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Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations

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INTRODUCTION

A fundamental premise of Anglo-American jurisprudence, that settlements should always be encouraged,[1] routinely is applied to class action suits.[2] However, because the class action device is unique and does not fit into traditional adjudicatory models,[3] the simple extension of this policy to class actions presents special problems.[4]

The class action suit is generally thought of as a long, complex,

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1. The judicial policy of encouraging settlements is evident in both the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Rule 16 of the Federal Rules of Civil Procedure authorizes the court to schedule pretrial conferences to discuss, among other topics, "the possibility of settlements or extrajudicial procedures to resolve the dispute." FED. R. CIV. P. 16(c)(7). The advisory committee note expressly recognizes the need to encourage settlements as early as possible in litigation proceedings in order to "eas[e] crowded court dockets and [save the money and time] of the litigants and the Judicial System." FED. R. CIV. P. 16(c) advisory committee note (1983). *See also* 3 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 16.17 (2d ed. 1985) [hereinafter cited as MOORE'S FEDERAL PRACTICE]. Rule 408 of the Federal Rules of Evidence precludes litigants from establishing liability with "[e]vidence of conduct or statements made in compromise negotiations." FED. R. EVID. 408. Rule 408 is designed to promote "the public policy favoring the compromise and settlements of disputes." FED. R. EVID. 408 advisory committee note. *See also* 10 MOORE'S FEDERAL PRACTICE, *supra*, at § 408.02. A policy that encourages the settlement of suits prior to litigation benefits both society and the individual litigants. Settlements avoid the expense and time required for a full trial. These savings can be especially significant when dockets are crowded and public finances are lean: a 1982 study estimated that the average cost of a full jury trial in federal district court ranged from $5843 to $12,035. James, *The Cost of Civil Litigation*, 22 JUDGES' J. 24 (Spring 1983). In addition to monetary savings, litigants are able to avoid the mental anguish associated with trial. Finally, settlements provide a means for decongesting the trial and appellate dockets since they are final dispositions and offer no prospects for appeals. *See* Bedlin & Nejelski, *Unsettling Issues About Settling Civil Litigation: Examining "Doomsday Machines," "Quick Looks" and Other Modest Proposals*, 68 JUDICATURE 9, 11 (1984).

2. *See* Patterson v. Stovall, 528 F.2d 108, 114 (7th Cir. 1976) (the court should not attempt to decide the merits of a controversy in a class action suit in which the parties have reached a settlement); Georgevick v. Strauss, 96 F.R.D. 192, 196 (M.D. Pa. 1982) (class action settlements should be encouraged), *vacated*, 772 F.2d 1078 (3d Cir. 1985); Heit v. Amrep Corp., 82 F.R.D. 130, 132 (S.D.N.Y. 1979) (according great weight to both the general policy favoring settlements and counsels' representations that the proposed settlement represented the "best available compromise").

3. The class action device enables courts to hear the claims of a large group of individuals through class representatives and class attorneys. Thus, the class at large is not present during the litigation. Unlike the traditional model where the individual client controls the conduct of the litigation, the absentee plaintiffs must rely on the class representatives and class attorneys for the adequate representation of their rights. The class action device differs radically from the traditional model, then, because the absentee class does not control the litigation but yet is bound by the result.

4. *See* Part I *infra*. This Note discusses the potential abuses of class action settlements only in the context of plaintiff suits. *See generally* Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U. REV. 492 (1982); Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); *Developments in the Law — Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981) [hereinafter cited as *Conflicts of Interest*]; *Developments in*

thorough procedure.[5] In reality, the class action suit that is fully tried is a rarity.[6] Most class actions are settled before the merits are judged in court. Because the resulting class action settlement can have a major impact on both plaintiffs and defendants,[7] and because class action settlements pose unique problems not ordinarily encountered in traditional litigation,[8] pretrial settlements must be carefully supervised and adequately reviewed.

The current pretrial settlement process often leaves unprotected the substantial interests[9] involved in a class action case. The process is particularly vulnerable to abuse when the class action suit is brought for economic, as opposed to ideological, reasons.[10] For example, with-

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the Law — Class Actions, 89 HARV. L. REV. 1318 (1976) [hereinafter cited as *Class Action Developments*].

5. The class action suit has been characterized as entailing dimensions "beyond anything seen in Anglo-American courts in terms of size, complexity, and longevity." Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem,* 92 HARV. L. REV. 664, 667 (1979).

6. A statistical study of class action suits filed in the District of Columbia found that in 63% of the cases the issue of class certification never reached the court. Of those cases in which certification was granted, 55% were disposed of in favor of the defendant on preliminary motions. Note, *The Rule 23(b)(3) Class Action: An Empirical Study,* 62 GEO. L.J. 1123, 1135-38 (1974). Another empirical study focused on the incidence of shareholder and class action suits brought against the 190 largest publicly owned corporations as listed in the 1975 *Fortune Magazine* rankings. The study showed that 71% of all suits filed were settled before trial, 17% were dismissed, and another 4% were denied class action status. Only 4% of all class action and stockholder derivative suits were fully litigated. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits,* 60 B.U. L. REV. 542, 545 (1980) [hereinafter cited as *Empirical Study (II)*]; *see also* Jones, *An Empirical Examination of the Incidence of Shareholder Derivative and Class Action Lawsuits, 1971-1978,* 60 B.U. L. REV. 306 [hereinafter cited as *Empirical Study (I)*].

7. The impact on defendants may include a large damage award and a tainted public image. *See* Part I. A. 1 *infra.* According to the Jones study, *Empirical Study (II), supra* note 6, at 547 & 567, of the 228 class action and shareholder derivative suits studied, 193 (85%) involved a monetary settlement; 164 suits, involving 23 settlements, amounted to over one million dollars each. The impact on plaintiffs may include inadequate representation of their claims by the class representatives. *See* Part I. B. *infra.*

8. Class actions typically involve important issues that have a significant impact on society. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980) (school desegregation), *cert. denied,* 450 U.S. 912 (1981); *In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir.) (customer fraud), *cert. denied,* 444 U.S. 870 (1979); Pettway v. American Cast Iron Pipe Co. (Pettway IV), 576 F.2d 1157 (5th Cir. 1978) (employment discrimination), *cert. denied,* 439 U.S. 1115 (1979).

9. *See* notes 3 & 4 *supra* and accompanying text.

10. This Note does not address the abuses that may arise in class action suits brought primarily for ideological purposes. Instead, the Note deals exclusively with the potential for abuse inherent in those class action suits prompted largely by economic considerations. Plaintiff class action suits that are economically motivated have a recognized potential for abuse. They have been depicted by some as "lawyers' " lawsuits in which the "client," the class, serves as little more than the means to generate fees. *See* Van Gemert v. Boeing Co., 573 F.2d 733, 735 (2d Cir. 1978), *aff'd.,* 444 U.S. 472 (1980). As the Supreme Court observed:

> That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief . . . but with re-examination of Rule 23 as to untoward consequences.

Deposit Guaranty Natl. Bank v. Roper, 445 U.S. 326, 339 (1980); *see also* Gulf Oil Co. v. Ber-

out court supervision, unscrupulous plaintiffs' attorneys can use the class action allegation to extract an unjustifiably high settlement from a defendant willing to settle for the nuisance value of the suit.[11] The class action process is also abused when the class attorney, who has already settled the case, artificially increases the amount of her fee.[12] In addition, because the economic interests of the attorney and the class may conflict, the attorney may negotiate settlement terms that do not reflect the interests of the absentee class.[13] Federal Rule of Civil Procedure 23 attempts to address this inherent potential for abuse that exists during the pretrial stage, when there is no court supervision of the class suit, by requiring that all class action settlements be approved by the court.[14] However, in practice, the current judicial scrutiny of class action settlements neither prevents abuse nor effectively protects the interests of the absentee class.[15]

This Note explores the problem of abuse of the class action device during the pretrial settlement process. Part I analyzes the underlying sources of potential abuse in pretrial settlement negotiations. Part II assesses the adequacy of the standards currently used by courts to detect collusive class action settlements. Part III concludes that the appointment of a neutral third-party guardian to oversee the pretrial

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nard, 452 U.S. 89, 101 n.13 (1981) (citing Comment, *Judicial Screening of Class Action Communications,* 55 N.Y.U. L. REV. 671, 699-704 (1980); 88 HARV. L. REV. 1911, 1917-20 (1975)); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1 (1971); Simon, *Class Actions — Useful Tool or Engine of Destruction,* 55 F.R.D. 375 (1973). When the class action suit has been economically motivated, courts have sought to prevent abuse by looking closely at counsel fees. On occasion, they have rejected percentage fee contracts and settlements in which the attorney's fee is part of the negotiated settlement. *See* Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) (rejecting settlement where attorney's fee was part of settlement); Magana v. Platzer Shipyard, 74 F.R.D. 61, 67 (S.D. Tex. 1977) (court has obligation to review the size of class counsel's attorney's fee for reasonableness); Illinois v. Harper & Row Publishers, 55 F.R.D. 221 (N.D. Ill. 1972) (court makes its own determination of the reasonable value of the attorneys' services and disregards contingent percentage fee contracts setting attorney fees). Nonetheless, examples of egregious abuses of the class action settlement process are not uncommon. *See* notes 93 *infra* and accompanying text. Moreover, as a recent case illustrates, even the most reputable members and firms of the plaintiffs' bar are not immune to the temptation of using the class action mechanism for personal economic profit. In *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), *affd. in part and revd. in part,* 751 F.2d 562 (3d Cir. 1984), lawyers claimed 40% or $21,000,000 of the $50,000,000 class award. "Three or four of the most prominent antitrust attorneys," 98 F.R.D. at 73, were implicated in an egregious example of attorney fee abuse: almost all of the legal tasks of the class suit were duplicated and triplicated, 98 F.R.D. at 70, 75; there were more attorneys involved in the litigation than parties at interest, 98 F.R.D. at 68; and at least one-third of the firms intervened after the defendant settled, 98 F.R.D. at 74. During the two years following the settlement, lawyers managed to deplete the class settlement fund by one-third.

11. *See* note 94 *infra* and accompanying text.

12. *See In Re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 70 (E.D. Pa. 1983) (of a total fee petition for $20,700,000, only $3,000,000 was accounted for by legal work done prior to the settlement), *affd. in part and revd. in part,* 751 F.2d 562 (3d Cir. 1984).

13. *See* notes 33-40 *infra* and accompanying text.

14. FED. R. CIV. P. 23(e).

15. *See generally* Part II *infra.*

negotiation process furthers the judicial policy of encouraging settlements while protecting the interests of the absentee class.

I. The Class Action Device and the Potential for Abuse in the Settlement Process

The Supreme Court has emphasized that class actions "serve an important function in our system of civil justice."[16] One benefit of class actions is that they enable private individuals who share legal claims too small to justify the cost of individual litigation to vindicate their interests in a single lawsuit.[17] As Justice Douglas has stated, class actions provide "one of the few legal remedies the small claimant has against those who command the status quo."[18] Society as a whole also benefits because class action litigation can ensure greater compliance with society's laws and regulations and promote the efficient use of scarce judicial resources.[19]

In order to ensure that these benefits are not lost, the Supreme Court has repeatedly stated that the requirements of the class action suit must be strictly observed.[20] Rule 23 of the Federal Rules of Civil Procedure sets forth the following four requirements: (1) numerosity of claims; (2) common issues of law and fact; (3) typicality of the representative party's claim; and (4) fair and adequate representation of the class' interests.[21] The last requirement — adequate representation — is central in achieving substantive and procedural fairness in class action suits.[22] This is because in class action suits, unlike traditional litigation, the plaintiffs do not act individually to protect their interests; rather, members of the absentee class rely on the class attorney and representative to pursue their interests vigorously.[23]

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16. Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981); *see also* Deposit Guaranty Natl. Bank v. Roper, 445 U.S. 326, 338 (1980) (the legal profession relies on the "private attorney general," facilitated by rule 23, to vindicate legal rights).

17. *See* Deposit Guaranty Natl. Bank v. Roper, 445 U.S. 326, 338 (1980); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); FED. R. CIV. P. 23(a) advisory committee note (1983).

18. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting).

19. *See Class Action Developments, supra* note 4, at 1353; *see also* General Tel. Co. v. Falcon, 457 U.S. 147, 155 (1982) (class action device conserves the resources of both the court and the parties); Deposit Guaranty Natl. Bank v. Roper, 445 U.S. 326, 339 (1980) (aggregation of individual claims can provide remedies for injuries left unredressed by regulatory action of government); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555-56 (1974) (policy of rule 23 is to "insure effectuation of the purposes of litigative efficiency and economy").

20. The requirements of rule 23 are "indispensable" and must be met at all stages of the proceeding. East Texas Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 405 (1977). If a trial court judge finds that the requirements of the rule have not been met, she is obliged to dismiss the suit. *See* General Tel. Co. v. Falcon, 457 U.S. 147, 156, 160 (1982); *Rodriguez,* 431 U.S. at 403.

21. *See* FED. R. CIV. P. 23(a).

22. *See Class Action Developments, supra* note 4, at 1471-75.

23. *See* MOORE'S FEDERAL PRACTICE, *supra* note 1, at ¶ 23.07[1] (2d ed. 1985) ("In determining the question [of adequacy] the court inquires into two matters: first, the adequacy of the representative, and second, the adequacy of his counsel.") (footnote omitted); *see also* note 3 *supra;* Hansberry v. Lee, 311 U.S. 32, 40-41 (1940):

The Supreme Court has made clear that the adequacy requirement, as well as due process of law,[24] is satisfied if there has been a "full and fair consideration of the common issue[s]"[25] adjudicated on behalf of the absentee class. Thus, in class action *settlements,* fairness is contingent on the ability of the class representatives to air all relevant issues during the negotiation process. Unfortunately, the inherent structural weaknesses of the class action suit — strong incentives to settle combined with the relative autonomy of the class action attorney — create a situation in which the interests of the class may not be adequately explored or protected in the settlement discussions. This makes it possible for the class to be bound by an unjust settlement. Settlements that do not inure to the benefit of the absentee class can seriously undermine the class action concept.

A. *The Interests of the Various Participants in a Class Action*

The interests of the absentee class and those of the class representatives — the class action attorney and the named representative — may conflict during the pretrial settlement negotiations. The class action attorney and the class action representative often have strong incentives to settle before trial. The absentee class, in contrast, seeks to recover as large an award as possible, sometimes attainable only after prolonged litigation. This divergence of interests is not fully checked by the adversary, because the defendant is often strongly motivated to pursue a settlement.[26] Thus, the settlement may accommodate the interests of the defendant and the class action representatives but not those of the class as a whole.

1. *The Defendant*

The defendant has both direct and indirect financial incentives to settle. Its most direct and immediate financial objectives are to minimize the amount of the damages eventually awarded to the class and to reduce litigation expenses.[27] The indirect costs of full-scale litiga-

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated as a party. . . . To these general rules is a recognized exception that . . . the judgment in a [class action] may bind members of the class . . . .

24. *See* MOORE'S FEDERAL PRACTICE, *supra* note 1, at ¶ 23.07[1] (2d ed. 1985) ("[I]n *Hansberry v. Lee,* the Supreme Court expressly made clear what had previously been implied: Adequate representation of interests is ordinarily required by due process as a condition to according a class action judgment binding effect against purported members of the class.") (footnotes omitted).

25. Hansberry v. Lee, 311 U.S. 32, 43 (1940).

26. *See* Part I. A. 1 *infra.*

27. *See* Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working,* 42 MD. L. REV. 215, 247 (1983); Jones, *supra* note 6, at 546; Rosenfield, *An Empirical Test of Class-Action Settlement,* 5 J. LEGAL STUD. 113, 114 & n.4 (1976). Litigation expenses include out-of-pocket costs as well as the opportunity cost to the company of diverting its time and resources from productive activities to supervising the lawsuit.

tion, however, can also be consequential. Consumer goodwill can be harmed by the adverse publicity that often accompanies class action litigation. Also, the possible disclosure of "dirty linen" during the trial process can damage the defendant's community standing. In addition, the discovery process can disrupt the day-to-day operations of defendant institutions and corporations. By settling, the defendant can minimize most of these indirect costs and avoid the risk of a large damage award.

2. *The Named Plaintiff*

The system governing the payment of attorneys' fees provides the named plaintiff with an economic incentive to settle before trial. If the suit is unsuccessful, the named plaintiff is responsible for legal expenses.[28] The representative remains ultimately liable for such expenses even if the lawyer violates the Model Code of Professional Responsibility and "advance[s] or guarantee[s] financial assistance to his client."[29] Only if the class wins or settles are the expenses shared by the class, since attorneys' fees are then taken from the common fund.[30] Thus, by settling, the representative avoids risking the personal liability that accompanies failure of the class suit at trial.

The policy that each class member, including the named representative, shares equally in the class award[31] — from settlement or litiga-

28. The named representative is also responsible for the costs of notifying the class. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1981) [hereinafter cited as MODEL CODE]. Although the Model Code of Professional Responsibility and the Model Rules of Professional Conduct generally address concerns applicable to the traditional lawyer-client relationship, many of their principles can be applied to the class action suit. *See* note 35 *infra.* The Model Code of Professional Responsibility explicitly provides that the client is ultimately liable for the costs of litigation. *See* MODEL CODE, *supra,* at DR 5-103(B). *But see* notes 34-35 *infra* and accompanying text.

30. *See* Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980):

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. The common fund doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to court costs are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

(Citations omitted).

31. Under the common fund doctrine, all members of the class must bear the costs and share the rewards of the fund equally. *See* Boeing Co. v. Van Gemert, 444 U.S. 472, 478-82 (1980); Alyeska Pipeline Co. v. Wilderness Socy., 421 U.S. 240, 264-65 n.39 (1975). The Court in *Boeing* explained that unequal shares of the settlement fund are appropriate only in cases in which the number of claimants is small, benefits can be traced with some accuracy, and the cost of the litigation can be shifted, with some confidence, to those benefiting. These characteristics, the Court noted, are not usually present where "litigants simply vindicate a general social grievance." 444 U.S. at 478-79 (citing *Alyeska Pipeline,* 421 U.S. at 263-67 n.39).

tion — provides another incentive for the named plaintiff to settle. For the named plaintiff, the risk of losing at trial is counterbalanced solely by the chance of an award larger than that offered for settlement. However, because all members of the class, including the named plaintiff, share equally in the additional reward, the incremental benefit of a larger award may not sufficiently compensate the plaintiff for her extra efforts in litigating the case. Thus, the named plaintiff may choose to minimize the cost of her involvement by settling promptly rather than becoming involved in prolonged litigation.[32]

3. *The Class Attorney*

Like the named plaintiff, the class attorney may have incentives to settle rather than litigate a class action lawsuit. Obviously, the costs of full-scale litigation are far greater than those of pretrial settlement. In theory, the attorney is not at financial risk if the litigation is unsuccessful, because the named representative is then responsible for paying her legal expenses.[33] In practice, however, the named representative is often a private individual who is unable to reimburse the attorney for the full cost of the class action. In these situations, the class attorney has usually advanced the costs of the class action, expecting to be reimbursed only if the suit is successful.[34] Thus, if the attorney takes the case to trial and loses, she will be out the time and money required to litigate a class action suit.[35] If the class attorney settles the suit, how-

32. This analysis can be extended to the situation of individual class members. If class members seek to maximize their income, and if their individual stake in the class action is low relative to the costs of supervision and direct involvement, the class member will remain a passive participant. Rosenfield, *supra* note 27, at 114-15.

33. *See* notes 28-29 *supra* and accompanying text.

34. Practicing attorneys have observed that "in most class actions costs are carried by plaintiffs' counsel. . . . As a practical matter, the expenses of class litigation are beyond the means of most plaintiffs. Thus, most class actions go forward under contingent fees with the lawyers carrying most or all of the costs." Cooper & Kirkham, *Class Action Conflicts,* LITIGATION, Winter 1981, at 35, 36. *See generally* Bergman, *Class Action Lawyers: Fools for Clients?,* 4 AM. J. TRIAL ADVOC. 243 (1980); Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect By the Drafters of the Proposed Model Rules of Professional Conduct,* 27 LOY. L. REV. 1047 (1981).

35. Maintenance of litigation — an attorney advancing costs and litigation expenses — is permissible under the Model Code of Professional Responsibility as long as the client remains liable for repayment. MODEL CODE, *supra* note 29, at EC 5-8. The drafters of the Model Rules recognized that maintenance of litigation, irrespective of its outcome, may be proper in class actions. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 18(e)(2) & comment (1983); *see also Class Action Developments, supra* note 4, at 1618-23 (arguing that ban on maintenance in the class action context is an unjustifiable obstacle to class suits). Since the major cost of the class action litigation is the attorney's own fee, maintenance of class actions is much like a contingent fee arrangement. As in contingent fee contracts, the class attorney will most likely recover a full fee only if the class suit is successful. Thus, the attorney, not the class, absorbs the full cost of defeat in class action suits. The attorney therefore has a tremendous incentive to settle, particularly in high risk litigation. The speculative nature of class action litigation has prompted several authors to characterize the class action attorney as an "entrepreneur." *See* Coffee, *supra* note 27, at 231; Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest,* 4 J. LEGAL STUD. 47, 60 (1975); Herzel & Hagan, *Plaintiffs' Attorneys' Fees in Derivative and Class*

ever, she will be entitled under the common fund doctrine to recover her full fee from the settlement fund.[36] By settling, then, the attorney obtains a certain fee and eliminates the risk that she will incur significant expenses for which she will not be compensated.[37]

Even if the prospects for success in the litigation are high, the attorney may nonetheless have a strong incentive to settle. As Judge Friendly observed in the context of a shareholders' derivative action, the class attorney's financial interest lies in the amount of her award less the time and effort required to produce it.[38] The attorney may therefore benefit more from a "small settlement . . . bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and an appeal."[39] Thus, even the prospect of a large recovery may not be sufficient to cause the class attorney to forgo a settlement that is unfavorable to the members of the absentee class.[40]

Actions, LITIGATION, Winter 1981, at 25. Professor Coffee has argued that one way to remedy the potential for abuse that exists in class action suits is to view the class action as entrepreneurial litigation and allow the attorney to acquire a property interest in that litigation. Under Coffee's proposed system, an attorney could no longer intervene in a class suit that had been settled; the attorney who originally filed would maintain exclusive control of the class claim and be the exclusive recipient of the resulting fee. According to Coffee, this would reduce the need for attorneys to generate a multitude of class action suits in order to spread the risks of an unsuccessful suit. Herzel and Hagan argue that the present "lodestar" formula — which takes into account the number of hours worked, the hourly rate, the difficulty of the litigation, and the quality of the attorney's work — gives attorneys a strong incentive to increase and even pad their hours. By contrast, they argue that percentage fees reward lawyers for greater recoveries and penalize them for excess hours. Arguing that "the best discipline is self-interest," they conclude that acceptance of contingent fees in class actions would do much to minimize abuse of the class action suit. Herzel & Hagan, *supra,* at 25. These views of the class action suit focus on the interests of the class attorney — what she would or would not do if rule 23 were amended. Such a view runs counter to the more traditional view of the class action attorney as a fiduciary for the class, responsible for the interests of the class as a whole. *See* note 54 *supra* and accompanying text. Court-mandated notice of the settlement to the class members, for example, emphasizes this fiduciary responsibility. *See* note 88 *infra* and accompanying text. The interest in ensuring that small claimants have access to the courts is also based on the fiduciary concept. *See* notes 17-18 *supra* and accompanying text. The analysis in this Note is based on the fiduciary model, which underlies the courts' settlement hearing standards. *See generally* Part II *infra.*

36. Under the common fund doctrine, the attorneys' fees are deducted from the settlement fund before any class member receives an award. See note 31 *supra.*

37. *See* Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 686 (S.D. Tex. 1976) ("[T]he spectre persists . . . that the plaintiff's attorney may accept an insufficient judgment for the class in trade for immediate and certain compensation for himself in the form of legal fees deducted from the total available funds proffered by defendant . . . .").

38. Saylor v. Lindsley, 456 F.2d 896, 900 (2d Cir. 1972).

39. Saylor v. Lindsley, 456 F.2d 896, 900 (2d Cir. 1972). This simple formula applies to traditional as well as class action lawsuits. However, in the traditional model, the client closely controls the direction of the litigation. By contrast, in the class action model, neither the class nor the named plaintiff exercises active control over the attorney's conduct. *See* Part I. B. *infra.* Hence in a class action the attorney has greater discretion in determining the amount of her fee. *Cf.* note 10 *supra* (discussing fee abuse in economically motivated class action suits).

40. *See* note 37 *supra.*

4. *The Class*

The class and its representatives may share incentives to settle: the public prestige and status in claiming a favorable settlement in what is often a high-stakes and high-visibility controversy; and the security of some financial recovery. Nonetheless, the desire of the class representatives to settle will ordinarily exceed that of the class members. Since the representatives must invest the time and resources needed to conduct the litigation, they are more likely to be interested in receiving a quick settlement and minimizing their expenses.[41] Class members, on the other hand, may feel that they can receive a more favorable valuation of their claim from a jury than from negotiating parties infected with a strong pro-settlement bias.[42] The risk-averse nature of class representatives may therefore induce them to settle when the class members would prefer to present their claims to a neutral party for decision.

B. *The Lack of Checks on the Class Attorney's Conduct*

The conflict of interests between the class and its representatives does not alone subvert the settlement process. The structure of the class action suit places the attorney in a situation in which she can too easily use the class action device, intentionally or unintentionally, to further her own interests. The ethical attorney cannot resort to the traditional guidelines for a conflict of interest — informed client guidance and the codes of legal ethics — because these rules do not easily apply in the class action context. Furthermore, the unethical attorney can too easily circumvent the safeguards of rule 23. These weaknesses lead to abuse of the class action process.

In traditional litigation, attorneys can resolve conflicts that are not totally disabling[43] by advising the client of the perceived conflict and allowing him to make informed choices regarding the litigation.[44] Be-

41. *See* notes 28-32 *supra* and accompanying text.

42. Assessing the value of negotiated settlement awards involves evaluating the negotiating parties' perceived probability of winning (or losing) during a jury trial and their estimates of the litigation costs, monetary as well as nonmonetary, that can be saved by settling. *See* Rosenfield, *supra* note 27. Guessing the size of a jury award entails predicting both the probability of winning the class suit and the jury's perception of the value of the class claim. In both cases, attorneys' fees are deducted before the award fund is distributed to the class. There are two scenarios in which the class may be better off with a jury award than with a settlement award. First, if the representatives negotiating on behalf of the class are biased toward settling, there will be a strong tendency to undervalue the class claim during the settlement negotiations. Second, if the class gets better legal representation in exchange for fees paid to conduct a jury trial, the class award may be significantly higher than it would be if the attorney had negotiated a settlement.

43. If the attorney faces an inpermissible conflict of interest, she should remove herself from the case. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 1 (1983).

44. *See* MODEL CODE, *supra* note 29, at EC 5-1; EC 5-16; DR 5-101(A). A lawyer should explain to a client the potential advantages and disadvantages of pursuing a class suit as opposed to a private claim. As a class plaintiff, a client can minimize the costs of successful litigation and indicate broad support for his individual position. However, as a class plaintiff, the client will

cause the "client" in a class action suit is the class, communication is costly; thus, meaningful client-attorney communication is not practicable.[45] Moreover, communication with the class in pretrial settlement proceedings may jeopardize the class's bargaining position if secrecy and confidentiality are essential to the negotiations.

The Model Code of Professional Responsibility fails to provide meaningful guidance to the ethical class action attorney faced with a conflict of interest. The current Code is oriented toward traditional litigation, in which the client is easily defined and that client pays the fee.[46] Neither feature, however, is present in class action litigation.[47] Moreover, even though the Code addresses concerns that are pertinent to some aspects of class actions,[48] it fails to provide proper guidance for the class attorney involved in pretrial negotiations.[49] This lack of meaningful guidelines leaves the attorney to her own judgment and thus frees her to make choices that benefit herself instead of the class.

The rule 23 safeguards also fail as an effective check on the attorney's conduct. One of the rule's requirements is that "the *representative parties* . . . fairly and adequately protect the interests of the class."[50] Courts have construed this language as charging the named class representative with the duty of insuring that the class attorney fulfills her responsibilities to the class.[51] However, in practice, the ability of the class representative to control the class attorney's conduct is severely limited.

First, courts have never adequately defined the proper allocation of decisionmaking authority between the class representative and attor-

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recover no more than any other class member, and will be obliged to produce documents, submit to interrogatories, and assume liability for costs and fees if the litigation is unsuccessful. *See* Cooper & Kirkham, *supra* note 34, at 35-36.

45. Take, for example, the seminal case of Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), which involved a class of approximately *six million* odd-lot stock buyers whose average damage claim was estimated at less than four dollars. Communication with such a numerous class will undoubtedly tend to be formalistic and meaningless to an attorney faced with a conflict of interest.

46. *See generally* O'Kelley, *Class Actions, Proposals for New Rules of Professional Responsibility,* LITIGATION, Winter 1979, at 25; Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses,* 71 KY. L.J. 787 (1982-83); Waid, *supra* note 34, at 1047-50; *Conflicts of Interest, supra* note 4, at 1446.

47. *See* note 30 *supra* and accompanying text; notes 52-66 *infra* and accompanying text.

48. Issues addressed by the Model Code of Professional Responsibility relevant to class action litigation are: client solicitation, *see* MODEL CODE, *supra* note 29, at DR 2-101; avoiding conflict of interest, *see id.,* at DR 5-103; and communication with potential class members, *see id.,* at DR 7-104.

49. The problem faced by an attorney in pretrial settlement negotiations is how to represent the class adequately in the face of a potential conflict of interest. *See* notes 33-40 *supra* and accompanying text. Neither the Model Code of Professional Responsibility nor the Model Rules of Professional Conduct address this problem.

50. FED. R. CIV. P. 23(a)(4) (emphasis added).

51. *See* National Assn. of Regional Medical Programs, Inc. v. Mathews, 551 F.2d 340, 344-46 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 954 (1977).

ney.[52] Both the class representative and the class action attorney are considered to be fiduciaries for the class.[53] However, the class attorney has the added responsibilities of acting as a fiduciary for the class representative and furthering the public interest.[54] Viewing the duties of the class attorney as coincident with the policy ends of class action litigation, courts have tended to allow the class counsel to control the direction of the suit.[55] For example, an attorney may propose for court approval a settlement that the class representative opposes,[56] or decide not to appeal a court-approved settlement that the representative deems unfavorable.[57] Moreover, if the conduct of the class attorney dissatisfies the class representative, the representative cannot dismiss the attorney, but must instead petition the court for redress.[58]

Second, in many instances the class representative lacks the necessary knowledge, interest, or ability to exercise vigorous control over the conduct of the litigation.[59] To counter the tendency of class representatives to defer to the class attorney, courts have established guidelines disqualifying certain attorneys who have close ties with the class representative. For example, neither business associates nor relatives of the class representative can serve as the attorney.[60] Courts have

52. *See* Deposit Guaranty Natl. Bank v. Roper, 445 U.S. 326, 343 n.3 (1980) (Stevens, J., concurring) ("The status of unnamed members of an uncertified class has always been difficult to define accurately."); Pettway v. American Cast Iron Pipe Co. (Pettway IV), 576 F.2d 1157, 1176-78 (5th Cir. 1978) (Noting that the decision to appeal does not rest entirely with the class attorney or named plaintiffs, the court commented that in "the class action context . . . no clear concept of the allocation of decision-making responsibility between the attorney and the class members has yet emerged."), *cert. denied,* 439 U.S. 1115 (1979).

53. *See* Greenfield v. Villager Indus., 483 F.2d 824, 832 (3d Cir. 1973).

54. Authors have emphasized that class action litigation should seek to promote the public interest as well as the aims of the individual class members. *See, e.g., Class Action Developments, supra* note 4, at 1353; *see also* notes 16-19 *supra* and accompanying text.

55. *See* Pettway v. American Cast Iron Pipe Co. (Pettway IV), 576 F.2d 1157, 1176-79 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979); Greenfield v. Villager Indus., 483 F.2d 824, 832 n.9 (3d Cir. 1973). *But see* Deposit Guaranty Natl. Bank v. Roper, 445 U.S. 326, 353 n.13 (1980) (Powell, J., dissenting) (criticizing the courts for allowing "clientless" litigation).

56. *See* Parker v. Anderson, 667 F.2d 1204, 1208 (5th Cir.), *cert. denied,* 459 U.S. 828 (1982); Kincade v. General Tire & Rubber Co., 635 F.2d 501, 508 (5th Cir. 1981); Pettway v. American Cast Iron Pipe Co. (Pettway IV), 576 F.2d 1157, 1216 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979); Flinn v. FMC Corp., 528 F.2d 1169, 1174 (4th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976).

57. *See* Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir.), *cert. denied,* 459 U.S. 828 (1982).

58. *See* Mendoza v. United States, 623 F.2d 1338, 1344 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

59. *See* Rhode, *supra* note 4, at 1203 ("[A]s a practical matter once a class is certified, named plaintiffs generally are neither highly motivated nor well situated to monitor the congruence between counsel's conduct and class preferences.").

60. *See* Zylstra v. Safeway Stores, 578 F.2d 102, 104 (5th Cir. 1978) (holding that "attorneys who are partners or spouses of named plaintiffs, or who are themselves members of the class of plaintiffs should be subject to a per se rule of disqualification"); Kramer v. Scientific Control Corp., 534 F.2d 1085, 1090 (3d Cir.), *cert. denied,* 429 U.S. 830 (1976) (Plaintiff class representative's law partner cannot act as class attorney.).

also barred the class action attorney from being a class representative or a class member.[61] In spite of the courts' efforts to regulate this aspect of class action suits, however, instances of phantom class representatives are not uncommon.[62]

The economic incentives of the class action structure also discourage vigorous supervision of the class attorney by any individual class member.[63] Because the individual class member's settlement award tends to be small,[64] no member is financially motivated to expend the time and effort required to supervise the attorney closely. Moreover, any increase in the settlement award derived from close supervision of the attorney must be shared with all other class members, making it unlikely that the benefits of supervision will outweigh the costs.[65]

As a result of these factors, it is the attorney who typically determines the interests of the class and the parameters of the class action suit. The lack of class control over the attorney's conduct can allow the class attorney to become the de facto representative of the class.[66] Given the divergent interests of the attorney and the class, an ethical attorney may not be able to maintain the neutrality needed to represent the class's interest adequately in settlement negotiations. Moreover, without adequate safeguards, an unethical attorney can deliberately use the class action mechanism to her personal advantage.

II. The Judicial Response to Class Action Abuses

The structural weaknesses of rule 23 — the lack of court supervision, the strong incentives for parties to settle, and the relative auton-

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61. *See, e.g.*, Bachman v. Pertschuk, 437 F. Supp. 973 (D.D.C. 1977).

62. *See, e.g., In re* Federal Skywalk Cases, 680 F.2d 1175, 1178, 1184 (8th Cir. 1982) (The trial judge prompted the class attorney to find an adequate class representative who could meet the federal jurisdiction diversity requirements. The judge's action was challenged as an abuse of discretion. The appellate court rejected the challenge, although it did not "condone" the practice. According to the circuit court, the better practice would have been to hold a hearing with counsel and all potential class representatives in order to determine if any class member could serve as class representative.); Charal v. Andes, 81 F.R.D. 99, 102 (E.D. Pa. 1979) (emphasizing that attorneys should not dominate the litigation and use plaintiffs only as a "key to the courthouse door"); Smith v. Josten's American Yearbook Co., 78 F.R.D. 154, 160 (D. Kan. 1978) (attorney had not contacted the named representative for over six months), *aff'd.*, 624 F.2d 125 (10th Cir. 1980).

63. *See* Handler, *supra* note 10, at 10:

> [I]t is the attorneys, not the class members, who are the true beneficiaries and the real parties in interest. This plain fact is even more apparent in large antitrust settlements where many millions of dollars in fees are at stake . . . . [I]t is the small purchasers, the supposed beneficiaries of class actions, who must pay these fees and other costs.

64. *See* note 17 *supra* and accompanying text.

65. *Cf.* notes 31-32 *supra* and accompanying text (The common fund doctrine requires class members to share the costs of litigation as well as the rewards.).

66. This situation creates the potential for conflicts of interests. *See* Leib v. 20th Century Corp., 61 F.R.D. 592, 595 (M.D. Pa. 1974) ("An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved.").

omy of the class action attorney — create a serious potential for abuse in the pretrial settlement negotiations of class action suits. Rule 23(e) charges the court with ensuring that the class action device is not abused.[67] Yet the practical options available to the court under rule 23 are severely limited.[68] The result is that the rule neither prevents abuse nor allows courts to redress the grievances of the absentee class adequately when abuse has already occurred.

Under rule 23, courts must approve any negotiated settlement before it is given binding effect. This requirement is established by section (e) of the rule, which provides in full that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."[69] Section (e) was adopted to preclude abuse of the class action process and to ensure that the procedural rights of the absentee class are not compromised.[70] Under section (e), the court is a fiduciary for the absentee class and the ultimate guardian of its interests.[71]

The test courts have used to determine if rule 23(e) policies have been satisfied is whether a class action settlement is "fair, adequate and reasonable and is not the product of collusion between the parties."[72] This test involves two inquiries: substantive (Is the settlement fair, adequate, and reasonable?) and procedural (Was the settlement

67. *See* notes 69-71 *infra* and accompanying text.

68. *See* note 74 *infra* and accompanying text.

69. FED. R. CIV. P. 23(e).

70. *See In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1122 (7th Cir.), *cert. denied,* 444 U.S. 870 (1979); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975); Young v. Katz, 447 F.2d 431, 433 (5th Cir. 1971); Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 679-80 (S.D. Tex.), *aff'd.,* 577 F.2d 335 (5th Cir. 1978).

71. "The ultimate responsibility of course is committed to the district court in whom, as the guardian of the rights of the absentees, is vested broad administrative, as well as adjudicative, power." Greenfield v. Villagers Indus., 483 F.2d 824, 832 (3d Cir. 1973), *quoted in* Shelton v. Pargo, Inc., 582 F.2d 1298, 1306 n.20 (4th Cir. 1978); *cf.,* Pettway v. American Cast Iron Pipe Co. (Pettway IV), 576 F.2d 1157, 1216 (5th Cir. 1978) ("Consequently, in reviewing a proposed settlement the district court should always consider the possibility that an agreement reached by the class attorney is not in the best interest of the class."); Magana v. Platzer Shipyard, 74 F.R.D. 61, 66 (S.D. Tex. 1977) ("Before approving the compromise, the Court must in every instance determine that the proposal is fair, reasonable, and in the best interests of all who will be affected by it."); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1797 (1972) ("In general, the standard used by the courts in evaluating a compromise is that the proposal must be fair and reasonable and in the best interests of all those who will be affected by it. . . . The main judicial concern is that the rights of the passive class members not be jeopardized by the proposed action.").

72. Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975). *See generally* City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974); MANUAL FOR COMPLEX LITIGATION § 1.46 (1977) (supplement to C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1969-86)) [hereinafter cited as MANUAL FOR COMPLEX LITIGATION].

the product of collusion between the parties?).[73]

A. *The Substantive Inquiry*

The substantive inquiry requires the court to assess the fairness of the negotiated settlement. To accomplish this, courts have developed a test that balances the strength of the plaintiff's case, the terms of the settlement, and the defendant's ability to pay.[74] In theory, this balancing test should produce a just result, since the court must consider the interests and rights of all parties involved. In practice, however, the balancing test has produced only a superficial examination of the pretrial settlement.[75] Thus, the substantive inquiry ordinarily has not revealed whether the settlement adequately represents the interests of the absentee class.

The substantive test is difficult to apply. The test requires the court to balance the fairness of the settlement against the worthiness of the plaintiff's suit.[76] But "fairness" and "worthiness" are vague terms that do not lend themselves to precise valuation.[77] Moreover, the court's task is made even more difficult because it must evaluate the fairness of the settlement and the plaintiff's likelihood of success on the basis of sketchy pretrial information.[78]

Yet it is not just the difficulties encountered in applying the balanc-

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73. *See* Pettway v. American Cast Iron Pipe Co. (Pettway IV), 576 F.2d 1157, 1220 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979).

74. *See* note 72 *supra* and cases cited therein.

75. *See* notes 76-84 *infra* and accompanying text.

76. According to the MANUAL FOR COMPLEX LITIGATION, *supra* note 72, at § 1.46, the test is whether the settlement is "fair, reasonable and adequate." *See, e.g.*, Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975) (notice of proposed settlement was sufficient and proposed settlement did not violate antitrust laws), *cert. denied,* 423 U.S. 864 (1975); City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974) (ten million dollar settlement was not inadequate as a matter of law); San Francisco NAACP v. San Francisco Unified School Dist., 576 F. Supp. 34 (N.D. Cal. 1983) (following submission of parties' negotiated settlement, proposed consent decree which addressed and resolved many of plaintiff's concerns was fair, reasonable and adequate and would be approved). In applying the test, the trial judge is to evaluate the following four factors: (1) the strength of the plaintiff's case balanced against the amount offered in the settlement; (2) the defendant's ability to pay; (3) the class action's complexity, length, and expense; and (4) the amount of opposition to the settlement. MANUAL FOR COMPLEX LITIGATION, *supra* note 72, at § 1.46.

77. *Cf.* note 105 *infra.* (The difficulty of assessing the fairness of a settlement is exacerbated if the class is inadequately represented during the negotiation process.).

78. Generally, courts have not read the rule 23(e) hearing requirement as a mandate to turn the settlement hearing "into a trial or a rehearsal of the trial" and have limited the scope of the hearing accordingly. City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974). These courts have reasoned that it would be counterproductive to transform the settlement hearing into a trial on the merits since the whole purpose of compromises, including class action compromises, is to avoid an extensive trial. *See* Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983) (the court must not try the case in a settlement hearing); Alliance to End Repression v. City of Chicago, 561 F. Supp. 537, 548 (N.D. Ill. 1982); Ohio Pub. Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1, 6 (N.D. Ohio 1982) (the settlement hearing should not be used to stage a minitrial on the merits, the event that the settlement aims to preclude).

ing test that weaken the substantive inquiry. In addition, the lack of "adversarialness" in the pretrial class action settlement process forces the court into an unjustified passivity.[79] At the settlement hearing the court is presented with only one option — the proposed settlement[80] — which is the product of negotiations between self-interested parties.[81] The present structure of a rule 23 settlement hearing does not ensure that the court will hear an alternative viewpoint, one that could conceivably argue that the proposed settlement was not "fair" to the absentee class. Without a devil's advocate, and without further information, the court is without the resources to utilize its equity powers to refashion the settlement[82] to meet the interests of the absentee class.

A final factor that militates against close scrutiny of the settlement terms is the fact that rejection of the settlement would significantly increase the demands on the court's resources.[83] Class action suits place a much greater burden on the court's time than ordinary litigation: the issues are more complex, tactics may involve more pretrial motions and conferences, and more attorneys and parties are involved.[84] Absent a strong showing of inadequacy, it seems highly unlikely that a court would reject a settlement, especially when the immediate result of doing so would be to burden the court's own

79. Court activism ensures that the interests of the absentee class are not compromised. Outside the pretrial settlement context, the court takes an active role in ensuring that the class action device addresses the interests of the absentee class. For example, courts will often create subclasses if conflicts within the class are sufficiently pronounced, appoint additional class representatives to ensure adequacy of representation, or order notice to absentee class members. *See* Mendoza v. United States, 623 F.2d 1338, 1346 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); Shelton v. Pargo, 582 F.2d 1298, 1306 (4th Cir. 1978); Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974); Fernandez-Rogue v. Smith, 91 F.R.D. 117 (N.D. Ga. 1981); Gill v. Monroe Co. Dept. of Social Serv., 79 F.R.D. 316 (W.D.N.Y. 1978); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977); Grogg v. General Motors Corp., 72 F.R.D. 523 (S.D.N.Y. 1976); *see also* Miller, *supra* note 5, at 667 ("Some of these [class action] cases obligate federal judges to undertake supervisory tasks requiring enormous expenditures of time and effort, converting their role from one of passive adjudicator of a dispute staged by opposing counsel to that of active systems manager.").

80. Some courts are predisposed to defer to the negotiated settlement because of the view that it is the product of an "arms length" transaction. *See* Guardians Assn. v. Civil Serv. Commn., 527 F. Supp. 751, 757 (S.D.N.Y. 1981); *see also* note 2 *supra.*

81. *See* notes 27-40 *supra* and accompanying text.

82. There is some question whether courts are empowered under rule 23 to refashion a settlement if they are able to detect serious abuse. Several appellate courts have disclaimed any authority to impose settlement terms on the parties. *See, e.g., In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1133 (7th Cir.) ("As an appellate court we are without power to rewrite the settlement of the parties. We only have the authority to approve or disapprove the settlement in the form it is presented to us.") (citing Patterson v. Stovall, 528 F.2d 108, 111 (7th Cir. 1976)), *cert. denied,* 444 U.S. 870 (1979).

83. *See* Dam, *supra* note 35, at 52-54.

84. A statistical study of federal cases in the Southern District of New York and Eastern District of Pennsylvania reports that the typical class action suit consumes more time than four individual actions. The study measured court time by three variables: the number of motions filed, the number of briefs submitted, and the number of opinions written. Bernstein, *Judicial Economy and Class Actions,* 7 J. LEGAL STUD. 349, 360-63 (1978).

docket and leave numerous class claimants without a ready solution to their grievance.

B. *The Procedural Inquiry*

The lack of a workable substantive standard of review has led courts to focus the settlement inquiry on the procedural aspects of the negotiation process.[85] Under rule 23(d) and (e), a court may provide absentee class members with certain procedural protections to ensure that their interests are adequately represented in the negotiated settlement,[86] whether or not the class has been certified.[87] One of the options available to the court is to order notice to the class members "of any step in the action."[88] Unfortunately, reliance on notice as a prophylactic device is illusory because notice does not ensure a substan-

85. *See, e.g., In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 (7th Cir.) (adequacy of representation in the negotiation process is an important factor in evaluating the fairness of the settlement), *cert. denied,* 444 U.S. 870 (1979); Shelton v. Pargo, 582 F.2d 1298, 1310, 1314 (4th Cir. 1978) (notice of dismissal is a prophylactic device that detects collusion); Pettway v. American Cast Iron Pipe Co. (Pettway IV), 576 F.2d 1157, 1169 (5th Cir. 1978) (interests of absentee class are protected primarily by procedural safeguards), *cert. denied,* 439 U.S. 1115 (1979); Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977) ("sweetheart" deals can be avoided by public disclosure of attorneys' fees); Magana v. Platzer Shipyard, 74 F.R.D. 61, 67 (S.D. Tex. 1977) (the focus of the court on a precertification settlement proposal should be whether the settlement was the product of collusion).

86. *See* Pettway v. American Cast Iron Pipe Co. (Pettway IV), 576 F.2d 1157, 1169 (5th Cir. 1978) ("[T]he law accords special protections, primarily procedural in nature, to individual class members whose interests may be compromised in the settlement process. These protections include notice, ensuring that class members know when their rights are being compromised, and an opportunity to voice objections to the settlement."), *cert. denied,* 439 U.S. 1115 (1979); Magana v. Platzer, 74 F.R.D. 61, 67 (S.D. Tex. 1977) ("[There are] two primary means by which [the court] properly can carry out the purposes of Rule 23(e): (1) the ordering of settlement notice to putative class members; and (2) close judicial scrutiny of the reasonableness of class counsel's attorney's fee to be recovered in connection with the proposed settlement."); *see also* Shelton v. Pargo, 582 F.2d 1298, 1314 (4th Cir. 1978); Tornabene v. General Dev. Corp., 88 F.R.D. 53, 55 (E.D.N.Y. 1980).

87. *See* note 88 *infra.*

88. FED. R. CIV. P. 23(d). Notice becomes mandatory upon certification of the class, and the class representative must bear the cost. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). Rule 23(e) also requires notice whenever a *certified* class suit is either dismissed or settled. FED. R. CIV. P. 23(e). Courts disagree on whether notice to class members of a *non*certified class settlement should be mandatory when the settlement calls for dismissal of the class allegation. In Shelton v. Pargo, 582 F.2d 1298 (4th Cir. 1978), the court held that the lower court's order of notice of dismissal of a noncertified class claim was an abuse of discretion where there were insufficient facts to show that putative class members had relied on the class representatives to litigate the case. Remanding the case, the Fourth Circuit instructed the lower court to inquire "carefully into the circumstances of the settlement, and [make] findings on whether the settlement was tainted by collusion, or whether absent putative class members, with a reasonable basis for a 'reliance' expectation, would be prejudiced by the settlement." 582 F.2d at 1316. On remand, the district court found that the settlement *had* been tainted by collusion. The court again ordered notice, arguing that notice should be used as a "prophylactic" device to prevent collusive settlements. Shelton v. Pargo, 81 F.R.D. 637, 640 (W.D.N.C. 1979). The court reasoned that the absentee class members were in the best position to evaluate whether their own interests had been compromised.

tively just settlement or prevent egregious abuses of the class action process.

Courts generally order notice to prevent collusive settlements and to ensure that no class member has unduly relied on the representational efforts of the named plaintiffs and thereby forgone the opportunity to bring an individual or class claim.[89] Notice informs the class members of the circumstances and terms of the settlement so that they may object to the proposed settlement or intervene in the suit if they feel their interests have been ignored. Perhaps the most important function of notice is to inform the class members that the statute of limitations, which was tolled during the certification decision, has started to run.[90]

Notice can protect the interests of the absentee class and prevent collusive settlements if it is indeed successful in eliciting a response from the absentee class members.[91] More often than not, however, notice fails to elicit intervention of absentee class members for the same reason that class members fail to control their representatives: an active class member incurs significant expenses without receiving commensurate benefits.[92]

Rothman v. Gould[93] illustrates how the inability of notice to elicit an adequate response renders notice an ineffective tool for preventing collusive settlements.[94] In *Rothman,* the defendant offered to settle

89. *See* Shelton v. Pargo, 582 F.2d 1298, 1301-02 (4th Cir. 1978); Mangana v. Platzer Shipyard, 74 F.R.D. 61, 67-71 (S.D. Tex. 1977); Rothman v. Gould, 52 F.R.D. 494, 496 (S.D.N.Y. 1971); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 482-83 (N.D. Ill. 1970). *See generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1797 (1972).

90. The Supreme Court has held that the statute of limitations must be tolled once a class action claim is filed. Tolling prevents individual class members from filing their individual actions prior to class certification. This avoids generating a multiplicity of suits. The statute of limitations begins to run again upon the class certification decision. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983); American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).

91. Courts' reliance on notice as a prophylactic device is based on the assumptions that notice will reach and be read by the majority of class members and that notice will motivate some class member(s) to intervene in the action. These assumptions are probably faulty. First, class members often have problems in grasping the significance of class suits, even when notice is sent and received. *See* Miller, *Problems of Giving Notice in Class Actions,* 58 F.R.D. 313, 321-22 (1973). Second, notice may not be a sufficient inducement for a class member to take on the responsibilities of representing the class, given that the class representative assumes liability for attorneys' fees and for any mishandling of the class suit. *See generally* notes 28-30 *supra* and accompanying text. Moreover, notice may well encourage, rather than discourage, abuse. Notice may attract unscrupulous attorneys who would use intervention in an about-to-be settled class suit as a means of generating fees. Also, notice could make strike suits, *see* note 94 *infra,* even more of a weapon against defendants, because defendants usually would suffer from this form of unfavorable advertising. *See* Almod, *Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?,* 56 N.C. L. REV. 303 (1978); O'Kelley, *Class Actions: Proposals for New Rule of Professional Responsibility,* LITIGATION, Winter 1979, at 25, 26.

92. *See* notes 63-65 *supra* and accompanying text.

93. 52 F.R.D. 494 (S.D.N.Y. 1971).

94. Collusive settlements are often the product of strike suits brought by putative class representatives. In general, the strike suit takes on one of three forms. In the first, the plaintiff threatens to bring his individual suit as a class action in order to extract a nuisance value settlement.

the named plaintiff's individual claim for a sizable sum, but only on the condition that the plaintiff drop his class allegation.[95] The plaintiff's counsel agreed and petitioned the court to decertify the class in order to "erase the class claims . . . so the settlement [could] be consummated."[96] The amendment of the complaint, however, left the class action suit with no representative. In an attempt to solicit a new class representative from among the class members, the court ordered that the members be notified of the status of the suit.[97] The court noted that the class claim would have to be dismissed if the notice failed to elicit an adequate class representative.[98] This result eventually occurred because no class member volunteered to represent the class.

If notice fails to elicit a response, as it is likely to do, the court is powerless to prevent the abuse of the class action mechanism. Class representatives and attorneys are then free to use the class action claim as a private bargaining chip and to ignore the legitimate interests of the absentee class.

III. An Alternative

From the foregoing, it appears that courts must depart from their current application of rule 23 if they are to assure negotiated settlements that further the legitimate interests of the absentee class. In tampering with the settlement process, however, the courts must be careful to remedy the ills of rule 23 without seriously undermining other important values. For example, they must eliminate the structural incentives that allow the class action device to be abused without adding significantly to the time and expense of class action litigation. In addition, they must insure that the interests of the absentee class members are adequately represented during the negotiation process without burdening the process to such an extent that settlements,

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While this type of strike suit significantly undermines the integrity of the judicial process, it does not compromise the reliance interests of putative class members, since there is no mechanism to notify them that a class action has merely been threatened. In the second variation, the plaintiff actually files a class claim and uses the class action allegation to obtain leverage in negotiating for a more favorable settlement. *See* Munoz v. Arizona State Univ., 80 F.R.D. 670 (D. Ariz. 1978). The class, having received *notice* that a class claim has been filed, *does* have a real reliance interest in the suit. However, precertification dismissal of the class claim would have no binding effect on claims of individual class members. *See generally* Dole, *The Settlement of Class Actions For Damages*, 71 Colum. L. Rev. 971 (1971); *Class Action Developments, supra* note 4, at 1541. In a third variation, the plaintiff files the class action suit *and* obtains certification of the class. The plaintiff then agrees not to amend the complaint to drop the class action allegation and settles without seeking damages for the unnamed plaintiffs. The class is bound by this settlement because it has been certified. Thus, the defendant protects himself from a future class action suit and the plaintiff extracts a higher settlement for herself.

95. 52 F.R.D. at 500-01.

96. 52 F.R.D. at 495.

97. 52 F.R.D. at 498-501.

98. 52 F.R.D. at 501.

which are encouraged by the law,[99] are impossible to achieve.

A. *The Mechanism*

A court has broad supervisory powers to insure that the class action process is not abused.[100] Under rule 23, a court may issue orders that affect the conduct of the attorneys, the parties, and any intervenors.[101] In addition, rule 83 allows a majority of the judges in a district to make and amend rules governing its "practice" so long as they are not inconsistent with other federal rules of civil procedure.[102] However, the court's power to issue orders or institute new court rules is not unlimited; the court must assess whether the rule or order unduly infringes on the legal rights of the parties involved, and whether such infringement is justified by the likelihood of serious abuse.[103]

Instituting a guardian mechanism is a procedural "modification"[104] of rule 23 that can meet these stringent requirements. The guardian mechanism would work in the following manner. After the plaintiff files a complaint alleging a class action suit, the court would appoint a guardian to insure that the interests of the absentee class members are protected.[105] The guardian would not be a party to the

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99. *See* note 1 *supra* and accompanying text.

100. *See* Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 165 (3d Cir. 1973); Miller v. Mackey Intl., Inc., 70 F.R.D. 533, 535 (S.D. Fla. 1976).

101. Rule 23(d) gives the court wide latitude to issue orders directing conduct in a class action suit. The rule lists several situations in which the court may issue the necessary and appropriate orders: "in the presentation of evidence or argument," FED. R. CIV. P. 23(d)(1); "imposing conditions on the representative parties or on intervenors," FED. R. CIV. P. 23(d)(3); and "requiring the pleading be amended to eliminate [a class action] allegation," FED. R. CIV. P. 23(d)(4). In addition, rule 23(d)(5) states that the court may issue orders concerning "similar procedural matters."

102. FED. R. CIV. P. 83. Rule 83 authorizes a court to issue orders or adopt local rules if: (1) the rule or order regulates a "practice," *i.e.,* procedural details and matters not covered by the rules; and (2) the rule or order is consistent with the federal rules, *i.e.,* the existing substantive rights of the parties are not materially altered. Rules Enabling Act, 28 U.S.C. §§ 2071-72 (1976); *see* United States v. Hvass, 355 U.S. 570, 571 (1958); Rodgers v. United States Steel Corp., 508 F.2d 152, 163 (3d Cir.), *cert. denied,* 423 U.S. 832 (1975); Zarate v. Younglove, 86 F.R.D. 80, 92 (C.D. Cal. 1980). Under rule 83, the court may control the conduct of lawyers practicing before it. *See Hvass,* 355 U.S. at 575; Gas-A-Tron v. Union Oil Co., 534 F.2d 1322, 1325 (9th Cir.), *cert. denied,* 429 U.S. 861 (1976); *Zarate,* 86 F.R.D. at 92.

103. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 (1981) ("[T]he mere possibility of abuses does not justify routine adoption of a [procedure] that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules. . . . Other, less burdensome remedies may be appropriate.") (footnote omitted).

104. The proposal, as presented, does not call for a *legislative* modification of rule 23. The guardian mechanism can be implemented as a court order under rule 23(d)(3), *see* note 101 *supra* and accompanying text, or in the form of a local rule under rule 83, *see* note 102 *supra* and accompanying text.

105. A court has broad equity powers to appoint a guardian ad litem for a party if that party cannot adequately represent himself. Although a guardian ad litem normally represents the interests of a child, state courts routinely appoint guardians to represent physically or emotionally encumbered persons and prisoners. Moreover, courts have appointed a guardian to represent the interests of the absentee class when deciding on the amount of the class attorney's fee. *See* Haas v. Pittsburgh Natl. Bank, 77 F.R.D. 382, 383-84 (W.D. Pa. 1977); Miller v. Mackey Intl., Inc.,

proceedings, but a friend of the court[106] — a fact finder who aids the judge in insuring that the settlement serves the interests of the absentee class.[107] The mechanism would function only during pretrial, and

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70 F.R.D. 533, 535 (S.D. Fla. 1976). In *Miller,* the court appointed a guardian ad litem for the class because the assertion that 1845 hours were required to represent the class adequately "lack[ed] credulity." 70 F.R.D. at 536. The court opined:

> Because the interest of the class members is specifically adverse to the interest of their lawyers who seek an attorney's fee to be awarded from the settlement fund, the class members must be protected. The attorney for the defendant has little concern for the manner in which the fund is divided. Consequently, the court appointed an experienced attorney as a guardian ad litem for the members of the class. . . . [T]his procedure both achieves protection for the members of the class and enables the trial judge to remain in an impartial position. Counsel for the class strenuously objected to the appointment of a guardian ad litem and asserted that the court should conduct cross examination of the witnesses testifying for plaintiff's counsel. However, that contravenes the court's traditional role, tending to cast the court into an advocate's role. Although specific authority for the appointment of a guardian ad litem is not provided for in Rule 23, it is inherent within Rule 23(d).

70 F.R.D. at 535 (citations omitted). In *Haas,* the court also appointed a guardian ad litem to represent the interests of the class during the determination of attorneys' fees. The court's reasons for appointing the guardian were similar to those stated in *Miller:*

> Having agreed to contribute a fixed sum of money in settlement of the suit, the proportion of the fund allocated to counsel fees is of no moment to the defendants. Consequently, defendants do not participate in the fee determination proceedings. The unfortunate result is the necessity for the judge to assume the advocate's role left unfilled by the defendants' departure. The dilemma thereby created for the Court finds the judge playing "devil's advocate" on behalf of the disinterested defendants, while at the same time attempting to exercise his impartiality in making a just determination of reasonable fees. To require the judge to occupy an adversary position during the fee proceedings is highly inconsistent with his acknowledged duty to act as an impartial arbitrator. The appointment of a guardian for the class obviates this considerable problem of judicial schizophrenia.

77 F.R.D. at 383 (footnote omitted). In both cases the court found that the inability of the nominal class representative, the class attorney, to represent the class adequately required the appointment of a third party to protect the class's interests. A similar approach — the addition of a neutral third party — is appropriate in pretrial class action settlement negotiations. During this stage of the proceedings, the court cannot ensure that the class is adequately represented. In theory, a guardian should not be necessary because the named plaintiff and the class attorney are obligated to represent the class. But given the inherent conflict of interest faced by the representatives and the lack of effective class control over their conduct, the court cannot reasonably rely on the representatives to speak adequately for the absentee class. *See* notes 43-66 *supra* and accompanying text. Moreover, if the class is misrepresented during the negotiation process, the "fairness" standard of the settlement hearing does not insure that the court will detect an inadequate settlement. The court may be able to detect irregularities in the negotiation process, yet be unable to evaluate whether those irregularities produced a collusive settlement because the terms of the improperly negotiated settlement may fall within the range of "fair" possibilities. *See* Haudek, *The Settlement and Dismissal of Stockholders' Actions — Part II: The Settlement,* 23 SW. L.J. 765, 771-72 (1969) ("[F]airness may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class.").

106. *Cf.* Wheatley v. Heideman, 251 Iowa 695, 712, 102 N.W.2d 343, 345 (1960) (a guardian is not a party in interest but an aid to assert the rights of the party being represented).

107. Courts already make extensive use of neutral third parties as fact finders in the class action process. The complexity of class action cases have made necessary the appointment of magistrates, masters, and expert witnesses to help manage the class action device. *See, e.g.,* Franks v. Kroger Co., 670 F.2d 71, 72 (6th Cir. 1982) (per curiam) (magistrate was responsible for adjudicating the individual discrimination claims); Officers For Justice v. Civil Serv. Commn., 473 F. Supp. 801, 818 (N.D. Cal. 1979) (special master appointed to handle the distribution of damages), *aff'd.,* 688 F.2d 615 (9th Cir. 1982), *cert. denied,* 459 U.S. 1217 (1983). Expert witnesses have aided the courts in understanding technical issues. *See, e.g.,* Kaehni v.

only if the parties attempted to negotiate a settlement. Thus, parties wishing to negotiate a settlement would be required to notify the court, and the court would appoint a guardian.[108]

Counsel would be required to conduct any negotiations in the presence of the guardian; however, counsel would be free to agree between themselves to expand the role of the guardian from a neutral third party *observer* to a *mediator* in the settlement process. As a mediator, the guardian would assist the parties in arriving at a compromise. In this role, the guardian would perform a wide range of functions aimed at conciliation: enhancing communications, presiding over meetings, identifying general areas of agreement, suggesting possible compromises, and perhaps exerting pressure to reach a solution.[109]

The Diffraction Co., 342 F. Supp. 523, 527 (D. Md. 1972), *affd.*, 473 F.2d 908 (4th Cir.), *cert. denied*, 414 U.S. 854 (1973).

108. The guardian mechanism can be seen as an extension of the pretrial conference, which can take many forms. Amended rule 16 emphasizes the pretrial conference as a means of controlling and managing complex civil cases. FED. R. CIV. P. 16. Recently, courts have focused on the judge's role in guiding complex litigation. *See In re* United States Fin. Sec. Litig., 609 F.2d 411, 427 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 936 (E.D. Pa. 1979), *vacated*, 631 F.2d 1069 (3d Cir. 1980). The pretrial conference, in particular, has been singled out as one of the judge's best tools. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 72, at § 1.10; Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV 770, 774 (1981); Sperlich, *Better Judicial Management: The Best Remedy for Complex Cases*, 65 JUDICATURE 415, 417-19 (1982). Through the pretrial conference, the judge can insist on clear and thoughtful organization, so that complex issues can be presented to the jury in a narrow and simple context. *In re* United States Fin. Sec. Litig., 609 F.2d at 427; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 936. A more formal pretrial procedure, statutorily enacted, is the medical malpractice screening panel. These panels have been created, in various forms, in 26 states. They are designed to reduce the volume of nonmeritorious suits and to encourage pretrial settlements of medical malpractice cases. A typical panel, such as the one used in Arizona, is composed of a judge, a lawyer, and a physician. It conducts an evidentiary hearing, in which participation is mandatory, to determine whether there is enough evidence to support a claim against each defendant. The actual gain in efficiency brought by this type of panel has been questioned by attorneys and judges. *See* Bedlin & Nejelski, *supra* note 1, at 11; Howard, *An Evaluation of Medical Liability Review Panels in Arizona*, ST. CT. J., Spring 1981, at 19, 23. Court annexed arbitration is another prehearing procedure that automatically refers a case to a neutral third party, other than the judge, to promote early settlement of the case. One version is the "Quick Look" concept where disputants agree to present the merits of their case in an abbreviated procedure. For example, the Northern District of Ohio has adopted a procedure in which each party is given one hour to make an opening statement, submit a summation of the evidence, and make a closing argument before six jurors who deliberate and render a nonbinding verdict. The parties are given two weeks to consider the jury's findings and may request a full trial de novo if they are not satisfied. Only three percent of the 80 cases that underwent this procedure actually went to trial. *See Jury Trial That Can Save Time and Money*, BUS. WK., July 20, 1981, at 166. Whatever the form of the pretrial procedure, studies have shown that the emphasis of the pretrial conference can influence the outcome of the litigation. For example, use of pretrial conferences emphasizing settlement leads to a higher percentage of settlements than would occur without the conferences. *See* Stevenson, Watson & Weissman, *The Impact of Pretrial Conferences: An Interim Report on the Ontario Pretrial Conference Experiment*, 15 OSGOODE HALL L.J. 591 (1977). These results have prompted commentators to propose that an exclusive, separate pretrial conference directed toward settlement can appreciably increase the rate of voluntary settlements. *See* Bedlin & Nejelski, *supra* note 1, at 22.

109. *See generally* Bedlin & Nejelski, *supra* note 1, at 15-18 (discussing different roles judges play in the settlement process); Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV.

If the parties preferred to limit the guardian's role to that of neutral third-party observer, the guardian would not participate in the settlement negotiations, but would be present at all meetings. The parties would be free to discuss their positions, offers, and counteroffers. If the parties arrived at a settlement that they wished to submit for court approval, the guardian would prepare a nonbinding written memorandum, disclosed only to the judge, outlining the parties' relative strengths and weaknesses as revealed during the negotiations. The court would use this memorandum as an independent source of information[110] to evaluate the substantive terms of the settlement at the approval hearing.[111]

B. *The Advantages*

The advantage of the guardian mechanism is that it offers a procedural solution to the structural causes of abuse in class action settlements. By including a neutral third party in the pretrial settlement process, the mechanism ensures that the negotiation process is not subverted by the self-interests of the class representatives. If pretrial negotiations remain uncorrupted, a court is in a better position to protect the interests of the absentee class during the settlement hearing.[112]

The introduction of a neutral third party during the settlement negotiations strikes down the veil of secrecy that facilitates improper settlements. It also prevents the plaintiff from using the class action allegation simply as leverage during the negotiations.[113] If attorneys did attempt this, the guardian would be free to inform the court. The court could then review the situation and prevent rather than merely punish abuses.[114]

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305 (1971) (study of different uses of mediation); Sander, *Varieties of Dispute Processing,* 70 F.R.D. 111 (1976) (general examination of alternative dispute resolution systems).

110. The lack of adequate information is a major obstacle confronting a court in its attempt to carry out its duties under rule 23. *See* note 78 *supra* and accompanying text.

111. Knowing that the confidential guardian report would serve as a rough guideline for the trial judge in the settlement hearing, the parties would be motivated to make realistic representations of their positions and offers during the negotiations, thus precluding "unofficial" negotiations. The court could further ensure that the mechanism not be evaded by stipulating that the absence of the guardian during the negotiation process establishes presumptive proof of collusion. In order to make substantial use of the guardian's contribution, the court should also insist that the guardian render as objective a representation as possible.

112. *See* Wellman v. Dickinson, 682 F.2d 355, 362-66 (2d Cir. 1982) (weighing heavily the participation in the settlement negotiations of a government agency committed to protecting the public interest), *cert. denied,* 460 U.S. 1069 (1983); Mendoza v. United States, 623 F.2d 1338, 1353 (9th Cir. 1980) ("The participation of a government agency [a neutral third party] in [the negotiations leading to the settlement] serves to protect the interests of the class against possible improper dealings."), *cert. denied,* 450 U.S. 912 (1981).

113. *See* note 94 *supra.*

114. Although the problem of padding of attorneys' fees is not fully treated in this Note, the guardian mechanism could be used to prevent this type of abuse because the guardian could verify that activities undertaken on behalf of the class were not duplicative of other attorneys' efforts. Also, the guardian could keep a tally of the hours that she spends on the settlement

By allowing the court to undertake a more informed substantive review of the class action settlement, the guardian mechanism enables the court to detect collusive settlements. Presently, review of the settlement terms is superficial rather than truly substantive because courts are not afforded the options[115] or information[116] with which to fashion an equitable settlement. The proposed system would solve these problems. Courts could use the guardian's report as an independent source of information in evaluating the substantive fairness of the settlement terms. Moreover, the guardian mechanism could secure the relevant information *without* compromising the neutrality of the court, because the court itself would not be involved in the pretrial negotiation process.[117] At the settlement hearing, the court could use the information furnished by the guardian to reject those settlement terms that harm the interests of the absentee class, or to suggest ways that the compromise could be refashioned.[118]

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negotiations. The guardian's report of hours, with an evaluation of the difficulty of the issues discussed, could provide the court with a rough estimate of the hours an attorney would need to work to represent the class adequately. If the attorney greatly exceeded the necessary hours, her fee could be adjusted accordingly. *Cf.* Haas v. Pittsburgh Natl. Bank, 77 F.R.D. 382, 383 (W.D. Pa. 1977) (the court appointed a guardian to protect the interests of the class since the attorney's fees were to be taken from the award to the class); Miller v. Mackey Intl., Inc., 70 F.R.D. 533, 535 (S.D. Fla. 1976) (the court appointed a guardian ad litem in an action to determine fees of the attorney, because the attorney's interests in this matter are adverse to those of the class). *See generally* note 10 *supra.* Moreover, the guardian mechanism could prevent strike suits after the class claim has been filed. *See* note 94 *supra.* Strike suits that occur *before* the class claim is filed could not be prevented because the guardian mechanism would not yet be in force. *See* text preceding note 108 *supra.*

115. *See* notes 79-82 *supra* and accompanying text.

116. *See* note 78 *supra* and accompanying text.

117. The danger of prejudgment and bias was described by the Supreme Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974):

> [A] preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

During the negotiation, the guardian should remain neutral in order to facilitate a mediation process in which the parties themselves negotiate an acceptable settlement. The guardian's main objective should be to gauge the strengths and weaknesses of the parties' contentions. Because the judge would not be a part of the pretrial settlement negotiations, she would be able to maintain the neutrality required to determine, at the settlement hearing, whether the settlement was fair, reasonable, and adequate. In making these determinations, however, the judge would have the benefit of the guardian's inside observations.

118. The settlement process would then resemble the negotiation of a consent decree. As described by Judge Chayes, the consent decree enables the parties to control the outcome of the litigation, "[e]ach party recogniz[ing] that it must make some response to the demands of the other party, for issues left unresolved will be submitted to the court, a recourse that is always chancy . . . ." Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1299 (1976); *see also* Fiss, *The Supreme Court, 1978 Term — Foreword: The Forums of Justice,* 93 HARV. L. REV. 1 (1979) (arguing that judges have a duty to uncover the inadequacies of the class action device and solve them creatively).

C. *Feasibility*

The advantages of the guardian mechanism should be weighed against the potential disadvantages — the monetary cost of instituting the mechanism and the infringement on the rights of the parties involved. Fortunately, these potential problems are not insurmountable.

A fixed salary for the guardian would best serve the goals of the guardian mechanism. It would insure the neutrality and thus the credibility of the guardian by removing any economic incentive to prolong negotiations — an incentive that accompanies a system of hourly or daily pay. Under this proposal, the guardian would be contracted for a specific time period that could be extended as necessary.

To finance the guardian mechanism the court would need to establish a fund. This could be done by setting aside a nominal percentage, perhaps one percent, of all settlement funds produced in class action suits.[119] The court could also supplement the guardian fund by imposing a monetary penalty on meritless class action suits.[120] This penalty would also discourage vexatious litigation.[121] To ease the financial burden, members of the bar wishing to perform pro bono work could volunteer to be guardians. Other "free" potential guardians are federal magistrates, already paid on a salary basis.[122]

The court could ensure that the guardian mechanism did not infringe on the rights of the parties by a court order delineating the scope of the guardian's activity.[123] The order should emphasize that the guardian is not to supplant the judge or to advocate a position. If the guardian violated the court order, the parties could petition the court for redress.[124] The court could then take the appropriate remedial measures, including dismissal of the guardian. In addition, the guardian should be required to document all her activities. This

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119. In Haas v. Pittsburgh Natl. Bank, 77 F.R.D. 382, 384 n.2 (W.D. Pa. 1977), and Miller v. Mackey Intl., Inc., 70 F.R.D. 533, 535 (S.D. Fla. 1976), the courts charged the services of the guardian against the class settlement fund under the common fund doctrine. The proposed one percent charge could be justified as an administrative court cost because any party to a class action suit would have to utilize the guardian mechanism if they wished to investigate the possibility of a settlement.

120. *See* Textor v. Board of Regents, 87 F.R.D. 751, 754-55 (N.D. Ill. 1980) (assessing court expenses against counsel whom the court found to have misused the class action device).

121. *See* Magana v. Platzer Shipyard, 74 F.R.D. 61, 71 (S.D. Tex. 1977).

122. Magistrates can be assigned "additional duties" in the area of civil litigation. 28 U.S.C. § 636(b)(3) (1976). Magistrates perform a variety of duties as assigned by the trial court. For example, they hear habeas corpus petitions, resolve discovery disputes, and preside over civil trials with the consent of the parties. *See* Smalkin, *The Role of United States Magistrates,* LITIGATION, Spring 1981, at 11.

123. *Cf.* La Buy v. Howes Leather Co., 352 U.S. 249 (1957) (where the Court upheld the use of a circuit court's writ of mandamus ordering a district court judge to hear a case which he had referred to a master).

124. *Cf.* United States v. Raddatz, 447 U.S. 667, 680-83 (1980) (where the Court held that a magistrate's findings are not final but the district court judge can use them in his final determination without a de novo hearing).

would ensure that the guardian did not overstep the bounds delineated by the court as well as provide an adequate record for review.[125]

Adding a third party to the negotiating process could be seen as an infringement on the private negotiating rights of the parties. However, the confidentiality that may be required in settling private claims is not necessarily justified in the class action context. In that context, more is involved than the negotiating parties' private concerns. Also of the import are the interests of the absentee class members and society's interest in preventing abuse of the class action mechanism. Moreover, it is not necessary for the guardian to be an intrusive force in the negotiating process. Indeed, the parties themselves have some control over the degree of the guardian's intrusion since they determine whether the guardian is to act as a passive third-party observer or an active mediator.[126] Therefore, the guardian mechanism should not unduly disrupt the settlement process. Instead, it should preclude only those settlements resulting from an improper use of the class action device.[127]

CONCLUSION

The guardian mechanism is not designed to eliminate all of the intrinsic weaknesses of the class action device. Rather, the guardian mechanism attempts to preclude abuse of the class action device during the pretrial negotiation stage of a class action suit, when the class action device is most vulnerable to abuse. By appointing a neutral third party to preside over the settlement negotiations, the court can maintain the integrity of the settlement process. This will help guarantee a responsible substantive review hearing rather than the current superficial scrutiny that at best can detect the possibility of abuse, but cannot adequately address the problem. Thus, the guardian mechanism furthers the policy ends of rule 23. It precludes collusive settlements and guarantees that the interests of the absentee class are considered at the settlement hearing without discouraging class action litigation.

— *Sylvia R. Lazos*

125. *Cf.* Protective Comm. v. Anderson, 390 U.S. 414, 435 (1968) ("It is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.").

126. *See* text accompanying note 109 *supra.*

127. *Cf. In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 n.20 (7th Cir.) ("To the extent [that an inquiry into the conduct of the negotiations] discourages settlements, it should only discourage those negotiated in circumstances so irregular as to cast substantial doubt on their fairness."), *cert. denied,* 444 U.S. 870 (1979).