



Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2005

Preventing the Subversion of *Devlin v. Scardelletti*

Brian Wolfman

Georgetown University Law Center, wolfmanb@law.georgetown.edu


Georgetown Public Law and Legal Theory Research Paper No. 12-139

Reproduced with permission from Class Action Litigation Report, 6 CLASS 453 (June 25, 2005).
Copyright 2005 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1075>
<http://ssrn.com/abstract=2150362>

6 Class Action Litig. Rep. (BNA), at 453-458 (June 25, 2005)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Courts Commons](#), and the [Litigation Commons](#)



CLASS ACTION LITIGATION



REPORT

Reproduced with permission from Class Action Litigation Report, Vol. 6, No. 12, 06/24/2005, pp. 453-457. Copyright © 2005 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

OBJECTORS

In 2002, the U.S. Supreme Court ruled in *Devlin v. Scardelletti* that objecting class members could appeal a federal district court's approval of a class settlement without first intervening in the litigation. Public interest lawyer Brian Wolfman says the ruling was a victory for both objectors and the integrity of class action procedure: Objectors, he argues, help keep fairness hearings fair.

But a number of courts are now ruling that *Devlin* only applies to non-opt-out class actions, rather than the much more numerous ones that give class members opt-out rights. In this article, Wolfman details the exact wording of the Supreme Court decision and asserts that the high court clearly did not limit the application of *Devlin*.

Preventing the Subversion of *Devlin v. Scardelletti*

By BRIAN WOLFMAN

In *Devlin v. Scardelletti*,¹ the Supreme Court held that, under Federal Rule of Civil Procedure 23, a member of a class who objects to a proposed class action settlement may appeal the district court's ap-

proval of the settlement without having first intervened in the action. *Devlin* was a victory for class action objectors and the integrity of class action procedure more generally. But there is a movement afoot to undermine *Devlin* by limiting it to the relatively small category of non-opt-out class settlements. The purpose of this article is to help stop that movement.²

¹ 536 U.S. 1 (2002).

Brian Wolfman is the director of Public Citizen Litigation Group, a public interest law firm in Washington, D.C. He can be reached at brian@citizen.org.

² As a matter of full disclosure, I was co-counsel for the victorious Mr. Devlin, and the result is one that my office had been urging in cases in which we represented objectors.

Introduction

Two preliminary points: First, class actions are enormously powerful tools for justice. For decades, they have righted wrongs and compensated victims of discrimination, provided a means for reforming oppressive or recalcitrant governmental institutions, and deterred a wide array of wrongful business conduct in situations where individuals would not have had the means to sue on their own. But class actions can be abused, which in turn sours the public and provides fodder for politicians, jeopardizing the prospect of justice for ordinary citizens. Even just a handful of “sell out” settlements, and courts willing to approve them, can lead Congress to ill-advised “reforms,” such as the misnamed Class Action Fairness Act of 2005,³ which provides defendants with their choice of forum in most class actions, but will do little or nothing to curb abuses that occur when defendants seek out the most malleable lawyer to settle potentially meritorious class actions at bargain-basement prices.

Although the great majority of class actions are not abusive and most seek to address real problems, the potential for class action abuse is real. In individual litigation, the clients (the principals) usually can monitor their lawyer (the agent). By contrast, the agency relationship in class actions defies monitoring because the absent clients have no real relationship with their lawyers. And, even if they did, given the small amounts per person generally at stake in class actions, they would not rationally expend the time and resources to oversee their lawyers’ work. As a result, as one court put it, “the [class] lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.”⁴ As for the defendants, they care only about minimizing their overall liability, and they are indifferent as to how the pot is split between lawyers and clients.⁵ Thus, if we are concerned about the potential for class action abuse, we will also be concerned about assuring that class action objectors—who *do* monitor the class lawyers’ conduct—have a full and fair opportunity to participate in the class action settlement process.⁶

Second, lawyers representing objectors to class action settlements will never win a popularity contest. After all, objectors are very annoying to *both* the plaintiffs and the defendants. By the time objectors appear, the named parties have come to an agreement that will often affect the rights of tens of thousands of people, and involve tens or even hundreds of millions of dollars and a multi-million dollar attorneys’ fee request. By that time, the defendant has usually spent hundreds of thousands of dollars or more notifying the class, and it certainly does not want the deal to go sour. Even the district court, which has preliminarily approved the settlement and permitted the notice to be sent to the class,

³ P.L. 109-2.

⁴ *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991).

⁵ *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) (citing *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995)); *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977).

⁶ See, e.g., Deborah R. Hensler, et al., *Class Action Dilemmas—Pursuing Public Goals for Private Gain* 491-96 (Rand Inst. for Civil Justice 2000).

sometimes seems invested in approval.⁷ As Judge Richard A. Posner has put it, “with all the momentum that a settlement agreement generates, . . . the class members are presented with what looks like a *fait accompli*.”⁸ It is thus not surprising that, as one oft-cited Federal Judicial Center study found, 90 percent of federal class action settlements are approved without any substantive changes.⁹

If we are concerned about the potential for class action abuse, we will also be concerned about assuring that class action objectors—who *do* monitor the class lawyers’ conduct—have a full and fair opportunity to participate in the class action settlement process.

One potential solution to the “*fait accompli*” problem is to insist that district judges carefully scrutinize class action settlements with such heightened awareness that they act as fiduciaries for the absent class.¹⁰ But that is not as easy as it sounds. The district court often cannot get the information it needs to fully assess the fairness and legality of the settlement. The settling parties, at one time adversaries, are now on the same side. And although Federal Rule of Civil Procedure 23(e) requires a “fairness hearing” at which the judge must assess the pros and cons of the settlement, the settling parties do not, of course, engage in an adversary presentation, but rather praise the settlement to the heavens, while ignoring its weaknesses or illegalities. Judge Frank Easterbrook has bluntly put it:

[A] settlement followed by a fairness hearing remains more like a contract than like litigation . . . [in which there is] a genuine contest. Representative plaintiffs and their lawyers may be imperfect agents of the other class members—may even put one over on the court, in a staged performance.¹¹

In sum, in this otherwise non-adversarial setting, objectors play an important role because they serve as counterweights to a process that heavily favors settlement approval and to participants who have an interest in cutting off debate.

⁷ See, e.g., *Mars Steel Corp. v. Continental Illinois Nat’l Bank and Trust Co.*, 834 F.2d 677, 680 (7th Cir. 1987); Susan P. Koniak & George M. Cohen, “Under Cloak of Settlement,” 82 Va. L. Rev. 1051, 1122-28 (1996).

⁸ *Mars Steel*, 834 F.2d at 680-81.

⁹ Thomas E. Willging et al., “An Empirical Analysis of Rule 23 to Address Rulemaking Challenges,” 71 N.Y.U. L. Rev. 74, 141 (1996).

¹⁰ See, e.g., *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 28081 (7th Cir. 2002); *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768, 784 (3d Cir. 1995).

¹¹ *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc).

The Problem Pre-*Devlin*

To be sure, in the district court, objectors can try to counter this hydraulic pressure for approval, and occasionally they defeat settlements.¹² But objectors' counsel often find that, in fighting unfair and unlawful class action settlements, the appellate courts—which are more removed from these pressures—are more sympathetic to their arguments and more apt to establish legal principles that will protect the rights of absentees.¹³

The settling parties understand this. So, for years, they waged an effort to prevent objectors from appealing, arguing that objectors did not have “standing” to appeal unless they first became intervenors in the district court. And, somewhat surprisingly, a fair number of circuit courts agreed.¹⁴ This reality made objector practice very difficult. At first, many objectors were caught unawares by the intervention requirements.¹⁵ After all, class action notices always affirmatively state that class members may object by filing a timely objection in the district court, and they never even hint that objectors must intervene to preserve their appellate rights.¹⁶ Moreover, even when absent class members were aware of the intervention requirement and did move to intervene, those motions were often denied on the ground that the class representatives—the very people that the objectors opposed—adequately represented the objectors' interests, or on the ground that the objectors' intervention was untimely because they had not moved to intervene before the settlement was announced.¹⁷ Not only were appellate rights thus effectively undermined in many circuits, but with appellate safety valves weakened, settling parties felt freer to make life even more difficult for objectors in the district court—filing their papers in support of the settlement on the eve of the fairness hearing, denying objectors access to relevant information, and making even more one-sided fairness hearing presentations.

¹² See, e.g., *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp.2d 519 (D. Md. 2002); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 1995 U.S. Dist. Lexis 3507 (E.D. La. Mar. 20, 1995).

¹³ See *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd* *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997); *General Motors*, 55 F.3d 768; see also, e.g., *Smith v. Sprint Communications Co.*, 387 F.3d 612 (7th Cir. 2004); *Stanton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003); *In re Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315 (3d Cir. 2001); *In re Teletronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000).

¹⁴ See, e.g., *Cook v. Powell Buick Inc.*, 155 F.3d 758, 760 (5th Cir. 1998); *Shults v. Champion Intern. Corp.* 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004, 1006 (10th Cir. 1993).

¹⁵ For instance, in *Bowling v. Pfizer Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dismissed*, 1993 WL 533489 (6th Cir. Dec. 21, 1993), the Sixth Circuit dismissed an appeal of a major nationwide settlement on the ground that the objectors had not intervened, even though prior reported decisions of that court held that non-intervening objectors had the right to appeal a class settlement. See, e.g., *Sertic v. Cuyahoga, Lake, Etc., Carpenters Dist. Council*, 459 F.2d 579 (6th Cir. 1972).

¹⁶ See *Manual for Complex Litigation Third*, § 41.43, at 488 (Fed. Judicial Ctr. 1995) (model class action notice).

¹⁷ See, e.g., *In re Teletronics Pacing Systems Inc.* 1999 WL 305511, *1-2 (S.D. Ohio Mar. 5, 1999), *rev'd*, 221 F.3d 870, 881-82 (6th Cir. 2000); see also *Devlin*, 536 U.S. at 5 (describing lower court's denial of intervention as untimely).

Devlin to the Rescue

Then came *Devlin*. Writing for a seven-Justice majority, Justice Sandra Day O'Connor held that any class member who timely objects to a class action settlement may, like any other litigant facing an adverse final decision of a district court, appeal as of right to the court of appeals from the approval of a class action settlement. *Devlin* contained two key holdings. First, it rejected lower court decisions that characterized the issue as one of “standing.” Class members' standing does not depend on having intervened in a class action in which they are already a member of the plaintiff class; they have standing to appeal, the Court held, for the same reason that they had standing to object: They are members of a class whose property or other interests are at stake in the approval of a class action settlement.¹⁸ Second, the Court rejected the notion, accepted by many courts of appeals, that class members must intervene as a prerequisite to appeal because, absent intervention, they are not “parties” to the action.¹⁹ The Court acknowledged that absent class members are considered “parties” for some purposes and not others.²⁰ But in the context of whether they should be permitted to appeal an adverse judgment only one fact really matters to the plaintiffs and the defendants alike: If the settlement is finally approved, it will have binding effect on the absent class members and permanently extinguish their rights.²¹ In that very important sense, the absentees are just like the named class representatives and hence are parties entitled to appeal.

Or Not?

Devlin made the difficult life of an objector a bit easier. Or so we thought. The ink was not yet dry on the decision before settling parties sought to eviscerate *Devlin* by arguing that it applies only to so-called mandatory classes—classes certified pursuant to Federal Rules of Civil Procedure 23(b)(1) and (2) that do not afford class members a right to opt out. To oversimplify somewhat, Rule 23(b)(1) and (b)(2) non-opt-out class actions generally involve claims solely for injunctive relief or similar relief that, as a practical matter, can only be afforded to the class as a whole. (*Devlin* itself involved a Rule 23(b)(1) non-opt-out settlement.) On the other hand, Rule 23(b)(3) class actions—which constitute the vast majority of class actions—apply to cases in which the class members have claims for monetary relief. In (b)(3) cases, class members must be allowed to opt out.²²

The effort to undermine *Devlin* began innocently enough, with a decision from the Arkansas Supreme Court holding that, under Arkansas's counterpart to federal Rule 23, the right to appeal established in *Devlin* should apply only to members of mandatory class actions.²³ Although *Ballard* interpreted only Arkansas Rule of Civil Procedure 23, it quickly had an effect in the federal courts. Just two months later, in *In re General American Life Insurance Company Sales Practices*

¹⁸ *Devlin*, 536 U.S. at 6-7.

¹⁹ *Id.* at 8-9.

²⁰ *Id.* at 9-10.

²¹ *Id.* at 10.

²² See Fed. R. Civ. P. 23(c)(2).

²³ *Ballard v. Advance America*, 79 S.W.3d 835 (Ark. 2002).

Litigation, the Eighth Circuit, relying on *Ballard* in dicta—dicta because the court dismissed the appeal as moot—proclaimed that limiting *Devlin* to mandatory classes “has considerable merit.”²⁴ Last year, the Eleventh Circuit characterized “the point of *Devlin*” as “allow[ing] appeals by parties who are actually bound by a judgment, not parties who merely could have been bound by the judgment,” and posited that it was “[t]his feature of *Devlin*” that led the Arkansas Supreme Court “to believe that it applies only to mandatory class actions.”²⁵ The Eleventh Circuit also noted the Eighth Circuit’s “tentative approval” of limiting *Devlin* to mandatory class actions, but itself expressed no opinion on the issue, which was not presented in the case before it.²⁶ And, recently, a Florida state appellate court, interpreting the Florida class action rule, held that *Devlin* applies only in mandatory class actions, expressing its agreement with the reasoning of the Arkansas Supreme Court and the Eighth Circuit.²⁷

Only two federal circuits have definitively decided the question, and, fortunately, both have held that *Devlin* applies to mandatory and opt-out classes.²⁸ That being the case, this Article may seem alarmist. However, as explained further below, because it is now clear that settling parties will contest non-intervening objectors’ rights to appeal settlement approval in opt-out cases, objectors now find themselves in a difficult position. In most of the country, they must seek and be granted intervention, lest they risk losing their appellate rights down the road. That result is exactly what *Devlin* rendered unnecessary, and any movement in that direction should be nipped in the bud.

²⁴ 302 F.3d 799 (8th Cir. 2002); see also *In re Wireless Telephone Federal Cost Recovery Fees Litig.*, 396 F.3d 922, 929-30 (8th Cir. 2005) (refusing to provide an advisory opinion on the issue because appellant only sought ruling on applicability of *Devlin* and did not object to settlement terms); *Snell v. Allianz Life Ins. Co. of N. Am.*, 327 F.3d 665, 670 n.2 (8th Cir. 2003) (suggesting in dicta that *Devlin* does not apply to opt-out class actions).

²⁵ *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1310 & n.7 (11th Cir. 2004).

²⁶ *Id.* at 1310 n.7.

²⁷ *Barnhill v. Florida Microsoft Anti-trust Litig.*, ___ So.2d ___, 2005 WL 766971, *1-2 (Fla. App., 3d Dist., Apr. 6, 2005) (also reversing trial court’s denial of intervention).

²⁸ *Churchill Village LLC v. General Electric*, 361 F.3d 566, 572-73 (9th Cir. 2004); *In re Integra Realty Resources Inc.*, 354 F.3d 1246, 1257 (10th Cir. 2004). The Seventh Circuit has considered an appeal by objectors in an opt-out case, citing *Devlin*, without addressing a possible distinction between mandatory and opt-out class actions. *In re Synthroid Marketing Litig.*, 325 F.3d 974, 976-77 (7th Cir. 2003). In an earlier pre-*Devlin* appeal in the same case, the Seventh Circuit reversed the district court’s denial of the objectors’ motion to intervene and heard the appeal on its merits. See *In re Synthroid Marketing Litig.*, 264 F.3d 712, 715 (7th Cir. 2001). Moreover, at least two circuits have stated *Devlin*’s holding broadly, but have not addressed the mandatory vs. opt-out issue. See *In re Rite Aid Corp. Securities Litig.*, 396 F.3d 294, 299 (3d Cir. 2005); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 350 F.3d 360, 363 n.3 (3d Cir. 2003); *In the Matter of Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 768 (7th Cir. 2003); see also *Batchelder v. Kerr-McGee Corp.*, 246 F. Supp. 2d 525, 530 n.1 (N.D. Miss. 2003). A few state courts have also upheld broad non-intervention rules, relying on *Devlin*. See, e.g., *City of San Benito v. Rio Grande Valley Gas. Co.*, 109 S.W.2d 750, 754-56 (Tex. 2003); *Nicholson v. F. Hoffman LaRoche Ltd.*, 576 S.E.2d 363, 365 (N.C. App. 2003).

Devlin Means What It Says

The efforts at limiting *Devlin* to non-opt-out classes, and the Eighth Circuit’s “considerable merit” dictum, are based on one sentence from the *Devlin* opinion that, even viewed in isolation, does not support the limitation. Moreover, all other aspects of the ruling in *Devlin* indicate that it applies to opt-out, as well as non-opt-out, class actions.

First of all, the question presented on which the Supreme Court granted certiorari was not limited to mandatory classes, nor did it even mention that petitioner *Devlin* was a member of one.²⁹

More important, after describing the facts of the case and the procedures below, the Supreme Court explained why it had granted review: “We granted certiorari [citation omitted] to resolve a disagreement among the Circuits as to whether nonnamed class members who fail to intervene may bring an appeal of the approval of a settlement.”³⁰ This statement of the question presented did not even hint that the ruling would be limited to mandatory classes.

The Court then cited the decisions that formed the split in circuit court authority. Almost all of the cases cited, including all of the decisions holding that intervention was not required to appeal from approval of a class settlement, were Rule 23(b)(3) opt-out class actions.³¹ It would have been spectacularly odd for the Supreme Court to have silently limited its holding to mandatory classes because such a holding would not have resolved the very question, and the very circuit split, that the Court claimed to be resolving.³²

Moreover, with the exception of its one reference to the non-opt-out nature of the *Devlin* case (discussed below), *Devlin* repeatedly described the issue before it broadly in ways that would encompass Rule 23(b)(3) opt-out class actions.³³

²⁹ See Petition for a Writ of Certiorari, at i, in *Devlin v. Scardelletti*, No. 01-417 (filed Sept. 7, 2001) (“Whether a class member who, upon receiving notice of a proposed class action settlement, objects and intervenes has standing to appeal the district court’s approval of the settlement.”). The question presented suggests that Mr. *Devlin* intervened in the action. Although he had moved to intervene in the district court, the motion was denied as untimely. See *Devlin*, 536 U.S. at 5. His unsuccessful attempt to intervene played no role in the Supreme Court’s decision.

³⁰ *Devlin*, 536 U.S. at 6.

³¹ See *id.* (citing *In re Paine Webber Inc. Ltd. Partnerships Litig.*, 94 F.3d 49, 51 (2d Cir. 1996); *Carlough v. Amchem Prods. Inc.*, 5 F.3d 707, 711 (3d Cir. 1993); *Marshall v. Holiday Magic Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977)).

³² Of the four cases cited by the Supreme Court that had held intervention a prerequisite to appeal, two indisputably were opt-out class actions. See *Cook v. Powell Buick Inc.*, 155 F.3d 758, 760 (5th Cir. 1998); *Gottlieb v. Wiles*, 11 F.3d 1004, 1006 (10th Cir. 1993). In one case, the opinion does not reveal whether certification was mandatory or opt-out. See *Shults v. Champion Intern. Corp.* 35 F.3d 1056 (6th Cir. 1994). Only one case cited by the Supreme Court, *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), clearly involved non-opt-out certification; however, *Guthrie* did not involve a class action settlement but rather an attempt by an absent class member to appeal a litigated judgment entered in district court proceedings in which the absentee had not participated.

³³ See, e.g., *Devlin*, 536 U.S. at 6 (describing Fourth Circuit’s holding); *id.* at 7 (“Respondents argue that, because petitioner is not a named class representative and did not successfully move to intervene, he is not a party for the purposes

Finally, at the end of the *Devlin* opinion—the place where the Court tends to state its holding most definitively—the holding is not limited to mandatory class actions, but instead includes all class actions:

We hold that nonnamed class members like petitioner who have objected to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening.³⁴

The sole basis for the argument that *Devlin* applies only to mandatory classes is the following sentence from the Court's opinion:

Particularly in light of the fact that petitioner had no ability to opt out of the settlement, see Fed. R. Civ. Proc. 23(b)(1), appealing the approval of the settlement is petitioner's only means of protecting himself from being bound from a disposition of his rights he finds unacceptable and a reviewing court might find legally inadequate.³⁵

This sentence, even if it were the only indicator of the Court's intent, does not support a limited reading of *Devlin*. The sentence describes Mr. Devlin's difficult circumstances and thus was illustrative, in the Supreme Court's view, of why an intervention requirement was unwarranted. The sentence includes no words of limitation. Quite the contrary, by premising the sentence with the word "particularly," the Court indicated that the non-opt-out character of the *Devlin* class action was a special and *additional*, not a necessary, part of its rationale.³⁶

Limiting *Devlin* to Mandatory Classes Makes No Sense

Even if there were some doubt from the text of the opinion as to whether *Devlin* applies to all class actions, there would be no reason to resolve that doubt by limiting *Devlin* to mandatory classes. The argument in support of the limitation is premised on the notion that Rule 23(b)(3) class members who are dissatisfied with a settlement can opt out and, therefore, because they can escape the settlement's binding effect, they do not need

of taking an appeal."); *id.* at 9 ("Nor does considering non-named class members parties for purposes of bringing an appeal conflict with any other aspect of class action procedure."); *id.* at 10 ("Nonnamed class members are, for instance, parties in the sense that the filing of an action on behalf of the class tolls the statute of limitations against them."); *id.* ("To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them"); *id.* at 11-14 (describing and rebutting government's views, none of which made distinction between mandatory and opt-out class actions); *id.* at 12 ("Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the Government's suggested requirement.").

³⁴ *Id.* at 14. Justice Antonin Scalia's dissent gave no indication that he viewed the majority's holding as applying only to mandatory classes. To the contrary, Justice Scalia decried the decision's far-reaching effects on appellate courts, *Devlin*, 536 U.S. at 21-22 (Scalia, J., dissenting), a point hardly worth making if the decision were limited to the relatively few non-opt-out class actions.

³⁵ *Id.* at 10-11.

³⁶ See *Oxford American Dictionary* 652 (Avon ed. 1982) (particular: "special, exceptional").

to appeal.³⁷ But that argument misapprehends the way most class actions work.

First, except for so-called "settlement classes," where certification and settlement take place simultaneously,³⁸ class certification, and thus the right to opt out, occurs in advance (sometimes years in advance) of settlement. Under a recent amendment to the federal class action rule, district courts have discretion to allow a second opt-out when a case settles, but they are not required to do so.³⁹ In opt-out cases where class members are not provided the right to opt out at settlement, it is difficult to see how an appealing objector's situation differs at all from the situation in which Mr. Devlin found himself.

Second, and more important, it is well understood that in many, and possibly most, Rule 23(b)(3) class actions, the opt-out right is not meaningful. In the quintessential Rule 23(b)(3) class action, the class members have relatively modest amounts at stake. Take, for instance, a situation where class members claim that their credit card company defrauded them by imposing an unlawful fee or that they were victimized by stock price manipulation that, while providing a huge windfall to company insiders, harmed the class members for relatively small amounts per share. Absent unusual circumstances, these class members would not rationally opt out because their cases are not valuable enough to support individual litigation. Indeed, the main goal of the modern damages class action is to aggregate relatively small claims that otherwise would not be redressed.⁴⁰ Thus, for all practical purposes, most class members in opt-out class actions facing an unfair or unlawful class action settlement find themselves identically situated to their counterparts in mandatory class actions.⁴¹ For both, the only practical way to fight the settlement is to object in the district court and appeal if the district court approves it.

Moreover, whatever one might have thought before *Devlin* about the question whether intervention should be required, one benefit of an all-inclusive, non-intervention rule is that it will avoid satellite litigation concerning intervention. Prior to *Devlin*, there was an enormous amount of such litigation.⁴² *Devlin*, it seemed, had put an end to all of that. Now, sadly, objectors in Rule 23(b)(3) class actions—which, as noted, comprise most class actions—unless they are in the Ninth or Tenth Circuits, would be well advised to move to intervene, because they cannot be sure what the rule

³⁷ *Ballard*, 79 S.W.3d at 837.

³⁸ See *Manual for Complex Litigation Fourth*, § 21.612, at 313 (Fed. Judicial Ctr. 2004).

³⁹ See Fed. R. Civ. P. 23(e)(3).

⁴⁰ See, e.g., *Amchem Prods Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'") (quoting Kaplan, "A Prefatory Note," 10 B.C. Ind. & Com. L.Rev. 497, 497 (1969)); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1309 (3d Cir.1993).

⁴¹ See *Churchill Village*, 361 F.3d at 572.

⁴² Cf. *Devlin*, 536 U.S. at 11-14 (criticizing Solicitor General's proposed intervention requirements in large part because it would engender wasteful litigation and provide little or no countervailing benefit).

is.⁴³ Thus, the satellite litigation over intervention will continue, but with a new twist: It will involve another round of litigation concerning whether *Devlin* extends to opt-out class actions.

This is a most unhappy prospect. Although I am confident that most, if not all, appellate courts will eventu-

⁴³ See *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 69 (S.D.N.Y. 2003) (case in which, in light of Arkansas Supreme Court's decision in *Ballard*, objectors "filed their motion to intervene out of an abundance of caution to preserve their right to appeal").

ally agree that *Devlin* applies to opt-out class actions, in the meantime, we are in for more litigation, with the potential to undermine objectors' rights. And perhaps once is not enough. Ultimately, the Supreme Court may have to say again what it already said in *Devlin*: A non-intervening absent class member who files a timely objection to a proposed class action settlement has a right to appeal approval of that settlement to a federal court of appeals.