THE FAIRNESS HEARING: ADVERSARIAL AND REGULATORY APPROACHES

William B. Rubenstein*

At the conclusion of every class action lawsuit, a judge must hold a fairness hearing to assess the reasonableness of the outcome. The fairness hearing contains the promise of providing real monitoring of class counsel. In practice, it has not fulfilled this promise and scholars have largely, therefore, forsaken it. In this Article, William Rubenstein provides a sustained investigation of the fairness hearing, arguing that since it will inevitably take place, we ought to perfect not abandon it. To that end, he explores four types of mechanisms that might assist the judge at the fairness hearing: a devil's advocate, *employed by the court to argue against the settlement;* bonds, *posted by the settling parties and used to pay the attorneys' fees of private objectors who raise valid concerns;* labels, *like food nutrition labels, compelled by a public agency to provide more transparency to the elements and quality of the settlement; and* certification marks, *like the Good Housekeeping Seal of Approval, created by an independent private group to signal class members and judges as to the adequacy of the settlement terms.*

Examining this new set of disparate proposals enables an assessment of the underlying question of institutional design: namely, whether adversarial or regulatory, public or private, approaches are likely to be most efficacious at identifying and curtailing problematic settlements and hence controlling class counsel. Given that at a fairness hearing a judge is charged with reviewing two distinct sets of concerns—the process by which the settlement was achieved and the content of the settlement in light of the strengths or weaknesses of the plaintiffs' claims—Professor Rubenstein concludes that these roles require a combination of adversarial and regulatory approaches. For review of the substance and value of the class's legal claims, adversarial presentation of issues is the preferred procedure and a judge the favored decisionmaker. For review of the settlement process, investigatory oversight is the needed procedure and an administrative inquisitor the ideal agent. The proposed settlement of a class action should trigger a two-part process involving both a judicial

* Professor of Law, UCLA School of Law. I would like to thank Stephen Bainbridge, Mark Grady, John Leubsdorf, Richard Nagareda, Seana Shiffrin, and Steve Yeazell for helpful ideas and comments on earlier drafts; Lora Cicconi, Justin Johnson, Aaron Lowenstein, and Andrew Spitser for research assistance; and Matthew Butterick for perfecting the graphics. Kim Svendsen assisted in the preparation of an early version of one part of this Article and provided very useful insights on this one. I also received excellent feedback from participants at the UCLA Law Review Symposium on January 26, 2006, and generous cooperation from the *UCLA Law Review* staff in facilitating the completion of the Article. I am especially indebted to my colleague Gary Rowe for enabling me to see the theoretical framework for this project.

assessment of the value of the claims and a regulatory assessment of the process of settlement. Such an enriched proceeding holds the promise of providing meaningful constraints on class counsel.

INTRODUCTION

Everyone agrees that class action lawyers must be kept in check, but no one knows quite how to do it. The goal is to identify procedural rules that will encourage plaintiffs' attorneys to file cases when individual litigation externalities justify representative litigation,[1] but that will simultaneously discourage the agency problems—particularly strike suits and sell-out deals[2]—that afflict class litigation. The ideal mechanism would provide real supervision of class action

1. *See* William B. Rubenstein, A General Theory of the Class Suit (Apr. 1, 2006) (unpublished manuscript, on file with author).

2. *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000).

attorneys without stifling their entrepreneurial instincts. During the past two decades, scholars have nominated a variety of candidates to serve as that ideal.[3] These proposals generally fall into two categories: private market-based mechanisms meant to monitor class counsel throughout the proceedings and public court-focused mechanisms meant to strengthen judicial oversight at the moment of settlement. Despite the range and ingenuity of these proposals, agency issues persist. And their persistence bleeds over into beguiling doctrinal and theoretical questions investigated in a second strain of class action scholarship concerning whether and when later courts should revisit counsel's adequacy collaterally.[4]

The bridge linking the agency-cost literature's concern with monitoring class counsel and the collateral-attack literature's concern about revisiting this monitoring is the peculiar juridical moment known as the fairness hearing.[5] I have elsewhere argued that class action lawsuits are transactions in which absent parties' rights to sue are traded for finality.[6] But, like a same-sex couple attempting themselves to reproduce, the buyers and sellers of finality cannot alone produce the bartered product: Given that the purchase of preclusion is the key aspect of the deal, at the end of every class action lawsuit, of any type or any size, in any court in any state, under any given body of law, invariably lies a person named a judge—the only actor capable of providing finality—holding a proceeding called a fairness hearing.[7]

---

3. *See infra* Part I.

4. The rich vein of recent scholarship on this subject includes: Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998); Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219; Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765 (1998); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383 (2000); *see also* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974).

5. On the peculiarity of the fairness hearing, see William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 413 (2001) (noting that the fairness hearing approximates what Lon Fuller labeled "contract parasitic on adjudication") (citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 408–09 (1978)).

6. *See generally id*.

7. In federal class actions, a "court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(1)(C). The required settlement hearing is referred to as the "fairness hearing." *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.634, at 322 (2004) [hereinafter MANUAL] (describing "fairness hearing"). Most state class actions track this process. *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 791 (4th ed. 2005) ("To provide additional protection for absent class members, most class-action provisions specifically require court approval of any compromise or dismissal of the class claims arranged by the parties.").

Nonetheless, both strands of scholarly literature have essentially given up on the judiciary's ability to provide real class action oversight; indeed the literature is largely motivated by this failure. Market-focused scholars locate monitoring outside of the judiciary and then rarely ponder what effect their proposals ought to have on the fairness hearing that will inevitably take place; it appears implicit that if the monitoring mechanism works, it does not really matter what the judge does at the end of the show, so long as she simply lowers the curtain. Court-focused scholars emphasize judicial oversight, but their proposals are therefore confined to familiar judicial mechanisms like special masters and guardian ad litem, mechanisms that inspire hopes for success akin to those with which one attends a grade school production of, say, *Hamlet*. The collateral-attack literature, having seen that show, looks away, vesting its hopes in the idea that the second act will be better than the first, despite the fact that the cast and stage remain largely unchanged.

Rather than averting our gaze from the first act, tempting as that may be, we should, I argue, give the inescapable fairness hearing more, not less, attention. To that end, I explore in depth four (more or less) new mechanisms that might assist the judge at the fairness hearing. These are:

> *The Devil's Advocate*. When a class action settlement is proposed, the court could appoint a "devil's advocate" to argue against the reasonableness of the settlement or fee, thereby using public funds to ensure an adversarial fairness hearing.[8]
>
> *Bonds*. When a class settlement is proposed, the settling parties could be required to post a bond with the court. The bond could be utilized as security so that if the settlement failed to win approval, the bond would be forfeited; more modestly, the bond could be used to pay the attorneys' fees of objectors who brought reasonable concerns to the court's attention. Both versions utilize market incentives to monitor class counsel.[9]

---

8. This concept has been in the scholarly literature for quite a while. *See, e.g.*, Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 128 (2003); Sylvia R. Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 322 (1985). John Leubsdorf also proposed a version of it to the federal Rules Advisory Committee a decade ago. *See* John Leubsdorf, Statement at the Public Hearing on Proposed Amendment to the Federal Rules of Civil Procedure 9 (Nov. 22, 1996) (transcript on file with the author). Nonetheless, the idea has never been fully explicated, much less tried.

9. Rhonda Wasserman has proposed that settling parties post a bond to "cover the costs of a court-appointed advocate." Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 529 (2000). Professor Wasserman's proposal provides a funding mechanism for Professor Leubsdorf's paid-objector idea. *Id.* Geoffrey Miller employs the concept of bonding in the context of suggesting that competing counsel be permitted to bid for lead-counsel rights at the moment of settlement, so long as they post security to ensure that the class will not be worse off by the substitution. Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633, 639–40 (2003);

> *Labels*. A public agency could passively require that class action settlements be labeled with a simple chart identifying their key characteristics, much like the Food and Drug Administration requires food to be labeled. Alternatively, a public agency could actively investigate, assess, and label class action settlements with a grade, like health departments rate restaurant sanitation. Or a public agent could simply review and report on the nature of the settlement, like a probation officer reports sentencing facts. Any of these approaches would help make more transparent to courts and class members the elements and quality of the settlement.[10]
>
> *Trademarks*. A private independent agency could register a certification mark, similar to the Good Housekeeping Seal of Approval, and provide that mark to class action settlements meeting its guidelines. Such a mark would, like its public counterpart, signal to class members and judges the quality of the settlement terms.[11]

The devil's advocate and bonding ideas are, respectively, public and private adversarial approaches; the labeling and marking ideas are, respectively, public and private regulatory ideas.

Examining this new set of disparate proposals enables an assessment of the underlying question of institutional design: namely, whether adversarial or regulatory, public or private, approaches are likely to be most efficacious at identifying and curtailing problematic settlements and hence controlling class counsel. Given that at a fairness hearing a judge is charged with reviewing two distinct sets of concerns—the process by which the settlement was achieved and the content of the settlement in light of the strengths or weaknesses of the plaintiffs' claims[12]—I argue that these roles require a combination of adversarial and regulatory approaches. For review of the substance and value of the class's legal claims, adversarial presentation of issues is the preferred procedure

---

see also Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1108–09 (1996) (asking, in passing, "If the parties were required to post a bond to settle, would that not encourage frivolous objections?").

Alon Klement has proposed a more capacious form of private monitoring for common-fund cases that similarly employs market incentives, though without bonds. Professor Klement proposes auctioning off the right to provide a monitoring function throughout the lawsuit in return for a percentage of the fund. Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25 (2002).

10. Alexandra Lahav has proposed a set of settlement principles, one of which emphasizes disclosure, but which does not go so far as this in identifying the details. Lahav, *supra* note 8, at 118.

11. Ian Ayres and Jennifer Gerarda Brown have recently proposed a creative use of certification marks as a private method for eradicating sexual orientation discrimination. Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA With a Certification Mark* (Yale Law & Econ. Research, Paper No. 309, 2005), *available at* http://ssrn.com/abstract=712842.

12. *See infra* Part III.A.

and a judge the favored decisionmaker. For review of the settlement process, regulatory oversight is required and an administrative inquisitor the ideal agent. Thus, the proposed settlement of a class action should trigger a two-part fairness hearing, involving both judicial assessment of the value of the claims and regulatory assessment of the process of settlement.[13] Such an enriched proceeding holds the promise of providing meaningful constraints on class counsel—and thus, as I will argue elsewhere,[14] of also providing some insight into questions of collateral attack.[15]

I. BACKGROUND

A. The Problems Solved and Created by Class Actions[16]

Litigation in the United States is decidedly singular in character: A lawsuit is conceptualized as involving but one plaintiff, one defendant, and one cause of action. Addition of claims and parties, though liberally granted, must

13. Several scholars have identified the non-adversarial nature of class action fairness hearings. *See, e.g.*, Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983 (1999) (describing how, in class settlements, judges perform functions different than their adjudicative functions); Lahav, *supra* note 8, at 91 ("The judge's role in class actions ranges from the traditional responsibility to evaluate and determine cases, to the more modern responsibilities to manage the interaction of various actors, monitor agents, determine the extent of plaintiff participation, and encourage the case's resolution."); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2020 (1997) (stating that "judicial supervision of complex suits resembles administrative agency activity"); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 51 (2003) ("When judges review proposed class settlements . . . they perform a function dramatically different from the traditional adjudicative role . . . ."); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 291, 374 (2003) (stating that courts overseeing class action settlement "often find themselves not adjudicating an adversarial dispute so much as assuming a vaguely inquisitorial role"); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2159 (2000) (characterizing some mass tort settlements as meaning that courts are "in the business of providing contractual agreements with the imprimatur of 'judgments'").

However, none of these scholars has suggested bifurcating the fairness hearing by sending the nonconventional, nonjudicial functions of settlement to a nonjudicial actor; instead, their proposals generally focus on enabling better judicial review of these aspects of the settlement.

14. *See* William B. Rubenstein, The Availability of Collateral Attack on Adequate Representation Findings in Class Action Cases (July 1, 2006) (unpublished manuscript, on file with author).

15. Richard Nagareda has also attempted to "build a bridge between writing on collateral attacks on class judgments and that on the problem of adequate class representation more broadly," using a combination of market and regulatory methods. Nagareda, *supra* note 13, at 367.

16. The problems solved and created by representative litigation are oft repeated and need not be rehearsed at length once again. For an overview, see, for example, Koniak & Cohen, *supra* note 9, at 1102, 1122. This review attempts instead to situate the many proposals addressing class action agency problems that have emerged in recent scholarship.

comply with joinder rules.[17] Representative litigation is a device employed to address collective-action problems in the adjudicative arena, or, in other words, to overcome the externalities of individual litigation.[18] Yet representative litigation creates its own independent problems, particularly those arising out of the principal-agent relationship between class counsel and class members.[19] As individual claims are often small, class members have little incentive to monitor their agent. They also lack the expertise that would enable them to do so. The unmonitored agent can therefore engage in at least two types of problematic behaviors. First, class counsel may do too little, settling the class

17. *See, e.g.*, FED. R. CIV. P. 13, 14, 18–20.

18. *See* Rubenstein, *supra* note 1. Rule 23(b)'s categories can be explained by reference to this goal. In a limited-fund situation, individual litigation depletes the defendant's resources, harming later filers. In injunctive situations, individual litigation creates a remedy with spillover effects on nonparties. In mass-harm situations, individual litigation threatens the legal system with overload. And in small-claims cases, individual litigation results in too few, not too many, lawsuits, consequently underproducing the positive externalities of litigation. *See* William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709 (2006). Representative litigation serves important social functions by controlling the externalities of individual litigation.

19. These agency problems have plagued representative litigation for centuries, as the U.S. Supreme Court recognized some sixty years ago in discussing equity's historic treatment of shareholder derivative actions:

> Unfortunately, the remedy itself [of representative litigation] provided opportunity for abuse, which was not neglected. Suits sometimes were brought not to redress real wrongs, but to realize upon their nuisance value. They were bought off by secret settlements in which any wrongs to the general body of share owners were compounded by the suing stockholder, who was mollified by payments from corporate assets. These litigations were aptly characterized in professional slang as "strike suits."

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1948). *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

John Coffee's work, starting in the early 1980s, recharacterized these issues as principal-agent problems and demonstrated how much of class action law could be viewed through this particular economic lens. *See, e.g.*, John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 435–36 (1981); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 235–36 (1983); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 12 (Summer 1985); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 704–12 (1986) [hereinafter Coffee, *Understanding*]; John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 640–43 (1987) [hereinafter Coffee, *Rethinking*]; John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1398 (1995) [hereinafter Coffee, *Class Wars*]; John C. Coffee, Jr., *Conflicts, Consent, and Allocation After* Amchem Products*—or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541 (1998); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000). The wisdom of Professor Coffee's analysis is primarily responsible for focusing subsequent scholarly debate around these concerns and for reframing it in these terms.

members' claims for less than their real value in exchange for quick and substantial fees (a sell-out or sweetheart deal). Second, class counsel may do too much, filing meritless cases in the hopes of extracting nuisance fees (a strike suit).[20]

In short, class action lawyers are agents without principals. While they perform a valuable social function, they also possess the capacity to abuse their position either by selling out their principals or by extorting their adversaries.

B. Inadequate Solutions to the Class Action Agency Problem

Class action law has long struggled to find ways to control counsel. Potential monitors include class members and class representatives; judges; defense counsel; government agencies; private objectors; public interest groups; and court-appointed guardian ad litem.

1. Class Representatives and Class Members

Class members generally are not meant to appear and monitor class counsel—the class action is a form of representative litigation wherein their class representatives are supposed to provide this service for them. Class members' passivity and absence is expected; indeed it provides much of the justification for aggregate treatment of their claims in the first place.[21] Though class members retain the right to appear and contest settlements or appeal judgments of which they disapprove,[22] it is a rare class member who does so.[23] They typically have little at stake and little expertise that would enable them to play a monitoring role.[24]

---

20. Hay & Rosenberg, *supra* note 2, at 1377–78. Although the strike suit and sweetheart deal both raise concerns about the incentives of plaintiffs' attorneys,

> they actually present quite distinct problems. Class members, in theory, care little about the strike suit (except perhaps morally) because they gain something from the defendant, even after attorneys' fees, for a meritless case. By contrast, class members ought to care a lot about a sell-out because they lose the value of their worthy case to their greedy attorneys. Placing more control in the classmembers' hands might help remedy the second problem, but would help remedy the problem of strike suits only if the plaintiff monitors act altruistically, or with a market perspective that exceeds the short term gains available even in a meritless strike suit.

Rubenstein, *supra* note 5, at 397 n.120.

21. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812–13 (1985).

22. *See, e.g.*, FED. R. CIV. P. 23(e)(4).

23. *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (reporting that less than 1 percent of class members opt out of class action settlements and only about 1 percent object to them).

24. *See, e.g.*, Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co., 834 F.2d 677, 681 (7th Cir. 1987) (stating that "ordinarily the unnamed class members have individually too little at stake to spend time monitoring the lawyer").

Class representatives are those few class members who have been selected out of the group precisely to, among other things, monitor class counsel. But little distinguishes them from their fellow class members in terms of incentive or expertise.[25] Class counsel typically identify class actions, select the class representatives from among their client pool or potential client pool,[26] and then largely ignore the class representative thereafter.[27] The fact that the agent creates the principal, and not vice versa, immediately suggests the agency problem that will follow. Worse, class counsel's selection of class representatives is generally not based on any special expertise particular class members might possess that would enable them to monitor effectively; indeed, the representative's interests must be "typical" of those of the class,[28] so certification incentives counsel against skilled representatives.[29] Finally, class representatives are typically only nominally compensated, so they lack a financial incentive to undertake their monitoring function.[30]

Scholars have identified situations in which class members might provide a monitoring function, and they have successfully proposed rules to effectuate at least one version of this idea. John Coffee originally identified this possibility, writing in the mid-1980s that, "if agency costs are to be reduced, the most effective monitor is likely to be the plaintiff who has the largest stake in the action."[31] Elliott Weiss and John Beckerman then developed the idea,[32] leading to its 1995 codification by Congress in the Private Securities Litigation Reform Act (PSLRA).[33] The PSLRA authorizes the class member with the largest financial stake to become the lead plaintiff and to select lead counsel.[34] This reform has spurred large institutional investors to take a more active role in securities litigation and to provide some oversight of class counsel. That oversight has not,

25. *See, e.g.*, Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165 (1990).

26. *See* Geoffrey C. Hazard, Jr., Lecture, *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1270 (1995) ("Counsel for a plaintiff class is usually the architect of the suit itself.") (citing Coffee, *Understanding*, *supra* note 19, at 681).

27. *See, e.g.*, Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 659–62 (1994).

28. *See* FED. R. CIV. P. 23(a)(3).

29. *See* Rubenstein, *supra* note 5, at 393.

30. *See* 35B C.J.S. *Federal Civil Procedure* § 1324, at 586 (2005); Jocelyn D. Larkin, The Impact Fund, Incentive Awards to Class Representatives in Class Action Settlements (May 2005), http://www.impactfund.org/pdfs/Class%20Incentives%20UPDATED.pdf.

31. Coffee, *Rethinking*, *supra* note 19, at 643.

32. *See* Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995).

33. Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

34. 15 U.S.C. § 77z-1(a)(3) (2000).

however, produced the reforms Congress likely desired—that large investors would take control of securities litigation and put an end to it, or at least put an end to hiring traditional plaintiffs' firms—nor is it clear what effect the PSLRA has had on either sweetheart or sell-out settlements.[35] Regardless, this form of oversight cannot be replicated for most other types of representative litigation, where the stakes are usually far smaller and the largest plaintiffs lack institutional incentives to monitor. For the same small-stakes reason, proposals to change class action governance by relying on class-member exit (opt-outs) are unlikely to succeed.[36]

These characteristics of the typical relationship between class members and class counsel give rise to the agency problem that drives the search for some other effective monitor.

2. Judges

The next most obvious check on plaintiffs' attorneys are the judges who oversee class action cases. Class action rules are structured to enable this oversight. First, the judge must certify the case for class treatment,[37] explicitly approving the adequacy of both the class representative[38] and class counsel.[39] Second, the judge must review the reasonableness of any proposed settlement and direct notice to the class members.[40] And third, the judge must approve the terms of the final settlement, reviewing any objections provoked by notice to the class.[41] If class action attorneys sell out their clients, the judge should perceive that the settlement does not live up to the value of the claims and reject it accordingly. Conversely, if class action attorneys file a frivolous case, the judge should perceive that the settlement is merely a nuisance payment, reject it for that reason, and dismiss the case.

In practice, neither of these events happens often. One reason might be, as several commentators have suggested, that there are simply no objective criteria by which the judges can accurately assess either the value or the process

35. *See* Klement, *supra* note 9, at 57 ("Experience since the enactment of the PSLRA proves that the legislation has failed to achieve its goal, as large institutional investors have rarely competed to be appointed lead plaintiffs."); *see also* James D. Cox & Randall S. Thomas, *Leaving Money on the Table: Do Institutional Investors Fail to File Claims in Securities Class Actions?*, 84 WASH. U. L.Q. (forthcoming 2006) (analyzing performance of institutional investors in securities cases).

36. For a good discussion of this issue, see Lahav, *supra* note 8, at 95.

37. FED. R. CIV. P. 23(c)(1)(A) (encouraging certification "at an early practicable time").

38. FED. R. CIV. P. 23(a)(4).

39. FED. R. CIV. P. 23(g).

40. FED. R. CIV. P. 23(e)(1)(A)–(B).

41. FED. R. CIV. P. 23(e)(1)(C).

of settlements.[42] Nonetheless, the law obligates them to make the best of this bad situation. But judges rarely hit that mark, either, for a second simple reason: They suffer from a remarkable informational deficit in the fairness-hearing process.[43] Because counsel for the plaintiff class and the defendant share an interest in obtaining court approval of the settlement, judges are unlikely to receive information that could be relevant to the fairness of the settlement from the parties themselves.[44] Judges are also unlikely to police class action attorneys for a third, independent, reason: They often have their own vested interest in seeing cases settle. Settlement removes the matter from the judge's docket, not an unimportant factor in a time of onerous caseloads;[45] moreover, the judge herself may well have brokered the class action settlement, giving her a vested interest in not seeing it upset.[46]

Proposals for reform aimed at the judicial function tend to focus on producing more information for the judge by enabling third parties—including objectors, government officials, court-appointed guardians, and public interest groups, among others—to step into the informational void and play an adversarial role.[47] I locate these proposals according to the particular third-party practice that they promote, below.[48] Sticking for the moment with the judicial function itself, some commentators have proposed that judges appoint magistrates, special masters, or guardian ad litem to perform some

42. *See, e.g.*, Hazard, *supra* note 26, at 1264 (discussing limits to courts' capacity to rationally assess the negotiation process); G. Donald Puckett, Note, *Peering Into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements*, 77 TEX. L. REV. 1271, 1279 (1999) (characterizing judicial review of proposed settlements as inherently futile).

43. *See, e.g.*, Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 808 (1997) ("Perhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action."); Klement, *supra* note 9, at 45–47 (describing informational problems); Wasserman, *supra* note 9, at 474 (same).

44. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46 (1991) ("[S]ettlement hearings are typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel.").

45. *See* Issacharoff, *supra* note 43, at 829 ("No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket."); Klement, *supra* note 9, at 47 & n.55 (describing and documenting federal-court overload); Richard A. Nagareda, *Turning From Tort to Administration*, 94 MICH. L. REV. 899, 968 (1996) ("[A] court exercising review under Rule 23(e) may have an incentive to rubber stamp a mass tort settlement simply to rid itself of such meddlesome claims.").

46. *See* Rubenstein, *supra* note 5, at 423–27.

47. For a good overview, see generally Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403.

48. *See infra* Part I.B.4–7.

aspect of that function at the moment of settlement.[49] This proposal surfaces in the *Manual for Complex Litigation* which instructs that, at the preliminary settlement stage, "the judge can have a court-appointed expert or special master review the proposed settlement terms, gather information necessary to understand how those terms affect the absent class members, and assist the judge in determining whether the fairness, reasonableness, and adequacy requirements for approval are met."[50] At the final settlement stage, the *Manual* provides as an example that "a judge might retain a special master or a magistrate judge to examine issues regarding the value of nonmonetary benefits to the class and their fairness, reasonableness, and adequacy."[51] Whatever help she gets, the judge herself is obligated to make the final determination. Perhaps for that reason, judges have only occasionally appointed special masters and generally have only done so to oversee a discrete aspect of a class action, not to evaluate the fairness of the settlement in full.[52] This is not surprising, as there is currently no recognizable type of special master with expertise in determining the reasonableness of a settlement.[53]

Although class action doctrine conceptualizes the judge as the critical check on representative litigation, in practice judicial officers perform this function only by default and rarely to a fault. It is this very failure that has provoked commentators either to suggest actors who can help provide information so as to make the judge more efficacious at the fairness hearing stage, or to look outside the judiciary for real oversight of class counsel.

---

49. *See, e.g.*, Lazos, *supra* note 8, at 329 (suggesting that a guardian ad litem assist the court by filing a written report identifying the strengths and weaknesses of the adversaries' positions); Jeffrey A. Parness & Daniel J. Sennott, *Expanded Recognition in Written Laws of Ancillary Federal Court Powers: Supplementing the Supplemental Jurisdiction Statute*, 64 U. PITT. L. REV. 303, 333 (2003) ("Special masters may be appointed under Federal Rule of Civil Procedure 53 in order to assist a federal judge in the administration of a complex or lengthy civil action. For instance, a master can be appointed to oversee class action discovery . . . .").

50. MANUAL, *supra* note 7, § 21.632, at 321.

51. *Id.* § 21.644, at 329 & n.995 (citing S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 22–23 (2000), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/MassTort.pdf/$file/MassTort.pdf).

52. *See, e.g.*, Georgine v. Amchem Prod., Inc., 157 F.R.D. 246, 306–08 (E.D. Pa. 1994), *vacated on other grounds*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997) (describing the role of special master in assessing the value of inventory settlements); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587–88 (10th Cir. 1961) (giving the special master power to calculate damages based on a fixed formula).

53. *See generally* Hazard, *supra* note 26.

3. Defense Attorneys

In *Phillips Petroleum Co. v. Shutts*,[54] the U.S. Supreme Court noted that defendants have an interest in ensuring that a class is adequately represented so that they may reasonably rely on the preclusive effect of a class judgment; inadequate representation renders the global relief that the defendants have purchased open to collateral attack.[55] That said, defense counsel are not likely to be an effective check on class action counsel in either sell-out or strike-suit situations. Defense attorneys cannot check the excesses of plaintiffs' attorneys in sell-out cases because, in these situations, defense attorneys make defensive use of the class action so as to settle all of their clients' claims in one fell swoop. By pitting plaintiffs' attorneys against one another, defense attorneys purchase finality at a bargain price.[56] Oddly, defense counsel fail to monitor class counsel in strike suits as well. The conventional account suggests that the defendants' fear of personal liability is so strong that they would rather settle than risk litigation,[57] although scholars have questioned the accuracy of this account.[58] Nonetheless, given that defense counsel are adverse to the class, there is no real hope that they themselves can provide adequate oversight of class counsel.

4. Government Monitors

Judges have always had the discretion to involve public agencies in class cases by requesting that a government agency knowledgeable in the relevant area of law, such as the Securities and Exchange Commission (SEC) in securities class actions, file a brief "to comment on the fairness and adequacy of the proposed Decree."[59] Judges have rarely taken advantage of this opportunity. Occasionally, state or federal agencies have voluntarily sought to participate

54. 472 U.S. 797 (1985).

55. *Id.* at 805.

56. Professor Coffee has characterized this process as one in which defense counsel create a "reverse auction." *See* Coffee, *Class Wars*, *supra* note 19, at 1370. On defendants' utilization of the class device to their advantage, see John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995); Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595 (1997); Wasserman, *supra* note 9.

57. *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357–60 (2003) (summarizing the conventional account of blackmail settlements).

58. *See generally id.*

59. S.F. NAACP v. S.F. Unified Sch. Dist., 576 F. Supp. 34, 48 (N.D. Cal. 1983); *see also* Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1176 (9th Cir. 1977) (noting that a Securities and Exchange Commission representative spoke in favor of the settlement at the fairness hearing); Brunet, *supra* note 47, at 410 n.32 (listing cases). *See generally* 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11:55, at 168 (4th ed. 2002).

in class action settlements to register their views with a court.[60] Nonetheless, public agencies have not performed in a universal manner that would suggest that they could provide regular oversight of class counsel.

It is curious, then, that in enacting the Class Action Fairness Act of 2005 (CAFA),[61] Congress appears to have vested its hope in government agencies to do just that. The Act requires defendants settling class actions in federal court to serve upon state and federal public officials all relevant documents in the case, and it bars federal courts from approving a settlement until the public agency has been given time to review these materials.[62] Oddly, however, the Act does not require that either the federal or state government agencies do anything. And there is little reason to think they will.

Extant public agencies are unlikely to provide comprehensive class action oversight for several reasons. First, no one such agency has any particular expertise in monitoring class counsel; specialized agencies like the SEC may have expertise as to securities law, but it does not necessarily follow that they possess any special skill in determining whether a class action settlement is fair or reasonable.[63] Second, no single specialized agency could monitor class cases across the board. Third, public agency involvement at the conclusion of the case—as mandated by CAFA—puts these agencies at an informational disadvantage not dissimilar to that facing the judge.[64] Finally, as discussed in more detail below, public agencies are prone to both political pressure and regulatory capture.[65]

5. Private Monitors or Objectors

Under current practice, parties that mount successful objections to class action settlements are generally entitled to a fee for their efforts. The odds of actually getting a fee, and the level of the award that follows,[66] are usually not

60. *See* Brunet, *supra* note 47, at 449–56.

61. Class Action Fairness Act of 2005 (CAFA) Pub. L. No. 109-2, 119 Stat. 4 (to be codified in scattered sections of 28 U.S.C.).

62. *Id.* § 3(a), 119 Stat. at 7 (to be codified at 28 U.S.C. § 1715).

63. *See* Brunet, *supra* note 47, at 452–53. Professor Brunet argues that an agency's substantive knowledge is enough to trump its procedural ignorance, particularly if the agency can consult on the procedural aspects of the class suit with experts in the field. *Id.* Yet he goes on to acknowledge that the most successful agency participation has occurred when state governments hired class action attorneys to represent them. *Id.* at 453–54. This underscores the strategic advantage of private monitors. *See infra* Part II.B.2.

64. *See supra* Part I.B.2.

65. *See infra* Part II.B.1; *see also* Brunet, *supra* note 47, at 453–56.

66. *See, e.g.*, Duhaime v. John Hancock Mut. Life Ins. Co., 2 F. Supp. 2d 175, 176–77 (D. Mass. 1998) (awarding class attorneys approximately $16.5 million and objector's attorney approximately $59,000); *In re* Horizon/CMS Healthcare Corp. Sec. Litig., 3 F. Supp. 2d 1208, 1215 (D.N.M. 1998)

significant enough to fund ongoing class action monitoring and objection efforts. This implies that if the fee schedule were adjusted, private attorneys might become productive monitors of class counsel in exchange for objectors' fees. As currently constructed, though, several aspects of the class action system subvert this potential.

First, only class members have standing to object, but because class members are generally passive, none will do so unless prompted by counsel. This means that an attorney objector must seek out clients to even get to the table, a costly and problematic endeavor.[67] This also means that objectors are essentially lawyers without clients and thus are prone to precisely the same excesses as those they propose to monitor.[68] Objectors can bring strike-suit-like objections, forcing the class attorneys to pay them to go away lest the class attorneys' own fee be held up through appeals.[69] Alternatively, objectors can sell out the class by accepting money from the class attorneys in return for dropping a legitimate objection.[70] Rule 23(e)(4)(B), added in 2003, was meant to ameliorate these problems by requiring court approval before objections can be withdrawn.[71] If strictly enforced, the amended rule could prevent both strike objections and sell outs, as a court will be unlikely either to permit class counsel to pay off strike objectors or to permit objectors to abandon potentially successful objections in return for a fee. But commentators tend to doubt that courts will be any better at monitoring the monitors than they are at monitoring class counsel themselves.[72] Moreover, the rule does not deter objectors who simply threaten to object, and then receive a payoff in return for not filing the objections.

(awarding class attorneys approximately $4.2 million and objector's attorneys approximately $79,000); Feinberg v. Hibernia Corp., 966 F. Supp. 442, 454–55 (E.D. La. 1997) (awarding class attorneys approximately $4.5 million and objector's attorney approximately $50,000); Petruzzi's, Inc. v. Darling-Del. Co., 983 F. Supp. 595, 621–22 (M.D. Pa. 1996) (awarding class attorneys approximately $2.5 million and objector's attorney approximately $11,000).

67. *See* Brunet, *supra* note 47, at 414–25 (on the procedural hurdles objectors face in terms of intervention, party status, and appeal).

68. Because each class member's potential gain from successfully objecting to an unfair settlement is fairly insubstantial, the objector lacks incentive to monitor his attorney's behavior in the same way that he lacked incentive to monitor the class attorneys. *See* Brunet, *supra* note 47, at 426; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 371–72.

69. *See* Miller, *supra* note 9, at 635 (stating that some objectors "just want to hold up the settlement to extract a commission"); Nagareda, *supra* note 13, at 375 ("One might say that professional objectors engage in their own subspecies of nuisance-value litigation.").

70. Brunet, *supra* note 47, at 426–34.

71. *See* FED. R. CIV. P. 23(e)(4)(B) ("An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.").

72. *See*, *e.g.*, Brunet, *supra* note 47, at 446–47. I later argue that judges may be more adept at monitoring objectors than they are at monitoring counsel. *See infra* text accompanying note 101.

Beyond the agency problems objectors present, under current rules they also are institutionally incapable of monitoring all types of settlement problems. This is so both because objectors' ability to conduct discovery concerning the settlement is questionable,[73] and, most importantly, because their fee is presently paid from the settlement. If objectors tweak a settlement, they get a fee; but if they raise a fundamental concern about a settlement that forces the deal to fall apart, there is no money from which they can take a fee.[74] Objectors' financial incentives therefore encourage them to pursue the least problematic settlements and to do so gingerly. Ultimately, then, objectors dependent on settlement approval for their fee will never provide significant oversight of class counsel.

6. Public Interest Group Monitors

Public interest groups may monitor class actions and raise objections when a settlement appears unreasonable from their ideological perspective. But most of these groups are issue specific and only occasionally parachute into class action practice.[75] Only two public interest groups have devoted significant resources to monitoring class action practice systematically—the consumer advocate group Public Citizen,[76] and a group organized by trial attorneys, Trial Lawyers for Public Justice (TLPJ).[77]

---

73. *See* Brunet, *supra* note 47, at 433–34; Lahav, *supra* note 8, at 85–86; Miller, *supra* note 9, at 635 ("Because objectors enter at the last minute, they are often poorly informed and offer little of substance."). Public Citizen attorneys Brian Wolfman and Alan Morrison recount this example:

> In the Mustang-convertible coupon settlement, the court did not provide a period for discovery, and counsel for the settling parties refused to provide the objectors with any information, including a copy of the settlement agreement and the complaint, prior to the date objections were due. Thus, objectors were required to piece together their objections without the pertinent information. Nevertheless, the court apparently saw no problem with this and approved the settlement after a fairness hearing lasting less than thirty minutes, at which the settling parties provided no evidentiary support for the settlement.

Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 488–89 (1996).

74. *See* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 154 (2001); *see also* Brunet, *supra* note 47, at 462.

75. Professor Brunet cites individual cases in which the American Association of Retired Persons and a chapter of the National Organization for Women appeared as objectors. Brunet, *supra* note 47, at 457. Similarly, a coalition of gay-rights groups intervened in the Holocaust litigation against Swiss banks, seeking a portion of the settlement proceeds. Lambda Legal, In re Holocaust Victims Assets Litigation (May 14, 2002), http://www.lambdalegal.org/cgi-bin/iowa/ cases/record?record=170.

76. Public Citizen Litigation Group has been involved in thirty-six settlement hearings in thirty class action cases in the past fifteen years on topics ranging from asbestos, to auto manufacturing, to the Dalkon Shield IUD. Public Citizen, Public Citizen's Involvement in Class Action Settlements (May 26, 2000), http://www.citizen.org/litigation/briefs/Class_Action/ articles.cfm?ID=552.

77. Trial Lawyers for Public Justice (TLPJ) has "challenged over twenty 'highly objectionable class action proposed settlements and obtained successful results in almost every case.'" Brunet, *supra* note 47, at 457 & n.243 (quoting Boehr v. Bank of America, No. CIV 99 22 65

Because public interest groups pursue their ideals rather than personal financial gain, they are probably less likely than private attorneys to sell out the class or to bring strike objections.[78] Moreover, those that appear as repeat players may develop monitoring expertise.[79] Yet public interest groups' financial independence is a double-edged sword. The need to appease their donor base, or to remain true to certain ideological commitments, constrains the types of cases public interest groups might involve themselves in and affects the types of objections they are likely to raise.[80] Even if they are able to resist these influences, their limited resources inhibit their capacity to police the better-capitalized class action attorneys' bar. Given these constraints, public interest groups will never be capable of providing a real check on class attorneys across the board. Their interests, even taken as a whole, will emerge in only a limited set of cases and pertain to only a limited set of issues.

7. Court-Appointed Guardians

Judges occasionally appoint a guardian ad litem to look after the interests of particular class members.[81] It is important to delineate the varieties of such guardians, as not all are meant to monitor class counsel. In situations where no class member is likely to appear—such as the settlement of trusts in a case like *Mullane v. Central Hanover Bank & Trust Co.*[82]—court appointed guardians are the class's, or some sub-class's, agents. They are not monitors of other counsel; they are counsel themselves. In other situations, courts have appointed guardians for class members at the moment of settlement to consider the value of settlement to the class or some subset thereof.[83] This

---

PHX PGR (D. Ariz. 2001) (declaration of Arthur H. Bryant, TLPJ, at ¶11)). Trial lawyers have incentives to police class action settlements because such settlements resolve cases they might otherwise be able to take to trial for lucrative verdicts and fees. This is the reason trial lawyers funded the appeal in *Amchem Products v. Windsor,* 521 U.S. 591 (1997), in the U.S. Supreme Court—the Court's reversal of the class settlement in that matter freed up a large number of asbestos cases for trials, verdicts, punitive damages, and lucrative trial attorneys' fees. *See* Joseph Nocera, *Fatal Litigation*, FORTUNE, Oct. 16, 1995, at 60; Joseph Nocera, *Fatal Litigation Part II: Dow Corning Succumbs*, FORTUNE, Oct. 30, 1995, at 137. This conflict among plaintiffs' attorneys is an important but little studied aspect of class action jurisprudence.

78. *See, e.g.*, DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 494–95 (2000).

79. Brunet, *supra* note 47, at 462–63.

80. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

81. *See* Brunet, *supra* note 47, at 464.

82. 339 U.S. 309 (1950).

83. *See, e.g.*, *In re* Asbestos Litig., 90 F.3d 963, 972 (5th Cir. 1996) (appointing Eric Green as guardian ad litem for the future plaintiffs' class to ensure that these unavailable parties' interests

type of guardian can in fact be a check on class counsel, though scholars have questioned whether it is too little, too late.[84] Thus, other proposals suggest a third function: that guardians not be appointed at the moment of settlement, but rather be deputized at earlier moments in the process to monitor class counsel at various stages.[85] This strong guardian watches the class agent's work and judges her efficacy based on that observation,[86] rather than judging the performance on its outcome alone, as the weaker versions of guardians do.

The primary problems presented by the independent-guardian idea concern how to fund this function and how to ensure that the person serving it has the necessary expertise. Scholars have attended to these questions,[87] though as I argue below, the literature has not clearly delineated between its adversarial and regulatory components. The proposals generally collapse these functions, imagining the guardian as both an adversary, arguing against class counsel in legal proceedings, and a regulator, watching class counsel settle the case and assessing her performance of this function. I am skeptical that one overseer will necessarily possess both adversarial and regulatory skills, and hence I spend time distinguishing the functions—as well as suggesting new funding mechanisms—below.

II. FOUR PROPOSALS

While a variety of actors are potentially capable of monitoring class counsel, each suffers from inherent problems. Perhaps the only thing we know for sure is that for class actions to achieve finality through preclusion, a judge will necessarily hold a fairness hearing. For that reason, it is logical to focus attention on mechanisms that might make the judge's oversight at that hearing more capacious and meaningful. This part outlines four possibilities,

---

were not compromised by class counsel); Haas v. Pittsburgh Nat'l Bank, 77 F.R.D. 382 (W.D. Pa. 1977). *See generally* Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 950 (1998) ("It also may be desirable to appoint some form of independent representative for the claimants that is distinguished from counsel by a method of compensation that reduces the risk of conflicting interests."); Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791 (1997) (discussing the role of guardian in an asbestos settlement).

84. *See* Brunet, *supra* note 47, at 464.

85. *See id*. *See generally* Klement, *supra* note 9 (recommending a monitor auction at outset of suit); Lazos, *supra* note 8 (recommending a guardian during pretrial settlement negotiations).

86. *See* Klement, *supra* note 9, at 63 ("Periodical examination of relevant files and records, constant communication with the class attorney, and consistent participation in settlement conferences and important hearings would often suffice to supervise the class attorney.").

87. For a well-worked-out scheme, see generally *id*.

characterizing these as adversarial or regulatory and distinguishing between public and private approaches.[88]

The four new mechanisms discussed here can be organized according to the method of their approach, as follows:

	ADVERSARIAL	**REGULATORY**
PUBLIC	Devil's Advocate	Labels
PRIVATE	Bonds	Marks

A. Adversarial Approaches

1. Public—Devil's Advocate

When attorneys file a motion seeking preliminary approval of a class action settlement, the court could appoint an attorney to argue against the settlement. The Catholic Church historically appointed a devil's advocate to present arguments against a proposed canonization or beatification.[89] A court-designated attorney could function in a similar manner: She would take the position that the settlement is not fair, reasonable, and adequate within the terms of Rule 23(e)(1)(c) or the equivalent state rule. Each court could maintain a list of attorneys in the community capable of providing this function and could pay the appointed attorney using public funds (or from the settlement, if it is a monetary settlement).[90] The devil's advocate would be

88. It is probably more accurate to identify these as quasi-public and quasi-private, as all the forms involve some mixture of public and private. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551 (2000) ("[W]hile we might talk in terms of 'public' and 'private' actors, the reader should not conclude that there is such a thing as a purely private or purely public realm."). My sorting emphasizes the dominant characteristic of the particular mix at issue.

89. *See* John F. Craghan, *Devil's Advocate*, *in* THE MODERN CATHOLIC ENCYCLOPEDIA 240 (Michael Glazier & Monika K. Hellwig eds., 2004); P. Molinari, *Devil's Advocate*, *in* THE NEW CATHOLIC ENCYCLOPEDIA 705 (Thomas Carson & Joann Cerrito eds., Gale 2d ed. 2003). The title may be misleading in that the function was not to represent the Devil per se, but rather to defend the faith as an advocate for the Church by insisting upon strict evidence in support of canonization. *Id.*

90. *See* Resnik, *supra* note 13, at 2190 ("[P]ublic resources could be used to provide salaries for lawyers or experts upon whom judges could rely. Such public employees, paid without regard to the outcomes of settlements, could provide 'independent' evaluations and represent groups within aggregates.").

the civil equivalent of a court-appointed criminal defender. The analogy is apt as both functions are arguably required by the Constitution's guarantee of due process, the former because property is at issue, the latter because liberty is.

The advantages of the devil's advocate concept mirror the advantages of court-appointed criminal attorneys. The requirement that a person perform this task helps to ensure that the system gives attention and respect to arguments against depriving individuals of liberty or property, thereby serving a legitimating function.[91] But the idea is not purely cosmetic: By making the best arguments she can against the settlement, the devil's advocate tests its validity. Our adjudicatory system insists that adversarial resolution of disputes is the most effective way of getting an accurate outcome.[92] The devil's advocate tests our commitment to that principle in much the same way the court-appointed criminal defense attorney does. The regular use of devil's advocates would facilitate the development of a private bar skilled at identifying the weak spots in class action settlements. In a well-functioning system, the prospect of litigating against the devil's advocate ought to create self-policing by class and defense attorneys, deterring both frivolous lawsuits and sell outs. Finally, the adversarial nature of the devil's advocate's challenge to the settlement could help insulate the settlement against collateral attack, thereby promoting certainty and reducing long-term cost.[93]

---

91. Judith Resnik describes this development on the criminal side:

> [T]he lack of equilibrium between government and individual defendants proved insupportable, generating concern about the integrity of criminal judgments. The United States Constitution was therefore reread to require equipage—counsel (in *Gideon*), investigative and expert capacity (in *Ake*), disclosure (in *Brady*), subsidies for appeal when offered by states (in *Douglas*)—all in response to a shared sense of the illegitimacy of outcomes borne from deeply unequal resources.

Id. at 2131 (citing Ake v. Oklahoma, 470 U.S. 68 (1985); Brady v. Maryland, 373 U.S. 83 (1963); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963)) (footnotes omitted).

92. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170–72 (1951) (Frankfurter, J., concurring) (stating that "fairness can rarely be obtained by secret, one-sided determination of facts" and that "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it"). As Stephan Landsman explains:

> The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.

STEPHAN LANDSMAN, ABA SECTION OF LITIG., READINGS ON ADVERSARIAL JUSTICE 2 (1988); *see also* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1873–74 (2002).

93. I say this because some courts and commentators have taken the reasonable position that the availability of collateral attack on class action settlements turns on whether the grounds for attack (for example, adequacy of representation) were adversarially tested in the initial

The disadvantages of the devil's advocate approach in some ways track the disadvantages of requiring the appointment of criminal-defense attorneys. First, a required procedure is more procedure, and more procedure is costly.[94] On the class action side, however, the cost is relatively minimal: The fee the devil's advocate would earn pales in comparison to the significant amounts of money that routinely change hands in many class settlements. A funding mechanism could easily skim some of the latter to pay some of the former. The more significant cost is the time that both the attorneys defending the settlement and the court overseeing it would have to spend in responding to the devil's advocate. Second, the routinization of arguing against settlement might obscure rather than clarify problematic settlements. The repeat protester begins to sound like the boy who cried wolf, the noise of the cries rendering it more, not less, difficult for the judge to spot the real wolf when it appears. Here is how the Catholic functionary has become a modern colloquialism, applied to anyone who argues purely for the sake thereof. Third, if we assume that some settlements actually are fair and reasonable, requiring an attorney to argue against these encourages frivolous arguments and breeds cynicism about the function itself—a familiar lament of the criminal-defense system.[95] This could be cured by permitting the devil's advocate to withdraw after filing an *Anders* brief[96] with the settling

proceeding. *See, e.g.*, Wolfert v. Transamerica Home First, Inc., 439 F.3d 165, 172 (2d Cir. 2006); Epstein v. MCA, Inc., 126 F.3d 1235, 1257–58 (9th Cir. 1997) (O'Scannlain, J., dissenting) (arguing against collateral attack because some objectors appeared and litigated the issue at the class court's fairness hearing), *vacated*, 179 F.3d 641 (9th Cir. 1999); Note, *supra* note 4, at 604 (arguing against collateral attack where adequacy litigated in the class court because "the interests of the absentees will be represented . . . by [those] contesting the propriety of the class action or by an intervenor seeking to control the conduct of the suit").

94. *See* Resnik, *supra* note 13, at 2166.

95. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1125 (1977) (describing "cynicism-breeding" elements of constitutional law in the trenches).

96. In *Anders v. California*, 386 U.S. 738 (1967), the U.S. Supreme Court held that the advocacy requirements placed upon a court-appointed criminal counsel "require[ ] that he support his client's appeal to the best of his ability." *Id.* at 744. However, the Court limited this absolute obligation by stating:

> Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal

court, though the cure arguably provokes as many problems as it solves in that it creates a collateral inquiry concerning the withdrawal and its implications.

2. Private—Bonds

When attorneys file a motion seeking preliminary approval of a class action settlement, the settling parties could be required to post a bond with the court. The bond could be employed in several different manners. One possibility is that the bond could be security for the settlement: If the judge rejects the settlement, the bond would be forfeited.[97] A second possibility is that the bond could simply be money made available to pay the attorneys' fees of objectors who brought reasonable concerns about the settlement to the court's attention.[98] Both versions take advantage of market mechanisms, using money to make settling lawyers hesitate.[99] But both versions also imagine this money spurring the development of monitoring institutions. The security version could engender the creation of bonding agents, as have bail bonds, with these insurers then monitoring class counsel via their underwriting practices.

> points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. The *Anders* brief thus identifies "anything in the record that might arguably support the appeal." *Id.*; *see also* BLACK'S LAW DICTIONARY 96 (8th ed. 2004) (defining "*Anders* brief" as a "brief filed by a court-appointed defense attorney who wants to withdraw from the case on appeal based on a belief that the appeal is frivolous," and stating that "the attorney seeking to withdraw must identify anything in the record that might arguably support the appeal" and "[t]he court then decides whether the appeal is frivolous and whether the attorney should be permitted to withdraw").

By analogy, the devil's advocate, finding no objection to the settlement, could be required to file an *Anders* brief identifying "anything in the record that might arguably support" an objection. *Anders*, 386 U.S. at 744.

97. The proceeds from the forfeiture could be retained by the court, distributed to the class, or, as is next proposed, used to reward successful objectors. I am indebted to Steve Yeazell for illuminating this possibility and its consequential institutional developments.

98. I here elide all doctrinal issues about objectors having clients that give them the legal capacity to intervene, raise objections, or appeal adverse judgments and settlements. For a good treatment of these issues, see generally Brunet, *supra* note 47. Rather than struggle with the positive aspects of this problem under current rules, I instead align myself with those who have proposed that objectors be given a quasi-party status solely by virtue of their entering an appearance with a reasonable objection. *See* Nagareda, *supra* note 45, at 951 ("[C]ourts should afford participatory rights in fairness hearings under Rule 23(e) comparable to those available to interested persons in informal rulemaking . . . . 'regardless of whether they [have] legal standing to be heard.'" (quoting Lindsey v. Dow Corning Corp. (*In re* Silicone Gel Breast Implant Prods. Liab. Litig.), No. CV92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *1 (N.D. Ala. Sept. 1, 1994))); Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244 (1977) (arguing for broad participatory rights in civil rights action).

99. *See* Wasserman, *supra* note 9, at 529 ("Requiring class counsel and the defendant to pay the fees of the [objector], in and of itself, should deter the presentation of grossly unfair settlements.").

The objector version could engender an entrepreneurial objectors' bar.[100] Although this latter proposal re-poses the agency problem of lawyers without oversight, the key difference is that the judge is better situated to evaluate the objector's right to a fee—as this turns on the help the objector provides to the judge herself—than she is able to evaluate class counsel's out-of-court presettlement performance.[101]

The advantages of the settlement-bond approach are several. First, bonds are a familiar way in which the legal system harnesses the power of the private market by requiring parties to put their money where their motion is.[102] Bonds are typically employed in contexts where full due process cannot be achieved. For example, most states insist that a party seeking pretrial attachment or replevin post a bond to secure the alleged debtor against errant seizures;[103] in *Connecticut v. Doehr*,[104] the U.S. Supreme Court came close to holding that such bonds are constitutionally mandated.[105] Bonding also secures injunctions more generally: Most jurisdictions require a party seeking preliminary relief to post a bond.[106] In these types of circumstances, courts are

100. Current professional objectors do not appear to represent that ideal, as they are held in quite low regard. Professor Brunet reports that class counsel describe objectors as "warts on the class action process," "pond scum," and "bottom feeders." Brunet, *supra* note 47, at 411. He further notes that "[o]bjectors 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?'" Lawrence W. Schonbrun, *The Class Action Con Game*, 20 REGULATION 50, 53 (Fall 1997), *quoted in* Brunet, *supra* note 47, at 407 n.21. Without defending or degrading extant professional objectors, the aspiration of settlement bonds is that this improved fee mechanism will encourage the development of an objectors' bar worthy of the private attorney general title.

101. *See* Lahav, *supra* note 8, at 130 (arguing for a broad view of objector compensation based on the principle that "attorneys who make a material contribution to the adversarial nature of the proceedings and assist in the realization of the other principles of governance should be compensated even if they did not produce a monetary improvement in the settlement").

102. Thus, eight states require minority shareholders filing derivative actions to post bonds. STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 382 (2002). These bonds typically serve "as security for all the corporation's reasonable expenses, including its attorney's fees." *Security for Expenses in Shareholders' Derivative Suits: 23 Years' Experience*, 4 COLUM. J.L. & SOC. PROBS. 50 (1968). Plaintiffs' attorneys are largely able to evade the requirement, *see id.* at 59–65; BAINBRIDGE, *supra*, at 384–85, leading commentators to conclude that "they don't work." *Id.* at 384. Because the bonds that I am proposing would be a prerequisite to judicial approval of a settlement, they might be more efficacious and less easily evaded—but this would especially be true if the practice became uniform throughout the country.

103. Connecticut v. Doehr, 501 U.S. 1, 20 (1991) ("All but a handful of States require a plaintiff's bond despite also affording a hearing either before, or (for the vast majority, only under extraordinary circumstances) soon after, an attachment takes place.").

104. 501 U.S. 1.

105. *Id.* at 18–21.

106. *See, e.g.*, FED. R. CIV. P. 65(c); *see also* FED. R. APP. P. 7 (authorizing a district court to "require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal").

being asked to issue orders without the time to accord full due process and hence to be certain that the remedy is in fact warranted. Thus, money, in the form of a bond, substitutes for process, discouraging frivolous filings and safeguarding the opponent's rights.[107] Here, money would, it is hoped, similarly discourage attorneys from filing sweetheart or blackmail settlements. Bonds create a financial risk to proposed settlements by augmenting the risk of loss should a proposed settlement fail.

At the same time, the monetary underpinnings of the bonding system could sort out good objectors from bad objectors and good objections from bad objections. An objector who scrutinized a settlement and found nothing wrong would not file an objection because she would be unlikely to convince the judge to grant a fee for her work.[108] Only truly problematic settlements would attract objectors. Bonding, then, does not provoke the over-litigation problem inherent in the devil's advocate approach, where every settlement triggers objection. Simultaneously, bonding provides a route for public interest and other nonprofit groups to better monitor class counsel. A common problem faced by such groups is their inability to secure a fee for their work given current objector funding mechanisms.[109] But fueled by fees from bonds, independent nonprofit groups could work more vigorously at overseeing class settlements, including those that do not produce a monetary award from which a fee may be extracted.

While the bonding proposal uses direct market incentives to discourage bad settlements and frivolous objections, bonding would also work indirectly by creating collateral monitoring institutions. If class counsel insured against loss of the bond, the insurance underwriters might themselves investigate the merits of the settlement before providing the bond. The experience and techniques they develop in doing so would essentially make them private class action police. Similarly, providing a fee mechanism for objectors could lead some group of attorneys to organize a practice around this function, a practice that would eventually enable special expertise and experience to be brought to the task.[110]

---

107. *See* DAN B. DOBBS, LAW OF REMEDIES § 2.11(3), at 197 (2d ed. 1993) ("[T]he bond serves to warn plaintiffs the price they may be compelled to pay if the injunction is wrongfully issued."); *id.* § 2.11(3) at 204; *id.* § 3.10(3), at 286–87 (explaining how attorneys' fees are recoverable out of injunction bonds for costs incurred in dissolving improper injunctions).

108. Because objectors might scrutinize a settlement and not object, there would have to be a mechanism either for compensating them for this service or for providing an enhanced fee in cases in which they did file valid objections. *See infra* text accompanying notes 115–119.

109. *See supra* Part I.B.6.

110. Such a practice could develop in different ways. If judges' fee awards were limited, this would likely establish a bar segment not unlike attorneys who otherwise organize their practices

There are several disadvantages of settlement bonds. Bonds raise the costs of settling class cases, although the effect ought not be so significant that it would deter the filing or settlement of meritorious class cases; and the bond requirement could be waived in public interest type matters.[111] More problematic than cost is the track record of professional objectors to date. Put simply, that record has been less than stellar.[112] This part of the profession has arguably attracted lawyers more interested in coercing a fee than in correcting a wrong.[113] The hope of bonding is that significant judicial oversight of the fee payments from the bond would correct these inefficiencies. Relatedly, the bonding proposal poses a host of practical problems. On the forfeiture side, rejected settlements might trigger less than full forfeiture depending on the specific grounds of rejection; a common law would need to develop concerning the measure of damages extracted from the bond.[114] On the objector side, bonding would have to both limit the number of objectors in any given case,[115] on the one hand, while compensating objectors for reviewing and not objecting to settlements, on the other. The former problem could be addressed through some sort of licensing or auction;[116] the latter through an *Anders*-brief-withdrawal procedure[117] or by providing a fee multiplier[118] in those cases where objections proved successful. Finally, if bonds were not uniform, attorneys could avoid them through forum shopping.[119] None of these problems is insuperable, but combined they suggest practical limits to the approach.

---

around public fees, such as criminal defense attorneys appointed by the bench. On the other hand, if fees in successful cases were more capacious—especially if judges were willing to provide multipliers for successful objections—an objectors' bar could approximate the class action bar itself, attracting risk-taking entrepreneurs. The problem with this new segment of the bar would be less about how to pay them than about how to insure against them becoming either complete pariahs among regular class action attorneys or being captured by them.

111. *See* DOBBS, *supra* note 107, § 2.11(3), at 205.

112. *See supra* note 100.

113. *See* Koniak & Cohen, *supra* note 9, at 1108–09.

114. *See* DOBBS, *supra* note 107, § 2.11(3), at 203–04 (describing methods of evaluating damages extracted from injunction bonds).

115. The number of objectors would have to be minimized given the limited resource of the bond and the limited patience of the judiciary. However, the difference between having one objector and many tracks the difference between litigation and regulation to some extent; one objector helps to create an adversary proceeding, and many objectors turn the settlement into a notice-and-comment procedure or a town hall meeting. S*ee generally* Nagareda, *supra* note 13; Yeazell, *supra* note 98.

116. *See, e.g.*, Klement, *supra* note 9, at 66–69 (using auction to select monitor).

117. *See supra* note 96. On the value of not objecting, see John Milton, *On His Blindness*, *in* 4 COMPLETE POEMS OF JOHN MILTON 86 (Charles W. Eliot ed., Kessinger Publ'g 2004) (1655) ("They also serve who only stand and waite.").

118. On enhancements, see DOBBS, *supra* note 107, § 3.10(10), at 308 (discussing John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981)).

119. *See supra* note 103 and accompanying text.

B. Regulatory Approaches

1. Public—Labels

When attorneys file a motion seeking preliminary approval of a class action settlement, they could be required to submit the terms of the proposed settlement to some public agency for review. The public agency could undertake any number of oversight functions. On the weak side, the public agency could simply mandate or approve a label that would be attached to the settlement, setting forth in straightforward language the terms of the settlement.[120] This would be the equivalent of the Department of Agriculture's nutrition labels, commonly attached to food products in the United States.[121] These labels provide information, with the private market—through, for instance, diet books—then instructing consumers how to use that information.[122]

120. Professor Lahav has emphasized disclosure as one of the four key principles at settlement. Lahav, *supra* note 8, at 118. The label-disclosure criteria I propose below are similar to those she proposes. *See id.* at 123.

121. *See* Nutrition Labeling of Food, 21 C.F.R. § 101.9(a) (2006).

122. Of course, the public agency compelling the labeling is not itself precluded from providing advice on how to utilize the information. The Food and Drug Administration does this with the nutrition label, offering a video program that demonstrates how "to make informed food choices, how to compare nutrient content claims without memorizing definitions, how to relate serving size to portion control, and how to use the Percent Daily Value as a reference tool without doing math." U.S. Food and Drug Administration, The Food Label and You: Check It Out (1996), http://www.cfsan.fda.gov/~comm/vltlabel.html.

Pre-Approval Notice
In re Megasoft Antitrust Case
All figures are best estimates as of July 1, 2006

	% Total Settlement
Settlement $50 million	**100**%
Plaintiff fund $38.5 million	**77**%
Expected claims $4.7 million	9%
Class members 500,000	
Projected claims 60,000 (12%)	
Settlement per class member $79*	
Expected residual $33.8 million	68%
Cy pres – Public schools, $22.5 million	
Reversion – Megasoft, $11.3 million	
Attorneys' fees requested $10 million	**20**%
Lodestar $4.0 million	
Hours 10,000	
Melded billing rate $400/hr	
Multiplier 2.5	
Attorney costs $0.5 million	**1**%
Administrative costs $1 million	**2**%

The median award for class members filing a claim is estimated to be **$79.** Instructions for filing your claim appear elsewhere in this settlement notice.

* Settlement per class member is based on median damage. Actual individual settlements may be higher or lower depending on factual circumstances.

This settlement received an 'A' grade from the Class Action Settlement Rating Association.

Post-Claim Filing Audit
In re Megasoft Antitrust Case
All figures are actual amounts as of June 30, 2007

	% Total Settlement
Settlement $50 million	**100**%
Claims paid $5.9 million	**12**%
Class members sent notice 500,000	
Actual claims 74,700 (15%)	
Opt-outs 2,000 (0.4%)	
Median recovery per claimant $79	
Residual $34.3 million	**69**%
Cy pres distribution $22.9 million	
Reversion $11.4 million	
Attorneys' fees awarded $8.3 million	**17**%
Portion of distributed fund 22%	
Attorney costs $0.5 million	**1**%
Administrative costs $1 million	**2**%

At the other end of the regulatory spectrum, an oversight agency could actually evaluate the terms of the settlement and rate it on a graded scale.[123] Somewhere between the passive labeling rules and the active rating agency lies the possibility of a public agent simply collecting information and reporting it to the court, perhaps with her recommendation. This is essentially the function performed by probation officers in collecting social facts for the sentencing judge.[124]

These public regulatory approaches take advantage of expertise, impartiality, and consistency. A public official charged with class action oversight would gain experience reviewing proposed settlements. That experience would train agencies to recognize and investigate the key aspects of proposed settlements. For instance, a judge overseeing one settlement every five or ten years might be impressed to hear that the plaintiffs' attorneys had pursued a dozen depositions in the course of the proceedings, while a public agency familiar

123. *See infra* text accompanying note 131.
124. *See infra* text accompanying notes 198–205.

with class action practice might ask the next set of questions: Who was deposed? Were the depositions taken before or after the settlement terms were established? How long did the depositions last? Were they coordinated across a variety of cases, or were they unique to this one?[125] The vast range of class action settlements reviewed would also enable the agency to develop standards and principles for what constitute best practices in the field.[126] The agency's promulgation of these guidelines, perhaps through notice and comment rulemaking, as well as its deployment of them in the field, would then restructure class action practice on the front end so as to ensure agency approval at the back end. A little regulation could produce a lot of change. A third advantage would be that of uniformity: If the agency approach were consistent throughout the country, or at least in key states, it would curtail the capacity of class action and defense attorneys to shop weak settlements to unsuspecting or friendly jurisdictions. It would alter the current haphazard system whereby the rigor of settlement scrutiny turns on the idiosyncrasies of the judge randomly assigned to oversee the settlement.[127]

The public regulatory approach suffers the same disadvantages that plague agency practice generally. The agency's enforcement practices would vary with the politics of those in control of the political apparatus.[128] The

125. Richard Nagareda provides a similar example of how discovery might differ in a single-shot class action as opposed to a mass tort class action, a point that an occasional trial judge might not appreciate:

> A particular derivative action, securities fraud case, antitrust claim, or consumer class action is not like the others of its kind. In these areas, inquiry into the "likely rewards of litigation" must necessarily center upon the progress of the particular class action in question prior to consummation of the settlement. The extent of discovery—into the merits of the plaintiff class's allegations and the potential obstacles to recovery in the form of legal defenses, for example—will be crucial where the class action in question is a unique event. In the mass tort context, by contrast, the class action is not a one-shot deal; rather, its objective is to resolve multitudes of future claims that come in recurring patterns.

Nagareda, *supra* note 45, at 946.

126. One small example of this is a set of settlement warning signals that Sam Issacharoff identifies. Issacharoff, *supra* note 43, at 832–33. Professor Issacharoff's experience in litigating, observing, and writing about complex class actions enabled him to identify these issues in a way that a trial judge overseeing an occasional settlement never could. *See also* MANUAL, *supra* note 7, § 21.61, at 310–12 (identifying potential abuses); *id.* § 21.62, at 316–17 (identifying relevant criteria); Lahav, *supra* note 8, at 86 (explaining why the criteria courts employ to assess counsel's performance are flawed); *id.* at 115 (outlining principles that should guide class action governance). For an example of practice guidelines developed by a trade organization, see National Association of Consumer Advocates, Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375 (1997).

127. *See* Lahav, *supra* note 8, at 91–92.

128. *See* Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1306 & n.63 (1972), *quoted in* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1696 n.130 (1975) (noting that "instances of 'farsighted' agency action blocked by 'Congress acting in the service of special interests'").

agency could be captured by the industry it is attempting to regulate.[129] Or, the agency could develop its own agenda, acting as a self-interested player, not a passive technocrat.[130] Finally, the cheap shot at any proposed agency approach is to analogize it to the postal service: Do we really want mindless bureaucrats of middling intelligence getting paid little money to oversee complex, international class action settlements? While in the abstract there is no reason to believe that the class action agency would function more like the post office than like a better respected part of the government—say, the Office of the Solicitor General—the efficiency concerns inherent in public oversight are sufficient to make this a genuine anxiety.

2. Private—Certification Marks

Before class action attorneys propose a settlement to a court, they could put the terms of the settlement before a private authority that could then decide whether to give its stamp of approval to the settlement. As with the public regulatory approach, the private agency could either provide an up or down approval, or a spectrum-like grade. Grading would be the equivalent of the manner in which California's health agencies, for example, rate restaurants throughout the state, informing consumers of the cleanliness of the premises.[131]

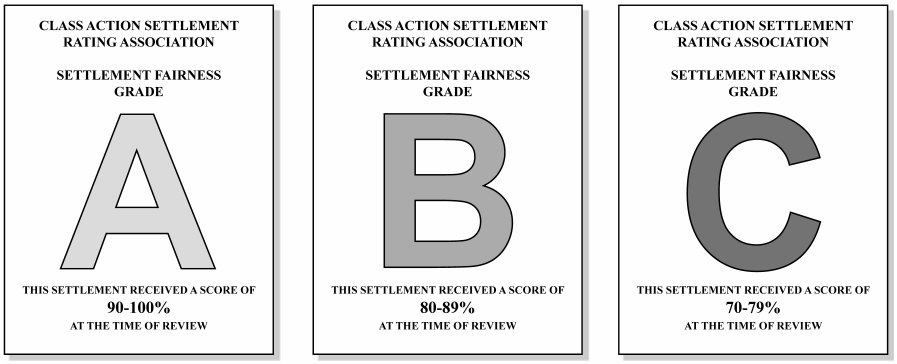
129. *See generally* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1050 (1997) (discussing the notion that agencies may become unduly influenced by the organizations they are charged with regulating); Stewart, *supra* note 128, at 1684–88 (describing aspects of capture critique). Some administrative law literature suggests that agency capture is an exaggerated phenomenon. *See, e.g.*, David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917, 961 (2001) ("The most important defect of capture theory is that it is unsupported by the evidence.").

A simple example of agency capture in the class action context is instructive. While plaintiff class action attorneys and defense attorneys share little in common, one orientation they do both enjoy is that once they reach a settlement, they jointly dislike anything that may upset that settlement. The defendant is close to ensuring finality and the plaintiff is close to a significant pay day. For this reason, repeat players in complex litigation do not have a deep interest in transparency of settlement: The only thing that publicity is likely to accomplish is to draw objectors to upset the deal or to coerce a kill fee. With both sides of the "industry" united in their distaste for transparency, an agency desiring to remain in good standing with the regulated parties might soft pedal transparency proposals.

130. For a sustained critique of the idea that bureaucracies are nonpolitical, see Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

131. The County of Los Angeles Environmental Health Division's Food Inspection Program provides an interesting template for how a public class action agency might rate settlements. The Health Division explains its work as follows:

> [T]he health inspector[ ] conducts inspections. Any violation to the regulations are documented on the Food Official Inspection Report (FOIR), which is issued by the health inspector at the conclusion of the inspection.
>
> The intent of the FOIR is to recognize the varying degrees of risk associated with violations of the applicable laws, codes and regulations. The report contains 100 areas for documenting violations and information. Violations are separated into four sections, with



The private agency providing the approval could do so informally, or the agency could do so formally by registering with the U.S. Trademark Commission what is known as a certification mark.[132] A certification mark is a type of intellectual property owned by one party but utilized by another through licensing.[133] There are three types of certification marks: those used to denote a region of origin (Florida orange juice; Idaho potatoes); those used to denote the quality or characteristics of goods (Good Housekeeping Seal of Approval; Underwriters Laboratories[134]); and those used to indicate that a product was produced by union labor (International Ladies' Garment Workers Association).[135] Perhaps the most familiar certification mark is the motion-picture rating system.[136] Each of these symbols signals to consumers certain

---

a fifth section used for tracking information. [In Section I, for example, the categories are Food Temperatures, Food, Employee Practices, Vermin, Water/Sanitizing, and Sewage].

COUNTY OF L.A., DEP'T OF HEALTH SERVS., RETAIL FOOD INSPECTION GUIDE 5–6 (2000), *available at* http://lapublichealth.org/eh/rfig/rfigfiles/documents2/rfigprnt.pdf. The inspector determines establishments' grades by starting with 100 points and subtracting points for violations to arrive at a final numerical score. A score of 90 to 100 receives an "A," 80 to 89 receives a "B," and 70 to 79 receives a "C." *Id.* at 14.

132. 15 U.S.C. § 1054 (2000).

133. *See* Terry E. Holtzman, *Tips From the Trademark Examining Operation*, 81 TRADEMARK REP. 180, 180–83 (1991) ("A certification mark is any word, name, symbol, or device used by a party or parties other than the owner of the mark to certify some aspect of the third parties' goods or services. . . . Thus, a license agreement is essential to the function of a certification mark.").

134. On the history of Underwriters Laboratories, see Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L.Q. 619, 685–86 (1999).

135. Holtzman, *supra* note 133, at 182–83.

136. The Motion Picture Association of America (MPAA) explains its movie rating system as follows:

> The movie ratings system is a voluntary system operated by the MPAA and the National Association of Theater Owners (NATO). The ratings are given by a board of parents who comprise the Classification and Rating Administration (CARA). CARA's

characteristics of the product they are purchasing. The class action seal would cue the court that an independent quality-control organization had reviewed the settlement and given its approval. If parties approached a court without the seal, it would indicate that something might be amiss with the settlement. A weak version of this mechanism currently exists in the growing practice by which settling attorneys hire law professors as expert witnesses to opine as to the validity of the settlement.[137] Such occasional appearances by hired expert witnesses, however, lack both the impartiality that a certification mark would bring and the routinization that would make the absence of a mark a negative signal to judges. To attain these attributes, an entrepreneur would need to organize and advertise the certification-mark service to the class action industry and then convince judges to look for the mark.

An advantage of the certification-mark approach is that it would, like consistent public-agency oversight,[138] help clarify and codify best practices in the field.[139] The federal government requires that mark proponents produce a statement of what will earn a mark and that they then dispense the mark to those who meet the qualifications without discrimination.[140] The mark gains its legitimacy precisely through its rule-of-law approach. As with the public-agency approach, the mark proposal brings expertise to the field, putting oversight in the hands of experienced officials as opposed to occasional participants like generalist judges. Were the practice to spread, the requirement that a settlement include a mark would encourage lawyers to heed to the best practices published by the marking agency, thus decreasing the oversight needed at the end of the process. The privatization of the agency—and the

> Board members view each film and, after a group discussion, vote on its rating. The ratings are intended to provide parents with advance information so they can decide for themselves which films are appropriate for viewing by their own children. The Board uses the same criteria as any parent making a judgment—theme, language, violence, nudity, sex and drug use are among content areas considered in the decision-making process.

MPAA, Film Ratings, http://www.mpaa.org/FilmRatings.asp (last visited May 22, 2006). The MPAA reports that "[t]he rating symbols are federally registered certification marks of the MPAA and may not be self-applied." MPAA, How Movies Are Rated, http://www.mpaa.org/Ratings_HowRated.asp (last visited May 22, 2006).

137. *Cf.* Midwestern Mach. v. Nw. Airlines, Inc., 211 F.R.D. 562, 568–69 (D. Minn. 2001) (describing expert testimony of Mary Kay Kane, Dean of University of California, Hastings College of Law, as to manageability of class suit).

138. *See supra* Part II.B.1.

139. For example, the National Association of Consumer Advocates standards and guidelines outline the advantages and disadvantages of coupon settlements, and suggest limited situations in which such certificates should be employed and the ways in which these settlements should be structured. National Association of Consumer Advocates, Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375, 382–84 (1997).

140. *See* 15 U.S.C. § 1064(5)(D) (2000); Holtzman, *supra* note 133, at 188.

need to maintain its public-mark status—could insulate it from both political pressure and industry capture. Better still, competition among marking agencies could produce efficiency gains.

The primary disadvantage of the certification mark is its market viability: It is unclear whether there exists a sufficient financial payoff to make the risk involved worth the investment. Consider the startup costs and marketing plan. While class counsel could be charged a significant fee for using the service, they are only likely to do so if they believe it is to their advantage. It will only be to their advantage if judges are likely to respect the mark and ease settlement approval accordingly. But judges are only likely to respect the mark if the marking agency first proves itself an impartial and legitimate regulator. To develop this reputational capital,[141] the marking agent would have to reject some settlements. Once it does this, however, settling lawyers will be reluctant to use the service. The circularity of these incentives makes the launch troubling. Absent a private solution, governmental market intervention might be compelled: One state could launch this type of program as an experiment and require settling counsel to use it.[142] But given forum shopping, class counsel could vote with their feet and simply market their settlements elsewhere. The other means by which the mark could overcome these startup barriers would be if it were created—as were the movie ratings[143]—by industry self-regulation. Well-capitalized and well-entrenched plaintiffs' attorneys might have some vested interest in such self-regulation, as it would generally aim at other parts of the plaintiffs' bar and might work to stave off public regulation of their own practices.

An industry-generated certification mark helps identify another disadvantage of the marking approach generally: capture. Even if launched by an independent third party, the private agency would not be immune to industry or judicial capture. As the agency's purpose is to protect class members from their unmonitored agent or apathetic judge, the fact that these sophisticated repeat players can likely shape the agency's work severely undermines the potential efficiency of this approach. Moreover, the private agency would have to charge enough for its service to make it a profitable concern, while a public agency could spread its costs among the taxpayers. Finally, a private marking

141. For a skeptical overview of reputational capital as applied to credit-rating agencies, see Partnoy, *supra* note 134, at 628.

142. This would essentially accomplish what Frank Partnoy observes about credit-rating agencies: that they prosper not because they provide a valuable service (reputational capital) but rather because so many regulatory programs are tied to their utilization (regulatory license). *Id.* at 711. He takes this as an "excellent example of how *not* to privatize a regulatory function." *Id.*

143. *See* MPAA, The Birth of the Ratings, http://www.mpaa.org/Ratings_BrthofRt.asp (last visited May 22, 2006).

agency—like its public counterpart—would have to be able to recruit and develop the right forms of expertise to make the venture successful and palatable to the judiciary.

No one of these problems is itself fatal—certification marks exist and profit, so people have overcome them—but together the barriers to putting this idea into practice are significant.

III. PERFECTING THE FAIRNESS HEARING

"But surely," to quote Bruce Ackerman, "it is time to stop playing *Hamlet* without the Prince."[144] The value of all of these proposals cannot be assessed without understanding what exactly it is that the judge is supposed to do at the fairness hearing. To know which approaches to employ there, and in what ways, requires an analysis of the types of questions that must be resolved. The nature of the inquiry must be matched with the most competent institutional approach to produce the most efficacious monitoring mechanism.

The short answer to these questions is that a fairness hearing involves both consideration of the strength of the legal claims and review of what the lawyers did. The institutional-competence literature explains that American courts are best qualified to resolve legal questions following an adversarial presentation of proofs and arguments, while nonjudicial actors are better situated to pursue and develop facts using various investigatory techniques. Thus, an institutional-competence approach to the fairness hearing entails an adversarial method for the legal-claim inquiry and a regulatory method for the settlement-process inquiry.

A. Fairness-Hearing Functions and Dynamics

The settlement of an individual lawsuit is a simple contract between the plaintiff and the defendant leading to the plaintiff's voluntary dismissal of the formal legal action;[145] such an agreement triggers no immediate judicial oversight.[146] By contrast, the settlement of a class action is not a simple two-party transaction, for it involves a representative releasing claims of absent class members. Such a triangulated agreement triggers judicial review,[147] the judge

144. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 731 (1985).

145. *See* FED. R. CIV. P. 41(a).

146. If the settlement contract is not honored, a subsequent breach of contract action may involve a different judge, not in overseeing the terms of the settlement itself, but rather in determining whether the settlement contract was breached. *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 581–82 (5th ed. 2000).

147. *See, e.g.*, FED. R. CIV. P. 23(e)(1)(A).

being especially vested with the responsibility of protecting absent class members' interests.[148] In federal court, Rule 23 directs the court to determine whether the settlement is "fair, reasonable, and adequate."[149] The rule provides no more direction than that, but a body of case law has developed, in common law fashion, supplying a set of criteria to guide courts at fairness hearings.[150] Writing nearly a quarter century ago, Judge Henry Friendly summarized these functions as involving "consideration of two types of evidence."[151] The first—and in Judge Friendly's terms, the "primary concern"—is "with the substantive terms of the settlement."[152] This inquiry directs the trial judge to assess the strengths and weaknesses of the plaintiffs' claims. This task is necessarily circumscribed by the informational problems facing the trial judge, and by the fact that it would be illogical for the judge to conduct a full trial to assess the merits of the case before approving a settlement designed to avoid a trial.[153] Perhaps because of this "necessarily limited examination of the settlement's substantive terms," Judge Friendly stated that

> attention also has been paid to the negotiating process by which the settlement was reached, and courts have demanded that the compromise be the result of arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests.[154]

While subsequent courts have elaborated on these themes—which in turn vary across federal circuits and from state to state—the basic premises described by Judge Friendly remain the law today.[155]

---

148. *See supra* note 7.

149. FED. R. CIV. P. 23(e)(1)(C).

150. *See generally* FRIEDENTHAL, KANE & MILLER, *supra* note 7, § 16.7 at 791–92 (summarizing general factors courts employ).

151. Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982).

152. *Id.*

153. *See id.* at 73–74.

154. *Id.* at 74.

155. *See, e.g.*, *In re* GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 796 (3d Cir. 1995); Mars Steel v. Cont'l Ill. Nat'l Bank & Trust, 834 F.2d 677, 682 (7th Cir. 1987). *See generally* Puckett, *supra* note 42, at 1277–79 (describing substantive and procedural elements of the fairness hearing).

The settlement standards in place in most fora do not necessarily present themselves in neat "substance" and "process" boxes, but nonetheless can be sorted this way. Thus, for example, a leading procedure treatise states that while factors vary across jurisdictions, a list of relevant factors includes:

> [1] the likelihood of the class being successful in the litigation, [2] the points of law on which the settlement is based, [3] the amount proposed as compared to the amount that might be recovered, less litigation costs, if the action went forward, [4] the plan for allocating the settlement among the class members, or for distributing the settlement to

The nature of the substantive and procedural inquiries differ significantly. The substantive analysis is a familiar judicial function involving the evaluation of the merits of a case. What makes it nonetheless remarkably peculiar at the moment of a class settlement, however, is that the parties' orientations toward the inquiry flip. Prior to settlement, plaintiffs are generally convinced of the value of their claims and know little doubt, while defendants are generally sure of the poverty of these claims, and they, too, know little doubt.[156] Once a settlement has been proposed, however, both the plaintiffs' representatives and the defendants have a vested interest in ensuring its approval. To gain approval, the plaintiffs must convince the judge that the settlement is preferable to what a trial would have yielded.[157] This puts the plaintiffs in the position of pointing out the weaknesses in their case. Similarly, settling defendants' counsel must identify the risks to their clients of going further, namely the risk of a significant adverse judgment. This puts the defendant in the position of pointing out the weaknesses in its defense.

As strange as it is that the substantive analysis creates these bizarro-world incentives, that analysis at least retains characteristics familiar to the judicial function in that it requires a judge to assess the law based on adversarial presentation of proofs and reasoned arguments.[158] The second fairness

---

> the class, [5] whether proper procedures were adopted for giving notice to the absent class members, and [6] whether a settlement would waive other viable claims.

7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1797.1, at 82–94 (3d ed. 2005) (citations omitted). The first three of these factors track the merits of the case, while the next two raise concerns about class action procedure. Procedural concerns about the settlement are also embodied in the factors a court considers to assess the adequacy of representation:

> These include things such as how well informed the plaintiffs' counsel were who negotiated the settlement and whether the settlement negotiations were conducted at arm's length. When a settlement is proposed between only some of the defendants and the class, the court also may consider whether approving the proposal will result in unfair prejudice to the remaining parties. In these and other settings, the court must be sensitive to the possibility of collusion between the parties actually participating in the action. Thus, for example, a settlement agreement in which the size of the recovery by the class representatives was unduly large in relationship to that of the unnamed class members has been found not to meet the requirements for approval.

Id. § 1797.1, at 102–05 (citations omitted).

It may seem as though the procedural elements are only scrutinized as an indirect means of ascertaining whether the substance of the settlement is a sell-out or sweetheart deal. However, because the adequacy inquiry is an independent and required supplement to the fairness inquiry, review of the procedural aspects of settlement has intrinsic as well as instrumental value.

156. *See, e.g.*, Connecticut v. Doehr, 501 U.S. 1, 13–14 (1991).

157. *See, e.g.*, Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424–25 (1968) (stating that a court must "compare the terms of the compromise with the likely rewards of litigation"). *See generally* MANUAL, *supra* note 7, § 21.61, at 309 ("[T]he court must examine whether the interests of the class are better served by the settlement than by further litigation.").

158. *See generally* Fuller, *supra* note 5, at 369.

hearing function—the procedural analysis—does not even have this benchmark.[159] At first blush, it might appear that the distinction between substance and process at the fairness hearing maps on to the distinction between law and fact in judging. The substantive analysis requires the judge to analyze the merits of the case in light of the applicable legal precedents. The procedural analysis requires the judge to look at what happened in the world (for example, Did the parties engage in arm's-length negotiations?). There is nothing about such an inquiry that is foreign to the judicial function, per se, as judges routinely resolve similar factual inquiries (for example, Did the car run the stop sign?).

But here are some rubs. Unlike the typical factually disputed question, fairness-hearing factual questions rarely have disinterested witnesses available. No one watches the parties engage in negotiations and consequently, no one is available to testify to the length of the arm.[160] Similarly, it is quite difficult to review a deposition transcript post hoc, which settling judges rarely do anyway, to determine the vigor with which the testimony was taken and defended. The problems presented by the lack of simultaneous witnessing are only made worse when, at the moment of judging, the parties who possess all of the information about what did happen are no longer adversaries but rather co-conspirators.[161] The possibility that a judge can render an accurate ex post decision based on evidence presented by the parties in these circumstances is quite low. Worse still, judges are for the most part generalists, handling all forms of cases and encountering class action settlements only occasionally. The procedural oversight demands a rather nuanced understanding of how class actions work for a judge to know what questions to ask regarding settlement of the dispute.

159. *See generally* Hazard, *supra* note 26; Puckett, *supra* note 42.

160. Increasingly, class action negotiations occur before a mediator hired by the parties to help achieve a settlement. Nonetheless, such mediators are bound by the confidentiality requirements of mediation from testifying regarding the nature of the proceeding. *See, e.g.*, Thayer v. Wells Fargo Bank, No. A103160, 2005 WL 1847174 (Cal. Ct. App. Aug. 5, 2005) (evidence from mediation inadmissible under California statutory law); Paul v. Friedman, 117 Cal. Rptr. 2d 82, 94 (Cal. Ct. App. 2002) (same). That has not stopped the settling parties from using—or courts from accepting—the mediation-based nature of the negotiations as a signpost of its contestedness. *See, e.g.*, D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.") (citing County of Suffolk v. Long Island Lighting, 907 F.2d 1295, 1323 (2d Cir.1990)); *see also* Puckett, *supra* note 42, at 1306–09. This development provides the parties with an extraordinary one-way ratchet: They can take advantage of the mediator's presence to shore up the legitimacy of their settlement, but the mediator herself is disqualified from protesting. These dynamics further underscore the difficulty a judge has in making a reliable assessment of the settlement process.

161. *See* Kamilewicz v. Bank of Boston, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting) (stating that settling attorneys "put one over on the court, in a staged performance").

Given the peculiar dynamics of the substantive legal analysis and the unconventional dimensions of the process analysis, it is not surprising that a knowledgeable federal district court judge summarized the fairness-hearing setting as leaving "the court unable to define either the measure of its responsibility or the limits of its power,"[162] with the result that "the rule of law is replaced by standardless administration."[163]

B. Institutional Competence

A variety of intertwined, though separately identifiable, scholarly literatures address questions about the relative institutional competence of the various branches of American government, though not always in those precise terms. The starting point is the constitutional literature on separation of powers. The primary reason conventionally given for separating powers has been that such diffusion is a bulwark against tyranny,[164] but increasingly separation of powers discussions also focus on efficiency in defense of dispersion.[165] This position argues that powers are separated because different branches of government are each best at performing certain types of functions; or, perhaps that because the powers have been so separated, each branch has become expert at performing its own functions.[166] The separation of powers literature is one launching pad for a second discussion of institutional competence—namely, the vast literature concerning administrative agencies, their functions, and

---

162. William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 842 (1995). Although the title of Judge Schwarzer's article references mass tort claims, the author states that the problems apply to all class action settlements. *Id.*

163. *Id.*

164. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 380 (1989) ("[W]ithin our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

165. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."); *see also* DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1053 (3d ed. 2003) (describing dual functions of separation of powers as "[e]nsuring [e]fficacy versus [p]reventing [t]yranny").

166. William Eskridge and Philip Frickey explain Justice Brandeis's notion of "institutional competence" in these terms:

> In a government seeking to advance the public interest, each organ has a special competence or expertise, and the key to good government is not just figuring out what is the best policy, but figuring out which institutions should be making which decisions and how all the institutions should interrelate.

William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Process, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS, at li, lx (1994).

their legitimacy.[167] Third, legal process scholarship, emerging from early administrative law concerns,[168] has led to a more general body of procedural scholarship that looks at institutional-competence questions with a focus on what courts can and should do.[169] And finally, this procedural scholarship has embodied a comparative subpart that juxtaposes common law adversarialism with civil law inquisitorial forms of adjudication.[170]

For present purposes, three critical points emerge from these various strands of literature. First, American judges are institutionally well situated to render legal decisions, but they are not particularly good at undertaking or overseeing factual investigations. The conventional model of adjudication in the United States is decidedly adversarial in nature, with the judge serving as an impassive umpire between competing parties that themselves investigate and present the facts of the case.[171] This means that American judges, unlike their civil law colleagues, are not conceptualized as factual investigators; facts are developed by advocates for the parties and received passively by judges and juries.[172] Second, American law allocates the public powers of investigation and fact gathering to the executive branch of government, specifically to police and prosecutors generally and to administrative agencies in particular

167. *See id.* at lxi (citing JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); Louis L. Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319 (1964)) (describing the development and themes of administrative law).

168. *See generally id.* at lxviii.

169. Lon Fuller's *The Forms and Limits of Adjudication*, *supra* note 5, is the classic consideration of adversarialism. Though Fuller's article was published in the 1970s, it was initially drafted in the 1950s, *see id.* at 353, and is characteristic of the legal-process school of jurisprudence of the 1950s. A general overview of the adversarial model and its discontents can be found in LANDSMAN, *supra* note 92. The classic texts documenting the limitations of the adversarial model as applied to late twentieth century American litigation are Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing how judges in public-law litigation perform functions well beyond umpiring legal disputes) and Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing how judges increasingly manage cases rather than decide them).

170. *See, e.g.*, MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986); ROBERT A. KAGAN, ADVERSARIAL LEGALISM (2001); Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

171. *See* LANDSMAN, *supra* note 92, at 2. American devotion to adversarialism finds its basis in the sense that the incentives inherent in private production and presentation are best aligned to produce an accurate adjudicatory outcome. *See id.*; *see also* STEPHEN N. SUBRIN & MARGARET Y. K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 22 (2006).

172. *See* KAGAN, *supra* note 170, at 105; Langbein, *supra* note 170, at 826–27 (stating that in Germany "the court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence, although the lawyers exercise a watchful eye over the court's work" and that "[d]igging for facts is primarily the work of the judge"). Stephen Subrin and Margaret Woo note that insulating the judge from fact finding may help ensure against hasty and hence false decisions. SUBRIN & WOO, *supra* note 171, at 22–23.

circumstances.[173] Third, administrative agencies specialize in particular subject matters, giving them the insight of expertise,[174] while their judicial counterparts are typically generalists.[175]

This thumbnail sketch enables an institutional-competence analysis of the functions that the judge must perform at a fairness hearing. Judges are well equipped to assess substantive questions at a fairness hearing, particularly if those legal questions are presented in an adversarial fashion. However, judges are not well equipped to undertake specialized investigatory oversight of the settlement process.[176] Judges confront four functional problems in overseeing the settlement process.[177] First, they have no formal training in fact gathering,[178] and the type of factual inquiry required at settlement cannot be delegated to the self-interested and nonadverse parties.[179] Second, judges do not possess the tools of the investigatory trade—for example, they have no staffs, they do not leave the courtroom to make surprise spot inspections, nor do they have at their disposal the technological mechanisms of investigation.[180]

---

173. *See, e.g.*, RONALD A. CASS ET AL., ADMINISTRATIVE LAW 771–72 (3d ed. 1998) (describing three basic devices for obtaining private information as "physical inspections of regulated activities, issuance of subpoenas requiring the production of documents or tangible objects, and imposition of orders requiring the creation and preservation of records").

174. James Landis's classic, initial discussion of administrative process is instructive here. Landis stated that "the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy." LANDIS, *supra* note 167, at 23–24. And he noted that this form of expertise "springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem." *Id.* at 23; *see also* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 140 (1994) (noting that specialized agencies are more competent to handle complex problems than generalist judges, though they are also more prone to "systematic influence and bias").

175. KAGAN, *supra* note 170, at 111. There are of course specialized courts, but very few are devoted specifically to complex class action practice.

176. *See* Erichson, *supra* note 13, at 2010–15, 2024 (describing institutional barriers to American judges employing inquisitorial techniques); Klement, *supra* note 9, at 45–46 (describing why common law courts are institutionally incapable of obtaining requisite information as compared to inquisitorial civil law judges).

177. *Cf.* Hart & Sacks, *supra* note 166, at lxi (identifying three related judicial shortcomings: "[J]udges are generalists unsuited to dealing with highly specialized areas; courts lack the factfinding resources and capabilities needed to solve multifaceted social and economic problems; [and] the case-by-case approach is too slow and imprecise for laying out workable rules for society to follow") (citing LANDIS, *supra* note 167, at 31–36).

178. John Langbein reports that German judges are not former lawyers, are schooled differently than regular lawyers, and are promoted based in part on their fact-finding skills. Langbein, *supra* note 170, at 850.

179. *See supra* note 171 and accompanying text.

180. *See, e.g.*, Int'l News Serv. v. Associated Press, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting) (stating that "[c]ourts are ill-equipped" to undertake factual investigations). *See generally* Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed*

Third, judges do not necessarily have any experience in or specialized knowledge of the mechanics of litigating class matters, so even if they did investigate the settlement process, they would not necessarily know what it was they were looking for. And lastly, judges are situated within an institutional framework that expects them not to perform this function. Without concluding that there is anything magical about settlement-process fact finding that necessarily places it beyond the actual or potential competence of trial judges, these functional concerns make the case for placing the responsibility for this aspect of the fairness hearing elsewhere.

Interestingly, however, scholars have not made that case. While a number of scholars, myself included,[181] have identified the peculiar role judges play in large cases,[182] few have suggested supplementing the judicial function with assistance from an investigatory institution. Some scholars have analyzed the costs and benefits of American judges' utilization of inquisitorial methods in mass tort cases;[183] others have suggested removing en masse sets of cases from the judiciary to administrative agencies,[184] or have looked to Congress to provide some global solution;[185] and, as outlined above, many proposals have been

Research Service for the Supreme Court, 71 MINN. L. REV. 1, 6 (1986) (noting the absence of fact-finding capacities in courts and stating that "[i]f choices among lawmakers were planned on the basis of relative advantages and disadvantages of each, as they never have been, courts would make no law except when neither a factual base nor a democratic base is needed for lawmaking").

181. *See generally* Rubenstein, *supra* note 5.

182. *See supra* notes 5, 13. Many scholars have identified this concern in writing specifically about mass tort cases. *See, e.g.*, Erichson, *supra* note 13; James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1017–21 (1995); Molot, *supra* note 13; Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994); Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413 (1999); Nagareda, *supra* note 13; Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683 (1992). For a more general consideration of the relationships between representative litigation and adversarial procedure, see generally JAY TIDMARSH & ROGER H. TRANSGRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM (1998).

183. *See, e.g.*, Erichson, *supra* note 13, at 2005.

184. *See, e.g.*, Nagareda, *supra* note 45, at 976; Judith Resnik, *From "Cases" to "Litigation*," 54 LAW & CONTEMP. PROBS. 5, 56 (1991) ("Not only could the national government regulate [mass tort matters], but one could also imagine administrative agencies being invested with authority or the creation of other courts to handle such problems.").

185. This was the U.S. Supreme Court's hope with respect to asbestos. In *Amchem Products v. Windsor*, 521 U.S. 591 (1997), the Court stated that "[t]he argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution." *Id.* at 628–29. Two years later, in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court repeated this theme, writing: "We noted in *Amchem* that the Judicial Conference Ad Hoc Committee on Asbestos Litigation in 1991 had called for 'federal legislation creating a national asbestos dispute-resolution scheme.' To date Congress has not responded." *Id.* at 822 n.1 (citation omitted).

forwarded that either use market mechanisms to reduce the importance of the fairness hearing or use more lawyers to assist the judge at that hearing.[186] What scholars have not proposed, as I do here, is a melded institutional approach to the fairness hearing, an approach that attempts to match a function with the institution best situated to perform that function.

C. Perfecting the Fairness Hearing

In assessing the substance of a settlement, the judge weighs the strengths and weaknesses of legal claims. Courts enjoy advantages over other institutions as legal decisionmakers, with American practice emphasizing an adversarial approach.[187] To perfect the fairness hearing, new procedures must enable a truly adversarial presentation of the underlying legal claims to the judge. In assessing the process of settlement, a court must make factual determinations without witnesses or other adversarial presentation. A judge is not the institutional actor best situated to undertake this inquiry—a specialized investigator is. To perfect the fairness hearing, new procedures must delegate regulatory oversight of the settlement process to a specialized agent. A perfected fairness hearing would be one that married judicial assessment of legal claims with regulatory oversight of settlement processes.

1. Adversarialism for the Substantive Assessment

A judge will be most capable of making an accurate assessment of the value of the legal claims following an adversarial presentation of the merits of these claims. This presentation must, by necessity, be abbreviated, but it nonetheless ought to be adversarial. The settling parties lack the incentives—indeed, possess the opposite incentives—to make this presentation to a judge. It must be made by third parties.

An ideal, if circumscribed, adversarial presentation could be created if independent lawyers were employed to advocate both sides of the underlying legal issues. The devil's advocate and bonding mechanisms described above[188] are inexact approximations of that ideal. The devil's advocate approach imagines the settling court appointing one lawyer to argue against the settlement, and in its initial formulation, the devil's advocate was not restricted to arguing only about the settlement's underlying substantive merits. Subsequent review of the institutional-competence literature, however, now enables

186. *See supra* Part I.
187. *See* Fuller, *supra* note 5; Molot, *supra* note 13, at 60–63.
188. *See supra* Part II.A.

a more refined application. The devil's advocate could be employed to assess the merits of the legal claims and argue either that the settlement is too low in light of the strengths of the legal claims or too high in light of their weaknesses.

Proper use of the devil's advocate could undo the bizzaro-world incentives that currently encourage plaintiffs to denigrate and defendants to puff underlying claims.[189] Depending on which position the devil's advocate took, either the settling plaintiff or defense counsel would be deployed to defend the settlement and would be *assigned to her proper side of the case*. Thus, if the devil's advocate thought the settlement too low, arguing that the plaintiffs' claims were quite strong, she would litigate against defense counsel, who would have the proper incentive to demonstrate the weaknesses of the plaintiffs' claim. The devil's advocate would essentially be stepping into the shoes of plaintiffs' counsel, implicitly suggesting that plaintiffs' counsel had sold out the class; she would attempt to substantiate that belief before the court by stressing the strengths of the claims. If, by contrast, the devil's advocate thought the settlement too high, arguing that the plaintiffs' claims were quite weak, she would then litigate against plaintiffs' counsel, who would have the proper incentive to demonstrate that the case was not a strike suit. In this setting, the devil's advocate would essentially be stepping into the shoes of defendants' counsel, implicitly suggesting that defense counsel had rolled over rather than resisted the strike suit.

The bonding mechanism described above could be used to create the same dynamics by employing private market mechanisms rather than a court fee to attract objecting counsel. The settling parties would post a bond, with objectors' fees coming from that bond.[190] Objecting counsel could study the settlement and decide whether to abstain, to object on the ground that the legal claims were worth less than the settlement accorded (thus triggering an adversarial response by the plaintiffs' counsel), or to object on the ground that the legal claims were worth more than the settlement provided (thereby triggering an adversarial response by the defendants' counsel). The value of this approach is that the private market would determine whether substantive objections were or were not appropriate; hence, adversarial appraisal of the settlement's merits

189. *See supra* text accompanying notes 156–157.

190. *See supra* Part II.A.2. I here apply the objector—not security—bond proposal discussed previously. The security bond substitutes money for process, but does not itself help create either an adversarial presentation of legal claims or an investigatory pursuit of factual information; it therefore provides less direct assistance to the judge at the fairness hearing. I concede that the sharp nature of its penalty might be more efficacious than the bureaucratic procedures I embrace. However, given that absent parties' rights will be resolved in the public fairness hearing, I emphasize the ways in which the processes employed there might be perfected, not avoided.

would not occur in every case—as with the devil's advocate[191]—but only in those cases where some private counsel saw the possibility of a fee.

Using the bonding approach as a screening mechanism to sort out when adversarial presentation of substantive questions is necessary suffers its own difficulties, however. First, judges would not be able to rely on objectors to perform this screening function unless they were sure that an extant body of objectors actually existed and screened. Second, entrepreneurial objectors might be hesitant to enter this market. There would be many cases in which they would do work but not file an objection. They would either have to be paid for these conclusions, or be rewarded with multipliers when they objected successfully.[192] This would enable them to err on the side of raising concerns with a settlement, a preference for risk over caution. Third, somehow the role of objector would need to be licensed so that a settling judge did not end up with a plethora of objectors on each side of the case.[193] That said, there would be no reason to limit the number of objectors to one, or to only recognize objections on one side of the settlement; if one objector thought the settlement too high and another too low, let them litigate the merits against one another.

Ultimately, focusing adversarial resources—devil's advocates and objectors—on the underlying merits of the case takes advantage of these actors' litigation capabilities to create a truly adversarial presentation of the legal issues for the institutionally competent settling judge.

2. Regulation for the Process Oversight

The procedural aspects of the fairness hearing, it will be recalled, require the judge to ensure that "the compromise [is] the result of arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests."[194] This function is better provided by investigatory experts with specialized knowledge of class action procedure. Only individuals with true expertise in class cases understand the dynamics of these cases and have the substantive knowledge to discern collusion or blackmail. Moreover, some sort of regulatory official—with investigatory skills—possesses the best

191. It is true that the devil's advocate approach could avoid triggering adversarial presentation in every case through utilization of the *Anders* brief approach outlined above. *See supra* note 96. Nonetheless, the judge would still have to study that brief and decide whether to permit the advocate's withdrawal, so adjudicatory work would remain. Under the bonding approach, no objector would present anything to the court, hence streamlining this aspect of settlement approval.

192. *See supra* text accompanying notes 115–119.

193. *Id.*

194. Weinberger v. Kendrick, 698 F.2d 61, 74 (2d Cir. 1982).

tools for the job. Regulators are capable of developing both the knowledge and institutional capacity to ask questions, demand documents, interview lawyers, and peel away the obscurity of the complex litigation process.[195] Judges generally lack both the particularized expertise and the investigatory skills and devices that the job entails. Someone else must do it.

Congress has, in CAFA, half-heartedly attempted to deploy extant agencies to perform this function, a measure unlikely to succeed.[196] By contrast, I earlier outlined the concept of creating a new, full-blown, freestanding public agency or a private certification-marking agency.[197] Subsequent review of the institutional-competence literature has demonstrated that the need is solely for a specialized factual investigator to supplement the adversarial aspects of the fairness hearing. This focused function may be one that can be accomplished without creating either an entirely new public agency on the one hand or a private entrepreneurial group on the other. What is needed at the fairness hearing is an investigatory official to assist the judge in much the same way a probation officer assists a sentencing judge. A more nuanced regulatory approach might therefore be one in which a court-annexed "office of class action investigations," operates in tandem with a court as does the probation office.[198]

A sentencing judge must base her decision upon facts, but the types of social facts at issue[199] are not best developed and presented by the prosecutor

195. Richard Nagareda employs administrative law at this moment in a related but distinct fashion. He considers court oversight of agencies as a model for court oversight of class settlements, arguing that courts should make class counsel explain what they have accomplished in a manner similar to courts' insistence that administrative agencies provide "reasoned explanations" for their actions. Nagareda, *supra* note 13, at 357, 363; Nagareda, *supra* note 45, at 945–52; *see also* Molot, *supra* note 13, at 94. While I share Professor Nagareda's commitment that class counsel be required to explain their action, my point here is that investigatory agencies are institutionally better situated to do the demanding than are judges.

196. *See supra* text accompanying notes 61–65.

197. *See supra* Part II.B.

198. What makes the analogy less than perfect is the infrequent nature of class action settlements as opposed to criminal sentencing. The latter is so regular that each courthouse has its own probation officers who regularly work with the judges there. Class action settlements are so episodic that this type of localized and regularized administrative fact finding is unrealistic. But this objection is not insurmountable: There could be one office of class action investigations within each federal circuit or within each state.

199. The federal rule requires that the report include:

> (A) the defendant's history and characteristics, including:
>
> (i) any prior criminal record;
>
> (ii) the defendant's financial condition; and
>
> (iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

and defense attorney in a conventional adversarial manner;[200] nor does the judge herself have the skill or institutional capacity to produce the facts. Accordingly, federal law requires a probation office to investigate facts[201] and produce a pre-sentence report for sentencing judges. The report is meant "to provide the trial judge with as much information as possible in order to enable the judge to make an informed decision. . . . [h]owever, [it] is no[t] binding on the judge."[202] The pre-sentence report is "a singularly important document"[203] that "often serves as the primary source of information about the defendant and the offense."[204]

> (B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;
>
> (C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant; . . . and
>
> (F) any other information that the court requires.

FED. R. CRIM. P. 32(d)(2).

200. As the U.S. Supreme Court explained nearly sixty years ago:

> Under the practice of individualizing punishments, investigation techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

Williams v. New York, 337 U.S. 241, 249–50 (1949).

201. According to a leading treatise:

> A probation officer usually prepares a presentence report after an in-depth interview with the defendant in order to obtain his account of the offense and information about the defendant's background and circumstances. The probation officer contacts the prosecutor and law enforcement agents connected with the case in order to get their version of the offense and other information they may have about defendant's activities. The probation officer will ascertain the defendant's prior criminal record and contact various individuals and agencies who might provide additional information about the defendant, such as members of his family, present and past employers, the victim of the crime, and medical, educational, financial, and military institutions with whom the defendant has had dealings. In its final form, the presentence report usually contains information about a defendant's prior criminal record, financial condition, and any circumstances affecting defendant's behavior that may be helpful in sentencing or correctional treatment.

WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.5(b), at 1236 (3d ed. 2000).

202. United States v. Belgard, 894 F.2d 1092, 1097 (9th Cir. 1990).

203. LAFAVE ET AL., *supra* note 201, § 26.5(b), at 1236.

204. *Id.* While two recent developments—the federal sentencing guidelines and the U.S. Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny—have

By analogy, the class action investigation office could compile information concerning the settlement process of the case for the judge, and even make recommendations to the judge concerning these findings, but the judge would retain the final authority to approve or reject the proposed settlement. Like a probation officer, the class action officer could investigate all of the facts leading to the settlement: She could interview the parties separately, collecting versions of how the case was litigated, how the evidence was developed, how the settlement negotiations were conducted, and how the settlement was reached. The investigator could also talk separately with the class representatives. She could review the discovery in the case, perhaps examining deposition transcripts or analyzing the extent to which documents were truly reviewed. Her investigation would yield a report and recommendation prior to the fairness hearing. This would be made available to the parties, all of whom would have the opportunity to argue against it, or in support of it, at the fairness hearing itself. Ideally, the class action investigation would occur prior to preliminary approval of the settlement by the court[205]—if strongly negative, the court might not grant preliminary approval, but otherwise, the report's contents could be summarized for the class in its fairness-hearing notice and the full report made available for review.

Among these possibilities—the probation office, the freestanding agency, or the certification mark—the probation-office analogy may provide the most useful template, if for no other reason than that it seems the most modest approach. It does not entail creating one, or fifty-one, new freestanding public agencies. And it does not entail private investment. It simply represents

---

altered the nature of the probation officer's work, the functional analogy drawn here remains pertinent. The federal sentencing guidelines redirected some of the probation office's inquiries and the nature of their recommendations—a change that has provoked criticism. *See* LAFAVE ET AL., *supra* note 201, § 26.5(b), at 1237 & n.5. *See generally* Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933 (1995); Stephen R. Sady, *Eliminating the Adversarial Role of the Probation Office*, 8 FED. SENT'G REP. 28 (1995). The *Apprendi* line of cases has focused attention on the facts that govern sentencing and how these facts are to be proven; these precedents have not yet, however, disrupted the use by judges of social facts developed by probation officers in setting a sentence within the acceptable range. Notwithstanding these recent developments, probation officers still conduct the type of factual investigation described above.

205. As described by the Federal Judicial Center:

> Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. . . . Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members. . . . At the fairness hearing, the proponents of the settlement must show that the proposed settlement is "fair, reasonable, and adequate."

MANUAL, *supra* note 7, § 21.632–.634, at 320–22.

an instance in which the adjudicatory system has segregated investigatory fact finding from the ultimate judicial proceeding, and institutionalized the fact-finding function within a judicial framework. If it has been done once, perhaps it can be done again.

* * *

The perfected fairness hearing joins the institutional competence of a judge in resolving legal questions with that of an investigator or regulator in pursuing factual questions. The dual nature of the fairness hearing's inquiry is broken down into its constituent parts—substance and process—and each part is assigned to the decisionmaker most likely to achieve an informed and accurate result.

CONCLUSION

Lon Fuller recounted a story about union officials and management agreeing upon a five-cent pay raise, a raise small enough to keep the company afloat but too small to win the rank and file's approval.[206] To conquer this problem, the parties arrange an arbitration at which the union's lawyer—with members observing—strenuously presses for a twenty-cent pay raise. The arbitrator, clued to his job, issues a ruling granting a five-cent pay raise. Professor Fuller wrote that "[h]ere, one form of order, contract, has not the strength to stand on its own feet; it has to be given an infusion from a phony arbitration."[207] He characterized the collusive arbitration as "[c]ontract [p]arasitic on [a]djudication."[208]

The class action settlement is a business deal, a contract, between skilled negotiators much like the former day union and management bosses.[209] Yet it too is a contract that cannot stand on its own feet. The class action settlement lacks stability not because the masses have so much at stake that they are well informed and impassioned, but rather because the masses have so little at stake that they are ignorant and indifferent. The problem is not that their agents have sold them out, but that they do not even know they have agents. In the face of this apathy, the task once again falls to a court to legitimate the deal—and what better way to do so than to hold a hearing and name it "fairness."

206. Fuller, *supra* note 5, at 408.
207. *Id.*
208. *Id.*
209. *See generally* Rubenstein, *supra* note 5.

Conventionally, the judge at the fairness hearing is not as compromised as the arbitrator Fuller described. She nonetheless knows what her job is. This is not altogether a bad thing,[210] "[b]ut the fact that all human relations are tinctured with a slight element of dissimulation is no reason to elevate dissimulation to the level of principle."[211]

If the fairness hearing is to be anything more than dissimulation, the legal system must arm judges with tools that will enable them to do the job for real. One function of this Article has been to identify what those tools are. I have argued that the fairness hearing's two inquiries demand different skills and call for distinct institutional approaches. Judges should be provided with an abbreviated but adversarial presentation of the underlying legal claims so as to assess their value and with an investigative report of the settlement process so as to discern its validity. A second function of this Article has been to imagine, describe, and examine the public and private mechanisms that could accomplish these tasks. This overview has led to the conclusion that either publicly appointed devil's advocates or private lawyers funded through settlement bonds can contribute to an adversarial assessment of the substantive legal claims. On the process side, freestanding specialized public agencies or private certification-marking institutions are conceivable but seem impractical, while a more modest court-appointed class action investigator—modeled after the probation officer—may best be able to provide a pre-settlement report to the judge concerning these issues.

The fairness hearing may never be perfect, but it can be perfected.

210. Professor Fuller explained that this "reading between the lines, far from being a perversion of adjudication, serves to enhance its efficacy." Fuller, *supra* note 5, at 409.

211. *Id.*