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Class Action Objectors: Extortionist Free Riders or Fairness Guarantors

Edward Brunet

This Article evaluates whether objectors to class action settlements add to the efficiency and fairness problems that plague the modern class action. Objector participation can take the form of (1) free market objections to the conduct of the class suit, often a proposed settlement generous only to the lawyers for the class, (2) intervention by the state in order to better represent consumer constituents, (3) appointment by the court of guardians for subclasses, and (4) intervention by public interest groups who seek to advance the public interest by avoiding unfair class action settlements. Until recently, legal doctrine has inhibited or discouraged such expanded objector participation. Substantial monitoring and free-riding costs are associated with the class action objector. Nonetheless, enhancing the ability of third parties to present their input in class action litigation can advance fairness and efficiency policies. Courts must permit some screening of the potential input of an objector prior to deciding whether to allow full objector participation.

INTRODUCTION

The class action concept is under assault. Critics seem to have won the day. The law and economics critiques of Professor John Coffee and others have had a huge influence on courts and
Courts have emphasized "[t]he dangers of collusion between class counsel and the defendant," characterized the class action as "an awkward device," and noted that "the relationship between a plaintiff class and its attorney may suffer from a structural flaw, a divergence of economic interests of the class and its counsel." The Supreme Court demonstrated distrust of class action settlements in both *Amchem Products, Inc v Windsor* and *Ortiz v Fibreboard Corp.* Class action reformers have attacked the very core of Federal Rule of Civil Procedure 23 ("Rule 23") and have successfully sought a revised set of procedures. In this climate, it is difficult to find a positive spin on either Rule 23 or the class action mechanism itself.

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2 See LEXIS SHEPARD'S, <http://www.lexisnexis.com> (visited April 16, 2003). (confirms that courts and commentators have accepted the critique of class actions set forth by Professor Coffee). Shepard's reports that Coffee's 1986 article (cited in note 1) has been cited 353 times, including an amazing forty-five times by state and federal courts. Similarly, Professor Coffee's 1995 article (cited in note 1) has already been cited 246 times, including twenty-five times by courts, and Coffee's 1987 article (cited in note 1) has been cited 164 times, including nine times by courts.

3 *Hanlon v Chrysler Corp*, 150 F3d 1011, 1026 (9th Cir 1998). See also *Weinberger v Great Northern Nekoosa Corp*, 925 F2d 518, 524 (1st Cir 1991) (lamenting that "class lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees").

4 *Culver v City of Milwaukee*, 277 F3d 908, 910 (7th Cir 2002).

5 *In re Auction Houses Antitrust Litigation*, 197 FRD 71, 72 (S D NY 2000). See also *In re Telectronics Pacing Systems, Inc*, 221 F3d 870, 873–74 (6th Cir 2000) (referring to the "perverse set of incentives" in limited fund class actions); *Mars Steel Corp v Continental Illinois National Bank and Trust Co*, 834 F2d 677, 678 (7th Cir 1987) ("[C]lass actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest.").


7 527 US 815, 842 (1999).

8 See Civil Rules Advisory Committee, Judicial Conference of the United States, Report of the Civil Rules Advisory Committee ("Advisory Committee Report") 2–3 (Administrative Office of the US Courts, May 20, 2002) (proposing to amend Rule 23(c) by changing procedures used to approve and notify class, changing procedures used to approve settlement under Rule 23(e), and setting forth provisions for appointing class counsel and attorneys' fees).

9 But see, for example, Elizabeth J. Cabraser, *Enforcing the Social Compact Through Representative Litigation*, 33 Conn L Rev 1239, 1240 (2001) (arguing that the class action allows the civil justice system to enforce rights essential to a social contract between individuals and corporate citizens); Brian Wolfman, *Forward: The National Association of Consumer Advocates' Standards and Guidelines for Litigating and Settling Class Actions*, 176 FRD 370, 370 (1998) (asserting that "class actions are enormously useful tools for justice"); Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 UC
The theoretical attack on class actions rests heavily upon the agency cost problem: class members, including their leaders—the representative parties—simply cannot efficiently monitor their attorneys—class counsel. The customary principal-agent relationship between attorney (normally the agent) and the client (hopefully the principal) fails to exist in the typical class action. The entrepreneurial incentives of attorneys who specialize in class actions transform this relationship into the converse connection in which the attorney becomes the principal and the unsophisticated client becomes the agent, with minimal ability to monitor the behavior of the class action counsel. The trial judge, a potential monitor of the class action counsel's behavior because of the requirement that the court approve of any class action settlement, is to "exercise the highest degree of vigilance in scrutinizing proposed settlements" and has been likened to "a fiduciary of the class." Yet, a district judge lacks the incentive, infor-
mation, and practical ability to effectively monitor class counsel. Under these conditions, the trial court alone cannot realistically be an effective check on the potential abuse that can arise in the class action settlement process.

The monitoring problem is central to today’s prevailing distrust of the class action. The critiques of Professor Coffee and others also identify efficiency problems inherent in the typical small stakes class action. Asymmetric stakes divide the class members from their attorney, causing “sweetheart deal” settlements to arise. Because of the lack of an effective monitor on the fairness of a proposed class action settlement, the problems associated with asymmetric stakes increase. Where multiple attorneys represent class representatives, often true in consolidated class actions in multidistrict litigation (MDL), common pool prob-

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15 See text accompanying note 10 (explaining that courts lack the time and investigative abilities to successfully monitor and that judicial monitoring of class counsel conduct is inconsistent with the neutrality essential to effective judging); Stephen M. Bainbridge and G. Mitu Gulati, How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions, 51 Emory L J 83, 139–40 (2002) (arguing that judges are boundedly rational, often lack expertise in substantive law, and have little incentive to spend the time needed to analyze and draft opinions in technical cases); G. Donald Puckett, Peering Into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements, 77 Tex L Rev 1271, 1279–83 (1999) (describing the “inherent futility” of trial court review of a proposed class action settlement); John C. Coffee, Jr., and Susan P. Koniak, Rule of Law: The Latest Class Action Scam, Wall St J A11 (Dec 27, 1995) (pointing out that in class actions “[i]ndividual trial judges simply have inadequate incentives to resist parties who want to settle and too little information to recognize when the settlement is collusive”).

16 See, for example, Alon Klement, Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers, 21 Rev Litig 25, 44–51 (2002) (concluding that courts are inadequate monitors of class action attorneys because of constrained resources and overburdened workloads); Issacharoff, 30 UC Davis L Rev at 829 (1997) (cited in note 1) (pointing out that courts “are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket”); Coffee, 95 Colum L Rev at 1465 (cited in note 1) (concluding that courts are passive and accepting in evaluating proposed class action settlements); Geoffrey C. Hazard, Jr., The Settlement Black Box, 75 BU L Rev 1257, 1272 (1995) (characterizing the class action settlement process as a “black box” that shields the negotiation process from enlightened scrutiny).

17 See, for example, Jay Tidmarsh and Roger H. Transgrud, Complex Litigation: Problems in Advanced Civil Procedure 121 (Foundation 2002) (asserting that “the notion that class actions exist primarily to profit lawyers while doing little for clients has reached the status of urban legend”); Coffee, 62 Ind L J at 635–36 (cited in note 10); Katherine Ikeda, Note, Silencing the Objectors, 15 Georgetown J Legal Ethics 177, 188 (2001) (stressing the conflicts between class counsel and class members because the class lawyers “have strong incentives to serve their own interests at the expense of the class”); Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 Cornell L Rev 1045, 1107–14 (1995) (setting forth a case study of an inequitable class action settlement that benefited attorneys, but inadequately benefited class members).
lems arise. Some lawyers may free ride off the work of others since they possess no clear property right in the attorneys' fees that may result from a settlement or judgment. They have little incentive to invest work in an uncertain common pool of fees that may never materialize. Efficient representation of class members is problematic in this context.

In addition, class actions present cost-differential problems arising from the vastly different stakes, risks, and information held by the parties. There may be an adverse selection problem because class members with weak claims can be aggregated together with those having strong claims. Under such conditions, the terms negotiated to settle class actions may bear little resemblance to a result consistent with the merits of the dispute at issue. Such settlements, accordingly, may well be unfair and inefficient.

This Article focuses on objectors, largely unpopular parties, and their attorneys who object to the terms of a proposed class settlement, sometimes after seeking to intervene formally into the litigation. I explore whether expanding participation by objectors in class actions will cure the pervasive monitoring and other efficiency problems that presently frustrate class action litigation. These would-be participants may have the potential to add to the quantum of monitoring that presently exists. In numerous cases, objectors have given courts information that allows the court to disapprove of a settlement or to even improve it at a Rule 23(e) hearing.

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19 See id at 637–39.
20 See, for example, Robert G. Bone, The Economics of Civil Procedure 281 (Foundation 2003) (explaining that the class action tends to lead to adverse selection of weak claims that end up pooled with strong ones because of the cost associated with readily distinguishing claims).
21 See Lawrence W. Schonbrun, The Class Action Con Game, 20 Regulation (No 4 1997) (noting that “objectors are as welcome in the courtroom as is the guest at a wedding ceremony who responds affirmatively to the minister's question, 'Is there anyone here who opposes this marriage?'”).
22 The term “objector” is usually limited to those who object to the terms of a proposed settlement. I accept this use of the term. Nonetheless, this Article will embrace a broader meaning of the term because class action objectors can emerge earlier than the exact time of a proposed settlement. For example, they may learn about a class suit and oppose the definition of a class as overinclusive or underinclusive at the time of a Rule 23 certification hearing, or they may object to the wording of a class action notice. Objectors can also emerge as the clients and attorneys who file copycat class actions, separate class suits that free ride off of a previously filed class action. See text accompanying note 105.
23 See, for example, In re Telectronics Pacing Systems, 221 F3d at 880 (reversing district court approval of settlement that was not at arms length); Powers v Eichen, 229 F3d
At the moment, however, several doctrinal difficulties inhibit the ability of objectors to monitor effectively. Courts have restricted the ability of objectors to appeal, on the theory that granting liberal appeal rights to those objecting would harm the potential efficiency of the class suit. Courts also have denied efforts of objectors to intervene into class suit as parties, and thereby perfect their party rights to present evidence, take discovery, and appeal.

The former problem of the rights of objectors to appeal has now been partially clarified by the recent Devlin v Scardelletti Supreme Court decision, which grants participatory objectors the right to appeal without first intervening in the class suit. Nevertheless, uncertainty remains about whether formal intervention criteria are fully applicable to objectors, as well as about the nature of the participation rights held by a class action objector. This Article will argue for some formal intervention-like screen, but against formal intervention itself as unnecessary.

Informational input from objectors regarding a proposed settlement could, in theory, improve the monitoring problem. By definition, the objector is a monitor, who is evaluating a proposed settlement and then investing resources to either improve the

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1249, 1258 (9th Cir 2000) (remanding, on strength of the argument of the objectors, an attorneys' fee award approved in the lower court, because the award lacked a full explanation).

24 See, for example, In re Integra Realty Resources, 262 F3d 1069, 1104 (10th Cir 2001) (citing Gottlieb v Wiles, 11 F3d 1004, 1009 (10th Cir 1993)) (noting that allowing an appeal would cause the class action to “break down under the burden of unpredictable and unlimited individual actions” and “would eviscerate the utility of the class action suit”); In re Joint Eastern and Southern District Asbestos Litigation, 78 F3d 764, 779 (2d Cir 1996) (denying the right of an insurer to appeal); Rosenbaum v MacAllister, 64 F3d 1439, 1442 (10th Cir 1995) (rejecting right to appeal on all issues but the propriety of attorneys' fees, on the theory that “there is always likely to be one” objecting party to a settlement who, if allowed, would slow down ultimate benefits to members of the class); Guthrie v Evans, 815 F2d 626, 628 (11th Cir 1987) (holding that class members must intervene in order to have standing to appeal).

27 See, for example, Crawford v Equifax Payment Services, Inc, 201 F3d 877, 881 (7th Cir 2000) (“Only when the class members suspect that the representative is not acting in their best interests is there a need to intervene.”); Gottlieb, 11 F3d at 1008 (10th Cir 1993) (requiring an intervenor to demonstrate that his interest was “typical” as a prerequisite to appeal).

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26 See, for example, In re General American Life Insurance Co Sales Practices Litigation, 302 F3d 799, 800 (8th Cir 2002) (limiting the holding of Devlin to class actions where class members have no ability to opt out, despite the broad nature of the Devlin opinion); Ballard v Advance America, 79 SW3d 835, 837 (Ark 2002) (distinguishing Devlin because the objector had the ability to opt out and thereby avoid the binding nature of settlement).
settlement terms or reject the settlement. Assuming the value of such objector input, a policy of liberalizing the ability to object and intervene in class actions would provide efficiency. Such a change may also advance fairness policies by broadening participation and the ability to be heard. Objectors create an adversary contest, usually regarding the difficult process of settlement approval, and thereby can perform a positive function.

Assuming the inevitable value of objector input, however, paints a naive and overly optimistic picture of the objector's role in the modern class action. Several problems plague the process of objecting into class actions. First, there is the problem of monitoring the monitor. The degree of monitoring by objectors may not be efficient. Clients of counsel who object may be unable to monitor their own attorneys effectively. Some objecting by attorneys who represent small stakes plaintiffs may be only an effort to obtain attorneys fees' for the objecting attorney. Such claim-jumping attorneys are able to free ride off the efforts of the initial class counsel, who had already identified an alleged legal wrong and spent considerable time procuring a settlement. Objectors and their attorneys may be engaged in a form of extortion, seeking to hold up court approval of a settlement in exchange for a piece of a limited settlement pot. Their efforts may increase the transaction costs of administering the class action—no small amount—without any net gain in the quality of a settlement.

Not all objectors, however, will have such nefarious intentions. In addition to focusing upon the typical monitor—an absent class member unhappy with a proposed settlement—this Article will focus on several other types of emerging monitors who have the potential to monitor the class more productively. One such party is the public interest group monitor. At present, several public interest groups routinely seek intervention to participate in critiquing allegedly unfair proposed class actions settlements. Both Public Citizen and the Trial Lawyers for Public Justice Class Action Abuse Prevention Project have repeatedly represented objectors to proposed class action settlements. As such

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8 See, for example, Patrick Woolley, Rethinking the Adequacy of Adequate Representation, 75 Tex L Rev 571, 618 (1997) (explaining extortion by class members who "threaten disruption of the [proposed] settlement . . . to obtain a disproportionate amount of the settlement fund").

29 See Trial Lawyers for Public Justice, Class Action Abuse Prevention Project, available online at <http://www.tlpj.org/key_current_cases.htm> (visited April 7, 2003) (summarizing class action cases where a public interest group has been able to improve the settlement terms or to obtain judicial disapproval of an allegedly unfair settlement); Pub-
input involves attorneys monitoring other attorneys, there is reason to be enthusiastic about the increasing degree of public interest group monitoring. Such monitoring has costs, however, and only limited resources.

A second potential monitor of the behavior of class action attorneys is a court-appointed guardian ad litem for objectors and potential objectors to a proposed settlement. Professor Coffee has proposed such a concept by suggesting that courts appoint separate attorneys for future claimants. This process of appointing a legal representative for one unable to adequately advance legal rights is a respected technique in trust litigation, illustrated in the landmark case of Mullane v Central Hanover Bank and Trust Co. While costly and clearly of limited strategic use in specific contexts, there is reason to think that timely appointed guardian attorneys might successfully monitor counsel who purport to represent the class.

The state is another potentially useful monitor of class action abuse. A federal agency or a state Attorney General's office has often provided input into the fairness of a proposed class action settlement or has even purported to represent the class itself. The impact of governmental bodies objecting into class suits should help produce a settlement consistent with the public interest. It seems intuitive that the state can monitor class action plaintiffs' attorneys and their opposing counsel. Administrative
agency attorneys are specialists who should have the appropriate incentives to monitor effectively, and they lack the opportunism faced by private counsel representing objectors.

The promise of such government intervention into class action suits may have some limitations. It carries high costs for government bodies that face increasing budget pressures. In addition, there are information costs associated with learning about potential class action abuse. Class actions involving a state's citizens are often settled without any notice to the state.

This Article will focus on these various types of participation by objectors. My general thesis is that a closed, private procedure in which a trial judge assesses a proposed class action settlement with only input from class counsel and defense counsel is far less efficient or fair than a procedure in which input is received from one or more objectors. I concede that objectors may be the least popular litigation participants in the history of civil procedure. In my research I have spoken with counsel who described objectors as “warts on the class action process,” and I also found references to objectors as “pond scum” and “bottom feeders.” While I acknowledge, and will develop, the problem of the obvious costs caused by those free-riding objectors who contribute nothing new to a class action, I conclude that the law regarding objectors to class actions should be slightly liberalized to provide a more participatory process when assessing class action settlements. I will also argue that efficiency and fairness are not polar opposites in this area. By increasing fairness through liberalizing the ability

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33 See, for example, Bob Van Voris, Flight Attendants Object to Smoke Deal, Natl L J A6 (Jan 19, 1998) (reporting that class counsel Stanley Rosenblatt was “clearly irrat[ed]” by the filing of objections to the class action filed by him and his wife on behalf of flight attendants exposed to secondhand smoke, and quoting his question that “When my wife and I were busting our ass for six-and-a-half years since 1991, where was [objector Public Citizen staff attorney Alan] Morrison?”); Bob Van Voris, Plaintiff Bar Divided by Settlements; Class Action Abuse, Natl L J A1 (Feb 23, 1998) (reporting that opposing attorney Alan Morrison of Public Citizen, who objected to a proposed settlement in which class counsel was to receive forty-nine million dollars, but the client class members were to receive nothing, was told, “You are scum; you are absolute scum,” by lead plaintiff counsel Stanley Rosenblatt in a Miami courtroom); Henry J. Reske, Two Wins for Class Action Objectors, 82 ABA J 36 (June 1996) (quoting Professor John Coffee that in early class action suits, objects were a “kind of gadflies” who were not taken very seriously).

34 See Van Voris, Plaintiff Bar Divided, Natl L J at A22 (cited in note 33) (noting that class action critics say that “many private objectors are no better than the settlement architects” and referring to objectors as “legal freebooters”); Bob Van Voris, $98M Diet Drug Settlement in Jeopardy, Natl L J A6 (Mar 8, 1999) (quoting class action lawyer Arnold Levin, who compared one class action objector to Mary Poppins because “he drops in at the end” and describes the objector's method as “[w]herever he can find a client, he objects”).
to object into class suits, courts will be able to receive valuable information that should improve the final assessment of a settlement. The dominant *Mathews v Eldridge* right-to-be-heard ethos equates due process with instrumental litigation accuracy, thereby justifying a class action model directed toward enhancing informational input proffered to the court. In this sense, efficiency and fairness can be complementary policies and need not invariably be traded off against one another.

This Article about objectors intends to cover the costs and benefits of allowing added objector participation. Part III focuses on this issue most specifically. It also distinguishes carefully between the private sector objector attorney and public sector objections filed by lawyers who work for the state or for public interest groups or as adjuncts to an Article III judge. Before analyzing the objector process, I begin in Part II by outlining the law and policy implications of intervention by third parties into already pending cases. Intervention is linked directly to the class action objection procedure in various ways. First, class action objectors, usually absent members of the class, are often outsiders to the litigation. Hence, courts may want to assess, as they do with proposed intervention petitions, the costs and benefits of the input advanced by objectors before welcoming full objector participation. Second, prior doctrine forced counsel representing the objectors to file an intervention petition in order to preserve the opportunity to appeal. Because of the pre-*Devlin* law, many class action objectors have sought to intervene into class actions and, accordingly, have been labeled as intervenors. Although intervention and objector participation in class suits are surely different concepts, their analytic similarity and past linkage requires a close initial look at the policies underlying third-party intervention into a case.

The position of objectors and judges in evaluating proposed settlement terms is similar. The trial judge and the objector are outside of the settlement process, and may lack the information...
needed to effectively evaluate a settlement. In contrast, the two typical party negotiators to a proposed class action settlement, counsel for the class defendant and counsel for the representatives of the class, are on the "inside" of the negotiation. They possess the incentives and the information essential to evaluating the strengths and weaknesses of the case. The positions of the various parties to a proposed class action settlement are illustrated graphically by Figure 1.

Figure 1

STRUCTURAL POSITION OF "OUTSIDE" OBJECTORS

- Judge
- Objectors
- Settlement Terms
- Class Counsel
- Defendant
In Figure 1, only the class counsel and the defendant are privy to the formation of settlement terms. They are, accordingly, the only parties to a class action settlement hearing who are represented within the spatial triangle that depicts the "insiders" to the settlement process. Objectors are a considerable distance from this settlement process and, therefore, appear on the left of the triangle some distance from the settlement. The arrow adjacent to the objectors indicates their considerable interest in becoming class action settlement insiders. The trial judge, who will theoretically monitor the fairness of the class action settlement, is similarly depicted at a considerable distance above the top of the triangle.

The thesis of this Article is that Figure 1 is a recipe for problems in class action settlement evaluation. The graph needs to be amended by somehow placing objectors within the settlement triangle, and placing the trial judge at its apex. Class action settlements will be fair and efficient only when all the actors capable of providing and assessing information regarding the settlement are actively involved.

I. The Fairness and Efficiency of Intervention by Third Parties

Intervenors, by definition, are outsiders who seek to participate in pending litigation. They are situated on the outside of litigation, but they want in. They may enter a suit only if formal criteria are met.

The judge in the Class Action Dilemmas graph is at the very apex of the triangle. Figure 1 places the judge some distance from the settlement terms and locates the main settlement actors, class counsel, and the defendant, inside the triangle. In contrast, the Class Action Dilemmas graph simply places the defendant and the class counsel outside of the triangle and thereby fails to note the "insider-outsider" characterization of the parties set forth in Figure 1.

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39 Figure 1 is a conceptual variation of a graph of class action settlements that first appeared in Deborah R. Hensler, et al, Class Action Dilemmas 98 (RAND 2000). The triangle depicted was entitled "Triangle of Interests in Damage Class Action Litigation." It did not use the term "objectors," but instead, used the phrase "Public Interest" and portrayed this concept a considerable distance from the triangle. Figure 1 differs considerably in other ways. The judge in the Class Action Dilemmas graph is at the very apex of the triangle. Figure 1 places the judge some distance from the settlement terms and locates the main settlement actors, class counsel, and the defendant, inside the triangle. In contrast, the Class Action Dilemmas graph simply places the defendant and the class counsel outside of the triangle and thereby fails to note the "insider-outsider" characterization of the parties set forth in Figure 1.

40 See, for example, FRCP 24(a)(2) (mandating a showing that an intervenor demonstrate an interest that would be impaired or impeded if his intervention is denied and that the intervenor is not adequately represented by one of the existing parties); FRCP 24(b)(2) (allowing permissive intervention when the claim of the intervenor and the main action have a question of law or fact in common).
the proposed intervenor and parties to the main action have a common question of law or fact, leaves the trial court with a good deal of discretion.\footnote{See Gene R. Shreve, Questioning Intervention of Right—Toward a New Methodology of Decisionmaking, 74 NW U L Rev 894, (1980) (concluding that all intervention leaves the discretion to the trial judge); Edward J. Brunet, A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria, 12 Ga L Rev 701, 738 (1978) (concluding that both Rule 24(a) and 24(b) grant substantial discretion to the court).}

The better intervention opinions use judicial discretion to make sure that allowing third-party input advances efficiency.\footnote{See, for example, In re Navigant Consulting, Inc, Securities Litigation, 275 F3d 616, 620 (7th Cir 2001) (suggesting that providing intervention can facilitate more accurate decisions by courts); General Motors Corp v Burns, 50 FRD 401, 405 (D Hawaii 1970) (granting intervention and noting that the intervenor organization and its members “have unique knowledge of the Hawaii automobile industry” that will help “to fully present to the Court all of the facts in this case”); James Wm Moore, ed, 6 Moore’s Federal Practice § 24.03[5][a] (Bender 3d ed 1997) (“Despite the label ‘intervention of right,’ courts exercise some discretion in weighing a motion to intervene under Rule 24(a)(2).”)

See, for example, Natural Resources Defense Council, Inc v Tennessee Valley Authority, 340 F Supp 400, 408–09 (S D NY 1971), revd on other grounds, 459 F2d 255 (2d Cir 1972) (concluding that intervenor Audubon Society interjects “a long-standing interest in and familiarity with strip-mining, expertise that may be helpful in clarifying the facts and issues in this case”).

See, for example, American Lung Association v Reilly, 962 F2d 258, 262 (2d Cir 1992) (denying intervention where intervening utilities advanced only defenses already asserted by defendant EPA); Cajun Electric Power Cooperative, Inc v Gulf States Utilities, 940 F2d 117, 120–21 (5th Cir 1991) (affirming a denial of intervention because the putative intervenor “brings no unique arguments to the litigation”); In re Domestic Air Transportation Antitrust Litigation, 148 FRD 297, 336–37 (N D Ga 1993) (denying intervention under Rule 24(b) because proposed intervenors had not “demonstrated that their interests are unique to them or that they are different in any way from the interests of the class as a whole”); Moore, 6 Moore’s Federal Practice at § 24.03[5][a] (cited in note 42) (asserting that “intervention is not favored if the applicant will contribute no unique arguments to the litigation”).

See generally, 6 Moore’s Federal Practice § 24.03[5][a] (cited in note 42) (listing discretionary factors used in assessing intervention of right).}
A successful intervenor is, by definition, connected to the existing lawsuit. Providing the intervenor a voice in the suit seemingly advances participation or right-to-be-heard values. In this way, fairness is furthered by procedures that allow third-party intervention.

At the same time, intervention can improve litigation efficiency. If we define litigation efficiency in terms of reaching an accurate decision, intervenors have the potential to enhance the quality of judicial decision making by introducing valuable information into a case. Courts, like any decision makers, need information to decide disputes. Assuming that a judge can efficiently process the information proffered by an intervenor, intervention should improve judicial accuracy.

The assumption that new information provided by intervenors is beneficial, however, may not be realistic. Intervenors are sometimes imitators, who do little more than free ride off the evidence already in a case. Intervenors can also delay and add to the cost of litigation. In addition, the information put forth by the intervenor could confuse a court or make the case unmanageable. In such a case, the informational input of the intervenor exceeds the optimal scale economies of the trial judge. When this occurs, the court should have the discretion to deny the counterproductive intervention petition.

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46 See Brunet, 12 Ga L Rev at 715–16 (cited in note 41) (defining accurate decisions as the optimal output of litigation).
47 I have earlier illustrated this point graphically. See id at 715 (showing judicial output curve in terms of judicial accuracy rising after receipt of additional valuable "informational input from joinder mechanisms"). See also Richard D. Freer, Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19, 60 NYU L Rev 1061, 1061–62 (1985) (stressing efficiencies gained by repackaging claims within litigation generally and within Federal Rule of Civil Procedure 19 particularly).
48 See, for example, Wilderness Society v Morton, 463 F2d 1261, 1263 (DC Cir 1972) (denying the intervention effort of a Canadian citizen and an environmental group and, in a concurring opinion of Judge Tamm, warning that intervention can make "the manageable lawsuit become an unmanageable cowlick"); Smuck v Hobson, 408 F2d 175, 179 (DC Cir 1969) (observing that the "decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending").
49 I have also illustrated this point graphically. See Brunet, 12 Ga L Rev at 716 (cited in note 41) (showing productivity curve of judicial output or accuracy falling after receipt of unproductive input from intervention). See also Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J L & Comm 1, 18 (1990) (describing the costs of consolidating complex litigation and noting that "[i]t is a mistake to regard consolidation as good in itself" and that "[d]iseconomies of scale may make a good thing into a bad thing").
50 See text accompanying notes 41–42.
Intervention doctrine must be able to reflect these considerations. To achieve an accurate litigation result, the court must receive only the optimal amount of information. Of course, not all judges will be able to handle the same quantities of informational inputs. One would expect widely differing optimal abilities of judges. Accordingly, the intervention doctrine must have the flexibility to incorporate the varying optimal capacities of judges.51

Several decisions have criticized the ability of intervention to improve the net accuracy of judicial results. In In re Navigant Consulting, Inc, Securities Litigation,52 Judge Easterbrook articulated an instrumental role for intervention by explaining that intervention "may facilitate accurate decision on the merits."53 While concluding that the trial court appropriately denied an intervention petition as untimely in a securities fraud class action, Judge Easterbrook stated that an intervention request, if filed earlier in the case, could have produced "extra discovery [that] might have led the judge to obtain the views of an expert."54 In other words, a timely intervention could have provided information critical to determining the fairness of the proposed settlement. Similarly, in Deltona Corp v Hoffman,55 a Florida trial court allowed four environmental groups to intervene into a wetlands dispute, reasoning that "considering the complexity of the scientific matters in question, those who presented the evidence below may be in the best position to present the evidence before this court."56 The Fifth Circuit echoed this policy in League of United Latin American Citizens v Clements,57 where it denied a county's intervention request because its proffered input would not help develop relevant factual issues.58

51 See Brunet, Ga L Rev at 718 (cited in note 41) (asserting that each decision maker has a different optimal point of informational input and reaches optimality after assimilating varying quantities of input).
52 275 F3d 616 (7th Cir 2001).
53 Id at 620.
54 Id.
55 7 Envir L Rep 20224 (M D Fla 1977).
56 Id at 20225.
57 884 F2d 185, 189 (5th Cir 1989).
58 See Getty Oil Co v Department Of Energy, 865 F2d 270, 277 (Temp Emerg Ct App 1988) (denying intervention because the intervention petition showed no presentation of new issues and suggesting that under such circumstances, amicus curiae participation would be more efficient); NDB Bank, NA v Bennett, 159 FRD 505, 508 (S D Ind 1994) (denying the intervention of an association of insurance agents who sought to help defend banks in a suit brought by the state insurance commissioner because the intervenor raised no new issues).
Of course, some intervention petitions will not introduce new helpful facts or law. Copycat would-be intervenors who advance only duplicative, carbon copies of the legal or factual inputs already in a case should be denied entry into the litigation. They frustrate efficiency by increasing the transactions costs of the litigation for both the court and the existing parties. In addition, they add complexity to the suit. Adding parties to any litigation has a cost to both the existing parties and the court. These costs can only be justified when the efficiency and fairness gains exceed the costs of joinder.

A court should assess the potential costs and benefits of any proposed intervention into litigation by a third-party outsider. In evaluating whether a jury will be helped or hindered by new inputs, the court acts as a surrogate gatekeeper in assessing the intervention petition. If the court concludes that the intervenor would hinder the litigation, the court should deny intervention, thereby leaving the would-be intervenor free to initiate collateral litigation in a separate proceeding. Because the intervenor is denied entry into the suit, fairness policies may be frustrated. Yet, this approach seemingly achieves a more accurate result and thereby enhances efficiency.

Fairness is not necessarily ignored when a unique and potentially helpful intervention is denied in the name of hindering efficiency. The Mathews approach remains the prevailing due process concept of natural justice. Under the Mathews test, the court examines whether adding additional units of procedural protection would assist in reaching an accurate result. Accurate decisions are the goal of due process under this approach. Under Mathews, denying participation in litigation because it may decrease accuracy is not only efficient, but also fair.

The foregoing analysis would appear to apply fully to all intervenors, including those who seek to participate as objectors in

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59 424 US 319.

60 See, for example, Jerry Mashaw, Due Process in the Administrative State 102-04, 153-55 (Yale 1985) (interpreting Mathews as setting forth a utilitarian model and criticizing Mathews as requiring a test based upon facts that are often unavailable). Although Mathews set out a three-part test, also assessing the harm to the individual and the cost to government of enhanced due process, the third factor in the balancing, "risk of error," or judicial accuracy, has emerged as the dominant factor. See Connecticut v Doehr, 501 US 1, 14 (1991) (using each of three due process factors, but stressing risk of error); Carey v Piphus, 435 US 247, 259 (1978) (referring to the Mathews test by identifying only the risk of error criterion).

61 See id at 344 (explaining that "due process rules are shaped by the risk of error inherent in the truthmaking process as applied to the generality of cases").
class actions. In a formal sense, only those class action participants who allege that they are class representatives are parties. They are the only named plaintiffs in the class action. Formally designated class representatives are the only members of a class with the legal right to present evidence to the court and to take discovery. Under this style of analysis, the only way an absent class member may participate in class action litigation is by formally intervening in a suit.

Such a formal analysis, however, fails to accurately depict the dynamics of a class action. Absent members of a class, while not construed to be parties with all the attendant rights of participation, possess attributes that make them seem like parties. A blanket rule that would deny party status to members of a class action flies in the face of reality. Class members are, in theory, the very essence of a class action. Absentees are the reason the class action device exists. Those who represent plaintiff classes in class action litigation expend great effort talking to “absent” class members, who often contact class counsel (and the court) with questions and unsolicited input. A rigid presumptive rule denying party status and rights to absentees may be ill advised. Such a rule may also be unfair in that it restricts participation to those who comprise the class itself.

Accordingly, the need for objectors to demonstrate satisfaction of intervention criteria should be reexamined. The universal requirement that all proposed intervenors satisfy intervention criteria certainly improves efficiency and fairness. These criteria, particularly in their requirement that the intervenor advance unique informational inputs, act as a real check to prevent intervention that might be counterproductive and costly to the court and existing parties. Every non-party should have to meet the existing intervention hurdles. Yet, should the demanding intervention tests be applied to absent class members? Put differently, should absent class members who seek to participate in a class

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62 See, for example, Felzen v Andreas, 134 F3d 873, 877–78 (7th Cir 1998), affd as California Public Employees’ Retirement System v Felzen, 525 US 315 (1999) (holding that absent class members are not parties and must intervene to obtain party status in order to appeal).

63 See, for example, Puckett, Note, 77 Tex L Rev at 1279 (cited in note 15) (stressing that the class counsel’s stake “results from extensive investment in research, discovery, and other preparation in anticipation of litigation”); telephone interview with Leslie O’Leary, Esq. on September 17, 2003 (class action counsel takes the position that firms invest heavily in catering to questions from absentees).
action in order to complain about a settlement have to satisfy the
formal intervention criteria to do so?

Certainly, some check on the entry of absentee objectors into
the participatory phase of a class action is essential. Allowing
every absentee to automatically enter a class action and take dis-
covery or present evidence would impose considerable costs and
make the class action device more unmanageable than ever. A
better procedure would evaluate the potential for duplication or
innovation presented by the applicant-absentee who knocks at
the door of a pending class action. Framed in this way, a liberal-
ized but real intervention requirement for absentee participation
in class actions may be needed.

The Supreme Court recently confronted the dilemma be-
tween the need for potentially productive intervenor input and
the formal intervention requirements of the Federal Rules of
Civil Procedure. In Devlin, the Court allowed an objector to ap-
peal the trial judge’s approval of a proposed settlement despite
the lack of any formal intervention into the case.\(^6\) Devlin in-
volved only the question of whether the objector who had not in-
tervened could appeal, and did not present the issue of whether
an objector at the trial court level could participate in the eviden-
tiary phase of a class action. Prior to Devlin, a majority of federal
circuits had taken the formalistic position that only a party to
litigation could appeal, and only those who had sought and ob-
tained intervenor status could be parties.\(^5\)

Justice O’Connor’s majority opinion acknowledged the valid-
ity of the earlier Martino v Ortiz\(^6\) decision, which held that “only
parties to a lawsuit, or those that properly become parties, may
appeal an adverse judgment."\(^7\) However, the majority eschewed
formalism by stressing that the Court had never “restricted the
right to appeal to named parties to the litigation.”\(^8\) It reasoned
that one who objects to a class action settlement unsuccessfully

\(^6\) 536 US 1, 14 (2002).
\(^5\) See, for example, Cook v Powell Buick, Inc, 155 F3d 758, 761 (5th Cir 1998) (holding
that absent class members could not appeal a district court settlement approval be-
cause they had not intervened earlier); Shults v Champion International Corp, 35 F3d
1056, 1061 (6th Cir 1994) (party status through intervention essential to appeal); Guthrie
v Evans, 815 F2d 626, 628 (11th Cir 1987) (conditioning appeal rights on prior interven-
tion into the case). Compare with In re PaineWebber Inc, Limited Partnerships Litigation,
94 F3d 49, 53 (2d Cir 1996) (finding that an absentee who had objected at the Rule 23(e)
hearing had the right to appeal).
\(^7\) 484 US 301 (1988).
\(^8\) Id at 304.
\(^8\) Devlin, 536 US at 7.
has an "interest" in the litigation because the trial court’s approval of the settlement "binds [the objector] petitioner as a member of the class," thereby triggering a right to appeal.69 Justice O’Connor reiterated this point by explaining that "[w]hat is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement."70 In essence, the fact that the absentee seeking to appeal was bound by the settlement justified the majority’s substance over form result.

Justice Scalia’s vehement dissent, joined by Justices Kennedy and Thomas, took a traditional formalist position regarding intervention. In Justice Scalia’s words, only parties to a judgment may appeal, and parties “are those named as such—whether as the original plaintiff or defendant in the complaint giving rise to the judgment, or as ‘[o]ne who [though] not an original party become[s] a party by intervention, substitution, or third-party practice.’”71 To Justice Scalia, only class representatives, those named in the caption of a case, possess the right to appeal.72 Because the appellant in Devlin did not successfully intervene, he could not be a party to the litigation with the attendant rights to appeal.

The Devlin dissent did focus on efficiency concerns, as well as doctrinal values. Justice Scalia quoted from the amicus curiae brief of the United States, which took the position that mandating intervention by would-be appellants would “enable district courts ‘to perform an important screening function.’”73 The government took an intermediate position in the case: some minimal and functional showing of intervention by absent class members would trigger an appeal right.74 Justice Scalia’s reasoning seemed fully cognizant of the potential for disruption caused by objectors to class action settlements. He lamented that objectors would be undeterred from appealing, and observed that to think that "meritless objections, undeterred the first time, will be deterred

69 Id at 2010.
70 Id at 10.
71 Id at 15 (Scalia dissenting), quoting Karcher v May, 484 US 72, 77 (1987).
72 Devlin, 536 US at 15.
73 Id at 21, quoting Brief for the United States and Securities Exchange Commission as Amicus Curiae, Devlin v Scardelletti, No. 01-417, 2001 US Briefs at 23 (2002).
the second, surely suggests the triumph of hope over experience.\footnote{Devlin, 536 US at 21 (Scalia dissenting).}

As authority for his fear of meritless appeals by class action objectors, Justice Scalia cited the notorious Shaw v Toshiba America Information Systems, Inc\footnote{91 F Supp 2d 942 (E D Tex 2000).} decision. In Shaw, the trial court complained about “professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests.”\footnote{Id at 973.} The district judge in Shaw had ample reason for his dissatisfaction. One set of counsel for the objectors had filed what appeared to be a phony set of objections that referred to the increased foot traffic that the proposed coupon settlement would cause at Sears.\footnote{Id at 973–74.} The only problem was that the defendant in the case was not Sears, but Toshiba! Counsel for the objectors had, in the judge’s terms, filed a “canned” set of objections, apparently by taking material from an earlier case and refiling it.\footnote{Id. Such actions justifiably expose counsel to sanctions. See text accompanying notes 123, 181.}

Justice Scalia is wise to worry about the efficiency of intervenor input. This concern is central to the position that underlies the better intervention opinions—some judicial screening of the likely input of the intervenor applicant is essential to deciding whether the would-be entrant to the case should be allowed to participate. The Devlin majority missed a clear opportunity to mandate systematic screening of proposed intervenor input by class action objectors. Had the Scalia position won the day, true extortionist objectors able to contribute little or nothing to the case would lack any ability to appeal.

On the other hand, it is disappointing that Justice Scalia did not probe more deeply into the problems of inadequate monitoring and lack of information that plague class suits. It is ironic that Scalia singled out Shaw for its criticism of objectors, but ignored statements on the very same pages that he quoted in which the trial court explained that “other objections contained considerable merit with respect to this particular case.”\footnote{Shaw, 91 F Supp 2d at 973–74.} The Shaw opinion was organized in a way to describe the input of what the court called “Beneficial Objectors,”\footnote{Id at 973.} some of whom had suggested
extending the date for coupon redemption,\textsuperscript{82} which had effectively sweetened the settlement pot for absentees.

The overall impact of Devlin is not altogether negative. Devlin may increase the opportunity for objectors to complain about the fairness of class action settlements. While the Devlin opinions are cast in a tone that covers intervention and appeals rights rather than class action policy, Devlin is predicated upon a concern for a voice in class action litigation. By allowing the objectors to appeal without a formal trial court motion to intervene, Devlin may lead trial courts to be more receptive to the input of objectors, who now possess the right to appeal without formal party status.

Devlin is not the first decision to articulate such a position. Crawford v Equifax Payment Services, Inc\textsuperscript{83} neatly articulated the value of receiving intervenor input in the form of objecting to a proposed class action settlement. There, Judge Easterbrook explained that district courts should “freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision.”\textsuperscript{84} It is crucial for legal doctrine to find a way to assimilate class action objector input. Judge Easterbrook has also noted the value of allowing objectors to appeal, criticizing trial judges who “block appellate review of their decisions by the expedient of denying party status to anyone who seems likely to appeal.”\textsuperscript{85}

This position recognizes the value of appeals to the class action objection process. Appeals create a healthy competition between the trial court and the appellate court. They are an important deterrent of trial court error.\textsuperscript{86} Rather than having just one trial court monitor a proposed settlement, the appellate process constitutes an important second opportunity for another court to evaluate the overall fairness of a potentially collusive settlement.\textsuperscript{87} Appeals by objectors are especially important because of

\textsuperscript{82} Id at 974.
\textsuperscript{83} 201 F3d 877, 881 (7th Cir 2000).
\textsuperscript{84} Id.
\textsuperscript{85} In Re Synthroid Marketing Litigation, 264 F3d 712, 715 (7th Cir 2001).
\textsuperscript{87} See, for example, Scardelletti v Debarr, 265 F3d 195, 214–15 (4th Cir 2001) (noting that the availability of appeal is an important check preventing collusive class action settlements between defendants and class counsel) (Michael concurring); Crawford 201 F3d at 881 (reasoning that “appellate correction of a district court’s errors is a benefit to the class”). See also Brief for Petitioner, Devlin v Scardelletti, No 01-417, 2001 US Briefs
the tendency of trial courts to approve proposed settlements.\textsuperscript{88} To be sure, appeals are costly because they expend party and court resources and delay the ultimate distribution of remedies negotiated in a class action settlement. Yet, it is noteworthy that efficiency-minded jurists such as Judges Easterbrook and Posner have willingly overturned trial court approvals of class action settlements based upon the input of class action objectors.\textsuperscript{89}

This positive description of the role of class action appeals by objectors is consistent with the more general approval that recent changes to Rule 23 give to class action appeals. New subsection 23(f) of the Federal Rules of Civil Procedure, added in 1998,\textsuperscript{90} provides appellate court discretion to hear district court denials or grants of motions to certify a class.\textsuperscript{91} This change was made because of the value that appeals provide to the trial court's decisions regarding class certification, as well as because of the need to reach a firm decision as to whether a case may properly proceed as a class action.

\textit{Devlin} expands class action voice, but does so at the price of potentially expanding the opportunity for the filing of adventure-some appeals. In the words of the Tenth Circuit, allowing an appeal by a class member who has not intervened "would permit one dissident—and there is likely always to be one—to postpone realization of any of the benefits that might otherwise come to the

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\textsuperscript{88} See 177 FRD 530 (1998) (adopting amended Rule 23(f) effective Dec 1, 1998).

\textsuperscript{89} See, for example, \textit{Reynolds v Beneficial National Bank}, 288 F3d 277, 284–85 (7th Cir 2002) (overturning a settlement in a class action against tax preparer and bank regarding loans based upon income tax refunds because the court failed to give adequate attention to determining the expected value to class if the case went to trial); \textit{Crawford}, 201 F3d at 882 (reversing trial court approval of a settlement where class counsel and his representative client "were paid handsomely to go away" and class members "received nothing"). See also \textit{Scardelletti}, 265 F3d at 215 (Michael concurring) (noting that in circuits allowing appeals by objectors who have not intervened, "we have not been presented with any evidence that objector appeals have gummed up the works").
class members. Some ability to screen the potential value of objector input is even more critical in the wake of the Devlin decision.

In fact, there can be both positive and negative input from class action objectors who comprise a diverse group of persons and entities. The following parts of this Article focuses more specifically on these contrasting types of objector input and the judicial attitude for sorting out the information offered by objectors.

II. EVALUATING PRIVATE OBJECTORS TO CLASS ACTION SETTLEMENTS

While objections to a proposed class action settlement might originate from public interest groups, the state or federal government, or court-appointed guardians ad litem representing absent class members or a particular subclass, input from such objectors is atypical in the normal hearing held under Rule 23(e) to approve a proposed class settlement. Instead, the prototypical class action objector is a private person or entity that is an absent member of the designated class. That objector is represented by an attorney who closely resembles the entrepreneurial counsel who filed the class action. This Part evaluates the risks and benefits of participation by the private objector and attorney to a class action settlement.

A. Exploring the Problems Presented by Private Objectors: Objectors As Negative Inputs to Class Suits

The normal objector to a class action settlement is a disgruntled absent member of the class, who comes forward to prevent a trial court from approving a proposed class action settlement. Alternatively, the objector may have filed a copycat class action—a separate class action lawsuit, usually premised on exactly the same theory as the initial suit and against the same defendant. While in theory the objector is a monitor of the performance of both the designated representative parties and counsel for the class, a separate monitoring problem exists. The objector is unlikely to be an acceptable monitor of the behavior of her own attorney. This situation is analogous to the problems with the principal-agent relationship between attorney and client at the outset of a class action. In that context, a knowledgeable class

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92 Rosenbaum, 64 F3d at 1442.
action attorney, the principal, finds a member of the class, the agent, and starts an uneasy attorney-client relationship that makes client autonomy nearly impossible.\footnote{See, for example, Klement, 21 Rev Litig at 43–44 (cited in note 16) (arguing that “class action attorneys are almost bound to appropriate part of class members’ rightful share, to work less than they should, and to give undue weight to their own welfare”).}

The class action objector process has an all too similar monitoring problem. The objector lacks the information to successfully monitor the objector’s attorney. In other words, the dilemma arises regarding who is monitoring the monitor.\footnote{See, for example, Alchian and Demsetz, 62 Am Econ Rev at 781–82 (cited in note 10) (suggesting that shirking may be reduced by appointing someone to monitor team production but then asking, “But who will monitor the monitor?”).} In a small stakes class action, the objector is the attorney, not the client, and the attorney may go unmonitored.

One major reason behind the wholesale unpopularity of class action objectors is their proclivity to free ride off of the efforts of counsel who initiate the class action. Consider the situation of the attorney who shows up seemingly out of nowhere, purporting to represent a class member, in order to object to a settlement. This attorney sits in the comfort of his office, reads about a proposed class action settlement with an increasingly large amount of financial information published by the press,\footnote{See, for example, Hensler, Class Action Dilemmas at 53 (cited in note 39) (setting forth graph showing over 3200 stories in the general press about class actions and over three hundred in the business press during 1995–96).} finds a client, files an objection to the proposed settlement, and, of course, requests attorneys’ fees in return for withdrawing objection to the possible settlement.\footnote{See, for example, Diana B. Henriques, In Landmark Settlement, a Question of Fees, NY Times Section 3 at 7 (Sept 13, 1998) (describing objectors to the settlement of an antitrust claim brought on a novel legal theory against multiple Wall Street brokerage houses based upon alleged manipulation of the Nasdaq market and specifying that among objectors was Berkeley, California lawyer Lawrence Schonbrun, “whose practice consists largely of objecting to the fees sought by other lawyers in high-profile cases”).} The conditions for free riding are optimal, where the counsel for the objector has the incentive to object and the information enabling the objection. In a context where the individual class members have suffered small injuries, the objector mythology holds that counsel for the objector merely free rides off of the considerable investment of the initial class action attorney for purely personal monetary gain.

This negative picture of the class action objection business has sometimes been labeled extortion or blackmail. The counsel for the objector agrees to allow the settlement to proceed, in ex-
change for a piece of the settlement pot. For example, the objector might threaten to file an appeal unless a proposed fee for class counsel is decreased and the counsel for the objector is given part of the reduced attorneys’ fee.

This alleged free riding goes beyond taking advantage of the initial entrepreneurial investment decision of the first class counsel who filed suit. The extortionist objecting attorney is also free riding on the settlement negotiated by counsel for the class and for the attorneys of the party opposing the class. The settlement negotiation phase of a class action constitutes a major component of the investment of both the plaintiff class and the defendant. Negotiating and drafting a settlement and the time-consuming process of explaining and selling it to clients requires considerable attorney time and labor. Objectors are free riding off of this settlement effort as well as off of the original decisions to select a defendant, identify a cause of action, and file suit.

Objectors can also have a negative impact on the cost of administering a class action. The court has a limited amount of time to devote to any particular task. The cost for a judge of dealing with class action objectors can be considerable. Objectors can delay the approval of a proposed settlement and the ultimate disbursement of the remedy bargained for in the settlement negotiation process. Such costs need to be factored into the overall calculus of sorting out the appropriate legal standards to govern objections to class actions.

The problem of so-called “canned” objections may be less problematic than some believe. These objections are manufactured in assembly-like fashion by extortionist counsel for objectors, who churn out form-style objections without regard to the actual facts of the case. To be sure, the fact that Justice Scalia singled out the materials filed by the objectors in Shaw drew con-

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97 See, for example, Patrick Woolley, 75 Tex L Rev at 618 (cited in note 28) (referring to objectors who disrupt the settlement to obtain “a disproportionate amount of the settlement fund”); Richard B. Schmitt, Legal Beat: Objecting to Class Action Pacts Can Be Lucrative for Attorneys, Wall St J B1 (Jan 10, 1997) (quoting Professor Susan Koniak who refers to objector participation as an extortion game); Advisory Committee Report at 183 (cited in note 8) (quoting testimony of Allen D. Black, Esq., that Committee Note should point out directly that “an objection may have practical or ‘blackmail’ force beyond its merits, if any”).

98 See, for example, Advisory Committee Report at 182–83 (cited in note 8) (quoting Professor Charles Silver that “the standard extortionist [objector] tactic is to threaten to appeal unless class counsel cuts the fee and to request a portion of the fee reduction as compensation”).
siderable attention to the free riding problem.\textsuperscript{9} The clever treatment of this point by the Shaw trial court surely caught the attention of the Supreme Court.\textsuperscript{10} District Judge Heartfield labeled objections “canned” and referred to some of the attorneys representing those advancing the objections as “professional objectors” who were appearing only to “extract a fee.”\textsuperscript{11} While it is clear that such objectors need to be chastised with the rhetoric used by Judge Heartfield, lost in the rhetorical din was the court’s conclusion that the canned objections were “generic, unhelpful protests.”\textsuperscript{12} This statement is strikingly similar to those of courts denying intervention to parties advancing only duplicative input into a case.\textsuperscript{13}

In the small stakes class action, there will be an unsatisfactory stake or incentive for the absent class member to enter a class action in order to voice an objection. As pointed out by Professor Issacharoff, this is the very reason that the class action monitoring problem exists.\textsuperscript{14} There is simply no reason to think that the small stakes class member will possess either the information or the incentive needed to evaluate the performance of class counsel or, more specifically, the adequacy of a proposed settlement.\textsuperscript{15} Judge Posner put the matter succinctly by asserting that “ordinarily the unnamed class members have individually too little at stake to spend time monitoring the lawyer.”\textsuperscript{16}

According to this line of reasoning, objectors present the potential to “delay or disrupt a class settlement simply by intervening and threatening to tie up the case on appeal.”\textsuperscript{17} Objectors do slow down the processing of a class action in a way that increases

\textsuperscript{9} 91 F Supp 2d 942.
\textsuperscript{10} See Devlin, 536 US at 21 (Scalia dissenting) (citing Shaw as an example of the ability of objectors to make litigation less efficient and stating that class action objectors are undeterred in filing objections to a settlement and are similarly undeterred when seeking to appeal).
\textsuperscript{11} Shaw, 91 F Supp 2d at 973–74.
\textsuperscript{12} Id.
\textsuperscript{13} See text accompanying note 22.
\textsuperscript{14} Issacharoff, 1999 S Ct Rev at 371–72 (cited in note 11). Professor Issacharoff goes on to argue that giving increasing voice to objectors will do little to provide the “structural protections” needed to police class counsel decision making). Id at 372.
\textsuperscript{15} See, for example, Christopher R. Leslie, A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation, 49 UCLA L Rev 991, 1046–47 (2002) (explaining that “it is not cost-beneficial for any individual class member to invest the time and resources necessary to effectively monitor the class counsel”).
\textsuperscript{16} Mars Steel v Continental Illinois National Bank and Trust Co, 834 F2d 627, 681 (7th Cir 1987).
\textsuperscript{17} Issacharoff, 1999 S Ct Rev at 372 (cited in note 11).
the parties’ litigation costs. The ability to appeal after filing an objection in the district court—now firmly established after *Devlin*—slows down the class action’s progress considerably. The very threat of an appeal can give the attorneys representing objectors a major weapon. They now possess substantial leverage when negotiating with the counsel seeking to secure an approved settlement. In a very practical sense, *Devlin* may have raised the ante for class action objectors by legitimizing their efforts to appeal from district court approvals of settlements.

In addition to increasing the transaction costs of class action litigation, counsel for the objectors will seek and may obtain attorneys’ fees. The size of these fees can be considerable. The cost of compensating the class action objector may mean that less is available for class members in what may be a limited settlement pot. As aptly expressed by Professor Leslie, “[a]s too many cooks spoil the broth, adding more attorneys depletes the settlement pool.” Commentators have characterized the fees paid to class action objecting attorneys as “an extortion game” and have described the objector’s tactics as identifying a class action settlement, arguing against it, and “go[ing] away” in exchange for “some payment of attorneys’ fees.” One attorney who has filed objections to class actions has conceded that objections to class action settlements have “basically become a cottage industry.”

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108 See Schmitt, *Legal Beat*, Wall St J B1 (cited in note 97) (describing the objection process as motivated by fees to the counsel representing objectors and describing “big payoffs” to counsel for objectors, including $1.45 million to a Dallas firm for six weeks of work, one million dollars to objectors who opposed the Louisiana-Pacific Corp siding settlement, and a proposed fee of $875,000 to lawyers for objectors challenging the then pending coupon settlement in the General Motors pickup truck litigation).


111 David Lyons, *Flight Attendants’ Lawyers Object to Settlement*, Miami Herald 1B (June 29, 1998) (quoting Professor John Banzhaff III, who also noted, “I have never heard of these folks. ... They have had no concern about the whole thing is over, and they [objectors] suddenly come in, I would say is suspicious”). See also Advisory Committee Report at 233 (cited in note 8) (quoting Professor Charles Silver that “[f]ee objections are pointless. ... Their only purpose is to enrich strategic objectors who threaten to ‘hold up’ settlements by appealing unless they are paid to disappear”).

112 Schmitt, *Objecting to Class-Action Pacts*, Wall St J at B2 (cited in note 108) (quoting Chicago attorney Alexander Moore). See also Henriques, *Landmark Settlement*, NY Times at 7 (cited in note 96) (referring to an attorney whose practice consists largely of filing objections to class action settlement fees sought by class counsel); text accompanying note 155 (discussing the full time objector practice of attorney Lawrence Schonbrun); Hensler, *Class Action Dilemmas* at 90 (cited in note 39) (summarizing interviews that view objectors as plaintiff’s attorneys who have filed either objections or duplicative class
The payoff of objectors in the class action suit brought against Louisiana-Pacific Corporation illustrates this extortion game. This case involved allegations that class members had been injured by the deterioration of the defendant's Inner Seal siding. Objectors emerged after the class counsel had negotiated a $375 million settlement. After a mediator recommended that the objectors' counsel receive a $400,000 fee, objectors filed an appeal of the court's overall settlement, arguing that the twenty-five million dollars to class counsel was excessive. The objectors withdrew their appeal in return for an increased fee of one million dollars, and the trial court defended the result by reasoning that "it was better to get finality than to hold the [settlement] up any further."

The case of the unknowing objector, Vollmer v Publishers Clearing House, represents a good example of judicial distaste for class action objectors. There, the appellate court remanded a trial court Federal Rule of Civil Procedure 11 ("Rule 11") sanction of fifty thousand dollars against counsel for a class action objector, but voiced considerable displeasure with the two attorneys who had moved to intervene and objected to an already negotiated settlement. Questions by the district court to the objecting client "demonstrated great unfamiliarity with the nature of his complaint," showed utter lack of knowledge about the terms of the proposed settlement that was the subject of his attack, and revealed that the objector was the spouse of the office manager for one of his two attorneys. In response, the trial court stated that the counsel for objectors appeared to be seeking to delay the...
case and increase its costs. The court issued a show cause order, demanding reasons why the two attorneys representing the unknowing objector should not be found in violation of Rule 11. Although the Vollmer decision overturned the trial judge's sanction order for procedural reasons, it quoted extensively from the trial court's condemnation of the behavior of counsel for the unknowing objector. The circuit court concluded that the district court was correct to deny the objector's intervention because the motion to intervene was an attempt to gain discovery rather than to preserve a right to appeal.

Perhaps the biggest single drawback to the objection process is the reduced incentive it gives to counsel to initiate class actions in the first place. The decision to bring a class action is an investmentdecision by the entrepreneurial attorney for the class. While it may be argued that class actions are far too easy to file, in fact, substantial sums can be spent investigating the decision to file a class suit. These pre-suit expenditures by potential coun-

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122 Vollmer, 248 F3d at 707.
123 Id at 709.
124 The Rule 11 sanctions were said to be improper because of the size of the sanction and because the trial court had used information he personally gathered about the practice experience and reputation of the two attorneys sanctioned without placing such material on the record. Among other things, this research convinced the trial judge that one or both of the sanctioned attorneys were professional objectors. Id at 709-10. Such contacts were said to threaten counsel's due process rights. Id at 710, citing Simer v Rios, 661 F2d 655, 680-81 (7th Cir 1981).
125 Vollmer at 705-07.
126 This criticism assumes that there is value in the class action device. See, for example, Dam, 4 J Legal Stud at 48-49 (cited in note 9) (stressing the aggregative efficiency potential of class actions, their ability to deter wrongful conduct, and their ability to compensate victims). The class action is part of the American private attorney general scheme of law enforcement that leaves the bulk of law enforcement in the hands of the free market, rather than allocate to the state the task of initiating suits. Without an efficient means to bring suits, laws—including legislation—are not likely to be followed. The United States has correctly chosen to leave to the market the task of selecting most law-suits, including class actions. Consider Brunet, 74 Tulane L Rev at 1928 (cited in note 32) (arguing that the "American law enforcement scheme [is] dominated by private attorney general enforcement" and that cheap, efficient means of enforcing substantive law are essential if laws are to be obeyed); Edward Brunet, Measuring the Costs of Civil Justice, 83 Mich L Rev 916, 932 (1985) (contending that litigation is a public good). An alternative system, which leaves civil law enforcement to the state, would require great expenditures of public funds and leave most case selection in the hands of government. See Hensler, Class Action Dilemmas at 69 (cited in note 39) (asserting that "public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations").
127 See, for example, Richard A. Epstein, Class Actions: The Need for a Hard Second Look, 4 Civil Justice Report at 1 (March 2002) (describing "entrepreneurial lawyers who hope to profit by organizing a class of potential plaintiffs and bringing their joint claim to a successful conclusion").
sel for a plaintiff class are risky investments. The up-front investment costs involve both a factual and a legal component. In theory, the ability of third-party counsel to easily free ride off the initiation of class actions by the real entrepreneurs, the initial class counsel, would deter the filing of class actions below the optimal level of law enforcement. An attorney who considers filing a class action may be deterred from initiating suit because of a fear of objector free riding. In fact, it is very difficult, if not impossible, to know if the filing of class actions has been deterred below what may be an appropriate level.

The alleged extortion ploy of the attorney for objectors—seeking a fee from the already negotiated settlement pot as a form of payment for withdrawing the objection or not appealing—merits attention. It might be reasonably argued that such extortionist payments are counterproductive to the original settlement agreement. Defendant's counsel, knowing that objectors are likely to subsequently emerge demanding a form of attorneys' fees as tribute from the settlement pot, may withhold consideration when negotiating the settlement of the class action. Presumably, this negotiation tactic would be based on the defendant's assumption that class counsel will want to increase the amount of an already negotiated settlement to pay the tribute to the objector's attorney without decreasing the size of the proposed fee award to class counsel.

While such a scenario is possible, negotiation dynamics make it unlikely to occur very often. After the Devlin decision, it became clear that objectors are players in class action settlements. Counsel for the class, knowing that one or more objectors are likely to emerge, has the incentive to try to increase a settlement demand to include an incremental part of the settlement for likely objectors. In a sense, the prospect of subsequent objections and the need to pay for them has been bid into the dynamic negotiation process and accounted for by the parties. While it is true

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128 See Schmitt, Objecting to Class-Action Pact, Wall St J at B16 (cited in note 110) (quoting Professor Charles Silver who argues that "if you are not out in the forefront bearing the costs and risks of litigation, you should be viewed with suspicion").

129 See, for example, FRCP 11(b) (requiring the pleader to have good ground to support both the factual and legal foundation of a lawsuit).

130 See, for example, Advisory Committee Report at 182-83 (cited in note 8) (summarizing the comments of Professor Charles Silver arguing that to allow objector attorneys' fees to come out of the original settlement pot "is dangerous because it will lead defendants to hold back in the initial settlement agreement").

131 See, for example, Edward Brunet and Charles B. Craver, Alternative Dispute Resolution: The Advocate's Perspective 82-85 (Bender 2d ed 2001) (noting that the rational
that defendants will attempt to avoid these fees, counsel for the plaintiff will exert pressure to include them in the original settlement. In approving an award of attorneys' fees to counsel for an objector, one district judge observed, "[n]o doubt settlement amounts are often negotiated, both in individual cases and class actions, with this prospect in mind.\footnote{Duhaime v John Hancock Mutual Life Insurance Co, 2 F Supp 2d 175, 176 (D Mass 1998). See Scardelletti, 265 F3d at 215 (Michael concurring) (noting that "when everyone involved—the class representatives, the defendants, the lawyers, and even the trial judge—knows that an objector has the right to appeal, it stands to reason that a settlement proposal will be designed and scrutinized with more care").} Accordingly, it remains unclear whether the process of paying fees, even to an extortionist objector, will necessarily effect the amount negotiated as a settlement for the class or not.

The perception that objectors are now legally enshrined as potentially legitimate players in the class action settlement game may have been solidified by the proposed changes to Rule 23. Proposed Rule 23(h)(3), entitled "Objections to Motion" and dealing with the award of attorneys' fees in class actions, now confirms that "[a] class member, or a party from whom payment is sought, may object to the motion."\footnote{Advisory Committee Report at 116 (cited in note 8).} The Committee Note accompanying the proposed addition to Rule 23 signals that this provision "may be a basis for making an [attorney's fee] award to other counsel whose work produced a beneficial result for the class, such as ... attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel."\footnote{Id at 117. This position was taken individually by the Reporter to the Civil Rules Committee. See Edward H. Cooper, The (Cloudy) Future of Class Actions, 40 Ariz L Rev 923, 950 (1998) (asserting that "[m]eans should be found to ensure that the costs of objecting are awarded on terms that will encourage reasonable objections").} The overall impact of the proposed textual change and comment is to give the trial court discretion to award attorneys' fees to the objector's counsel.\footnote{See text accompanying notes 165, 178, and 258 (discussing whether objectors are entitled to attorneys' fees under present doctrine).}

The Committee Note accompanying proposed Rule 23(h) even raises the possibility of discovery by objectors, specifying that the "court may allow an objector discovery relevant to the objections."\footnote{Id at 121. See Edward H. Cooper, 40 Ariz L Rev at 950 (cited in note 134) (asserting that class action objectors should be granted "full (and guided)" discovery on the merits of the litigation and also on the process of negotiating a proposed settlement).} The Sixth Circuit has left open the possibility of objector
discovery to determine the reasonableness of attorneys' fees.\textsuperscript{137} The First Circuit has taken a contrary position: that an objector has no right to either discovery or to court scrutiny of an allegedly extortionist payoff to a separate set of objectors.\textsuperscript{138} Several commentators have criticized the permissive Committee Note language as facilitating extortion by class action objectors, since it enables them to seek separate settlement fees by using discovery as a weapon.\textsuperscript{139} Such criticism assumes that the discovery requests would be illegitimate, made only to generate fees.\textsuperscript{140} Others have criticized objector discovery because it adds cost and delay to the administration of class actions.\textsuperscript{141}

When the discretionary text of the proposed rule is viewed in conjunction with the permissive accompanying commentary, the potential for abuses of discovery becomes clear. To compensate for this possibility, rational, experienced negotiators will incorporate this into the initial negotiation process. My point is not that either party would welcome objector discovery—they will surely oppose it.\textsuperscript{142} Yet, the parties will be thinking about objectors and possible objector discovery requests when negotiating a settlement, and surely will incorporate this certainty into the dynamic negotiating process.

\textsuperscript{137} See \textit{Bowling v Pfizer, Inc}, 102 F3d 777, 780–81 (6th Cir 1996) (noting that side agreements between class counsel and objectors raise questions that make such agreements relevant, but denying the discovery request advanced by intervenor-objects where settlement had become final).

\textsuperscript{138} See \textit{Duhaime}, 183 F3d at 4 (holding that an objector has no right to discovery or court review of side settlement when there is no demonstration of fraud involving the settlement approved for the class). For criticism of the First Circuit position, see, for example, Ikeda, Note, 15 Georgetown J Legal Ethics at 191–93 (cited in note 17) (arguing that the side settlement in this litigation necessarily affected the basic settlement of the case itself, and thereby merited careful judicial review).

\textsuperscript{139} See, for example, Advisory Committee Report at 179–83 (cited in note 8) (summarizing comments by (1) David E. Romaine, Esq., that allowing more objector discovery is troubling and unwise because “greater objector discovery would only increase costs and delay;” (2) John Beisner, Esq., that allowing objector discovery may be used to “secure unwarranted leverage by counsel or certain class members for personal benefit”; (3) Professor Charles Silver that a class member with a small claim who demands to see extensive discovery documents and depose everyone “is acting irrationally and probably is an extortion artist”).

\textsuperscript{140} Id.

\textsuperscript{141} See, for example, id at 184–85 (summarizing statements of (1) NASCAT and Committee to Support the Antitrust Laws that “routine access to discovery in the class action may impose cost and delay, particularly in complex cases with hundreds of thousands of pages of documents” and (2) Steven P. Gregory, Esq., “that [o]bjections, even frivolous objections, can cause unnecessary delay in awarding benefits to class members” and suggesting that a “compelling reason” be presented to justify objector discovery).

\textsuperscript{142} See, for example, id at 183–84 (cited in note 8) (summarizing statement of Beverly C. Moore, Jr., Esq., that “e[ven plaintiffs’ counsel object to objector discovery”).
B. Viewing Objectors in a More Positive Light: Objectors as a Potential Benefit To Class Actions

Class action mythology consists nearly exclusively of negative observations about objectors. The previous Subpart depicts the prevailing view. Unfortunately, the prevailing view ignores the potential that objectors can be a helpful force for the class. This Part examines a number of potential benefits that private objectors may bring to the class action context.

I begin on an important quantitative note. It is important to determine whether there is really a class action culture of regular, routine objector free riding, and also whether there is a subset of objectors who are genuine repeat-player “professional objectors.” We simply do not know how frequently objectors attempt to participate in class actions. In the mythological class action, there is always one or more free-riding objector’s attorney, whose practice consists of seeking to manipulate his or her client while threatening to object to a proposed class action settlement. However, the only Federal Judicial Center (“FJC”) study of class actions found that a significant percentage of class action settlements were approved by the district courts with no objection whatsoever. The percentage of class action cases in which no objections to a proposed settlement were filed, either in writing or in person, ranged from a high of 64 percent in the Southern District of Florida to a low of 42 percent in the Northern District of Illinois. While this valuable study appears to be the only reliable measure of the extent of objector participation, it is, of course, an incomplete snapshot of objector participation in class actions. It is fascinating, however, to think that the mythology of

143 See, for example, Thomas E. Willging, Laurel L. Hooper, and J. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report of the Advisory Committee on Civil Rules 178, 183 (Fed Jud Center 1996) (referring to a “growing” and “entrepreneurial” use of objections by professional objectors).


145 The other two district courts reported no objector participation at 51 percent (ED Pa) and 60 percent (ND Cal). Willging, Hooper, and Niemic, Empirical Study at 178 (cited in note 143). These results, of course, closely mirror the non-objector participation of the other two districts mentioned in the text.
an "investor in every proposed settlement pot" seems to be false, at least from this one study.

The data studied by the FJC were even more striking with regard to the percentage of class action settlement hearings at which objectors appeared. One would anticipate that a free-riding objector and her attorney would appear and present their views at the Rule 23(e) hearing in order to make an impression with the court and, for settlement leverage purposes, with both class counsel and attorneys for the party defending against the class. Instead, the FJC study found that objector participation in the settlement approval hearings ranged from a high of 14 percent to a low of 7 percent.\footnote{Id at 139. The other two districts reported objector participation at Rule 23(e) hearings at 11 percent and 9 percent. Id.}

In other words, the typical class action settlement hearing is one in which the class action objector does not participate. This point did not go unnoticed by the Judicial Conference when it submitted comments to the proposed recent changes to Rule 23, as the Conference emphasized the very low level of objector participation in the class action data available for study.\footnote{Advisory Committee Report at 165 (cited in note 8) (summarizing input from the Conference that the FJC study "showed that 90 percent of settlements reviewed were approved without objections and without change").}

In theory, this low rate of objector participation at class action settlement hearings could reflect an "early side deal" strategy. In other words, a "lie in the weeds" objection strategy might be consistent with an opportunistic view of the behavior of objector's counsel, who might conceivably try to sell the objector's lack of participation at a Rule 23(e) hearing as part of an early side deal, whereby an objector agrees to withdraw a potential formal objection in return for a handsome fee. This view is consistent with the free-riding view of private professional objectors' counsel, who may be trying to reap a sell-out settlement to enrich himself while doing as little real work as possible.

Yet, there are two reasons to question whether the low rate of objector participation supports the existence of early side deals. First, a class action objector's attorney who wanted to maximize his fee would be prone to object loudly at the Rule 23 hearing itself. That is the only way to fully express the grounds for objection to the trial court. An objector who strikes an early side deal may not be maximizing revenue. Second, the low measure of objector participation at the Rule 23(e) fairness hearing might re-
flect the way the FJC counted "objections." Any class member who wrote a letter to the court questioning the adequacy of a proposed settlement or voicing general concerns was included as a class action objector for the purposes of the 42 percent to 64 percent of class actions that included "objectors." This number necessarily includes a large number of unrepresented pro se objectors who merely write one letter and then disappear from the litigation process. Classifying such absentees as objectors overstates the quantum of attorney-led free-riding objection activity, which in reality is probably a low percentage of all class action objections.

It is even more difficult to know whether there are so-called "professional objectors" — attorneys who make a living free riding off the work of class counsel. The testimony submitted to the Civil Rules Advisory Committee relating to the proposed change to Rule 23 seems contradictory. The Association of the Bar of the City of New York opposed making discovery available to class action objectors because "there is a growing entrepreneurial use of objections by professional objectors." This mirrors the view that class action objecting has become a "cottage industry" and the position taken in Shaw, lamenting canned objections that had apparently been filed by "professional objectors."

Recent comments to the Civil Rules Advisory Committee by Washington, D.C. attorney Brian Wolfman flatly refute the idea of a culture of free-riding professional objectors. Mr. Wolfman
specializes in filing class action objections on behalf of absent class members, in conjunction with the public interest group Public Citizen. He claims to know only one professional objector, and notes that this attorney has made meritorious objections in many cases. My point is not to assess whether Mr. Wolfman

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154 See text accompanying notes 238, 250, and 266; <http://www.citizen.org/printarticle.cfm?ID=552> (visited Apr 7, 2002) (summarizing over thirty leading class actions in which Public Citizen has presented objections to class action settlements). See also Brian Wolfman, Forward: The National Association of Consumer Advocates' Standards and Guidelines for Litigating and Settling Class Actions, 176 FRD 370 (1998) (stating that Mr. Wolfman is a staff lawyer for the Public Citizen Litigation Group who "frequently represents objectors to class action settlements"). In a literal sense, the attorneys who routinely represent class action objectors on behalf of public interest groups such as Public Citizen or Trial Lawyers for Public Justice's Class Action Abuse Project are the true professional objectors. See text accompanying note 151.

155 Mr. Wolfman reveals the identity of this professional objector as Lawrence Schonbrun of Berkeley, California. Telephone interview with Brian Wolfman, Sept 27, 2002. This revelation comes as no surprise given the amount of press that surrounds Mr. Schonbrun. Mr. Schonbrun describes himself as a "nationally recognized authority on the issue of attorney's fees in class actions who has appeared on '60 Minutes,' '20/20'... [and] has been chronicled in the Wall Street Journal, Barron's, and the Washington Post." Lawrence W. Schonbrun, The Class Action Con Game, 20 Regulation (cited in note 21). A Wall Street Journal reporter wrote that Schonbrun has "objected to numerous class action settlements over the years, usually without pay," but noted that he was paid $100,000 for objecting to the settlement of a class action against Louisiana-Pacific corporation. Schmitt, Objecting to Class-Action Facts, Wall St J at B1 (cited in note 108). See also Hensler, Class Action Dilemmas at 360 (cited in note 39) (noting that Mr. Schonbrun represented objectors in the Louisiana-Pacific class action and that he was paid $100,000 not from the settlement common fund but from class counsel and the defendant). A New York Times reporter has described Mr. Schonbrun's practice as consisting "largely of objecting to the fees sought by other lawyers in high-profile cases" in a story about objectors' challenges to a proposed $174,823,124 fee in an antitrust class action against multiple Wall Street brokerage houses. See Henriques, Landmark Settlement, NY Times at 7 (cited in note 96). A National Law Journal reporter described Mr. Schonbrun as a "sole practitioner [who] devotes most of his practice to objecting to class settlements and attorney fees" and applying to the court for fees in return for his objections. Van Vors, Plaintiff Bar Divided, Natl L J at A22 (cited in note 33). A Miami Herald writer quoting Mr. Schonbrun in 1998 reported that he had "filed objections in 70 cases around the country." Lyons, Flight Attendants' Lawyers Object to Settlement, Miami Herald at 1B (cited in note 111). Schonbrun's work as an objector has not gone without controversy. In the Shaw decision, a separate segment of the court's opinion approving settlement dealt with Mr. Schonbrun's objection on behalf of his client Robert Demyanovich. Shaw, 91 F Supp 2d 75. The court was clearly upset that Schonbrun, who had submitted a declaration that included six pages of media articles setting forth his prior work challenging attorneys' fees in proposed class action settlements, was unable to provide his client's correct address, telephone number, or the serial number for a Toshiba laptop purchased by his stated client. Id. The court revoked its prior order granting Mr. Schonbrun pro hac vice status and entered an order that he would have to submit a motion for such status one week before his next appearance in the Eastern District of Texas including a verified affidavit containing specific details about his alleged client's identity. Id. See also Mike Carter, Permatemp Lawyers Get $327 Million, Seattle Times B2 (May 16, 2002) (reporting the settlement of an employment law class action against Microsoft in which Schonbrun represented objectors to a proposed twenty-seven million dollar fee award and quoting Judge John Coughenour that Mr. Schonbrun's
is correct, but to raise the question of whether there is any firm proof of systematic extortionist free riding by class action objectors. To be sure, there are a few reported cases discussing other repeat-player attorneys who represent objectors. It appears that there is a split of non-empirical authority on this controversy.

Objectors can be an important source of unique input into the class action. This is particularly true of objections to proposed settlements, where the attorneys who have negotiated the settlement have no incentive to criticize their own agreement, and the court may just want to excise a complex case from its docket. The true professional extortionist free-riding objector would object purely to obtain “blackmail,” and is likely to advance informational input of little value in assessing the validity of the class action settlement. In contrast, it is possible that a legitimately interested objector could emerge with important facts that shed new light on a putative settlement.

Several courts have explicitly praised class action objectors. In Reynolds v Beneficial National Bank, the Seventh Circuit

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conduct was “questionable”). Mr. Schonbrun achieved a noteworthy victory for his objector client in Powers v Eichen, 229 F3d 1249, 1256 (9th Cir 2000). There, the Ninth Circuit held that trial court class action fee awards must clearly set out the reasons supporting a fee above a 25 percent “benchmark.” Id. See also Staff, In Brief: Objectors Win, Natl L J A12 (Nov 6, 2000) (describing Mr. Schonbrun’s result in Powers); Lawrence W. Schonbrun, Tobacco Lawyers: Settlement’s Biggest Winners, available at <http://www.reporternews.com/opinion97/con092297.html> (visited Apr 7, 2003) (op-ed by Mr. Schonbrun explaining that the class action plaintiff’s bar will select an industry, file a class action, and harm consumers, and characterizing the American legal system as the “world’s largest lottery”).

See, for example, Vollmer, 248 F3d at 709–10 (reversing fifty thousand dollar Rule 11 sanction against California attorneys described as “not real class action lawyers,” but instead, lawyers who “follow people around the country . . . and then they stick their nose in [a case] and they extract money”).

See Willging, Hooper, and Niemic, Empirical Study at 58 (concluding that “objections represent an outside source of information about the substance of the settlement” and that such objections may be “a crucial source of information about defects in the settlement”).

Id (acknowledging that “the settling parties at this stage have little or no incentive to present negative information about the settlement”).

See, for example, In re Prudential Insurance Co America Sales Practice Litigation Agent Actions, 278 F3d 175, 202 (3d Cir 2002) (asserting that “even the court at this point may be inclined to favor settlement of a huge, complex action, and the general atmosphere becomes highly cooperative”); Bainbridge and Gulati, How Do Judges Maximize?, 51 Emory L J at 139–40 (cited in note 15) (contending that judges are boundedly rational and that they lack the incentive to dig deeply into issues in complex, technical cases); Coffee and Koniak, Latest Class Action Scam, Wall St J at A11 (cited note 15) (asserting that judges lack the incentives “to resist parties who want to settle” and also lack the information to know when a proposed settlement is really collusive).

See text accompanying note 97.

288 F3d 277 (7th Cir 2002).
accepted the arguments of objectors challenging a settlement between class counsel and defendants. The class consisted of recipients of allegedly illegal income tax refund anticipation loans, and they sought to bring claims against a tax preparer and a lending bank. Judge Posner overturned the trial court's approval of a settlement, praising objectors and their lawyers in the process. Judge Posner characterized the objectors as "in effect volunteer lawyers for the class" who constitute a "real party in interest." He also approved the concept of awarding a fee to objecting counsel because "[i]t is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally."

Judge Easterbrook has also taken a position justifying objectors on instrumental grounds. In Crawford, the Seventh Circuit reversed district court approval of a class action settlement in a case brought under the Fair Debt Collection Practices Act. Judge Easterbrook's opinion endorsed broadly permitting objector intervention and objection, asserting that trial courts should "freely allow the intervention of unnamed class members who object to proposed settlements." The Third Circuit has mirrored this view, concluding that "objectors play an important role by giving courts access to information on the settlement's merits" in a context in which class and defense counsel "can be expected to...

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162 Id at 282–83.
163 Judge Posner specifically criticized the trial court for approving the settlement without considering evidence of the "net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate." Reynolds, 288 F3d at 284–85.
164 Id at 287–88.
165 Id at 288. While endorsing the possibility of a fee paid to an objector's attorney, Judge Posner went on to limit the objector's fee to situations where the enhanced value to the settlement was greater than the fee sought and to observe that the instant objector may not deserve a fee because of an earlier similar objection by a different objector group. Id at 288–89. This conclusion was couched in restitution terms, that objectors, while "good Samaritans," constitute "professionals [who] render valuable albeit not bargained-for services in circumstances in which high transaction costs prevent negotiation and voluntary agreement." Reynolds, 288 F3d at 288 (citing Saul Levmore, Explaining Restitution, 71 Va L Rev 65 (1985)). See also Duhaime v John Hancock Mutual Life Insurance Co, 2 F Supp 2d 175, 176 (D Mass 1998) (approving a $59,211.56 award of attorneys' fees to class action objector and former Senator Howard Metzenbaum because "his attorneys' work did substantially benefit the class generally" by improving the information contained in the class notice involving options available to absentees and by reducing the attorneys' fees to class counsel).
166 15 USC § 1692e (2000).
167 Crawford, 201 F3d at 881.
spotlight the proposal’s strengths and slight its defects.” Judge Rosenn, also of the Third Circuit, expressed a similar attitude by asserting that “a lawyer with objector status plays a highly important role for the class and the court because he or she raises challenges free from the burden of conflicting baggage that Class Counsel carries.” While these positions stop short of a complete theoretical justification of the routine objector voice in class action litigation, they find potential value in receiving objector input.

Other decisions specifically note the value of objector participation in the context of a case. In In re Telectronics Pacing Systems, Inc, the Seventh Circuit overturned a district court order approving a class action settlement in a products liability action against makers of allegedly defective leads to cardiac pacemakers. Largely relying on the arguments advanced by the objectors, but rejected by the trial judge, the court found the settlement lacking proof of an arms-length negotiation. The Third Circuit referred to “enhancements” by objector representatives of four states to a proposed settlement of an insurance fraud class action brought by the Milberg, Weiss firm. A district judge organized his rationale approving a class action settlement against Toshiba for allegedly marketing defective laptop computers by designating a segment of his opinion “Beneficial Objectors” and

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168 Bell Atlantic Corp v Bolger, 2 F3d 1304, 1310 (3d Cir 1993) (noting that in “seeking court approval of their settlement proposal, plaintiffs’ attorneys’ and defendants’ interests coalesce and mutual interest may result in mutual indulgence”).
169 Prudential Insurance, 278 F3d at 202 (Rosenn concurring and dissenting) (noting also that the “objecting lawyer independently can monitor the proposed settlement” and that the objecting lawyer “not only renders a service to the class, but aids the court”).
170 For the position that there is a healthy reversal rate in the appeals filed by objectors that demonstrates the value of the objection process, see Brief of Amicus Curiae, Council of Institutional Investors in Support of Petitioner, Devlin v Scardelletti, No 01-417, 2001 US Briefs 417 at 18 (noting that there were forty-four published appeals by objectors between 1971–2000 and fourteen—32 percent—resulted in reversals, compared to overall reversal rate for federal civil appeals in 2000 of 12 percent).
171 221 F3d 870, 882 (6th Cir 2000).
172 Id at 875.
173 Id at 880 (asserting that the appellate court “cannot approve this settlement because it appears not to be the result of arms-length negotiation among the parties” and rejecting the contention that the threat of bankruptcy justifies a limited fund class action).
See also Powers v Eichen, 229 F3d 1249, 1255-56 (9th Cir 2000) (permitting an appeal by objectors of an order approving attorneys’ fees because of the conceptual difficulty of the lawyer for the class negotiating his own fee and the inadequacy of the notice which contained little information regarding fees).
174 See Prudential Insurance, 148 F3d at 298 (reversing, in part, the trial court’s approval of a settlement and requiring clarification of a fee award and noting that the state objectors improved mathematical scoring procedure for filing claims by class members).
noting that the input of some objectors led to substantially extending the redemption date for coupons, and thereby increasing the potential value of the settlement. Similarly, a trial court praised the "active participation of several [objector] fee applicants" who had "enhanced" the district judge's settlement evaluation of both the class counsel's attorneys' fees and the proof requirements for absent class members seeking to claim settlement funds, while at the same time denying any objectors' fee to an applicant who had "neither benefited the class nor assisted the Court." 

Analysis of decisions involving objectors who enhance a common settlement fund underscores a distinction between two types of objectors. Objectors who are trying to enrich a settlement fund are not necessarily in the same position as objectors who seek to decrease attorneys' fees. Their objectives and impact are distinguishable. Fee objectors serve a useful purpose to the court, but also simultaneously act as unappointed agents for the class action defendant, often raising arguments that the size of the fee is too high in relation to the quality of the substantive plaintiffs' case. In addition, objectors to fees alone might be sometimes willing to extort their own side deal and readily depart the scene. In contrast, the objector who seeks to enhance a settlement pool seems to advance the interest of the class members more clearly.

It may also be important to distinguish between proposed monetary settlements with a single, undefined settlement fund, from which both attorneys' fees and class compensation are taken, and a proposed settlement that separates attorneys' fees from funds for the class. The fee objector in the former case is really enhancing the compensation to the class if he successfully reduces fees. In contrast, the fee objector in the latter case is only reducing the amount owed by the class action defendant. For that

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175 See Shaw, 91 F Supp 2d at 973-75 (noting that objector's counsel had doubled the length of time to redeem coupons and thereby "conferred a substantial benefit on the class," but also observing that other objectors had filed "canned" objections having nothing to do with the case and another objector's attorney, Lawrence Schonbrun, had "submitted documents to this Court which are, at best, negligently created and, at worst, suspiciously manufactured").


177 While it is true that some class action defendants will be indifferent as to the size of the plaintiffs' attorneys' fees in a proposed class action settlement, defendants cannot help but be pleased when an objector argues that the fee is too high given the poor quality of the plaintiffs' arguments.
reason, this objector might be characterized as a stealth agent for the defendant.

Decisions awarding attorneys' fees to objectors necessarily hinge on whether the objectors have helped or hindered the process of evaluating a settlement. Courts are loathe to grant objectors attorneys' fees unless they aid or confer a benefit on the class as a whole, rather than enrich only the objector. The district judges who award fees to objector's counsel represent assessment of the positive work that benefits the class action process. Some degree of novel input that helps the class is necessary to objectors in their quest for compensation.

This is not to say that objectors will always provide helpful input or that they will not free ride off the efforts of class counsel in initiating suit and the hard work of both defense and class counsel in negotiating a settlement. True extortionist, free-riding objectors who provide no added value and who increase the transactions costs of class actions sometimes exist. When such an objector is identified, the court may try to impose sanctions. Thus far, sanctions have been meted out to class actions objectors in only a handful of cases, perhaps out of fear that a court of appeals would overturn the sanction. A district judge affirmed the recommendations of a magistrate that he sanction an objector's attorney who had made a variety of fee objections, filed Rule 11 motions against class counsel, and tried to recuse the trial court in the Prudential insurance fraud class action litigation, only to

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178 See, for example, Duhaime, 2 F Supp 2d at 176 (D Mass 1998) (asserting that "[o]bjectors are not ordinarily awarded attorneys' fees, except where their efforts have conferred benefits on class members generally, as distinguished from the objectors themselves particularly"); In re the Prudential Insurance Co of America Sales Practices Litigation, 962 F Supp 572, 593-94 (D NJ 1997) (denying an award of attorneys' fees to counsel for objectors because they "did not advance the progress of the litigation or sharpen any issues"); Domestic Air, 148 FRD at 360 (stating that paying fees to objectors' counsel is appropriate where their work "produced a beneficial effect upon the progress of the litigation").

179 See, for example, In re Anchor Securities Litigation, 1991 WL 53651 (E D NY) (counsel "whose actions have conferred a benefit upon a given group or class of litigants may file a claim for reasonable compensation for his efforts").

180 Prudential Insurance, 962 F Supp at 593 n 50 (denying fees to objectors whose input was "not novel to this Court" and merely duplicated arguments already raised by states of Florida and Massachusetts).

181 Of course, the paucity of sanctions to objector attorneys may be a measure that objectors benefit the case or, alternatively, the statistical fact that objections are not made as often as theory would indicate. See text accompanying notes 144-29.

have the court of appeals overturn the sanction. The Seventh Circuit reversed a fifty thousand dollar Rule 11 sanction against two California attorneys who had objected to a proposed settlement purporting to represent a client who, when questioned by the court, knew almost nothing about his objection. In Shaw, the trial judge sanctioned an objecting pro hac vice attorney who appeared unable to provide reasonable identification of his objector client. For reasons probably related more to the law and policy of sanctions than any analysis of class action objectors, the prospect of sanctioning extortionist objectors appears to work better in theory than in practice.

The common thread of the decisions supporting objector participation in the class action settlement approval process is simply that objectors might be in a position to provide beneficial information to a district judge faced with the unenviable task of assessing the validity of a proposed settlement. Such reasoning finds support in the proposed revisions to Rule 23, which provide more procedural structure and clarity to the settlement approval process. New proposed Rule 23(e)(4)(A) specifically grants the absent class member the right to object to a proposed settlement or compromise. The text's silence regarding intervention, to-

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183 See In re Prudential Insurance Co of America Sales Practice Litigation Agent Actions, 278 F3d 175, 191–92 (3d Cir 2002) (affirming the court’s inherent power to impose sanctions but overruling the district court’s non-monetary sanctions on grounds of insufficient notice). The concurring and dissenting opinion of Judge Rosenn observed that the objector “had the wholesome effect of providing a careful scrutiny of the fairness of a gigantic settlement affecting millions of policyholders nationwide.” Id at 202 (Rosenn concurring and dissenting).

184 See Vollmer, 248 F3d at 710–11 (reasoning that the district judge had violated due process by conducting an extra-record investigation into the law practice of the sanctioned attorneys and because the size of the award, under the circumstances, was excessive). For a more complete discussion of the Vollmer class action, see text accompanying notes 123.

185 91 F Supp 2d at 975 (sanctioning so-called professional objector Lawrence Schonbrun by entering an order that he must file a motion for pro hac vice status one week before his intended appearance and submit a verified affidavit with details about his client’s identity).


187 Advisory Committee Report at 101–02 (cited in note 8) (“Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).”)

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gether with its unqualified right of a class member to object, yields a conclusion that an objector wishing to file written material or be heard orally at a Rule 23(e) hearing need not file an intervention petition. The accompanying Committee Note “confirms” this right to object to a proposed settlement.

Several of the many individuals who commented upon the recently proposed amendments to Rule 23 mirrored this theme by supporting, rather than opposing, a way to embrace objector participation. Of particular interest was the Defense Research Institute’s position that “objections should be encouraged, not discouraged,” and its position urging an Advisory Committee standard for determining when to receive objector input. The thrust of these comments was not that objector input is always productive. Rather, this valuable commentary from the class action firing lines seems to seek a more refined process that could welcome objector input that would, on balance, improve the court’s ability to assess a proposed settlement.

The question of whether and to what extent so-called “side agreements” between objectors and other counsel must be disclosed informs the debate about whether class action objectors are a beneficial or a counterproductive force. In the free-riding story, the extortionist objector will seek blackmail in the form of attorneys’ fees from the already negotiated settlement pot.

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8 See FRCP 23(e).
9 Advisory Committee Report at 106 (cited in note 8) (stating that proposed Rule 23(e)(4) “confirms the right of class members to object to a proposed settlement” and basing this right upon the binding effect of the settlement).
10 See, for example, id at 180–85 (summarizing comments from (1) Professor Judith Resnik, referring to the goal of making information available to the judge to assess a settlement, (2) Leslie Brueckner, Esq., arguing that “[o]bjectors often will be the only means to expose the weaknesses of the settlement,” (3) Brian Wolfman, Esq., claiming that objector input is valuable and that “[o]bjectors must be provided substantial procedural support,” (4) Beverly C. Moore, Jr., Esq., stating that “[l]egitimate objectors face real problems,” and (5) National Association of Protection & Advocacy Systems, arguing that the Committee Note accompanying the proposed rule changes “may chill desirable objections”). See also Linda S. Mullenix, Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm, 33 Val U L Rev 413, 440–41 (1999) (noting that “objectors have indeed played a crucial role in keeping all the players honest” and pointing out that the same objector attorney litigated challenges to the Supreme Court in the Ahearn and in the Amchem cases).
11 Advisory Committee Report at 182 (cited in note 8) (summarizing testimony of Patrick Lysaught, Esq., for the Defense Research Institute, and noting that the Committee Note needs to provide guidance regarding what is a proper basis for objecting and specifying a prima facie evidentiary showing). The Defense Research Institute, founded in 1960 to enhance the skills of defense lawyers, is a national “membership organization of all lawyers and involved in the defense of civil litigation,” available online at <http://www.dri.org/dri/about/mission.cfm> (visited Apr 7, 2003).
Should this tactic be successful, the objector attorney will fold his tent and withdraw the objection. Settlement terms of this nature, like most settlements, are essentially private matters. In a private side deal, the free-riding extortionist has been bought off, the potentially valuable objection fails to be considered by the district court, and the settlement approval hearing loses the drama of having the objector's contest conducted in public. Privacy is particularly crucial to the workings of a side deal. It is important to keep the terms of a true buy-out from the trial court that is scrutinizing the settlement, and from other potential critics of the buy-out. It is also important to keep the side deal from the press who has found class action reporting particularly newsworthy.

By discouraging potentially extortionist private side deals and making the terms of these agreements public, courts are much less likely to approve a tainted buy-out settlement. Moreover, a rule that would require that all side deals with objectors be transparent may deter the initiation of such side deals in the first place. The Second Circuit used this rationale when it affirmed a trial court order that required a class counsel fee-sharing agreements to be openly disclosed to the district judge because "[o]nly by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising."

The virtues of transparent side deals and disclosure led to the present proposed change to Rule 23(e)(4)(B), mandating that "[a]n objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval." Although this draft does not seek to ban side deals—almost a practical impossibility—it does put their terms before the trial judge and require judicial inquiry

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192 See Brunet and Craver, Alternative Dispute Resolution at 182 (cited in note 131) (stressing that settlements are typically confidential and secret).
193 See Bone, The Economics of Civil Procedure at 279 (cited in note 20) (describing side deals between counsel for the objector and class counsel and the defendant in a trans- action that "settles the attorney's individual claims for a premium, or by making slight adjustments to the settlement so the attorney can argue that he benefitted the class and thus deserves a higher fee").
194 See, for example, Hensler, Class Action Dilemmas at 53 (cited in note 39) (charting over 3200 stories in about class actions in the general press and over 300 in the business press in 1995–96).
195 Id at 494 (arguing that payments to objectors to settle claims "ought to be disclosed to the judge, and arguably to class members as well").
196 In re "Agent Orange" Product Liability Litigation, 818 F2d 216, 226 (2d Cir 1987).
197 Advisory Committee Report at 102 (cited in note 8).
into their validity. The accompanying Committee Note supports the idea of the trial court questioning the withdrawn objection by mandating judicial review if an objection is formally withdrawn, and stating that “if the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.” In other words, the court must do more than just look for an objection that is formally withdrawn; the district judge must somehow look out for objections that are not vigorously argued.

Though combative commentary to the proposed Rule 23(e)(4)(B) provision for the disclosure of side deals may have created the potential for trench warfare, such commentary never materialized. Like the proposed Rule itself, the bulk of the commentary to it supports the value of objector input by making it more difficult to keep side arrangements private. Most of the comments broadly support full information disclosure regarding side deals. Several comments make the points that parties would have an incentive not to disclose side deals, and that the court needs the ability to sanction the parties to ensure compliance. These comments have a measure of truth; a rule requiring disclosure of side deals to the court will be difficult to police. Nonetheless, this norm should work a degree of in terrorem disclosure, and is a considerable improvement over the status quo, which is one of free-wheeling, silent side deals that are a license to extort.

Some attention to the timing and nature of objector participation is required. In order to provide helpful information to the court, the objector needs information. Objectors often surface fol-

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199 Advisory Committee Report at 107 (cited in note 8).

200 See, for example, id at 174–79 (summarizing positions of (1) Professor Judith Resnik, arguing that “[f]ull disclosure of side agreements of all kinds should be required”, (2) Leslie Brueckner, Esq., stating that parties should be required to be disclose side agreements, (3) Brian Wolfman, Esq., claiming that side agreement filing should be mandatory and should include the full agreement rather than a summary, (4) the Federal Trade Commission, positing that judicial oversight requires that the court be fully informed as to the context of any settlement, and (5) Professor Susan Koniak, arguing that the “rule should provide strong and mandatory sanctions for failing to disclose such deals”). But see id at 177 (noting statement of Professor Charles Silver that fee provisions of proposed rule and commentary “reflects an unwarranted preference for regulation over private arrangements”).

201 Id at 176–78 (cited in note 8) (summarizing comments from (1) Leslie Brueckner, Esq., arguing that “the settling parties have every incentive not to disclose the existence of related agreements” and that the “proposal lacks teeth,” and (2) Professor Susan Koniak, claiming that sanctions should be added because “the urge to cheat is great”).
lowing receipt of class action notice and have little time to collect their own information, formulate a coherent position, and formally object to the court. There will be cases where some discovery is essential to the objectors.\textsuperscript{202} It is reasonable to predict that a legitimate objector may need some discovery relating to the merits of the case in order to assess the real value of a proposed settlement. Such a request should be granted.\textsuperscript{203} This process takes time. District courts need to find a way to give potentially useful objectors adequate time to collect information that will allow them to make meaningful objections.\textsuperscript{204} While granting this extra time comes at a cost, the increase in legitimate participation that informs the court should result in a benefit to the crucial process of monitoring the class action settlement.

III. PUBLIC SECTOR MONITORS: MONITORING BY THE STATE, PUBLIC INTEREST GROUPS, AND GUARDIANS

Not all class actions objections arise when private practitioners file objections on behalf of class members. Some class actions objections are filed by state or federal agencies, sometimes proceeding on a \textit{parens patriae} basis.\textsuperscript{205} In other instances, public interest groups who have identified class action abuse as a worthy investment of their scarce resources file objections.\textsuperscript{206} A third type of objection to a potentially corrupt class action settlement can be filed by a court-appointed guardian.\textsuperscript{207} This Part focuses on the theory and nature of objections filed by entities in the public sector.

Each of these three types of objectors, while analytically distinct, shares several common characteristics. These objections


\textsuperscript{203} See Cooper, \textit{Future of Class Actions}, 40 Ariz L Rev at 950 (cited in note 134) (contending that "objectors should be supported by full (and guided) access to discovery materials, if the litigation (or earlier individual litigation) has generated adequate discovery, or by a realistic opportunity to engage in discovery on the merits"). Professor Cooper urges that objectors be given access to discovery on the negotiation process itself. Id.

\textsuperscript{204} See Advisory Committee Report at 229–30 (cited in note 8) (summarizing (1) Judicial Conference input that the present "time periods for disclosure and objecting often make informed objections impossible" and lamenting that "[o]ften an objector has to fight counsel to get the documents" needed to object, and (2) quoting Victor Schwartz, Esq., that it is of "paramount importance to notify the class members about fee hearings so that they may be informed before the class attorneys’ fees are set in cement").

\textsuperscript{205} See text accompanying notes 208–223, 226–296.

\textsuperscript{206} See text accompanying notes 237–273.

\textsuperscript{207} See text accompanying notes 274–279, 283–292, 294–312.
will likely be led by specialist attorneys, who may be able to perform quality monitoring. Also, these objectors exist with very focused missions that operate somewhat outside of a free market profit motive. Analysis of incentives, critical to monitoring potential, might be different for these objectors. In addition, the free-rider problem that plagues class action objectors works differently for these public sector parties. While these public sector objectors follow earlier filed class actions in a way that resembles free riding, they lack the profit motive that leads to extortion and, thus, do not create the same type of free-riding scenario that characterizes the private practitioner who files class action objections.

At present, I speculate that objections by these three groups are filed in a small percentage of class actions. Public interest groups and state and federal agencies have very limited resources that prevent, in their own prosecutorial discretion, routine participation in class actions. Yet, public sector objections hold enough promise and appear with sufficient frequency to merit a closer examination.

A. The State or Federal Government as a Class Action Objector

Participation in class actions by states is increasingly common. States may become class action players either by filing a parens patriae suit as a class action or, alternatively, by intervening in an already existing class action. The tobacco litigation brought by the states against the manufacturers of tobacco products illustrates the parens patriae form of participation. Similar products liability style claims have been brought against entire industries, including the lead paint industry, gun manufacturers, and even health maintenance organizations. The latter situa-

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See, for example, Hensler, *Class Action Dilemmas* at 495 (cited in note 39) (acknowledging that “public interest lawyers are perennially strapped for resources”).


See, for example, *In re Mid-Atlantic Toyota Antitrust Litigation*, 605 F Supp 440, 449 (C D MD 1984) (approving settlement of state parens patriae actions in a price-fixing context).

See, for example, *Texas v American Tobacco Co*, 14 F Supp 2d at 965; *R. J. Reynolds Tobacco Co v Engle*, 672 S2d 39, 42 (Fla Ct App 1996) (certifying a statewide tobacco class action).

See, for example, *Texas v American Tobacco Co*, 14 F Supp 2d at 965 (allowing a parens patriae suit by the state of Texas against the tobacco industry to recover Medicaid losses); *Scott v American Tobacco Co*, 725 So 2d 10, 18 (La Ct App 4th Cir 1998) (affirming
tion is illustrated by state agencies intervening or, at times, seeking amicus curiae status in pending class suits to complain about the terms of a proposed settlement or to take a position not presently advanced by the private practitioners initiating the litigation. For example, the states of New York, Massachusetts, Pennsylvania, and Nevada joined a class action suit against the automobile insurer State Farm in a suit dealing with the issue of whether the insurance company's use of generic automobile parts constituted consumer fraud.\textsuperscript{213} The State of Texas Insurance Department joined several class actions to oppose the size of attorneys' fees in proposed settlements.\textsuperscript{214} The California public employee pension fund (CALPERS) intervened in shareholder lawsuits pending in New York.\textsuperscript{215} The Texas Attorney General objected to a proposed settlement of a Pennsylvania class action against Conseco, Inc, regarding whether nursing home policies misled elderly insureds.\textsuperscript{216} The Texas Attorney General intervened and obtained an additional two million dollars in a Texas class action against automobile insurers accused of illegal double rounding of periodic bill payments.\textsuperscript{217} The nature of state administrative agency participation in class actions is understandably diverse, reflecting the broad group of political views that characterize governmental action.

At the same time, the federal government sometimes becomes a player in class action litigation. While probably less common than state intervention into pending aggregative litigation, federal involvement can constitute a major force. The Ninth Circuit singled out the positive participation of the Department of
Justice as “a significant factor in quieting the potential for unfair treatment of minority interests within the plaintiffs’ class” in a class action where the government took part in settlement negotiations. In addition, the Federal Trade Commission has recently challenged proposed class action attorneys’ fees awards in several actions; the Securities Exchange Commission maintained a policy during the Clinton Administration to intervene in pending securities class actions; the Equal Employment Opportunity Commission has intervened in pending race discrimination class actions; and the Federal Deposit Insurance Corporation...

218 See *Mendoza v United States*, 623 F2d 1338, 1353 (9th Cir 1980) (noting that the DOJ had come into the case before trial and been an “active participant” that “serve[d] to protect the interests of the class against possible improper dealings”).

219 See Caroline E. Mayer, *FTC Seeks to Limit Attorney Fees in Class Action Suits*, Wash Post A17 (Sept 30, 2002) (quoting FTC Chairman Timothy J. Muris, that the agency is interested in challenging coupon settlements where coupons are worth a fraction of their face value and attorneys’ fees where the class action was filed following earlier case filings or investigations by the agency, and noting that the FTC had objected to attorneys’ fees in three class actions in 2002); *Carter v ICR Services Inc*, Memorandum Opinion on Proposed Settlement 2, 5–6, Civ Action 00-C-2666-W (N D Ala Sept 6, 2002) (allowing FTC to participate as a class action objector with amicus curiae status, noting that the FTC “has actively monitored the developments in this case,” but approving, over agency’s objection, $1.235 million in attorneys’ fees in a case involving a five million dollar common fund for class members); *Erikson v Ameritech Corporation*, Memorandum Order, No 99 CH 18873 (Cook Co Ill Cir Ct Sept 18, 2002) (rejecting proposed settlement of consumer fraud class action brought by voice mail subscribers where FTC and several states objected to the proposed conduct relief as inadequately compensating class members); *FTC v Equinox International Corp*, FTC Brief in Opposition to Class Counsel’s Fee Petition, (Sept 2000) (arguing that existence of a prior government enforcement action preceding a class action should be a factor in reducing class counsels fee, citing *Donnarumma v Barracuda Tanker Corp*, 79 FRD 455, 468 (C D Cal 1978)).

220 See, for example, Michael Siconolfi and Jeffrey Taylor, *SEC Steps Up Intervention in Class Action Pacts*, Wall St J C1 (June 2, 1995) (reporting that agency will not just intervene on appeal, but will consider coming into class action securities cases at earlier stages because of “abuses in the litigation process involving class actions”); Michael Siconolfi, *SEC Fights Legal Fees in Prudential Case to Cut Fees for Plaintiffs’ Lawyers*, Wall St J B8 (Mar 9, 1994) (stating that SEC decision to intervene in a securities class action “reflects the new tone set by SEC Chairman Arthur Levitt in a January speech to securities regulators” that agency would advise courts on the “appropriateness of proposed settlements”). See also *In re Cendant Corp Litigation*, 264 F3d 201, 231 (3d Cir 2001) (noting that SEC participated as amicus curiae in a class action to advance the position that auctions to select class counsel are not consistent with the Private Securities Litigation Reform Act of 1995); *Goldberger v Integrated Resources, Inc*, 209 F3d 43, 53–54 (2d Cir 2000) (affirming trial court approval of lodestar fee to class counsel in securities fraud class action because the attorneys for the class were aided by the prior work done by government attorneys who criminally prosecuted officers of defendant); *In re Quantum Health Resources Inc Securities Litigation*, 962 F Supp 1254, 1259 (C D Cal 1997) (reducing attorneys’ fee in securities class action to 10 percent because prior agency investigations benefitted class counsel).

221 See Mary Williams Walsh, *U.S. Joins in 2 Bias Suits Against Lockheed Martin*, NY Times C1 (Dec 6, 2000) (reporting agency decision to intervene in Title VII class actions...
has intervened in a class action against credit card issuing banks.\footnote{222 See Heaton v Monogram Credit Card Bank of Georgia, 297 F3d 416, 426 (5th Cir 2002) (noting effort by FDIC to intervene either of right or permissively, concluding that motion to intervene was mooted by dismissal of substantive claim, and reporting that FDIC did participate).}

The process of government attorneys raising objections to the conduct of pending class actions should be distinguished from that of private law firm attorneys purporting to represent absent class members. First and foremost, the agency cost monitoring problem should be less severe. While the objector client is unable to monitor his own attorney, the prospect of an attorney who works for the state monitoring the class action plaintiff’s attorney is more plausible.\footnote{223 See, for example, Carter, Civ No O0-C-2666-W at 5 (noting that the FTC “has actively monitored the developments in this case and it has assisted the Court in assuring that individualized notices were sent to most of the class members”).}

Of course, not all attorneys are created equal. Varying degrees of class action and substantive expertise differentiate lawyers. One might argue that attorneys for state agencies, for example, lack the expertise in the class action field to appropriately monitor class counsel. How can attorneys with limited real world class action experience monitor repeat class action players? There may be a huge information gulf between the state agency attorney monitor and counsel for Milberg, Weiss.

However, several counterpoints address this potential problem. First, counsel for the state agency may provide considerable \textit{substantive} expertise. A lack of procedural class action experience should not doom the state agency’s ability to evaluate a settlement’s adequacy. Much of our present thinking about the adequacy of a settlement focuses upon substance—whether the settlement approximates a probable trial result.\footnote{224 See, for example, Reynolds v Beneficial National Bank, 288 F3d 277, 284–85 (7th Cir 2002) (reversing class action settlement approval because trial court did not make a greater effort to determine the probable value of the plaintiffs’ case at trial); Crawford v Equifax Payment Services, Inc, 201 F3d 877, 882 (7th Cir 2000) (reversing district court approval of settlement because it “is substantively troubling”); Geoffrey C. Hazard, Jr., \textit{Class Certification Based On Merits of the Claims}, 69 Tenn L Rev 1, 4 (2001) (arguing that merits of case are relevant to the class action certification determination).} The proposed set-
tlement will be negotiated in the shadow of the substantive law. The attorney for an agency will likely be strong on substance, if not as strong on procedure.

Moreover, a state or federal agency should have access to enough decent procedural advice to be, in a structural sense, an adequate procedural monitor. State and federal agencies are often parties to the paradigm big cases. Government lawyers settle and litigate cases with giant monetary consequences. It is hard to believe that a state lawyer could not consult with another more experienced colleague about class action procedure settlement strategies. While there are, of course, transaction costs to seeking monitoring help from other government attorneys, agencies are administered like law firms and should be able to efficiently access procedural specialization.

In a particular state or agency, there may be a realization that the ability to monitor a class action is simply lacking. In that case, the state may contract out for class action monitoring expertise. This is essentially what happened when the states brought suit and negotiated their giant settlement with the tobacco industry. Leading members of the states' class action bars were hired by the states to offer valuable (and expensive) class action expertise.

It is clear that agency counsel possess the substantive abilities to monitor a settlement by class counsel. The remaining question concerns their incentive. Because they toil at a govern-

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226 See, for example, John R. Wilke, Microsoft Reaches Tentative Antitrust Pact, Wall St J A3 (Nov 1, 2001) (describing how government attorneys negotiated landmark settlement intended to rein in company's monopoly power); Kurt Eichenwald, Archer Daniels Agrees to Big Fine for Price Fixing, NY Times A1 (Oct 15, 1996) (government attorneys negotiate $100 million settlement following price fixing finding against Archer Daniels Midland Company).

227 See Brunet, 74 Tulane L Rev at 1934 (cited in note 32) (asserting that state attorney general's offices are analogous to law firms, with specialist attorneys and broad jurisdiction over a variety of issues and that smaller agencies often approach state attorney general's offices for guidance); Frank J. Kelley, Changes in the State's Law Firm Over the Past Twenty Years, 29 Wayne L Rev 267, 268 (1983) (labeling the Michigan state attorney general's office as the "state's law firm").

228 See Brunet, 74 Tulane L Rev at 1934 (cited in note 32); James V. Grimaldi, Lawyers Could Get Billions In Tobacco Deal, Seattle Times A1 (Oct 5, 1997) (describing payment of $14.7 billion to private lawyers brought into the tobacco litigation by forty states); Daniel Bice, Tobacco Suit May be First Solo, Milwaukee Journal-Sentinel 1 (Dec 16, 1996) (noting that state of Wisconsin was first and only state not to hire private practitioners to represent it in negotiating settlement of tobacco litigation).
ment salary, some may question whether government attorneys possess enough incentive to assess cases involving significant stakes and the class action attorneys working with altogether different monetary incentives. Moreover, some argue that government agency attorneys themselves are unmonitored due to the ambiguity that exists regarding their precise duties of loyalty.229

Government attorneys have different incentives than class action counsel.230 The culture of the agency workplace is simply different than that in which a private attorney works. Rather than aspire to monetary rewards, the typical agency attorney seeks prominence generally, and peer group acceptance, particularly.231 The prototypical agency attorney may be motivated by a culture that seeks adherence to a particular mission.232 Such institutional goals are increasingly set out in written agency mission statements that help to unify and sharpen the purposes of both individual agency personnel and the entity itself.233 In order

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229 See, for example, Jonathan R. Macey and Geoffrey P. Miller, Reflections on Professional Responsibility in a Regulatory State, 63 Geo Wash L Rev 1105, 1118 (1995) (arguing that unlike private sector lawyers, “public-sector lawyers, by contrast, often do not have the benefit of a clearly defined client” and noting the lack of monitoring of the agency attorney). See also Note, Rethinking the Professional Responsibilities of Federal Agency Lawyers, 115 Harv L Rev 1170, 1181 (2002) (arguing that an agency attorney has no readily discernable client and setting forth multiple conflicting clients for the federal agency lawyer, ranging from the agency itself to the public interest to other individuals working for the agency).

230 See Jonathan R. Macey, Lawyers in Agencies: Economics, Social Psychology, and Process, 61 L & Contemp Probs 109, 114 (Spring 1998) (“Lawyers in administrative agencies are likely to have values, attitudes, and perspectives different from those found in a random sample of the population.”).

231 See Ronald N. Johnson and Gary D. Libecap, Agency Growth, Salaries and the Protected Bureaucrat, 27 Economic Inquiry 431, 448 (1989) (noting that for the “top-ranked personnel, those who may be in a position to influence policy, salary does not appear to be the major motivating force, as their salaries are capped”). Compare Macey, 61 L & Contemp Probs at 110 (cited in note 230) (pointing out that “[l]awyers’ professional responsibilities are directed toward their clients, rather than either toward more selfish ends such as self-aggrandizement, or toward more global ends such as justice or efficiency”).

232 Johnson and Libecap, 27 Econ Inquiry at 448 (cited at note 231) (concluding that top agency personnel associate “with the mission of the agency”); Note, 115 Harv L Rev at 1173-76 (cited in note 229) (advancing contrasting models of the government lawyer’s loyalty as to her employing client, the agency, or alternatively, to the public interest or the common good); Steven K. Berenson, Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?, 41 BC L Rev 789, 789-90 (2000) (asserting that “government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice”); Macey, 61 L & Contemp Probs at 112–13 (cited in note 230) (referring to lawyers’ tendency to align actions and ideas).

233 See, for example, 12 CFR § 650.22(b) (2002) (mandating the adoption of a mission statement of Federal Agricultural Mortgage Corporation); Environmental Protection
to be promoted within the agency, a government attorney will have to perform well and in a manner consistent with the formal agency mission. Motivation should come from the agency's public service mission itself.

To be sure, there are some government attorneys who may be motivated more by monetary or personal advancement considerations than by a stated public service mission that may have been formulated long ago or by more altruistic colleagues. Such

Agency, Agency Mission Statement, available online at <www.epa.gov/history/org/origins/mission.htm> (stating that "the mission of the U.S. Environmental Protection Agency is to protect human health and to safeguard the natural environment—air, water, and land—upon which life depends") (visited Apr 7, 2003); US Food and Drug Administration, FDA's Mission, available online at <www.fda.gov/opacom/morechoices/mission.html> (stating that the mission of the agency is to "promote the public health by promptly and efficiently reviewing clinical research and taking appropriate action on the marketing of regulated products in a timely manner;" by "ensuring that foods are safe, wholesome, sanitary, and properly labeled;" by assuring safe and effective use of devices, safe and properly labeled cosmetics and by protecting public health from electronic product radiation) (visited Apr 7, 2003); Federal Trade Commission, Vision, Mission & Goals, available online at <www.ftc.gov/ftc/mission.htm> (stating that the agency "seeks to ensure that the nation's markets function competitively," that unfair or deceptive acts are eliminated, that consumers may "exercise informed choice," and that economic analysis will support its efforts) (visited Apr 7, 2003); Central Intelligence Agency, CIA Vision, Mission and Values, available online at <www.cia.gov/cia/information/mission.html> (stating that mission is to support those who make national security policy by "providing accurate, evidence-based, comprehensive, and timely foreign intelligence related to national security;" and conducting counterintelligence and "other functions related to foreign intelligence and national security as directed by the President") (visited Apr 7, 2003); California Department of Education, Institutional Operational Standards, 5 CCR § 72705(a) (2002) (mandating, through agency regulation, that an "institution shall have a written statement of its mission, purposes, and objectives"); California Department of Corporations, Mission, available online at <www.corp.ca.gov/aboutus.htm> (stating that agency will "rigorously enforce the laws of the state, ensuring that all of California's financial services consumers enter the marketplace with confidence," educate the public about "the risks and rewards of investing," and provide business a financial services marketplace that is transparent and efficient) (visited Apr 7, 2003); Illinois Department of Insurance, Mission Statement, available online at <www.ins.state.il.us/main/overview.htm> (stating that mission "is to protect consumers by providing assistance and information, by efficiently regulating the insurance industry's market behavior and financial solvency, and by fostering a competitive insurance marketplace") (visited Apr 7, 2003).

See, for example, William A. Niskanen, Jr., Bureaucracy and Representative Government 38 (Aldine Atherton 1971) (noting that decisions by bureaucrats are made to maximize utility, and that utility can include reputation, power, salary, and perquisites).

See Note, 115 Harv L Rev at 1188 (cited in note 229) (contending that the government lawyer "must determine at the outset of her work the agency's provisional objectives on a given issue . . . [and] must then independently evaluate those objectives from her perspective as the agency's legal expert").

See, for example, Macey and Miller, 63 Geo Wash L Rev at 1111 (cited in note 229) (arguing that government attorneys try to advance their own importance within their agencies rather than pursue the public interest); Anthony Downs, Inside Bureaucracy 82 (Little, Brown 1967) (stressing the tendency of individuals who work for bureaucracies to subordinate public goals and advance private self interest).
agency lawyers may nonetheless excel. They may have a plan to eventually be noticed by law firms in the free market. The steady migration of agency personnel to jobs practicing their specialty with law firms supports the monetary thesis. Whether motivated to do high quality work to advance personal self-interest or simply by a culture that seeks peer acceptance and attainment of the public good, there is little reason to think that the government attorney will lack an incentive to monitor class actions effectively.

B. The Public Interest Group Objector

The filing of objections to proposed class action settlements by public interest groups is already an established phenomenon. Two very different public interest groups, Public Citizen and Trial Lawyers for Public Justice, each routinely participate in class actions—usually by representing objectors unhappy with the terms of a proposed settlement. The participation of these two high-profile litigation-based public interest groups reflects their respective decisions that class action settlements constitute a public interest issue of the highest order, meritorious of investing hard won interest group dollars into improving the settlement of a class suit.

The phenomenon of public interest group objection is supplemented by occasional objections filed by single-issue public interest groups, who identify an issue of interest to their focused constituency and try to present their interests to a court. For ex-

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237 See, for example, Hensler, Class Action Dilemmas at 45 n 116, 89–91 (cited in note 39) (noting that "Public Citizens' lawyers had appeared as objectors to some of the most widely criticized class action settlement agreements" and that Public Citizen and Trial Lawyers for Public Justice "have objected to a number of proposed class action settlements in recent years"); Paul M. Barrett, Civil Action: Why Americans Look to Courts to Cure the Nation's Social Ills, Wall St J A1, A10 (Jan 4, 2000) (describing class action lawyers and referring to Public Citizen as a "pro-consumer firm that regularly intervenes in class actions to try to reduce legal fees"); Van Voris, Plaintiff Bar Divided, Natl L J at A1 (cited in note 33) (reporting that "both Public Citizen and TLPJ have aggressively targeted class action settlements that recover little for class members while surrendering the right of plaintiffs to have their day in court"); Reske, Two Wins for Class Action Objectors, 82 ABA J at 36 (cited in note 33) (explaining that Public Citizen, a group representing consumer interests, had either represented or assisted objectors "in 13 class actions involving products ranging from Mustang convertibles to Dalkon Shield intrauterine devices"); Wade Lambert, Public Interest Law Group Fights Some Class Settlements as Unfair, Wall St J B4 (Aug 17, 1995) (reporting that "Trial Lawyers for Public Justice, a public interest law group that brings class action suits and is funded by plaintiffs' lawyers, is now making a concerted effort to fight class action settlements it views as unfair" and acknowledging that the Class Action Abuse Project, begun in 1995, pits the group against some of its own supporters).
ample, the American Association of Retired Persons objected to a class action settlement between a class of holders of nursing home and home care insurance policies and the defendant insurer, arguing that the settlement conferred little real benefit on the elderly class. Similarly, the New York chapter of the National Organization for Women represented objectors who complained that the proposed settlement of a sex discrimination class action against Salomon Smith Barney overcompensated the attorneys for the class and underpaid class members.

The volume of class action objections reviewed and filed by Trial Lawyers for Public Justice ("TLPJ") is not insubstantial. Since beginning its "Class Action Abuse Project" in 1995, TLPJ attorneys review between fifty and seventy proposed settlements in class actions per year and file objections in cases deemed "particularly unfair or illegal." The TLPJ Website contains a summary of noteworthy recent class action objections filed by the group. TLPJ has challenged over twenty "highly objectionable class action proposed settlements and obtained successful results in almost every case." The breadth of the class actions in which TLPJ has appeared to represent objectors is diverse. It includes objections to a proposed fifty-five million dollar settlement of

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233 See Davis and Hallinan, Conseco's, Wall St J at B8 (cited in note 216).
234 See, for example, Patrick McGeehan, Settlement of Bias Suit is Delayed, Wall St J C1 (June 25, 1998) (describing rejection of proposed settlement in case involving alleged fraternity-style sexual harassment antics in basement "boom-boom room" of Garden City, NY branch office of defendant because spending fifteen million dollars on diversity programs was too vague and inadequate for a large company); Suit Settlement at Smith Barney Meets Challenge, Wall St J B10A (Aug 17, 1998), 1998 WL-WSJ 3505687 (reporting objections by three members of the "boom-boom room" class action against Smith Barney because of alleged conflict of interest of mediator who helped parties reach settlement, alleged inadequate representation by class counsel, and alleged secret agreements in the settlement process).
240 See Brief Amicus Curiae of Trial Lawyers for Public Justice, Stephenson v Dow Chemical Co, Case No 00-7455(L), at 1 (2d Cir 2001) (asserting that "TLPJ has established a Class Action Abuse Prevention Project dedicated to monitoring, exposing, and preventing abuses of the class action device nationwide").
241 Bob Van Voris, Kansas Case in Class by Itself, Natl L J A1, A13 (March 15, 1999) (reporting on case where TLPJ objected to a proposed settlement of a class suit which would have required homeowner members of an opt-out class to sell their homes as part of deal negotiated by class counsel); Telephone Interview with Leslie Brueckner, Staff Attorney, TLPJ (Jan 14, 2003) (explaining that TLPJ challenges proposed class action settlements that violate existing class action rules or are inherently unfair to class members).
claims arising out of a release of arsenic from a chemical plant; criticisms that a proposed settlement of a West Virginia class action against Liggett Group, Inc, gave the class members almost nothing, while releasing the defendant from further liability from claims by smokers; objections that a class action settlement by a class of customers who paid allegedly illegal home mortgage escrow fees was unfair because few members of the class would redeem coupons awarded to class member victims; and complaints that a proposed settlement of claims by a class of automobile insureds—who alleged that their insurer, MassMutual, had not fully disclosed information regarding periodic payment of premiums charges—had failed to include any type of compensation for five million past policyholders. It is noteworthy that the Class Action Abuse Project pits TLPJ against one of its own natural constituencies—the plaintiff’s trial lawyer bar. The objections filed by TLPJ are often directed at settlements negotiated by the same trial lawyers who are this organization’s actual and potential contributors.

244 See Lambert, Public Interest Group Fights, Wall St J at B4 (cited in note 237) (reporting that proposed settlement failed to provide fairly for future claimants and failed to use proper notice).

245 See Bob Van Voris, Liggett Deal Suddenly Turns Sour, Natl L J A7 (June 16, 1997).

246 See Bob Van Voris, $1 Million Bond May Discourage Future Fee Challenges, Natl L J A6 (July 13, 1998) (reporting that class action lawyers wanted objectors to post a one million dollar bond to appeal and quoting class counsel stating, “[y]ou can’t just walk in, disrupt the rights of thousands of people and say ‘too bad’ after their rights have expired because you wanted to pursue your appeal”). For TLPJ objections to a similar case, see Bob Van Voris, Court Must Clip Coupon Pact—TLPJ, Natl L J A20 (June 8, 1998) (reporting that TLPJ complained that “class counsel is going to get a significant fee and it is very likely that the class will get next to nothing” and that TLPJ expert affidavits estimated that fewer than 1 percent of the class of over 100,000 former mortgagors would complete the complicated steps to get a rebate).

247 See Bob Van Voris, Insurance Class Deal Criticized, Natl L J at A4 (Feb 19, 2001) (reporting that a proposed settlement in a federal class action in New Mexico would mandate new disclosures for 1.1 million current policyholders and would compensate the sole practitioner class counsel by awarding him five million dollars in cash, a three million dollar life insurance policy, and a $250,000 per year annuity for his life, while paying $350,000 to the two class representatives, including $250,000 to one representative who was a New Mexico lawyer). Public Citizen and so-called professional objector Lawrence Schonbrun filed similar objections in this case. Id. A TLPJ press release asserts that the proposed settlement was withdrawn and the settlement hearing was cancelled. TLPJ Press Release, available online at <www.tlpj.org/pressreleases/53084_l.htm> (visited Apr 7, 2003).

248 See Van Voris, Plaintiff Bar Divided, Natl L J at A12 (cited in note 33) (reporting that TLPJ “enjoys financial and litigation support from the plaintiffs’ bar” and quoting Arthur Bryant of TLPJ that “[a]s an organization funded primarily by contributions from trial lawyers, we did not go into this area lightly” and that “the problem of collusive class settlements became impossible to ignore”).
The public interest group Public Citizen has intervened on behalf of objectors in a wide variety of class actions. A 2000 report of Public Citizen lists thirty-six class actions in which it had participated since 1989. Public Citizen was extensively involved in several of the most publicized class action cases of the 1990s. Public Counsel objected to the proposed settlement of a class action against the manufacturer of an allegedly defective cardiac pacemaker because of the inability to opt out and a proposed 28 percent fee for class counsel of the fifty-seven million dollar patient benefit fund; opposed a proposed settlement that would prevent objectors from opting out of claims against the maker of the diet drug Redux; objected to the settlement of the asbestos class action Amchem because of conflict of interest ethical issues surrounding the side settlement of fourteen thousand pending cases and future claims against the defending parties; represented class members in the silicone gel breast implants litigation who contended that the proposed settlement was not adjusted for inflation over its thirty year length, that spousal loss of consortium claims were ignored, and that attorneys' fees needed to be set in an adversary procedure; objected to the proposed coupon settlement in the General Motors Truck litigation involving side-saddle fuel tanks because of the reduction to five hundred dollars of a one thousand dollar coupon if transferred, the lack of a fair procedure used to set attorneys' fees, and defective notice to the class; and acted as "principal objectors" in the Ford Bronco II litigation, complaining that the settlement was "virtually worthless," that class counsel exaggerated the value of the proposed settlement and that the attorneys' fees were excessive.

249 Public Citizen, Public Citizen's Involvement in Class Action Settlements, available online at <www.citizen.org/print-article.cfm?ID=552> (setting forth a detailed summary of each of the thirty-six cases, including the status of case and the reason for intervening, and listing attorneys who worked on the case, as well as the result) (visited Apr 7, 2003).

250 Id (citing Teletronics, 186 FRD 459).

251 Id (citing In re Diet Drugs Products Liability Litigation, 1999 US Dist Lexis 14881 (E D Pa)).


253 Id (citing In re Silicone Gel Breast Implant Litigation, 1994 US Dist Lexis 12521 (N D Ala)).

254 Id (citing In re General Motors Pickup Truck Fuel Tank Product Liability Litigation, 55 F3d 768 (3d Cir 1995)).

255 Id (citing In re Ford Motor Co Bronco II Product Liability Litigation, 1995 US Dist Lexis 3507, *19 (E D La) (agreeing with objectors that settlement had a value to class of "effectively zero").
It is very difficult to arrive at an objective measure of the success or benefit of a class action objection. The websites of TLPJ and Public Citizen understandably refer to their success stories as objectors.\textsuperscript{256} It seems logical that an objector's sweetening of the payout to class members evidences that the objection has achieved success. Yet, additional payments to class members could be little more than an effort to buy out a public interest objector and reach a final settlement that will be approved by the court without objection. Payments to public interest group class action objectors will not resemble the typical extortionist direct payment to private practitioners, but are more likely to be in the form of payments to the class. Such payments to class members might be considered a mild, more positive form of buyoff that does not merit the term “extortion.”

The Rand study of class actions took a position strongly supportive of public interest group intervention into the class action process. While appropriately cautioning that such entities “have their own policy agendas,” it reasoned that public interest groups “may be a source of more impartial advice to judges” and that public interest groups play an important role “in calling attention to questionable class action practices.”\textsuperscript{257}

Examination of the results obtained by public interest groups’ class action objections supports the relatively positive endorsement of the Rand study. An award of attorneys’ fees seems the easiest yardstick of success for public interest group objections. A court would not award an objector fees without concluding that the objection had meaningfully aided the court and the settlement approval process.\textsuperscript{258} For example, a district court

\textsuperscript{256} See, for example, id (referring to a “smashing victory” in the appeal from the proposed settlement in the GM side-saddle truck class action, describing the trial court’s “comprehensive, forceful opinion, addressing all of the issues that we raised” in the vehicle leasing class action, \textit{Clement v American Honda Finance Corp}, 176 FRD 15 (D Conn 1998), characterizing the result in the Third Circuit \textit{Georgine} decision as a “smashing victory” in a “trumped-up suit,” and characterizing the defeat of a non-opt out settlement in the Hayden arsenic class action case, \textit{Hayden v Atochem North American, Inc}, 2000 US App LEXIS 4828 (5th Cir), as a “significant accomplishment”).

\textsuperscript{257} Hensler, \textit{Class Action Dilemmas} at 494–95 (cited in note 39). See also Bob Van Voris, \textit{Study Points to Class Action Abuses}, Natl L J A4 (Nov 22, 1999) (reporting that a Rand study recommended that “[j]udges should ensure sufficient opportunity for objectors to settlements to express their reservations in court”).

\textsuperscript{258} Despite authority that “[a]n objector to a class action settlement is not generally entitled to an award of counsel fees,” \textit{In re Domestic Air Transportation Antitrust Litigation}, 148 FRD 297, 358 (N D Ga 1993), courts do grant attorneys’ fees to class action objectors who have had a positive impact on the litigation, sharpened debate of settlement approval, or enhanced the class recovery. See, for example, \textit{Reynolds v Beneficial National
awarded $59,211.56 to Public Citizen for its work representing an objector in an insurance fraud class action brought against John Hancock, emphasizing the benefit achieved by the objections. The court stressed that the objector’s “attorneys’ work did substantially benefit the class generally” by clarifying both the options available to the class and the size and nature of the payment to class counsel. Similarly, in In re Domestic Air Transportation Antitrust Litigation, the court singled out the work of Public Citizen and other objectors, concluding that the “objection component in the settlement approval process . . . has been crucial to the Court’s consideration of the fairness of the settlement and was enhanced by the active participation of several fee applicants.” There, the court went on to approve the fee petition of Public Citizen and several other objectors whom the court found to have “significantly refined the issues germane to a consideration of the fairness of this complex settlement . . . [and] transformed the settlement hearing into a truly adversarial proceeding.” In addition, a district court granted a $105,037 fee award to Public Citizen in a class action involving an allegedly defective heart valve where the objectors enhanced benefits for follow-up surgeries and pushed compensation for the victims’ spouses.

At the same time, measuring the success of an objector’s input by attorneys’ fees would exclude some major victories achieved by public interest groups. It is impossible to award attorneys’ fees when the trial court rejects a proposed settlement. This means that a public interest group is unlikely to receive any attorneys’ fees in some its most noteworthy victories, where it is able to defeat a proposed settlement so thoroughly that the settlement is never revived. For example, in objecting to the proposed settlement in the Ford Bronco II class action, Public Citizen advanced multiple objections to allegedly overly generous settlement terms following the filing of seemingly serious products liability class claims involving the Ford Bronco’s roll-over problems. Class counsel had agreed to drop the consolidated class actions in return for a warning sticker, driver safety information already required by a federal agency, a vehicle inspection (that was arguably valuable to the defendant in order to get many of the 700,000 class members into a Ford automobile showroom), and four million dollars in attorneys’ fees. Public Citizen won a major victory when the court refused to approve the settlement, terming its value at “effectively zero.” Nonetheless, the act of defeating the settlement, clearly of benefit to the class action process, netted no fee to the objector. Similarly, in the over twenty class actions in which TLPJ has challenged class action settlements, the public interest group sought fees in only two cases.

Attorneys who represent objectors on behalf of public interest groups should be capable monitors. They often possess substantive expertise in the specialty subject matter of their interest group. In addition, those lawyers who do class action objection work for Public Citizen and TLPJ are repeat players, who possess procedural expertise. Assuming they have enough information to form a knowledgeable opinion, there is little reason to doubt

and was able to significantly enhance “reoperation benefits,” achieve ten million dollars for compensation of spouses, and reduce the attorneys’ fee for class counsel from thirty-three million dollars to $10.25 million).

265 See Public Citizen’s Involvement (cited in note 249).


their ability to evaluate whether class counsel and the defendant have fairly settled a class action.

Public interest groups should have adequate incentives to monitor complex class action maneuvers. Public choice theory's focus on free-riding problems can make the formation and influence of public interest groups seem illogical at best, and impotent at worst. Yet, some public interest groups have achieved great legislative and litigation successes. Daniel Farber has asserted that "ideology clearly plays a critical role in the formation and growth of these groups." Robert Rabin has stressed the focused ideology and commitment that serves to give litigation public interest groups "organizing power." It seems logical to conclude that the attorneys who monitor class action performance for these public interest group objectors are highly motivated to reach results consistent with the overall mission of their interest group.

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269 See Daniel Shaviro, Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s, 139 U Pa L Rev 1, 94-95 (1990) (describing the "paradox" of interest group formation and asserting that free riding should be "fatal" to interest group activities).

270 See, for example, id at 43-44 (noting the interest groups are often "well-financed and influential"); Helen M. Ingram and Dean E. Mann, Interest Groups and Environmental Policy, in James P. Lester, ed, Environmental Politics and Policy: Theories and Evidence 136–42 (Duke 1989) (suggesting that Sierra Club, NRDC, and Environmental Defense Fund are successful organizations); Rabin, 28 Stan L Rev at 209–10, 257–58 (cited in note 268) (noting the successes of the NAACP Legal Defense Fund, the ACLU, and several different environmental groups).


272 Rabin, 28 Stan L Rev at 220–21 (cited in note 268) (referring to the "singular focus" of successful public interest groups as "indispensable as an organizing device" and stressing need for public interest groups to agree on relatively general principles).

273 Farber, 9 J L, Econ, & Org at 74 (cited in note 271) (noting that successful environmental public interest groups are "likely to involve individuals with exceptionally high levels of ideological commitment"). Not surprisingly, public interest groups have articulated mission statements. See, for example, National Association of Consumer Advocates, Mission Statement, available online at <http://www.naca.net/about.htm> (describing NACA's mission "to promote justice for all consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair and abusive business practices that adversely affect consumers") (visited Aug 9, 2003); Trial Lawyers for Public Justice, Our Mission, available online at <http://www.tlpj.org/mission.htm> (setting forth mission "through creative litigation, public education and innovative work with the broader public interest community...[to] protect people and the environment; hold accountable those who abuse power; challenge governmental, corporate and individual wrongdoing; increase access to the courts, combat threats to our justice system; and inspire lawyers and others to serve the public interest") (visited Apr 7, 2003).
C. Court-appointed Guardians as Objectors

While much less common than the filing of objections by the state or by committed public interest groups, court-appointed guardians \textit{ad litem} and adjuncts have provided a basis for meaningful objections to proposed settlements in class actions. For example, the trial court appointed a guardian \textit{ad litem} to represent the interest of future claimants to a proposed settlement fund in the \textit{Ahearn v Fibreboard Corp}\footnote{162 FRD 505, (E D Tex 1995), aff'd in \textit{In re Asbestos Litigation}, 90 F3d 963 (5th Cir 1996), vacated and remanded, 521 US 591 (1997), affirm on remand, 134 F3d 668 (5th Cir 1998), revd, \textit{Ortiz}, 527 US 815.} \textit{asbestos} exposure class action.\footnote{Green, 30 UC Davis L Rev at 799 (cited in note 9) (noting that Eric Green was appointed as guardian \textit{ad litem} for the class in \textit{Ahearn}); \textit{Coffee}, 95 Colum L Rev at 1420 (cited in note 1) (noting that "only \textit{Ahearn} gave any recognition to the special position of future claimants by appointing a guardian \textit{ad litem}").} The guardian raised useful objections to the proposed settlement that called for a limited cash outlay by the defendant corporation of ten million dollars and ignored the firm's asset value.\footnote{See \textit{Coffee}, 95 Colum L Rev at 1401–02 (cited in note 1) (noting objections by the guardian and his argument that "Fibreboard's value . . . might be as high as $250 to $300 million").} Using powers to appoint a technical expert under Rule 54(d)(2)(D) of the Federal Rules of Civil Procedure, a district judge appointed a "fee examiner" to analyze the fairness of a fee request from the lead counsel in a complicated, Multi-District Litigation (MDL) set of class actions alleging insurance fraud.\footnote{See \textit{Prudential Insurance}, 962 F Supp at 575–76, 576 n 22 (D NJ 1997) (noting a court order of Nov 6, 1996 appointing an independent fee examiner "to assist the Court in determining an appropriate award of attorneys' fees," granting the examiner authority to examine documents relating to task, concluding that the seventy page report of the examiner showed a "professional approach to [a] laborious task," basing authority under Rule 54(d)(2)(D) rather than under special master authority of Rule 53, and reviewing \textit{de novo}, but refusing to adopt the report of fee examiner), affd, 148 F3d 283, 330 (3d Cir 1998) (noting that the fee examiner found the ninety million dollar fee to be reasonable and fair and that this fee and the appointment of the examiner were both challenged by an attorney objector who was later sanctioned for his behavior). Rule 54(d)(2)(D) specifically empowers the district court to, by local rule, establish procedures to resolve attorneys' fees battles "without extensive evidentiary hearings" and to refer attorneys' fee issues to a special master. FRCP 54(d)(2)(D). It appears that the district judge in this case appointed an adjunct without using a designated special master or a particular local rule and, instead, may have been relying on unspecified inherent powers.} Judge Pointer appointed special guardians for subclasses in the silicone gel breast implants litigation.\footnote{\textit{Coffee}, 95 Colum L Rev at 1420, 1406 (cited in note 1) (stating that breast implant settlement was "negotiated in a virtual fishbowl of public disclosure and debate").} Judge Lifland appointed a legal representative that he alternatively referred to as a guardian, amicus curiae, or
examiner to represent future claimants in the Johns-Manville Corporation bankruptcy.\(^{279}\)

The selection of court-appointed guardians to represent the interests of absentees in the landmark notice case of Mullane illustrates early judicial use of the technique of appointing a guardian for a class.\(^{280}\) In Mullane, New York legislation permitted the creation of common trust funds comprised of small and moderate sized trusts to take advantage of scale economies in trust administration.\(^{281}\) New York law required the trust companies to hold periodic accountings of their trust administration to provide a degree of closure to settle the accounts.\(^{282}\) In these actions, the plaintiff trust company would seek judicial approval of its work. In the Mullane litigation, no other parties appeared, and the court appointed Kenneth Mullane as the guardian and attorney for income beneficiaries and James Vaughn as a guardian for principal beneficiaries.\(^{283}\) Mullane challenged the jurisdiction of the court and the notice to those beneficiaries with known names and addresses.\(^{284}\)

While Mullane was not filed as a class action, it certainly involved aggregative techniques. The accounting actions mandated under New York law worked an effect much like a defendant class action. The trust company was required to file a lawsuit, and the only possible adversary parties were the set of beneficiaries of the trust. The court was required by the legislation to ap-

\(^{279}\) See *In re Johns-Manville Corporation*, 36 Bankr 743, 757–59 (S D NY 1984) (noting a court's power to appoint a guardian where there is an immediate need to determine the rights affecting unknown parties).

\(^{280}\) 339 US at 315 (holding that use of publication notice to notify out of state beneficiaries of pooled trusts violated due process).

\(^{281}\) 2001 NY Laws § 100-C.

\(^{282}\) Id.

\(^{283}\) Presumably, the court appointed two guardians because of the potentially antagonistic positions of the income and principal beneficiaries. If the income beneficiaries failed to claim income that was rightfully theirs, the principal beneficiaries would see their investments increase. In other words, the latter group would be better off if notice to income beneficiaries was deficient. Judicial appointment of guardians for any income or principal beneficiary having an interest in the accounting of the trust was mandated by statute. See 2001 NY Laws § 100c(6); *Mullane*, 339 US at 310 (stating that two guardians were appointed pursuant to a New York common trust fund legislation). The guardian for the principal beneficiaries had a second reason to not challenge the adequacy of notice because New York law allowed the expenses of trust administration to be taken out of the trust corpus and were thus payable from principal. See Richard D. Freer and Wendy Collins Perdue, *Civil Procedure: Cases, Materials and Questions* 164 (Anderson 3d ed 2001) (citing *In re Bank of New York*, 67 NY 2d 444, 448 (1946); *In re Continental Bank & Trust Co*, 67 NY 2d 806, 807 (1946).

\(^{284}\) Freer and Perdue, *Civil Procedure* at 311.
point guardians. The income and principal beneficiaries were really subclasses, and those likely to complain about the trust administration were close to the position of class action objectors. In Mullane, counsel for the objector was complaining about the lack of information in the class action notice. It is interesting—and probably not accidental—that Justice Jackson's Mullane opinion referred to the “interests” of the beneficiaries of the trusts and asserted that the “individual interest does not stand alone but is identical with that of a class.” While not technically a class action, the Mullane holding represents an early success story of aggregative justice demonstrating that a court-appointed attorney guardian can monitor the behavior of an alleged fiduciary. It is a classic example of a court making use of a legislative scheme to resolve a predictable monitoring problem in advance and to make use of adjunct powers to enlist additional help in the difficult task of monitoring. Mullane also provides evidence that a guardian can monitor effectively and is not necessarily impotent, despite a structural lack of symmetrical information about the litigation at the time of appointment.

The theory of appointing a guardian ad litem is deceptively simple. The guardian will represent the interests of the absent class members and thereby monitor the behavior of class and defense counsel during settlement negotiations. The thrust of the guardian’s work in the class action context is to create a fuss regarding a potentially unfair class action settlement. The guardian constitutes a sort of adversary substitute by providing a degree of adversary proceedings often lacking in class actions. The guardian takes up the devil’s advocate role as an aid to provide a

285 See 2001 NY Laws § 100c(6) (requiring appointment of guardian for beneficiaries who have an interest in the accounting of the common trust fund).

286 See Mullane, 339 US at 311.

287 Id at 319 (emphasis added). Justice Jackson also used class action language helpful to the 1966 revision of Rule 23 when he said that notice “reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all.” Id. This language forms the present analytic basis for not requiring universal notice in all types of class actions.


289 See, for example, Cooper, 40 Ariz L Rev at 950 (cited in note 134) (advocating a role for guardians aiding the court in evaluating the fairness of a proposed class action settlement).
voice to the court. In Professor Cooper's words, it “may be desirable to appoint some form of independent representative for the claimants that is distinguished from [class counsel].” Similarly, Professor Resnik has urged that “judges will have to turn settlement hearings into a closer approximation of adjudication than they have in the past.” Presumably, the guardian will monitor the performance of class counsel and take care to publicize any sweetheart deals.

In one variation of the guardian concept, the guardian does not represent a party, but is an adjunct to the court and prepares a written report evaluating a proposed settlement. This variant recognizes that a guardian ad litem is conceptually an officer of the court under the court’s supervision and control. Without the “guardian” concept, courts have appointed special masters to aid in formulating class action settlements.

*Haas v Pittsburgh National Bank* is illustrative of the idea that the court appoints a guardian ad litem to represent the interests of absent class members. In *Haas*, the court—responding to an attorneys’ fee petition by class counsel—unilaterally selected a guardian ad litem for the class and was immediately confronted with class counsel’s motion to vacate the appointment. In summarily denying the motion to vacate, the court reasoned that the appointment filled a void created by the

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290 See Sylvia R. Lazos, Note, 84 Mich L Rev at 328 (cited in note 288) (setting out need for a “devil’s advocate” to aid the court in evaluating a proposed settlement and urging that the mediator play a mediating role in helping the parties reach a compromise).

291 Cooper, 40 Ariz L Rev at 950 (cited in note 134) (advocating that the “settlement process can be structured by the court by designating a variety of participants who must be heard”).


293 Lazos, Note 84 Mich L Rev at 329 (cited in note 288) (calling for a written report to the court listing the strengths and weaknesses of each side’s case).

294 See generally, Note, *Guardians Ad Litem*, 45 Iowa L Rev 376, 386–87 (1960) (defining a guardian ad litem as one appointed for the limited purpose of representing a party under “disability” and stressing that the guardian ad litem is an officer of the court who acts “under the close control and supervision of the court”).

295 See, for example, *McLendon v Continental Group, Inc.*, 749 F Supp 582, 612 (D NJ 1989) (appointing Professor George Priest as a special master in an ERISA class action involving an alleged plan to avoid pension liabilities, with specific direction that the special master was to assist parties in settlement and to aid in determining the amounts due to the class members).

296 77 FRD 382 (W D Pa 1977).

297 Id at 383.

298 Id.
defendant’s “total indifference” to the fee request of class counsel and allowed the judge to stay impartial and avoid playing the role of devil’s advocate regarding the propriety of the fee request. The court emphasized that the input of the guardian would create a true adversarial proceeding, essential in a small stakes class action where, “not surprisingly, there is normally no class member participation.”

Individuals appointed to be guardians *ad litem* in a class action should possess the stature and expertise essential to monitor a proposed class action settlement. They surely have greater monitoring potential than the typical absent class member. Particularly in class actions involving substantial stakes, appointment of a guardian or special master should be given careful consideration to ensure that some sort of adversary consideration of the proposed settlement is provided to the court.

My enthusiasm for the promise inherent in a more systematic appointment of guardians to aid the class action approval process should not be taken as an unqualified endorsement. The lack of information and the timing of a guardian’s appointment could present problems. Assume that a trial court appoints a guardian for a subclass after a proposed settlement has been negotiated. The guardian appointed may lack any knowledge about the dispute itself or the settlement negotiations. The guardian will usually be playing information catch-up when compared to the defendant and class counsel’s much greater knowledge about the settlement. It may be too much to hope that the information disadvantage of the guardian can be overcome by expertise and the very best of intentions. It is difficult to imagine that a court-appointed subclass guardian could negotiate knowledgeably soon after appointment. Guardians need to be appointed early in the process and must be afforded access to necessary information.

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299 Id at 383.

300 Haas, 77 FRD at 383. See also *Miller v Mackey International, Inc*, 70 FRD 533, 535 (S D Fla 1976) (appointing a guardian to allow the court to stay neutral over the objection for class counsel, reasoning that appointment is appropriate “where there is litigation between a guardian and a ward—herein, the attorneys for the class and the class,” and basing power to appoint within inherent scope of Rule 23(d)).

301 See, for example, Brian Wolfman and Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 NYU L Rev 439, 480 (1996) (noting that the court appointed a guardian in *Ahearn* too late because the proposed settlement bargaining had already occurred and advocating a “requirement that future class members always have separate representation during the original settlement negotiation process”). Compare Coffee, 95 Colum L Rev at 1446 (cited in note 1) (pointing out that the
The guardian’s position should be compared to that of the ultimate class action guardian—the trial judge who must somehow evaluate the fairness and efficiency of the class action settlement. The existing literature seems uniformly negative on the court’s ability to monitor class action settlements effectively. Evaluating settlement fairness is a demanding task and one for which courts are ill equipped and have little experience. Yet, the sitting district judge who has presided over the class action would seemingly know more about the case and the attorneys than the guardian appointed to assist in monitoring would know. The court would have spent time and effort getting to know the issues and counsel in the class action. In contrast, the guardian often comes in to the case far too late and inevitably is in an inferior position from an informational perspective. At worst, the routine appointment of guardians to consider objecting to proposed class action settlements might institutionalize the passing of the buck from the trial judge, who is to scrutinize the possible settlement, to an uninformed guardian who is beholden to the judge.

There have been times when a guardian could aid the monitoring process, as illustrated by the Ahearn litigation and the strategic appointment of a guardian ad litem for the class in selective fee applications. The guardian can be an effective monitor when appointed in a timely fashion (prior to a key settlement negotiation, rather than after it has occurred, where the guardian has a carefully focused and narrow task, and is afforded access to relevant information). Some ability to take limited discovery seems essential for the guardian to play a positive role. This, of course, means that to be effective, the guardian needs resources to finance the necessary discovery.

guardian ad litem for future claimants is not adequate “because a guardian is not in a position to negotiate the settlement’s terms”).

302 See text accompanying notes 15–16; Coffee and Koniak, Latest Class Action Scam, Wall St J Section A11 (cited in note 15) (questioning the incentives of the district judge to adequately resist parties who want to settle class actions and who are advancing a specific proposed settlement and asserting that the judge has “too little information to recognize when the settlement is collusive”); Lazos, Note, 84 Mich L Rev at 321 (cited in note 288) (explaining that the lack of an adversary contest at a typical fairness hearing “forces the court into an unjustified passivity” because usually the court lacks a devil’s advocate and information).

303 See Hensler, Class Action Dilemmas at 486–87 (cited in note 39) (stressing the lack of guidance available to judges who must evaluate class action settlements); Bainbridge and Gulati, 51 Emory L J at 139–40 (cited in note 15) (noting the bounded rationality of judges supervising complex litigation).

304 See Wolfman and Morrison, 71 NYU L Rev at 480 (cited in note 301) (noting the appointment of a guardian in Ahearn litigation).
The guardian ad litem might be seen as an adjunct to an Article III judge, selected to represent the interests of a subclass of class action absentee. A guardian is a type of court-appointed objector. There may be other judicial adjuncts that can play a similar role in monitoring class action settlements. For example, the court might appoint a special master, appoint a guardian who answers to the district judge, or assign a federal Magistrate Judge to supervise the settlement process. Judge Robert E. Jones appointed a special master to supervise the administration of the settlement in the oriented strand home siding litigation. Judge Lifland appointed an adjunct representative of future claimants to the Johns-Manville bankruptcy case without settling on a formal title, suggesting that the appointment could be done as a guardian, amicus curiae, or an examiner. District judges have appointed special masters to help adjudicate facts in class actions. Alternatively, district judges can appoint their own expert witnesses under Federal Rule of Evidence 706. Guardians should be considered a part of the procedural weaponry available to the busy trial judge seeking impartial information in order to decide whether or not a class action settlement is fair.

Judicial adjuncts and appointed guardians ad litem are not interchangeable. Each occupies a unique and distinct position in terms of their ultimate allegiance in a class action. The appointed guardian in Ahearn represented the interests of future claimants. Although the guardian’s court supervision might create a potential conflict in roles, he owed a fiduciary obligation to those represented. Owing a duty to this specific set of absent class members or to a subclass is far different than the position of a special

305 US Const, Art III (outlining the powers of the federal judiciary).
306 See Hensler, Class Action Dilemmas at 360–63 (cited in note 39) (describing the appointment of former Oregon Supreme Court Justice Richard Unis as special master to manage the administration and implementation of the many features of the claims brought under the settlement).
307 See In re Johns-Manville Corp, 36 Bankr 743, 759–60 (S D NY 1984) (suggesting that terming the legal representative an “examiner” was consistent with § 1104(b) of the Bankruptcy Code, but also was limited by scope of the bankruptcy reorganization context).
309 See Hensler, Class Action Dilemmas at 495 (cited in note 39) (urging that federal judges seek assistance in evaluating the quality of settlements and pointing out their authority to appoint their own experts under Rule 706).
310 See Note, 45 Iowa L Rev 387 (cited in note 294) (taking the position that the guardian ad litem acts in a fiduciary capacity and has a general duty to represent the ward).
master, whose ultimate principal is the district judge.\textsuperscript{311} A judicial adjunct such as the fee examiner in the \textit{Prudential Insurance} MDL litigation reports to the judge in a way consistent with the special master paradigm.\textsuperscript{312} While his work might benefit absentees, he owes no duties to the class members. This is not to suggest that the fee examiner cannot be helpful to absent class members. I merely point out that these public sector generic guardians each occupy a different structural position in terms of their ultimate loyalties. There may even be situations where the court could profit by appointing both a guardian to represent the absent class members and a special master to help put together a more appropriate settlement. There is no reason that these devices need to work in isolation, and there can be advantages to their use in tandem.

\section*{Conclusion}

Class action objectors have a bad reputation. Some theorists posit that they are claim jumpers who free ride off of the efforts of the original class counsel, who has researched the case’s legal theory, entered into a time-consuming relationship with a client, gathered and assessed facts underlying the claim, and filed suit. The objector free-riding story is made even worse because class action objectors effectively poach the considerable time and effort spent by class counsel and defense attorneys negotiating a proposed settlement. The clients of class action objectors have minimal ability to monitor the performance of their attorneys. Conditions for collusion are great in the class action objection context. Class action mythology suggests that there is a cadre of professional objectors who regularly and systematically seek extortionist buyouts by the class and defense counsel. In return for a payoff to the objecting lawyer, it is agreed that the objection will be withdrawn or that a notice of appeal will be retracted. In this story, the overworked and all too human judge sits passively, only too happy to see the objection go away, or blissfully unaware that a threatened objection was ever registered.

\textsuperscript{311} See FRCP 53(c) (allowing the trial court to circumscribe the powers of a master); Charles A. Wright and Mary K. Kane, \textit{Law of Federal Courts} 701–02 (6th ed 2002) (stressing the “extensive power” of an Article III judge over litigation).

\textsuperscript{312} The fee examiner in this case, Stephen Greenberg, submitted a Report and Recommendation to the trial judge about three months after Greenberg’s appointment. \textit{Prudential Insurance}, 148 F3d at 330.
This review of the activities of class action objectors suggests that some of the above story is true. Some objectors—perhaps the least popular parties in the history of civil procedure—have earned their reputation. A major theme of this Article, however, is that not all class action objectors have behaved badly or provided unproductive input. There often appears to be little or no objection activity. Moreover, some courts have gone out of their way to praise the input of class action objectors for shedding new light on issues and providing an adversarial contest, rather than the silent, private settlement dance that all too often characterizes a class action settlement. Sometimes, courts stir up objections by appointing guardians for subclasses. States and public interest groups often raise objections to class action settlements that bear little resemblance to the extortion scenario. These public sector objectors march to the beat of a different drummer in their motivation and they bring to the case specialist attorneys better able to monitor the performance of the attorneys who have negotiated a class action settlement. The normal agency cost criticisms of class action objections seem less severe for these public sector objectors.

Recent developments cast objectors in a more positive light. Both the proposed amendments to Rule 23 and recent case law value the input of class action objectors and seemingly ignore the free-riding extortionist story. The proposed amendments to Rule 23 are designed to strengthen the problematic process of settlement review. The right to object seems firmly enshrined in view of the likely approval of proposed Rules 23(e)(4)(A) and 23(h)(2), granting both a general right to object to an absent class member and a more specific right to object to attorneys fees. Once made, objections will need court approval to be withdrawn under proposed Rule 23(e)(4). Devlin's approval of appeals by objectors and Judge Posner's Reynolds opinion—justifying an award of attorneys' fees to those objectors who provided beneficial input—provide more good news for objectors. These developments are buttressed by the endorsement of class action objectors in the influential Rand study of class actions.

A more balanced reaction to class action objections is needed. The nature of a class action objection is analytically similar to the

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313 See Committee Note, 201 FRD at 617 (cited in note 38) (stating that the amendments to Rule 23 are "to strengthen the process of reviewing proposed class-action settlements").
314 See FRCP 23(e)(4).
procedure of intervention. Courts have cobbled together an efficient and fair solution to intervention in civil cases. Proposed intervention is granted only when it is likely to be helpful to a court.\footnote{See Brunet, 12 Ga L Rev at 738 (cited in note 41); see also, Natural Resources Defense Council, Inc v Tennessee Valley Authority, 340 F Supp 400, 408–09 (S D NY 1971), rev’d on other grounds, 459 F2d 235 (2d Cir 1972) (noting the ability of proposed intervenor to clarify issues presented in the litigation).} Duplicative intervention motions are denied, but potentially beneficial intervention requests—those that can enhance judicial output or accuracy—are granted.\footnote{See Part II.}

Policy relating to objectors may be headed in the right direction—that of using a neutral screening approach, much like intervention, to assess the class action objector. Class action objectors can hurt or help litigation, much like intervenors.\footnote{See Brief for Respondents, Deulin v Scardelletti at 31 (pointing out that the "reality of the matter is that objectors to class action settlements come in all different shapes and sizes: some retain legal counsel and make a substantial commitment of time, energy and resources to the process, whereas others do not retain legal counsel and are content to file a piece of paper containing some variant of 'I object' or 'This is a terrible deal'").} Whether objectors receive attorneys’ fees will have a significant influence on the nature and degree of potentially counterproductive class action objection activity. Courts should adopt an approach that strictly evaluates the input of objectors to determine if it is of significant value in relation to the information already in the case. District judges need the discretion to deny any attorneys’ fee request of any objector that does not genuinely help the case. Like intervention petitions, class action objections should be viewed as neutral and screened carefully before they are rewarded, but not dismissed out of hand because of a fear of free riding.

Figure 2 depicts an imperfect, but improved, modern positioning of objectors and judges.
The objectors are far closer to the settlement process than in Figure 1. They have access to settlement information from the potential discovery they can reap. Objectors also have the leverage of the Devlin case that should net them increased respect from class counsel and defendants, who now must consider objectors as players in the class action settlement process. Figure 2 places the trial judge at the top of the settlement triangle. Admittedly, the judge is still not within the triangle as a party to the settlement negotiations. Such a development is impractical and potentially unwise because the nature of judging requires some degree of distance from the parties—who must necessarily hold great incentives to settle and who need significant information to craft a fair and durable settlement. Unlike Figure 1, the court in Figure 2 is closer to the process, at the very apex of the settlement triangle. The modern judge receives additional input from the class action objector. Just as important, the potential of appeals by dissatisfied class action objectors, created by Devlin, gives the court the incentive to provide objectors a day in court and a further incentive to participate meaningfully in the class action settlement in order to avoid the possibility of reversal. In short, the structure of class action settlements, while admittedly still imperfect, is improving due to a confluence of the doctrines in Devlin, changes in Rule 23, appellate decisions giving objectors additional clout, and the presence of a new breed of public sector objectors.