoverable assets were $1,200 in a bank account and a Corvette that was inoperable. Additionally, the circuit court stated that Sud "pled guilty to a crime, and is facing up to 5 years in prison and a $250,000 fine."

Moreover, the circuit court considered the Division's restitution claims in *CPD v. Access Funding* and assessed whether it could restore the Class Members' structured settlement payment rights. For example, the settling parties' attorneys proffered that Access sold the structured settlement rights that it previously acquired from the Class Members. Consequently, at the July 25, 2017 circuit court hearing, the court observed that the Division faced "a high bar" in proving its restitution theory. The court expressed this concern because under Maryland law, the Division arguably must show that the transferees -- the parties that acquired the structured settlements from Access -- were not *bona fide* purchasers. As such, in the Final Approval Order, the court stated that the Division's "claim seeking to avoid [the transactions] … is far from certain. What is certain is that … litigation will continue, and that will deplete the Defendants' insurance policies."

The circuit court did not abuse its discretion in ruling that "the settlement is fair and adequate." Indeed, the court held four lengthy hearings and reviewed several substantive pleadings and legal arguments so that it could determine whether the settlement was adequate in light of the five factors enumerated above. While the Division takes issue with the fact that the $1.1 million settlement represents only a small percentage of the Class Members' $17.7 million injury, it is well established that a "fine-tuned equation by which to determine the reasonableness of the size of a settlement fund does not exist." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 6:16 (15th ed. 2018) (quoting *In re*

Relafen Antitrust Litig., 231 F.R.D. 52, 73 (D. Mass. 2005)). Importantly, the court considered and rejected the Division's argument during the settlement proceedings. As discussed, the court properly found that the Class Action Defendants lacked the assets to contribute towards the settlement and that further litigation would deplete the insurance policy.

The Division further contends that the circuit court erred in disregarding whether Access' executives -- Messrs. Jundanian, Borkowski, and Boghosian -- had the financial wherewithal to contribute towards the settlement. In the Final Approval Order, the court declined to consider the three executives' finances, stating that "neither of those persons are parties to this litigation, and thus, there is no basis for determining whether those individuals have assets." The majority, in *dicta*, seems to agree with the Division that the trial court was obliged to consider the executives' finances because the settlement releases them from future liability. I, respectfully, disagree.

Were I writing on a blank slate, I would agree that it might be worthwhile to address the financial wherewithal of persons who are not part of the litigation. It is well settled, however, that in considering whether a class action settlement is adequate, circuit courts consider, among other factors, "the solvency of the *defendants* and the likelihood of recovery on a litigated judgment." *Shenker*, *supra*, 226 Md. App. at 688 (emphasis added). In reviewing whether the amount of the settlement was adequate, the court considered the financial wherewithal of the Class Action Defendants and found that each defendant lacked assets of any significant value. Consequently, the court stated that the insurance policy presented the only viable source of recovery for the Class. While the Division contends

that the court should have assessed whether Messrs. Jundanian, Borkowski, or Boghosian had assets, none of the three executives were parties to the class action litigation. As a result, the court lacked any basis to consider their finances. *See Shenker*, *supra*, 226 Md. App. at 688 (stating that courts look at "the solvency of the *defendants*" in determining whether a settlement is adequate) (emphasis added). Accordingly, the court did not abuse its discretion in finding that the settlement was substantively fair.

The Division further argues that because the circuit court adopted the settling parties' proposed order, the court failed to exercise independent judgment. The Division -- relying on *In re Community Bank of Northern Virginia*, 418 F.3d 277 (3d Cir. 2005) -- asserts that the court essentially rubber-stamped the proposed settlement.

"Although a trial court may not give a settlement boilerplate approval, it need not turn the settlement hearing into a trial or a rehearsal of the trial, nor need it reach any dispositive conclusions on the admittedly unsettled legal issues in the case." *Shenker*, *supra*, 226 Md. App. at 684 (citations and internal quotations omitted). While a court's "[*verbatim*] adoption of a party's proposed findings of fact and conclusions of law [are] highly disapproved of, [it] is not *per se* grounds for reversal." *In re Cmty. Bank of N. Va.*, 418 F.3d at 300. "Above all, our task is to determine whether the circuit court was well-informed to determine the fairness and adequacy of the settlement, and that it reached a well-reasoned decision." *Shenker*, *supra*, 226 Md. App. at 685.

The circuit court's decision in this case was neither conclusory nor preordained. While the circuit court's Final Approval Order contains substantial similarities to the proposed order, the record makes abundantly clear that the court did not give the settlement

"boilerplate approval." By contrast, the transcripts from the four lengthy hearings demonstrate that the court carefully considered and analyzed the settlement in a manner consistent with the requirements in Md. Rule 2-231(h) and Fed. R. Civ. P. 23(e). In short, the trial judge did an exemplary job in conducting four comprehensive hearings to allow all parties to address the significant issues before the court. Indeed, the court ensured that notice of the proposed settlement was sufficient and that all prospective members of the Class received the notice.

The court further heard objections from the Division -- both in writing and at the hearings -- and the court reviewed a multitude of pleadings in support of and against the settlement.[14] Moreover, the settling parties provided the court with the proposed order shortly before the February 2, 2018 fairness hearing. The court waited until February 9, 2018 -- a week later -- to file the Final Approval Order, so that it could make an informed decision on the fairness, reasonableness, and adequacy of the settlement.

Moreover, the Division's reliance on *Community Bank* is misplaced. In that case, the United States Court of Appeals for the Third Circuit vacated a settlement order, holding

[14] At the fairness hearing, the circuit court admitted that it "didn't read [the Division's] motion for summary judgment" that was filed in *CPD v. Access Funding*. Nevertheless, in the Final Approval Order, the court stated that it "ha[d] reviewed" the summary judgment motion "in determining whether the [settlement] is fair, adequate, and reasonable." The Division asserts that this seemingly contradictory statement clearly demonstrates that the court "scarcely reviewed" the proposed order. I disagree. Indeed, there is not a scintilla of evidence that the court failed to review the summary judgment motion in the period of time between the fairness hearing and the date it filed the Final Approval Order.

that "the only evidence … in the record that the District Court exercised independent judgment is the fact that it said it did." 418 F.3d at 301. The court explained:

> [T]here is substantial basis in the record to question whether "independent judgment" was exercised. As detailed above, *see* JA at 1973-74, during a closed door session held *before* the November 14, 2003 fairness hearing, the District Court asked the settling parties to submit the proposed findings of fact and conclusions of law, which it "would adopt basically."
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> We are confident that the district judge sincerely concluded that he had exercised the required "independent judgment." Statements of subjective conclusions, however, are insufficient when adopting verbatim suggested findings of fact and conclusions of law to meet the strict requirements of Rule 23. What is required at a minimum is a statement of reasons, expressed in objective form, how the court exercised independent judgment in evaluating the submissions of counsel.

Id. In *Community Bank*, the district court told the parties that it "would adopt" the proposed findings of fact before they were even submitted. In contrast, the circuit court in this case carefully considered the objections the Division raised in the four hearings and the various pleadings. In sum, the "court was well-informed to determine the fairness and adequacy of the settlement, and [it] reached a well-reasoned decision." *Shenker*, *supra*, 226 Md. App. at 685. In my view, the circuit court did not abuse its discretion in approving the settlement.

IV. The Circuit Court Did Not Abuse its Discretion in Awarding Attorney's Fees.

Lastly, I address the Division's contention that the circuit court abused its discretion in awarding the Class' attorneys $330,000 in fees. In the Final Approval Order, the circuit court explained its reasoning for the award:

> In complex cases such as this, the appropriate method to determine the amount of attorney's fees to be awarded is to utilize the percentage method. *See United Cable Tel. of Baltimore v. Burch*, 354 Md. 658, 686-87 (1999). As noted by one court, when attorney's fees are being paid from a common fund, "one-third has been held to be a fair and appropriate award" and is considered "typical and reasonable."
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> The Settlement Agreement initially provided the Class Counsel would seek an award not to exceed thirty-three percent (33%) of the Settlement Funds, which would be an award of $363,000. Class Counsel, however, is only seeking thirty percent (30%) of the Settlement Fund.

The Division argues that the circuit court abused its discretion in awarding fees to the Class' attorneys because they did not conduct any discovery or perform any substantial work other than file the complaint. I disagree. While the Class' attorneys did not depose the Class Action Defendants or engage in formal discovery, the attorneys expended significant time and resources. For example, in an affidavit, Mr. Marshall averred that his law firm spent 359.8 hours on the class action litigation, which equaled $152,915 in total fees when accounting for each attorney's hourly billing rate. In addition, Mr. Warnken provided in an affidavit that he had personally spent at least 163 hours on the case. Mr. Warnken attested that he spent most of his time "researching the facts, the case, the parties and potential parties, and potential causes of action." Mr. Warnken further provided in the affidavit that he "spent substantial time researching the individual actors involved in Access" and the effects of Mr. Jundanian's "prior bankruptcy filing" on the claims.

In determining whether the Class's attorneys "have the experience and resource[s] necessary for adequate class representation[,]" the circuit court considered the

qualifications of Brian Brown, Esq., Leah Barron, Esq., Byron Warnken, Esq. and Raymond Marshall, Esq. The circuit court observed that all of counsel for the Class demonstrated specialization in handling lead paint cases and the evaluation of the strengths and weaknesses of cases specific to this subject matter.

The record clearly demonstrates that the circuit court carefully considered the merits of the award. Critically, the circuit court devoted a significant portion of the February 2, 2018 fairness hearing to consider the various factors weighing in favor of and against a fee award. The court permitted the Class' attorneys to argue why they were entitled to attorney's fees. Thereafter, the court heard the Division's objections. Before rendering its decision, the court reviewed the submitted pleadings in addition to the affidavits and billing invoices that were appended to the pleadings. While the court's analysis in the Final Approval Order is concise, I discern no abuse of discretion on this record.

Next, the Division claims that the award was improper because the court should have applied the "lodestar method" if the attorneys were even entitled to an award.[15] The Division relies on our opinion in *Garcia v. Foulger Pratt Development, Inc.*, 155 Md. App. 634 (2003). In *Garcia*, the primary issue on appeal was whether the circuit court properly applied the "common fund doctrine." The plaintiff, a limited partner, sued on behalf of himself and other partners to recover a development fee to which they were

[15] "The 'lodestar' approach calculates the attorneys' fees by multiplying the reasonable number of hours expended by the attorney on the litigation by a reasonable hourly rate and then to consider appropriate adjustments to the product of that multiplication." *Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 673 n.14 (2003) (internal quotations and citations omitted).

entitled. 155 Md. App. at 650-51. We determined that the fee recovered was a common fund that benefited the entire partnership. *Id.* at 671. Under the circumstances, if the plaintiff "was not entitled to pay his attorneys' funds out of the common fund, [the other partners] would reap the fruit of his labor, without sharing any of the costs." *Id.* After holding that the fee award could be deducted from a common fund, we held that the circuit court did not abuse its discretion in using the lodestar approach rather than the percentage method. *Id.* at 675. We further reasoned that the attorney was not entitled to the total fees requested because he "had not achieved excellent results." *Id.* at 674.

While the Division is correct that there is "no inherent impediment" in applying the lodestar method, there is no inherent impediment in using the percentage method, either. It appears that the Division's primary objection to the percentage method is that the Class' attorneys recovered only "four-cents-on-the-dollar" for the Class. The Division cites to *Garcia* for the proposition that the percentage method is unreasonable where it is clear that the attorneys did not achieve "excellent results." Even if *Garcia* stands for this proposition, it is misleading to suggest that the attorneys did not achieve favorable results. As discussed, *supra*, the Class settled the suit for $1.1 million -- more than the maximum amount available under the Class Action Defendants' insurance policy.

The attorneys, after conducting due diligence, discovered that the Class Action Defendants did not have any recoverable assets to contribute towards the settlement. Moreover, the attorneys recommended that the Class settle the suit rather than attempt to obtain restitution. The attorneys reasoned that recovering restitution was unlikely because (1) it is unclear whether a circuit court has the authority to void an order of a sister court;

and (2) Access sold the structured settlements to third parties and if the third parties were *bona fide* purchasers, it would be difficult to "undo" the transactions.

The attorneys' fees awarded in this case represent 30% of the recovery in this case, namely, the full amount of the declining insurance policy. While a 30% recovery is apparently on the higher side of the average in class actions, it is not unreasonable. *See* 5 William Rubenstein, *Newberg on Class Actions* § 15:83 (5th ed. 2015) ("More recent empirical data on fee awards demonstrate that percentage awards in class actions are generally between 20-30%," though "50% [and] somewhat larger percentages are not unprecedented."). I, therefore, would hold that the circuit court did not abuse its discretion in awarding the attorneys $330,000 in fees, i.e., 30% of the settlement amount.

The Division further alleges that the award is improper because it diverts $330,000 from absent members of the Class and that it "profoundly devalues and subverts" Maryland's public enforcement laws. I disagree on both counts. *First*, we held in *Garcia*, *supra*, 155 Md. App. at 671, that attorney's fees may be deducted from a common fund. *Second*, the fee award has no effect on the Division's ability to exercise its statutory authority to bring a public enforcement action. As discussed, *supra*, the Division is free to levy civil or criminal penalties against Access or any other party, and the Division may issue a general order of restitution against any of the parties. Accordingly, I would hold that the circuit court did not abuse its discretion in awarding attorney's fees.

In conclusion, I agree with the majority in noting that it is not our role to revisit whether the settlement represents a good deal, or even a good deal under the circumstances. Pursuant to statutory authority and well-developed case law, the trial court did an excellent

job of determining that the settlement was procedurally and substantively fair and did not abuse its discretion in certifying the Class.

I further agree with the majority that our task is to review the decision to approve the settlement to determine whether the correct law and procedures were applied, and, ultimately, whether the Circuit Court for Baltimore City abused its discretion in reaching its decision to approve the settlement. As I have endeavored to convey, this is a very difficult case for all of the participants. Nevertheless, a senior judge with extensive experience in this subject matter conducted a ten-hour mediation with the Class and the Class Action Defendants. Both the Division and the Consumer Financial Protection Bureau declined invitations to attend the mediation. After the mediation, the Class reached a settlement in principle with the Class Action Defendants.

After taking several months to finalize the terms of the settlement, the settling parties filed a Joint Motion for Preliminary Approval of the Class Action Settlement. Thereafter, the Division filed a motion to intervene. After the trial court granted the Division's motion, the trial court held four extensive hearings before issuing a comprehensive memorandum opinion addressing each and every issue raised by all parties in this case. Put simply, I do not find that the trial court abused its discretion in any way or otherwise erred as a matter of law in approving the settlement under the circumstances of this case. For all of these reasons, respectfully, I dissent. I would affirm the February 9, 2018 Final Order of the Circuit Court for Baltimore City approving the settlement agreement.