NO. 12-11887

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MIRANDA L. DAY, for herself
and all persons similarly situated,
Plaintiffs-Appellees,

v.

RAYMOND GUNN,
Interested Party - Appellant,

v.

PERSELS & ASSOCIATES, LLC; RUTHER & ASSOCIATES,LLC;
LEGAL ADVICE LINE, LLC; JIMMY B. PERSELS; NEIL J. RUTHER;
ROBYN R. FREEDMAN; and CAREONE SERVICES, INC.,
Defendants-Appellees,

On Appeal from the United States District Court
for the Middle District of Florida

REPLY BRIEF OF APPELLANT RAYMOND GUNN

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INTRODUCTION

None of the appellees dispute that the settlement provides no benefit to the 125,000 absent class members whose claims against the defendants are sacrificed under the deal. Nevertheless, appellees assert that the district court did not abuse its discretion in approving the settlement because the court addressed each of the factors listed in *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984), as guidelines for evaluating the fairness of a proposed settlement. According to appellees, because the district court considered the *Bennett* factors, there can be no legal error and this Court must affirm the decision below unless it finds an abuse of discretion.

Appellees are wrong. The district court recognized that this case presents the threshold legal question (which it characterized as "the elephant in the room") of whether a no-value settlement can satisfy the requirements of Rule 23(e). Thus, before turning to the *Bennett* factors to evaluate whether the proposed settlement was a reasonable compromise, the court held that a no-value settlement can be approved if (1) class members can opt out; (2) defendants are unable to pay a meaningful award; and (3) class counsel favor the settlement. The district court's threshold determination was based on questions of law that this Court reviews *de novo*. Only if this Court finds that the district court did not err as a matter of law in holding that a no-value settlement—indeed, a settlement that leaves the class in a worse position

than if the case had never been brought—can satisfy the requirements of Rule 23(e) will the Court need to review the district court's application of the *Bennett* factors for an abuse of discretion. Either way, this Court should reverse the district court's order approving the settlement.

ARGUMENT

I. The District Court Erred as a Matter of Law in Holding That the Ability to Opt Out Can Cure the Unfairness of a No-Value Settlement.

Appellant Gunn's opening brief explained that the district court erred by holding that "[t]he ability to opt out of the settlement agreement adequately countered the lack of an award to the Class members," because the right to opt out is guaranteed in every class action brought under Rule 23(b)(3). Gunn Br. at 26 (quoting Doc. 157 at 16). Thus, if an opportunity to opt out could counter the unfairness of a settlement's terms, every agreement in a (b)(3) class action certified for settlement purposes would necessarily be fair, and there would be no need for Rule 23(e)'s requirement that the court protect absent class members by independently evaluating proposed class settlements and approving only those found to be "fair, reasonable, and adequate." *See In re GM Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 809 (3d Cir. 1995) ("[T]he right of parties to opt out does not relieve the court of its duty to safeguard the interests of the class.") Appellees offer no adequate

response, and are unable to cite a single case where an opt-out right was found to "adequately counter[] the lack of an award to the Class members."

CareOne and Day both claim that it was appropriate for the district court to consider the ability to opt out as a remedy for an otherwise deficient settlement because, in *Faught v. American Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011), this Court noted that class members "were free to opt out of the class." CareOne Br. at 40 n.13; Day Br. at 41-42. *Faught* is inapposite because it did not involve a no-value settlement, and the Court did not rely on the ability to opt out as a basis for finding that the settlement was fair. Rather, the settlement in *Faught* established a claims review process under which class members could receive full monetary compensation for their losses, and the settlement did not waive the right of class members to pursue individual lawsuits against the defendants. *Id.* When this Court noted that class members were free to opt out to preserve their ability to bring class claims under their state consumer protection statutes, the Court was not endorsing the idea that the ability to opt out can remedy an otherwise unfair deal; it was simply observing that no individual class member was obliged to participate in the settlement that the Court, for reasons unrelated to opt-out rights, concluded was fair.

The Law Firm Defendants attempt to draw a distinction between the ability to opt out of a litigation class and the ability to opt out of a settlement class: "[T]he issue in this case is not every class member's ability to opt out of the class; the issue is the class members' ability to opt out of the settlement." LFD Br. at 31. The Law Firm Defendants say nothing more about the supposed distinction, do not explain why it matters, and cite no authority. In any event, the supposed distinction makes no sense in a case where, as here, notice of the proposed settlement was not preceded by notice of certification, because exclusion from the class and from the settlement are one and the same.

II. The District Court Erred as a Matter of Law by Deferring to the Views and Reputation of Class Counsel.

As explained in Mr. Gunn's opening brief, the district court erred by deferring to class counsel's opinion of the settlement because the court has a duty, imposed by Rule 23(e), to act as a guardian of the absent class members and analyze independently the fairness of the settlement. Rule 23(e) imposes this duty in recognition of the fact that, once a proposed settlement has been reached, the settling parties and their counsel are non-adverse because both sides favor the agreement. This realignment of interests leaves the absent class members without a champion; thus, it is the court that must act as a "fiduciary serving as guardian for the

unrepresented class members." *United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980). Deference to the judgment of counsel regarding whether a settlement is fair to the absent class members is contrary to the court's role as guardian of the class. Further, the views of class counsel contribute nothing as a factor to determine the fairness of a settlement because class counsel always favor approval; the court is never asked to evaluate a proposed settlement that class counsel have not endorsed.

Appellees argue that this Court sanctioned deference to the views of class counsel in *Canupp v. Liberty Behavioral Healthcare Corp.*, 447 Fed. Appx. 976, 978 (11th Cir. 2011), and CareOne and Day cite a few other cases that have mentioned the opinion of settling counsel as a factor for assessing a settlement's fairness. *See* CareOne Br. at 48; Day Br. at 42-43; LFD Br. at 36. None of the cited cases, however, involved a settlement that provided a generous fee for class counsel but nothing for the class.

Canupp, for example, did not involve a no-value settlement. Rather, *Canupp* was a conditions-of-confinement suit for injunctive relief only, and the settlement addressed nearly every issue raised in the complaint. *See Canupp v. Sheldon*, No. 04-260, 2009 WL 4042928, at *6-9 (M.D. Fla. Nov. 23, 2009). Moreover, the settlement in *Canupp* did not involve a realignment of the interests between class counsel and the absent class members, because the settlement did not provide for the payment of

any attorney fees. *Id.* at *10. Thus, there was no danger, as there is here, that the settlement might "'benefit the class representatives or their attorneys at the expense of the absent class members.'" *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) (quoting *City of Miami*, 614 F.2d at 1331).

Recognizing that the unreported decision in *Canupp* does not bind this Court, *see* 11th Cir. R. 36-2, CareOne and Day also cite *In re Smith*, 926 F.2d 1027, 1028 (11th Cir. 1991). That case involved judicial approval of a settlement in a case brought on behalf of a minor, not a class action. In *In re Smith*, unlike here, there were no unrepresented parties with interests in need of protection. *Id.* at 1029.

CareOne and Day also cite *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977), for the proposition that the judgment of counsel is a factor that can be considered in evaluating the fairness of a settlement. The settlement in *Cotton*, however, included a fund of an "unlimited amount" that was created "to insure that any class member who ha[d] been discriminated against w[ould] be made whole." *Id.* at 1334. Because the settlement in *Cotton* provided a mechanism for class members to obtain full monetary relief, there was no realignment of interests between class counsel and the absent class members as there is here, where class counsel receive a generous attorney fee and the absent class members get nothing.

CareOne also cites *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1215 (5th Cir. 1978), because *Pettway* repeats *Cotton*'s statement that the judgment of counsel is a factor to consider in evaluating the fairness of a settlement. *Pettway*, however, properly recognizes that the approval of class counsel is not determinative because of "the potential conflict of interest between an attorney and a class" and "the natural bias toward relatively small settlements and large fee awards in class actions." *Id.* Indeed, the dispute in *Pettway* regarded "the sufficiency of the total amount of damages awarded to the class," and the Court found that the district court had abused its discretion in approving the settlement. *Id.* at 1217-18.

Similarly, in *Holmes*, this Court recognized that "the class action settlement process is 'more susceptible than adversarial adjudications to certain types of abuse.'" 706 F.2d at 1147 (quoting *Pettway*, 576 F.2d at 1169). Thus, the decision in *Holmes* warned that "[r]eliance on counsel's opinion tends to render the district court captive to the attorney and fosters rubber stamping by the court rather than the careful scrutiny which is essential in judicial approval of class action settlements." *Id.* at 1150. The Court noted that the degree of deference that a trial court might give to counsel's opinion depends on the posture of the case, and rejected reliance on counsel's opinion as a basis for approving "the disproportionate and facially unfair allocation" of the back pay award at issue. *Id.* Applied to the facts of this case, the

reasoning of *Holmes* requires rejection of the district court's deference to the views of class counsel because the award in this case is even more facially unfair than the award at issue in *Holmes*.

Finally, Day cites three cases from other circuits that she claims support the principle that the trial court should defer to the views of class counsel in evaluating class action settlements, even where the settlement provides nothing for the class but provides a generous fee award to class counsel and incentive payment to the class representative. Day Br. at 44 (citing *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148-49 (8th Cir. 1999); *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996); *Williams v. Vukovich*, 720 F.2d 909, 922-923 (6th Cir. 1983). None of the three supports Day's point. In *Petrovic*, the Eighth Circuit stated that the district court must "protect the interests of the class" but should not substitute its own judgment "as to *optimal* settlement terms," and affirmed the district court's approval of a settlement that provided compensation to each member of the class. 200 F.3d at 1148-49 (emphasis added). In *Isby*, the settlement provided injunctive relief, which was the only form of relief sought in the case; thus, the Seventh Circuit found no abuse of discretion where the district court had considered the opinion of counsel. 75 F.3d at 1200. And, in *Williams*, the Sixth Circuit rejected a proposed settlement despite class counsel's support. The Sixth Circuit noted that although a court may "defer to the judgment of

experienced counsel who has competently evaluated the strength of his proofs," "[t]he court should insure that the interests of counsel and the named plaintiffs are not unjustifiably advanced at the expense of unnamed class members." 720 F.2d at 922-23.

III. As a Matter of Law, a Settlement That Leaves the Class in a Worse Position Than If the Case Had Never Been Brought Cannot Be Fair, Reasonable, and Adequate.

The district court approved the settlement despite the lack of any monetary award to the class, in large part because the district court concluded that defendants lacked the means to fund a meaningful settlement or to satisfy a large judgment. Doc. 157 at 21-22. The court was correct that defendants' ability to pay may properly be considered in determining whether the *amount* of compensation for class members provided under a settlement is reasonable when balanced against the risks of further litigation, including collection risk. But where, as here, a district court approves a settlement that provides *no relief* to the absent class members but requires the surrender of their litigation rights, the district court errs as a matter of law.

As noted in Mr. Gunn's opening brief, the Fifth Circuit recently reversed a district court's approval of a class settlement that would have provided $21 million to the class in exchange for releasing their claims against defendants because there was no assurance that the class would receive any money from the settlement after

administrative costs were paid. *In re Katrina Canal Breaches Litigation*, 628 F.3d 185, 196 (5th Cir. 2010). Although the district court had found that all six factors used in the Fifth Circuit to evaluate class settlements favored approval, the Fifth Circuit held, as a matter of law, that a settlement cannot be fair, reasonable, and adequate under Rule 23(e) where there has been no demonstration that the settlement will benefit the class. *Id.* at 195; *see In re GM Truck*, 55 F.3d at 805 ("Rule 23(e) imposes on the trial judge the duty of protecting absentees" by "assuring that the settlement represents adequate compensation for the release of the class claims"); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 221 (D. Me. 2003) ("[A] settlement is not fair where all the cash goes to expenses and lawyers."); *Clement v. Am. Honda Fin. Corp.*, 176 F.R.D. 15, 28 (D. Conn. 1997) (disapproving settlement where "there is a strong danger that the settlement will have absolutely no value to the class"); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, No. MDL-991, 1995 WL 222177, *6 (E.D. La. Mar. 15, 1995) (rejecting proposed settlement that would release claims "for no or highly speculative consideration" even where "plaintiffs may face serious and significant barriers to recovery").

In their briefs, neither Day nor the Law Firm Defendants address the legal issue of whether a no-value settlement can be approved under Rule 23(e). CareOne argues that "[t]he absence of monetary relief does not automatically render a settlement

unfair." CareOne Br. at 34-35. CareOne fails to appreciate that the district court's legal error in this case was approving a settlement that provides no benefit—monetary or otherwise—to the absent class members.

For example, CareOne relies on *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993). There, the Third Circuit affirmed the district court's approval of a nonmonetary settlement in a derivative suit where the district court found that the case was weak on the merits but the changes in corporate structure required by the settlement "furnished a real benefit" to the corporation on whose behalf the suit was brought. Similarly, the district court in *First State Orthopaedics v. Concentra, Inc.*, 534 F. Supp. 2d 500, 521-22 (E.D. Pa. 2007), approved a settlement that provided prospective relief but no monetary compensation because the court found that the changes in defendant's business practices "would not have been undertaken but for th[e] lawsuit" and "provide[] real benefit to the class." In contrast, the business practice changes set forth in the settlement here are of no value: They are already required by law and rules of legal ethics, and, in any event, under the circumstances of this case, prospective changes will not benefit the class. *See* Gunn Br. at 24-26.

CareOne also cites *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 950 (9th Cir. 2011), in which the court of appeals vacated the district court's approval of a class settlement that provided a generous attorney fee but no

monetary relief to the class. The court remanded the case for the district court to reconsider the fee award in the context of the overall settlement, but "express[ed] no opinion on the ultimate fairness of what the parties have negotiated." *Id.* On remand, the district court reduced the attorney fee but found that the nonmonetary settlement was adequate because the case was "meritless or near meritless," and class members "retained the right to sue for any alleged personal injuries they might claim to suffer." Memorandum, *In re Bluetooth Headset Products Liability Litigation*, No. 07-1822, ECF No. 372, 12 (C.D. Cal. July 31, 2012). The district court concluded that the case was so weak that "there was no real likelihood of any monetary benefit to the class," and, because "[t]he injunctive relief was quite possibly more than the class would have achieved" if it had prevailed at trial, there was no reason "to reject a settlement that provides a class with more than it would otherwise achieve." *Id.* at 14-16. In contrast, appellees do not dispute that plaintiffs regularly obtain significant monetary relief for the types of claims released for nothing under the settlement in this case.

IV. The District Court Abused Its Discretion in Concluding That a No-Value Settlement Was a Reasonable Compromise of the Claims Released by the Class.

Mr. Gunn's opening brief explained that this Court has identified six factors to guide district courts in evaluating the substantive fairness of a proposed class settlement, and that the essence of the inquiry is whether the settlement reflects a

reasonable compromise in light of the risks and potential reward of continued litigation. Gunn Br. at 17. Here, as discussed in the opening brief, the district court erred by concluding that a no-value settlement was a reasonable compromise of the class claims in this case because (1) claims arising from the abusive debt-settlement schemes challenged in this case have substantial economic value but the settlement provides no benefit to the class in exchange for giving up those claims; and (2) the district court relied too heavily on inadequately supported claims of collection risk. Appellees' responses to these points are unavailing.

A. Appellees underestimate plaintiffs' likelihood of success on the merits.

Appellees contend that the case is weak on the merits. First, CareOne argues that the claims against it are "tenuous" because its Client Agreement with Day had a mandatory arbitration clause that banned class actions. CareOne Br. at 21-23. But the claims in Day's amended complaint arise solely from her Retainer Agreement with the Law Firm Defendants; thus, the district court denied CareOne's motion to compel arbitration with respect to any claims related to CareOne's activities as administrative staff to the Law Firm Defendants. *See* Doc. 82. Appellees act as though the claims against CareOne arising from the Retainer Agreement are peripheral to the main claims against the Law Firm Defendants. To the contrary, this

case is a challenge to the "lawyer model of debt settlement," in which debt-settlement companies like CareOne associate law firms like P&A in an attempt to take advantage of the lawyer-exemption found in some consumer protection statutes. Thus, it is CareOne's actions, carried out under the guise of providing management services to the Law Firm Defendants, that are at the heart of this case.

Second, appellees argue that the claims against Ruther and Persels might be subject to dismissal for lack of personal jurisdiction, but those defendants were unable to secure a dismissal during the sixteen months that this case was pending in the district court. Even if their jurisdictional theory ultimately prevailed, there would still be five defendants left. Further, the settlement releases the claims of class members in 49 states. To force class members who reside in states where Ruther and Persels are undisputably subject to personal jurisdiction to give up their claims just because class counsel, who brought this case on behalf of Florida residents only, decided to sacrifice the claims of consumers nationwide would not be fair.

Third, appellees contend that Day's cause of action under the Credit Repair Organizations Act (CROA) is weak, although CareOne admits that "the cases are divided." CareOne Br. at 27. Yet regardless of whether defendants' theory for avoiding CROA liability were viable, the amended complaint pleads several other causes of action. Moreover, in analyzing the reasonableness of the settlement, the

Court must compare the value of the claims released against the value of the relief obtained, and as explained in the opening brief, multiple legal theories are available to challenge the abusive debt-settlement practices at issue in this case. *See* Gunn Br. at 19-20. Indeed, neither CareOne nor Day dispute that individual claims against debt-settlement companies often result in significant monetary relief. Nonetheless, they argue that the value of the claims of individual class members is of limited use in determining the amount that might be awarded in a class action. Day Br. at 22-23; CareOne Br. at 38. The Law Firm Defendants take the argument a step further and claim that "[w]hat plaintiffs in other cases have recovered against other defendants is irrelevant." LFD Br. at 41. Appellees are wrong. The outcome of cases challenging the same behavior at issue in this case is clearly relevant to the fairness of this settlement. *See, e.g., True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1071 (C.D. Cal. 2010) (finding that settlement of individual action "alleging substantially similar claims" as those that would be released under proposed class settlement "suggests the claims of the class members may have significant value").

Moreover, as appellees are well aware, in a statewide class action in the Eastern District of Washington, a class of about 2,738 Washington residents has settled with CareOne and the Law Firm Defendants for a total of $2,200,000, of which $1,540,000 will be paid directly to the class members pursuant to a formula that will reimburse

each class member about 33% of the total fees they paid to defendants.[1] *See* Settlement Agreement, *Bronzich v. Persels & Associates, LLC*, No. 10-0364, ECF No. 274, Exhibit 1 (E.D. Wash. Aug. 10, 2012). If the settlement in *Bronzich* is approved, class members will receive payments, on average, of about $562. If this case settled for the same amount per class member, the total payment to the class would be more than $70 million. That members of the Washington class will receive individual payments averaging $562 while members of this class receive zero highlights the unfairness of this settlement.

B. Appellees overstate the risk that the class might not be able to collect a significant judgment.

Defendants' assertions regarding collection risk do not apply to CareOne. *See* Gunn Br. at 32. CareOne has never claimed that it lacks the resources to pay a meaningful settlement. *See* CareOne Br. at 33 (stating that "P&A lacks the financial wherewithal to fund a significant settlement" and that "P&A" does not have "insurance that covers Plaintiff's claims"). Indeed, it appears that CareOne has insurance that would respond to this case, because the settlement agreement in *Bronzich* states that an insurance company is providing $750,000 of the settlement amount. Settlement Agreement, *Bronzich*, ECF No. 274, Exhibit 1 at ¶ 5(a).

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[1]The agreement in *Bronzich* was reached on about July 25, 2012, and the preliminary approval hearing is set for September 12, 2012.

Similarly, none of the appellees provide any legal support for the assertion that class members could collect nothing from the three individual defendants because they are married and hold their assets jointly with their spouses. *See* CareOne Br. at 34. Appellees simply assume, without citation to any authority, that married individuals are immune from all collection efforts.

Appellees repeat the claim that P&A lacks the resources to contribute to a meaningful settlement because it suffered net financial losses in 2010 and 2011 and still owes money pursuant to a settlement in another case. But appellees do not respond to our argument that the third declaration of Neil Ruther, Doc. 155, which is the only source of specific information about P&A's financial condition, provides too little detail to support the district court's conclusions regarding collection risk. For example, the claim that P&A suffered a net loss during the last two calendar years is meaningless without information about P&A's assets, deferred revenues, and payroll, including how much P&A pays the individual defendants in this case. Without more information, there is no way to know whether P&A could contribute to a meaningful settlement.

Mr. Gunn's opening brief explained that Ruther claimed in his third declaration that P&A owes $14 million pursuant to a settlement in another case. Although Ruther did not attach the settlement agreement, he stated that the agreement had been

made "a part of the public record" in a subsequent case brought to enforce the terms of the settlement. Doc. 155, ¶ 4. The opening brief provided WestLaw citations to the pertinent records and attached the settlement agreement to which Ruther's declaration referred and the district court relied.[2] Based on the court records, Mr. Gunn's opening brief observed that the case referenced in Ruther's declaration was brought by two plaintiffs: My Professional Advice (MPA) and Legal Advice Line (LAL), and that LAL is a defendant here. Gunn Br. at 33-34. The documents show that the amended complaint and the settlement agreement in this case referred to LAL "LLC," and the complaints in the Maryland cases were brought by LAL "Inc.," but we noted that the parties to this case have used the two names interchangeably. Indeed, counsel for the Law Firm Defendants referred to their client in the district court as LAL "Inc." (Doc. 100), and in this Court entered their appearance for LAL "Inc."

[2]The complaint and the memorandum in support of summary judgment in the subsequent case, *My Professional Advice, Inc. v. Ruther*, No. 24-C-11-5013 (Md. Cir. Ct.), are available on Westlaw, *see* Complaint, 2011 WL 3381399 (Md. Cir. Ct. July 28, 2011); *see also* Memorandum in Support of Motion for Summary Judgment, 2012 WL 1884500 (Md. Cir. Ct. July 2011), but the settlement agreement referenced by Ruther is an attachment to the summary judgment papers and is not available on Westlaw. In an Addendum to the opening brief, we reproduced the memorandum in support of summary judgment (the same document that is available at 2012 WL 1884500) with the attachments, including the court record that Ruther referenced and the district court relied upon. *See* Doc. 157 at 21.

In their brief, the Law Firm Defendants assert that their counsel's repeated use of LAL "Inc." was a typographical error that they corrected three weeks after Gunn filed his brief. LFD Br. at 34. They also assert that LAL Inc. and LAL LLC are entirely unrelated entities, as though the common name is a mere coincidence. LFD Br. at 34-35. But the two LAL entities are obviously related to one another. For example, Neil Ruther, the owner of LAL LLC, was the general counsel of LAL Inc. for more than a decade. *See* Complaint, 2011 WL 3381399, ¶ 8; Memorandum in Support of Summary Judgment, 2012 WL 1884500, ¶ 3; Gunn Br. at ADD 14. And the documents in the Addendum to the brief of the Law Firm Defendants show that LAL Inc. and LAL LLC share a mailing address. *Compare* LDF Addendum at page 60 of 67 *to* page 66 of 67. Thus, the links between the two LAL entities warrant further investigation before one could properly conclude that P&A is judgment-proof because it owes money to LAL Inc. Nonetheless, both the district court and class counsel accepted without further inquiry Ruther's claim about P&A's financial condition.

In addition, $9 million of the $14 million obligation referenced in Ruther's third declaration is conditioned on P&A's continued business relationship with CareOne—a relationship that generates tens of millions of dollars for P&A. Gunn Br. at 34; *see id.* at ADD 18. The conditional nature of P&A's obligation and the

involvement of CareOne warrant closer inquiry before accepting Ruther's assertion that P&A's obligation under the prior settlement makes P&A judgment-proof. Significantly, none of the appellees acknowledge this point, much less respond to it.

Given the lack of evidentiary support, the district court abused its discretion in accepting appellees' claim that collection risk justifies a no-value settlement.

CONCLUSION

For the reasons stated above and in appellant's opening brief, the district court's order approving the settlement of this class action should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 4,831 words.

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

CERTIFICATE OF SERVICE

I certify that on September 10, 2012, I filed the foregoing Brief of Appellant Raymond Gunn using the Electronic Case Files (ECF) system which will send a Notice of Docket Activity (NDA) to all counsel who have registered to file and serve documents electronically (Attorney Filers). The NDA constitutes service on the Attorney Filers. The Attorney Filers who have been served by NDA are:

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