Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers

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I. Introduction

Class actions have grown to hold an essential role in American legal landscape and culture. In harnessing lawyers’ private pursuit of self-interest, class actions have promoted the common good\(^1\) by taking law enforcement out of the state’s hands and putting it in the hands of private attorneys general.\(^2\) Deterrence of anticompetitive behavior, enforcement of full disclosure in the stock market, compensation of innocent workers and customers for malignant illnesses, and assurance of adequate product quality, have all come to rely to a large extent on the viability of class actions.\(^3\) Private lawyers, seeking private gain, have become self-employed guardians of the public interest, searching for causes of action and pursuing them to recovery. Using private resources, class attorneys have made

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\(^1\) For example, in his testimony on February 10, 1995, before the Subcommittee on Telecommunications and Finance Committee on Commerce in the United States House of Representatives concerning litigation reform proposals, Arthur Levitt, Chairman of the Securities and Exchange Commission (SEC) stated that “[p]rivate actions are crucial to the integrity of our disclosure system because they provide a direct incentive for issuers and other market participants to meet their obligations under the securities laws.” *Common Sense Legal Reform Act: Hearing on H.R. 10 Before the House Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong. (1995) (statement of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission).


substantial contributions to deterrence and compensation, supplementing the public sector in pursuit of these goals.4

Yet class actions have been repeatedly criticized for allowing class attorneys to appropriate more than their rightful and efficient share of the common fund and for providing much less compensation and deterrence than alleged.5 Lawyers’ gain has often come at the price of class members’ loss. Misalignment of interests, it has been claimed, has resulted in absurdly low compensation for class members, and at the same time class action attorneys’ fees have soared.6 Courts have repeatedly failed to guarantee class members their rights and have kept approving collusive settlements that award class members mere coupons while providing attorneys with large monetary fees.7 Named representative plaintiffs have proven to be merely figureheads: ineffective, passive, unsophisticated, and

4. See id. at 71 (contrasting enforcement by nonprofit organizations with enforcement by law firms).

5. See id. at 119, 434-37 (comparing attorneys’ fees with payouts to class members).

6. See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995) (demonstrating the huge gap between class members’ recovery and class attorneys’ fees). In General Motors Corp., the Third Circuit reversed the trial court’s certification of a settlement that provided each member of the represented class a $1,000 discount on the purchase of a new GM truck, while awarding the class attorneys approximately $9.5 million in fees. Id. at 780-82. Yet, whether claims of abuse and collusion hold true in general is very difficult to determine. Some figures drawn from a recent study of ten consumer and mass torts demonstrate the difficulty in appraising these claims. See generally HENSLER ET AL., supra note 3. In these suits, class attorneys’ fees ranged from 5% of the total dollars defendants agreed to pay to settle the lawsuit to about 50% of the total settlement value. HENSLER ET AL., supra note 3, at 435. Of each dollar the defendant paid to the class, class members received less than 20 cents in one class action, less than 50 cents in three class actions, and about 50 cents in two other class actions; in the remaining class actions, class members received 65 cents on the dollar or more. HENSLER ET AL., supra note 3, at 442. Which of these outcomes were optimal from the class perspective depends on variables such as the cases’ merits, their probability of success, the aggregate damages class members suffered, and the lawyers’ actual costs. These were difficult to evaluate even for researchers who interviewed lawyers and judges involved in the litigation and who surveyed available records of these cases. HENSLER ET AL., supra note 3, at 424.

7. See, e.g., General Motors, 55 F.3d at 780-82 (reviewing the district court’s rationale for approving a settlement and award of attorney fees over the plaintiff’s objections).
completely disregarded by both courts and class attorneys. 8
Class actions have thus reached what seems to many a dead end. Lawyers are instrumental to the success of private law enforcement, yet any such success results in bigger feasts for lawyers, leaving class members with mere scraps and leftovers.9
The self-appointed guardians are allegedly giving too much consideration to their self-interest and too little attention to their duties as guardians. The question is, therefore, who should guard the guardians?10

This Article presents a possible answer to this question, a way out of the dead end. It shows that lawyers can be effectively monitored, if the right monitors are chosen and those monitors are given the proper incentives. It proposes to use private monitoring by self-interested individuals and organizations, who would compete and pay to obtain the monitor’s position and would receive a share of the class recovery in return. Monitors would supervise class attorneys, set their fee, and oversee their conduct in litigation and settlement. They would have the resources and the expertise necessary to guarantee higher expected payoffs for class members, and they would be sufficiently compensated to do so. Instead of direct regulation of lawyers, courts would only have to supervise monitors. Private monitors would do the rest of the job.

The proposal consists of the following three elements:

The monitor’s fee. 11 The monitor would be paid a percentage of the total class recovery. That percentage would be the minimum

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8. See Jean Wegman Burns, Decorative Figureheads: Eliminating Class Representatives in Class Actions, 42 HASTINGS L.J. 165, 179-86 (1990-91) (providing an extreme view that class action representatives are not necessary to the operation of the class action).
9. One major critique of the class action device is that it allows plaintiffs’ attorneys to bring frivolous strike suits and force defendants to settle such suits merely to avoid the litigation, reputation costs, and the huge risks involved. See, e.g., SECURITIES CLASS ACTIONS: ABUSES AND REMEDIES (Edward J. Yodowitz et al. eds., 1994). Although this Article does not investigate this problem, it is readily verifiable that my proposal can only mitigate such a problem as it reduces lawyers’ excessive rent from bringing class actions.
11. See infra Part V.A.
necessary to motivate the monitor to invest the time and costs required for effective supervision of the class attorney. Since that required investment would often be low, the price class members would have to pay by yielding part of their joint fund would be more than outweighed by their gains from adequate supervision of class attorneys’ rents and opportunistic behavior.

Selection of the monitor. The monitor would be selected by an auction in which every candidate would submit the highest price he is willing to pay if he is given the monitor’s position. The candidate whose bid is highest would be selected and would then pay his bid, which may be distributed at the court’s discretion either to the class or used to finance part of the class’s litigation costs. Thus, a large part of the price that the class pays for monitoring would be earned in advance through the winning monitor’s bid.

The pool of candidates would not be restricted to class members only. Anyone may bid to monitor, subject to structural restrictions that are intended to limit possible collusion between monitor and lawyer. The winner of the auction would be the one who would monitor the lawyer most efficiently, as he would be able to earn the highest net rent in monitoring and thereby being able to bid highest for the job.

The monitor’s duties and authority. After being chosen, the monitor would select the class attorney, determine her fee arrangement, and submit it for the court’s approval. During litigation the monitor would supervise the class attorney and submit reports to the court when required. Any settlement would have to be approved by the monitor, subject to his absolute discretion.

By awarding the private monitor a percentage of the class’s recovery, the proposed scheme would motivate potential candidates to bid for that position and result in the selection of the most efficient monitor from among those candidates. By opening the auction not only to the class members but also to all other potential monitors, the auction process will avoid being restricted to too limited a pool of candidates—among whom the most adequate do not want to monitor and the ones who would want to do so are always inadequate. Private monitors would guard the class attorneys from abusing their rightful

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12. See infra Part V.B.
13. See infra Part V.C.
beneficiaries, namely, society-at-large and class members in particular. They would succeed where courts and class members have failed because they would be adequately financed, motivated, and informed and would therefore be able to provide a proper check on class attorneys.

Most of the literature that has analyzed the various agency problems in class actions has focused on the optimal regulation of the class attorney’s fee. This Article takes on these problems from a different perspective. It is a first effort to analyze basic questions such as who should monitor class action lawyers, how the monitor should be selected and compensated, and what conditions would promote effective monitoring. Although some have written on the efficacy of court and class member monitoring, few have tried to put together an analytical framework within which such efficacy can be evaluated and improved. Furthermore, none has come up with a workable monitoring scheme that would be applicable in the broad and diverse contexts in which class actions arise. This Article’s approach is thus novel both in its focus and in its suggested solution.

The Article proceeds as follows. Part II gives a short summary of the main agency problems that affect the performance of attorneys in class actions. Part III describes the inherent constraints and barriers that prevent courts from effectively supervising class counsels. Part IV discusses the ineffectiveness of monitoring schemes under Federal Rule of Civil Procedure 23 and under the 1995 Private Securities Litigation Reform Act. Part V details the private monitoring proposal and discusses its advantages over current practices. Part VI offers a brief conclusion.

II. Why Monitor? Class Attorney Agency Problems

The less lawyers are supervised, the more they tend to slack off, misrepresent facts, and collude with defendants. This does not imply that lawyers are immoral or unethical by nature. It only means

14. See infra Part II.
15. The methodology used to demonstrate the different problems in class actions is analytical rather than empirical. The extent of abuse, collusion, misrepresentation, and under-investment is not and cannot be proved empirically, given the complexity of issues of fact and law involved. Such problems are shown, however, to be almost inescapable due to the current information and incentive structures in class actions.
that they are human. Indeed, there exists an extensive literature that has analyzed and documented similar problems in various relationships, such as those between an employer and her employee, a landlord and his tenant, a shareholder and a corporate manager, an insurance company and its insured, and a patient and her doctor. These are all agency relationships. In each of them an agent performs some tasks for a principal, the agent’s interests and incentives diverge from those of the principal, and the agent holds some relevant private information that is not shared by the principal.

Agency problems are traditionally divided into moral hazard and adverse selection problems. The former include all cases in which the agent’s actions are not observed by the principal. The latter consist of cases in which the agent’s decisions depend on some unobservable characteristics that only she can observe, in a manner that may adversely affect the principal. In the class action context—as well as in attorney-client relationships in general—moral hazard refers mainly to the lawyer’s private information concerning the effort, time, and skill that she has invested in the lawsuit. Adverse selection consists of all other private information that the lawyer holds that may affect the class’s expected recovery, such as the expected, ex ante probability of winning the suit, the lawyer’s quality, or her attitudes toward risk.

The following subsections give a more detailed account of the various inefficiencies inherent in attorney-client relationships in general and particularly in class actions. They show that these inefficiencies remain largely unsolved under attorney’s fee regulation and that there is therefore need for improvement in the direct monitoring of class counsel.


20. The term “inefficiency” as it is used in this Article includes any situation in which the class earns a lower expected payoff than it would have if all of the information were available to the court. The point of view taken is ex post, after the
One preliminary note is necessary. This Article discusses common fund class actions. These are class actions that create, increase, or preserve a common fund whose monetary benefits extend to the whole class.21 The lawyer’s fee in such class actions is paid from the common fund, thus allocating the proceeds from the lawsuit between the class and the lawyer, who can never collect a fee higher than the actual amount recovered, whether in settlement or in judgment. A different type of class action that this Article does not discuss is the fee-shifting class action in which no common fund is created and in which the class attorney fees are paid by the losing defendant.22 Fee-shifting class actions create different incentives as

class has been harmed. See, e.g., Brown v. Phillips Petroleum, 838 F.2d 451, 456 (10th Cir. 1988) (showing how the court serves as a fiduciary for the class when deciding the class counsel’s fee). The analysis does not encompass costs incurred by defendants and courts, nor does it embody the ex ante deterrence effects of the alternative class action structures. Professor Steven Shavell has written extensively on the general divergence between private and social interests in litigation. See Steven Shavell, The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System, 26 J. LEGAL STUD. 575 (1997). For an excellent discussion of the effect of the class action on deterrence, insurance, and compensation, see David Rosenberg, The Causal Connection In Mass Exposure Cases: A “Public Law” Vision of the Tort System, 97 HARV. L. REV. 849 (1984), and David Rosenberg, Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases, 71 N.Y.U. L. REV. 210 (1996).

Nevertheless, it should be clear that the two main objectives of common fund class actions, namely deterrence and compensation, are positively correlated with class members’ recovery. Everything else being equal, the larger the class’s recovery, the more plaintiffs are compensated and the more prospective defendants are deterred. Whether such higher compensation and deterrence is optimal is beyond the scope of this paper.


22. When the class seeks non-monetary remedies such as structural reforms, injunctions, or declaratory relief, no fund is available for the lawyer’s compensation. Examples include many of the civil rights, prisoners, school desegregation, and environmental protection class actions. In the absence of a paying client, the class lawyer’s fee in such cases will often be paid by the losing defendant. This is an exception to the rule in American courts whereby each litigant must bear his litigation costs, irrespective of the litigation’s outcome. See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 247 (1975).
far as settlements and attorney’s fee motions are concerned. In particular, defendants have a true interest in limiting the class attorney’s fee; thus, the adversary process that is so lacking in common fund class actions performs much better in the fee-shifting context. Furthermore, most of these suits are initiated by interest groups and are handled by public interest attorneys whose incentives largely differ from those of the private class action bar. Finally, in the absence of a common fund, neither the class attorney nor any potential monitor can be paid a share of it; payment must be input based, according to the time and costs actually spent. The proposal to auction a share of the class to potential monitors is, therefore, both of a lesser necessity and probably less applicable in such cases.

Access to judicial relief in these contexts therefore requires explicit legislative authorization of fee-shifting from a losing defendant to the lawyer. Id.


24. Common fund class actions accounted for about 75% of all class actions reported in judicial opinions, in the general media, and in the business press in 1995-96. HENSLER ET AL., supra note 3, at 52-53.
A. Litigation Inefficiencies

Litigation requires investment of time, effort, and financial resources. Legal research, drafting and answering interrogatories, conducting depositions, interviewing experts, and arguing cases in court are all tasks the lawyer must perform in order to advance the value of the case. Additionally, numerous fixed expenses must be borne, including filing fees, experts’ fees, administrative costs (for example, document production, postage, long distance and fax charges, lawyer transportation, typing services, etc.), and overhead and fixed costs of maintaining a law office. Class action attorneys bear all these costs, yet enjoy only part of the returns. Whenever the class wins or settles a lawsuit, the attorney’s share of the recovery is less than one hundred percent.


Moreover, in no class action can the class attorney expect to be fully reimbursed for her costs. First, there is always a chance that the class may lose, in which case there is no available fund to pay the lawyer. Second, even if the class wins or settles, the highest share the lawyer might be allowed may still be insufficient to recoup the lawyer’s investment and expenditures. Lawyers would therefore tend to invest less than they would if they were the sole owners of the proceeds from the lawsuit or if they were directly and effectively monitored by the owner and always paid to cover their costs.

Neither form of class attorney compensation, namely the percentage fee and the “lodestar” hourly fee, will solve this under-compensating lawyers, using a contingent fee in which the attorney would bear a percentage of her costs equal to her contingent share of the recovery. According to this proposal, the lawyer would be compensated for the remaining costs by a “third party administrator” who would be paid an upfront fee in advance. Although from a theoretical perspective this proposal seems to solve the moral hazard problem, its applicability is doubtful, especially because of agency problems that would arise in the relationship between the third party and the lawyer.

27. The lodestar fee was introduced by the Third Circuit in *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-70 (3rd Cir. 1973). According to this fee arrangement, the court must first determine the hours reasonably expended by counsel that created, protected, or preserved the fund. Then the number of compensable hours should be multiplied by the counsel’s reasonable hourly rate. The product is the “lodestar,” which may then be increased or decreased based upon the risk of nonpayment and the quality of the attorney’s work. In *City of Burlington v. Dague*, the Supreme Court eliminated the use of contingency (or risk) adjustment in statutory fee shifting cases. 505 U.S. 557, 567 (1992). Nevertheless, most courts have not regarded this decision as binding in common fund class actions and have therefore allowed for risk multipliers. See, e.g., *Florin v. Nationsbank of Georgia*, 34 F.3d 560, 564-66 (7th Cir. 1994) (rejecting the application of *Dague* in common fund class actions); *In re Washington Pub. Power Supply Sys. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (finding that the rationale for barring multipliers in statutory fee cases does not apply in the common fund context); *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 515-17 (6th Cir. 1993) (arguing that the uniqueness of common fund class actions requires allowing district courts to select the most appropriate method for calculating attorneys’ fees); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1273 (D.C. Cir. 1993) (stating that *Dague* does not address the question of attorneys’ fees in non-statutory common fund class actions); *McLendon v. Cont’l Group*, 872 F. Supp. 142, 155-57 (D.N.J. 1994) (citing the differences between statutory fee-shifting cases and common fund class actions as justification for not eliminating the use of risk adjustment in the latter); *see also Skeleton v. GM*, 860 F.2d 250, 254 (7th Cir. 1988) (holding that the arguments—equitable and statutory—against risk multipliers in statutory fee cases have much less application in common fund
investment problem. Under a percentage of the recovery fee arrangement, the class attorney would be motivated to spend more than the minimum possible hours, as she would enjoy part of the returns. Yet she may still earn some rent over and above the value of the hours she would actually spend, and her investment would tend to be lower than optimal. Generally, spending more time on the case should increase its value for the class but at a decreasing rate. This means that the increase in expected gross recovery generated by each additional hour is less than the one produced by the preceding hours. Optimally, the lawyer should stop investing only at the point where the increase in the expected recovery equals the cost of her time. In economic terms, that is the point at which the marginal return to the lawyer’s time equals its marginal cost. However, since the lawyer only gains a fraction of the returns, her marginal return is always lower than the marginal return for the class. The lawyer would therefore invest less time on the case, not working beyond the point at which her marginal return equals the cost of her time.\(^{28}\) Since all hours spent before that point produce a higher marginal return for the lawyer, she would earn a positive rent above her total costs.

\(^{28}\) One proposal intended to eliminate the separation between ownership and control of the class action was to auction the aggregate claim to the highest bidder. \textit{See Macey \\& Miller, The Plaintiff’s Attorney, supra note 25, at 105-118; Jonathan R. Macey \\& Geoffrey P. Miller, Auctioning Class Action and Derivative Suits: A Rejoinder, 87 NW. U. L. REV. 458, 460-62 (1993) (explaining the rationale for auctioning large-scale, small-claim class actions and proposing a procedure for doing so). See generally Jonathan R. Macey \\& Geoffrey P. Miller, A Market Approach Toward Tort Reform Via Rule 23, 80 CORNELL L. REV. 909 (1995) (providing a pragmatic analysis of class litigation issues). After buying the aggregate claim, the lawyer becomes its full owner and would therefore make optimal decisions to maximize the claim’s value. In spite of the theoretical appeal of this proposal, courts have nevertheless refrained from experimenting with it. It seems that the aversion toward claim selling and due process issues, and the fear that class claims would be sold too low due to lawyers’ risk aversion, collusion, or the lack of viable capital market for claim financing, have all prevented serious consideration of the full auction proposal. \textit{See Macey \\& Miller, The Plaintiff’s Attorney, supra note 25, at 110-16.} For a more restricted experimentation with auctions in class actions, \textit{see infra} note 40.\)
Although it may seem that an hourly rate would solve this agency problem, this is far from true. First, an hourly rate requires verification of the number of hours that the attorney spent on the case, otherwise she will file excessive time reports. Second, even if the number of hours actually spent is verifiable, it is difficult to know whether they were all necessary and cost effective; that requires information of the state of the case and its merits at each point throughout the litigation. Third, and most importantly, since the class attorney can only be paid if the class wins and a common fund is created, the hourly rate must be multiplied by a “risk multiplier,” taking into account the risk of non-payment. Indeed, that is the practice under the lodestar fee arrangement, which is currently practiced in class actions. Yet, the multiplier depends on information that the class attorney privately holds, namely the probability that the class would win the suit at each point during the litigation.29 Whenever this multiplier is set too high, the attorney would over-invest in the lawsuit; whenever it is set too low, the attorney would tend to under-invest.

Hence, whether paid by the percentage of recovery fee arrangement or by the lodestar fee, the lawyer’s investment of time, effort, and costs will often be non-optimal. Maximizing her fee, she will set her investment at a level different than the one that the class—if it had all relevant information—would have chosen.

B. Settlement Inefficiencies

Litigants bargain in the shadow of the law. This seemingly obvious observation is nonetheless often misleading. In practice, lawyers—not litigants—are the ones who bargain, and the shadow against which they bargain is the expected litigation outcome, which is affected by lawyers’ litigation incentive structures as well as the law. This is mostly true in class actions, in which the decision whether, when, and for how much to settle is left to the class attorney. Unlike ordinary litigation, in which a client may override the lawyer and settle, in class actions the class attorney is the only one who can initiate a settlement. The court may veto it but can never force an alternative settlement on the lawyer. Therefore, class attorneys must be at least as well off in settlement as in


32. See HENSLER ET AL., supra note 3, at 75 (noting that the plaintiff’s attorney and defendant often settle class actions by creating a compromise value for litigants’ claims).

33. The Manual for Complex Litigation characterizes the authority of class attorneys rather differently:

When class representatives favor acceptance of a settlement offer that class counsel believe is inadequate, they should be permitted to submit it to the court for preliminary approval and, if the court so orders, a fairness hearing. Although the court will ordinarily not approve a settlement that counsel do not recommend, class counsel—like class representatives—have no veto power over settlement of class actions.

MANUAL FOR COMPLEX LITIGATION § 30.44 (3rd ed. 1995).

I am unaware of any case in which a named plaintiff negotiated a settlement over the class attorney’s disapproval.
The question is to what extent, if at all, is the class made better off by the settlement? Since litigation consumes the resources of both the defendant and the class attorney and also exposes them to risk, there is a range of possible settlements at which both can be made better off. There is no guarantee, however, that such settlements would benefit the class as well. Since the class counsel bears the total litigation costs and since part of these costs are saved if the case is settled, any time that the lawyer earns the same percentage in trial and in settlement, she might agree to a settlement that would leave the class worse off than in litigation.

34. The assumption throughout this Article is that the law casts some shadow on settlement negotiations. Put more clearly, the assumption is that the litigation alternative is viable, posing a threat of adverse aggregate judgment to the defendant. This assumption is clearly violated by a “settlement class action” (i.e., a class action that is certified only for the purpose of settlement). In 1996, the advisory committee on civil rules considered adding Rule 23(b)(4), which would have allowed for certification of a class action if “the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirement of subdivision (b)(3) might not be met for purposes of trial.” Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559, 559 (1996). This proposed amendment was eventually rejected. In Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), the Supreme Court ruled that although “settlement is relevant to a class certification,” the class should still satisfy all requirements set by one of the alternatives in Rule 23. Id. at 619-22.

35. Some have suggested that class counsel should not simultaneously negotiate both a settlement and attorneys’ fees. See Prandini v. Nat’l Tea Co., 557 F.2d 1015, 1017 (3d Cir. 1977) (explaining that “the potential for impropriety” warrants the disapproval of the court); David Brainerd Parrish, Comment, The Dilemma: Simultaneous Negotiation of Attorney’s Fees and Settlement in Class Actions, 36 Hous. L. Rev. 531, 537-48 (1999) (reviewing the approaches of both federal and state court decisions regarding simultaneous negotiation of attorney’s fees and settlement). But see Evans v. Jeff D., 475 U.S. 717, 738 n.30 (1986) (holding that parties may simultaneously negotiate a “defendant’s liability on the merits and his liability for his opponents’ attorney’s fees”). Even if class attorneys do not negotiate their fee simultaneously with the class settlement, they still have some expectation of what that fee will be. Whenever that fee depends on the settlement amount, it will influence the lawyer’s bargaining position and her minimum accepted settlement.

36. This argument was initially suggested in the broader attorney-client context by Geoffrey Miller. Miller, supra note 30, at 193-94; see also Hay, Asymmetric Rewards, supra note 30, at 502 (applying mathematical formula in class actions in order to avoid the problem of asymmetric shares); Hay, Fee Regulation, supra note 30, at 1456-63 (discussing the basic structure of optimal fee
the lawyer earns 25% leaves him with $250,000 and leaves the class with only $750,000. If the expected judgment in litigation is $4 million and the lawyer has to spend $1 million in costs and time, he would earn a zero net payoff in litigation. He would, therefore, be more than willing to settle for the $1 million. The defendant’s counsel would obviously agree to such a settlement, but class members who could expect to win $3 million at trial (in expected terms) would be left much worse off. 37

It has been proposed that the class can be guaranteed its litigation payoff if the lawyer’s percentage is bifurcated, setting the percentage in settlement lower than in litigation. 38 This would account for the lower costs the lawyer incurs if the case settles as compared to litigating it to judgment. Although such bifurcation would result in higher settlements, its optimal application requires information about the lawyer’s expected litigation costs, information which the lawyer privately holds. 39 Some of the settlement inefficiencies are thus bound to remain unless such information is available to whoever monitors the class attorney. 40

caps and how courts want to set them low enough to ensure that the class attorney will not settle the claim solely with regard to his own interests); Bruce L. Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1377-78 (2000) (providing a recent example of concern over counsel conduct in class action settlements).

37. See, e.g., Mars Steel Corp. v. Cont'l Illinois Nat'l Bank, 834 F.2d 677, 681-82 (7th Cir. 1987) (stressing the importance of conducting a careful inquiry into the fairness of proposed settlements with regard to the class members); In re Corrugated Container Antitrust Litig., 643 F.2d 195, 212 (5th Cir. 1981) (stating that settlement terms must be fair, adequate, and reasonable); Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) (explaining that the judge should balance the settlement terms against the likelihood of success at trial when considering proposed settlements).

38. See Hay, Asymmetric Rewards, supra note 30, at 502 (setting the “fractional share of class recovery” differently for settlement and nonsettlement recoveries); Hay, Fee Regulation, supra note 30, at 1456-63 (discussing setting an “optimal fee cap” for class counsel).


40. Several courts have recently experimented with auctioning the class attorney’s position in securities class actions. For a comprehensive descriptive review of these cases, see LAURAL L. HOOPER & MARIE LEARY, FEDERAL JUDICIAL CENTER, AUCTIONING THE ROLE OF CLASS COUNSEL IN CLASS ACTION CASES: A DESCRIPTIVE STUDY (2001). The Third Circuit has established a Task Force to analyze the various methods of selection of class counsel and prepare a report that
As in litigation, here too the lodestar contingent hourly fee would also involve serious agency costs. On the one hand, the lawyer would tend to invest an excessive number of hours up to the point that she is certain of a future settlement with the defendant. Whenever her hourly adjusted fee is higher than her opportunity cost, she would want to delay the settlement and have the opportunity to spend—and earn—more hours, even past the point at which the settlement is practically certain. On the other hand, when a settlement is less than certain, the lawyer will have excessive incentives to settle because a settlement would guarantee her fee for the time and costs that she has already spent on the case, whereas in litigation she would risk losing that fee altogether. This reintroduces agency problems that are very similar to the ones present under the percentage fee. To equalize the lawyer’s expected fee in settlement and in litigation, the court would have to know the risk of non-payment in trial. Since courts do not usually hold such information, the lawyer would either be paid excessively in settlement, leaving the class with less than it could earn in trial, or the lawyer would be underpaid in settlement, which would result in unnecessary litigation.

will evaluate them for the benefit of the bench and bar. A preliminary draft of the task force’s report, as well as the descriptive report can be found at http://www.ca3.uscourts.gov.

In some of these auctions, bidders were required to submit their proposed percentage on a grid, changing according to the stage in litigation in which the case is resolved and the amount recovered. The idea is similar to that proposed by Hay, Asymmetric Rewards, supra note 30, and Hay, Fee Regulation, supra note 30, which advocates trying to reduce the lawyer’s rent on the one hand, while better aligning her settlement incentives with the class interests. See, e.g., In re Lucent Techs., Inc., 194 F.R.D. 137, 156 (D.N.J. 2000) (finding that bidding is necessary to protect the interests of the proposed class); Wenderhold v. Cylink Corp., 188 F.R.D. 577, 587 (N.D. Ca. 1999) (“[D]etermination of lead counsel through a competitive bidding process is necessary to protect the interests of the putative class members.”); In re Cendent, 182 F.R.D. 144, 151-52 (D.N.J. 1998) (selecting lead counsel as the “lowest qualified bidder”).

41. For a discussion of these problems, see Coffee, Understanding the Plaintiff’s Attorney, supra note 25, at 714-20.

42. See infra Part III.
C. Sweetheart Deals

If courts are presented with inaccurate information not only regarding the projected earnings of the class and lawyer in trial but also with respect to their actual rents in settlement, then inefficiencies, collusion, and abuse will be exacerbated. Whenever the court is led to believe that class members earn more than they actually do or that the lawyer’s payoff is less than it is in fact, defendants and class attorneys benefit at the expense of the class. Fee regulation is simply inapplicable to such cases. The reason should be obvious. A fee arrangement can regulate the lawyer’s conduct if it makes such fee contingent on observable parameters such as the settlement amount or the time the lawyer spent. By misrepresenting any of these parameters or by concealing part of the lawyer’s payoff, the defendant and the class attorney deprive the court of its means of regulation.

Several forms of collusion and sweetheart deals have been documented in the literature on class actions. First, there are settlements in which the value presented to the court is higher than the actual benefit to class members. In-kind settlements, providing class members with non-monetary benefits that are difficult to evaluate, often leave much leeway for the defendant and class attorney to convince the court that the value rendered is higher than it actually is. Similarly, broad definition of the class, extensive scope

43. Sweetheart and collusive settlements have been extensively documented in the context of “settlement class actions” (i.e., class actions that are certified for the purpose of settlement only). See generally Symposium, Settlement Class Actions, 80 CORNELL L. REV. 811 (1995). References to relevant articles on these topics are made below.


of defendant’s release, and imposition of difficult-to-satisfy conditions on class members who wish to collect their share all may falsely increase the perceived value of the settlement. Finally, reversion of unclaimed funds to the defendant, accompanied by large settlement amounts, would increase the lawyer’s fee with no accompanying benefit to the class (assuming that the fee is calculated from the dedicated, as opposed to the actually collected, fund).

Second, in some contexts, especially in mass torts, defendants can make side transfers to class attorneys in ways that are not transparent to courts. Side transfers can be facilitated, for example, through inventory settlements. In inventory settlements, class attorneys settle cases in which they were retained on an individual basis outside the class action for more favorable terms than those obtained for the class. Even if the individually retained cases remain within the class, the attorney may still gain more than is awarded by the court as she earns her contractual fee from her clients. Thus, although the class action fee may be kept low, the attorney would still earn a high percentage over all his inventory of cases. The larger this inventory is, the higher the unobserved payoff to the lawyer.

D. The Need for Direct Monitoring

As the above discussion makes evident, whether in litigation or in settlement, class attorneys are almost bound to appropriate part of class members’ rightful share, to work less than they should, and

(documenting the alleged collusion in settlement proceedings and the aftermath of Hoffman v. BancBoston Mortgage Corp., No. CV-91-1880 (Ala. County Cir. Ct. 1991)).


to give undue weight to their own welfare. This is made possible by the court’s inferior information as compared to the class attorney. Attorney fee regulation, which receives the most attention, both in courts and in academic literature, may only achieve what may be termed a “constrained” optimum. Such an optimum is constrained by the inadequate and inferior information of the monitor, whether it be the court or the class representative. The more inferior this information, the more unsatisfactory the expected outcome for the class will be. Furthermore, when manipulation of the settlement value and concealment of attorneys’ side benefits are possible, fee regulation is rendered totally ineffective.

This Article next examines current direct monitoring schemes in class actions. One such scheme consists of monitoring by courts, which are supposed to supervise the class attorney both through setting the attorney’s fee and examining any settlement proposed before certifying it. The other scheme consists of monitoring by class representatives who are selected to represent the class and protect its interests. The analysis in Sections III and IV shows that both monitoring mechanisms are evidently inadequate and thus call for reform. A proposal for such reform is presented in Section V.

III. Inadequate Monitoring by Courts

The initial premise of the drafters of the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure was that courts would supervise class counsels in the same ways that they perform other judicial duties (i.e., overseeing litigation, holding pretrial conferences, promoting settlements, and deciding issues of law and fact).\(^{48}\) Moreover, courts are allowed wider prerogatives in class actions than they have in ordinary litigation as they choose class attorneys, set their fee, and review all proposed settlements.\(^{49}\) Courts have been granted these powers only to ensure that lawyers do not take advantage of class absence and that they do not appropriate class members’ rights.\(^{50}\) Yet courts have not performed these functions well

\(^{48}\) Hensler et al., supra note 3, at 14.

\(^{49}\) See Fed. R. Civ. P. 23 advisory committee’s note (1966) (indicating that amendments were concerned with the fair and efficient conduct of the action).

\(^{50}\) See Developments in the Law: Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 877, 937-38 (1958) (explaining the requirement of
enough. Constrained by the institutional requirements of neutrality and passivity set by the adversary system on the one hand, and lacking sufficient adversity between the defendant and the class attorney whenever attorney fees and proposed settlements are concerned on the other, courts have been left, by and large, uninformed about the parameters necessary to effectively regulate class attorneys. Taking into account their constrained resources and overburdened dockets, it is not surprising that courts have failed to adequately monitor class actions.

Common to all agency problems is their correlation with the asymmetry of information between the principal and the agent. The less the principal is informed, the higher the agency costs will be. A court that wishes to guarantee optimal performance by class counsel needs to know how much time the attorney has invested in the case, how she has used her time, what expenditures she has made, how promising the case was, what her quality is, her usual hourly rate, and more. When settlements are considered, the court must evaluate the expected recovery the class would gain in trial—which is equal to the expected judgment multiplied by the probability the class would prevail and the expected litigation investment the class attorney would have made had the case proceeded to judgment.

Yet common law courts are institutionally incapable of obtaining information unless presented to them by the litigants. Unlike inquisitorial civil law judges who may demand that parties produce documents in their possession, examine witnesses, and select and commission expert opinions, the paradigmatic common law court is passive and relies solely on adequate notice and representation in determining whether a class suit will bind absentees.

the adversary process for its education about the case. Sustaining distance from active participation in trial is perceived to be essential for remaining impartial. Only the litigants, seeking to convince the court to support their positions, are supposed to provide the court with the necessary facts. The accuracy of these facts is guaranteed only by the conflicting positions of the parties.

Although judges may assume active roles in pretrial conferences, these actions cannot significantly improve the court’s information. Pretrial conferences help to organize lawsuits and clarify controversies, and they may be used to force concessions on the parties and facilitate settlements; however, by their very pretrial nature, they cannot be used to gather and present evidence. At the pretrial stage courts act as facilitators, not investigators. Even courts that are active and resourceful in their handling of pretrial stages rely on the parties for their information and do not initiate their own factual investigations.


53. A federal district court articulated the perceived necessity of distance as follows:

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. Haas v. Pittsburgh Nat’l Bank, 77 F.R.D. 382, 383 (W.D. Penn. 1977).

54. But see PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 111-42 (1986) (documenting the activist approach to the judicial role advocated by Judge Jack B. Weinstein throughout his involvement in the Agent Orange class action settlement); Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 NW. U. L. REV. 469, 538-60 (1994). Weinstein encourages judges to “reach out to embrace what competent and neutral help they can secure,” to use special masters, and to educate themselves about the relevant scientific reports and studies. Id. at 559. Even this extremely activist view does not allow the judge to hold case specific factual investigations, however. For a critique of this approach, see Linda S. Mullenix, Mass Tort as Public Law Litigation: Paradigm Misplaced, 88 NW. U. L. REV. 579, 589-91 (1994) (criticizing Judge Weinstein’s vision as calling for the judge to be “an instrument of the Lord”). The Manual for Complex Litigation also recognizes the possibility of sua sponte experts appointed by the court, in accordance with Rule 706 of the Federal Rules of
On top of these institutional barriers, courts are also constrained by their limited resources. Dockets are full, and support personnel are scarce. Conducting meaningful investigations without the necessary means is often unworkable. Moreover, in the specific context of attorney fee applications, courts are expected to apply restraint and limit the extent of factual investigations. They are urged not to allow protracted satellite litigation and to control and expedite fee award determinations.

Thus, it should come as no surprise that courts often find it almost impossible to monitor attorneys in common fund class actions. Since class counsels’ fees are paid from the common settlement fund or judgment, defendants have no interest in them. Adversarial litigation is thus lacking, and courts are left

Evidence, but advocates careful consideration before utilizing this authority. MANUAL FOR COMPLEX LITIGATION § 23.51 (3rd ed. 1995).

55. In the year 2000, the total number of federal filings annually, civil and criminal, per authorized judgeship was 488, of which 378 were civil cases and 110 criminal. The number of unweighted filings per judge is even higher because some of the authorized judgeships remain vacant. The weighted (where weights are assigned according to difference in time consumption across cases types, following a weighting system developed by the Federal Judicial Center in 1993) filings for authorized judgeship in 2000 was 479, of which 311 were civil cases. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS—2000: ANNUAL REPORT OF THE DIRECTOR 26-27, tbl. X-1A (2000), available at http://www.uscourts.gov/judbus2000/contents.html. A RAND study has found the mean reported time on civil cases in federal courts to be 185 minutes. JAMES S. KAKALIK ET AL., RAND, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 249 (1996).


57. Common fund class actions are distinguished from fee-shifting cases, in which the defendant is charged with the class attorney’s fees in the event that the class prevails. Both are exceptions to the American rule by which litigants bear their fees and costs irrespective of whether they prevail. See, e.g., Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 250-51 (1985) [hereinafter Task Force Report] (distinguishing between the different types of funds for attorneys’ fees); Alyeska Pipeline Co. v. Wilderness Soc’y, 421 U.S. 240, 247 (1974) (“In the United States, the prevailing litigator is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.”).
by and large uninformed about numerous relevant issues such as the class attorneys’ regular hourly rates, the quality of representation they rendered, and the time and cost they spent. 58

This is certainly true when the case is settled early on. 59
The court, unaware of information that was exchanged and discovered between the parties, is often in no better position than it was when the suit was filed. It does not know how meritorious the case is, how meaningful the settlement remedy is for class members, how much time and cost the class attorney invested in the case, and how effective and efficient these investments were. Having to decide on an “all or nothing” basis, either to approve the settlement or to veto it, the court often has no choice but to approve it. 60

Moreover, since the court is burdened by prolonged litigation, it is often interested in terminating the case as soon as possible. Whereas in ordinary litigation the litigants initiate the settlement only when they prefer it to litigation, 61 in class actions the control over the decision to conclude the litigation is, to a large extent, in the hands of the court; class members have little influence over it. The court,

58. Defendants often agree not to oppose the attorney fee request under a “clear sailing” agreement. See, e.g., Malchman v. Davis, 761 F.2d 893, 905 (2d Cir. 1985) (discussing the problems of such agreements); see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621-22 (1997) (discussing the effects of an exhaustive agreement on the fairness and equity of a settlement).

59. See, e.g., Coffee, Understanding the Plaintiff’s Attorney, supra note 25, at 691 (discussing the difficulties courts face in evaluating the strength of a case in the context of a settlement); Hazard, supra note 39, at 1266-68 (decrying the lack of objective criteria for determining the fairness of a settlement); Jack B. Weinstein & Karin S. Schwartz, Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements, 163 F.R.D. 369, 373 (1995) (addressing the discretionary nature of class notification in the context of precertification dismissals of settlements).

60. See Brian Wolfman & Allan B. Morrison, Representing the Unrepresented in Class Actions Seeking Monetary Relief, 71 N.Y.U. L. REV. 439, 490-95 (1996). On the “all or nothing” problem in judicial approval of class actions settlements, see Weinstein & Schwartz, supra note 59, at 385, which calls for flexibility in the settlement process.

being unduly affected by its own interests in clearing its dockets, might be tempted to approve unworthy settlements. 62

Information scarcity also hinders the court’s effectiveness in monitoring when the suit has proceeded to trial and judgment. The court may find it difficult to evaluate the relevant parameters for setting the lawyer’s fee even if it has considered the evidence before it and has observed the lawyer’s performance. Nowhere during trial is the court informed about the number of hours the lawyer invested in the case before trial, and no one but the class attorney—and sometimes the defendant—knows what investment she optimally should have made at each point throughout the litigation. Lacking this information, the court is left with a crude estimation of these parameters, unable to structure properly the lawyer’s incentives in trial or in settlement. 63 Here too, the class attorney and the defendant are not true adversaries; the defendant has no interest in the way the judgment is allocated between the lawyer and the class.

Courts have often voiced their frustration with current practices. They have expressed the inconvenience associated with the tasks of reviewing fee applications and conducting thorough investigations of the class attorney’s performance, which are tasks that they are called to perform only after the case has been resolved. One court, for example, described the lodestar motions after settlement as follows:

Then began the process which all too often consumes a disproportionate share of the court’s time, the application for attorneys’ fees. It is at this point in these and other common fund cases that the court is abandoned by the adversary system and left to the plaintiff’s unilateral application and the judge’s own good conscience.

62. See Koniak & Cohen, supra note 45, at 1122-30 (claiming that judicial self-interests in promoting settlements and clearing dockets account for courts’ approval of collusive settlements).

Rarely do the settling defendants, who have created the pool of money from which the attorneys’ fees are awarded, offer any counterpoint; rarely do members of the class come forward with any response or opposition to the fees sought. There are no amici curiae who volunteer their advice.\footnote{64 In re Activision Sec. Litig., 723 F. Supp. 1373, 1374 (N.D. Cal. 1989).}

And another court stated:

Judicial monitoring also is necessarily imprecise. The judge cannot readily see what legal work was reasonably necessary at the time; the judge first sees the application for fees after the case is over, and hindsight may obscure the difficult decisions made under uncertainty as much as it illuminates them. The Supreme Court’s oft-repeated wish that litigation about fees not turn into a second major lawsuit is an unattainable dream.\footnote{65 Kirchoff v. Flynn, 786 F.2d 320, 325 (7th Cir. 1986); see also Task Force Report, supra note 57, at 246-49 (providing an extensive critique of the lodestar method).}

Courts must therefore rely on outside sources to satisfy their fiduciary obligations to represented class members.\footnote{66 One way that courts try to overcome their institutional and resource constraints is by appointing guardians \textit{ad litem} and special masters for the class during settlement negotiations. Yet the special master and the guardian \textit{ad litem} are also resource constrained, as their fees must be paid by the settling defendant and class attorney who obviously have no interest in meaningful inquiries. Moreover, like courts, they too operate \textit{ex post}, only after a settlement has been proposed. At this point they can obtain only limited evidence of the actual value of the case as class attorneys know it and can learn even less of potential avenues for litigation that could improve the class position in trial that were forgone by the class attorneys. Finally, the powers and authorities of the special master and guardian are derivative of the courts’ powers. Whenever the latter operates with both hands tied, so does the former. Without sufficient remuneration, adequate incentive structure, and early involvement in the case, these court-appointed officers cannot render significant assistance in securing the class interests. See Robert G. Bone, \textit{Rule 23 Redux: Empowering the Federal Class Action}, 14 REV. LITIG. 79, 92 n.45 (1994) (pointing out options that judges have when}
to their inherent constraints, they cannot adequately monitor class attorneys, and they may often intentionally refrain from doing so out of consideration for other cases pending on their dockets. One obvious source for class attorney monitoring is the class itself. This Article next investigates why performance of this function by class representatives is also ineffective.

IV. Inadequate Monitoring by Class Members

Courts are not the only ones who may monitor class counsels. Class members are also expected to directly supervise their appointed lawyers.67 Named plaintiffs are required to render adequate representation to the class if the outcome of the class action is to have a binding and preclusive effect on all class members, and unnamed class members are supposed to provide an external check on the class action litigation or settlement.68 Yet the former are usually chosen by class attorneys and are passive, unsophisticated, and completely disregarded by courts, all because their interests in the class action are too small to justify appropriate investment of time and money by the supervising class attorneys. As for the latter,

67. FED. R. CIV. P. 23(a)(4); see also Mersay v. First Republic Corp. of Am., 43 F.R.D. 465, 470 (S.D.N.Y. 1968) (noting that “the primary criterion [for adequately named plaintiff representation] is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to insure them due process”); Gill v. Monroe County Dep’t of Soc. Servs., 92 F.R.D. 14, 16 (W.D.N.Y. 1981) (stating that the most important task of the class representative is selection and supervision of the class attorney).

68. See, e.g., Note, Conflicts in Class Actions and Protection of Absent Class Members, 91 YALE L.J. 590 (1982) (advocating a regulated system of oversight by the unnamed class members).
their information and opportunities to affect the actual outcome are scarce, and they usually abstain from any true involvement, preferring to free ride the class action without risking any costly active involvement in it.69

Efforts to engage large stake class members and encourage their active participation in class actions, most prominently the one attempted by the Private Securities Litigation Act of 1995 (PSLRA), have also failed. Institutional investors have kept their safe place on the sidelines, demonstrating outright preference against enmeshing themselves in messy litigation.70

This section identifies the reasons for the inability of class representatives, be they small stake class members or large institutional investors, to provide adequate monitoring. Although different forms of private monitoring have been considered before, no one has yet attempted to analyze how monitoring should have been structured to render it effective. As the following discussion suggests, this lack of rigor may account for the failures of past practices.

A. Rule 23

Rule 23 addresses the class action as if it is initiated by members of the class who may sue on behalf of all class members.71 Of the four prerequisites to class certification, two focus on the class representative,72 whose claims or defenses must be “typical of the claims or defenses of the class”73 and who must “fairly and adequately protect the interests of the class.”74 One court has noted that the “typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff’s claims.”75 This should assure that his self-
interest is aligned with the interests of the class. Adequacy of representation requires that the interests of the representative do not conflict with the class and that his attorney will be qualified, experienced, and willing to pursue the litigation vigorously.

A recent empirical study conducted by the Federal Judicial Center has demonstrated the significance of the typicality and adequacy of representation issues in pre-certification litigation. The study has found that defendants opposed certification in about 50% of the class actions examined. Disputes regarding adequacy of representation or typicality were raised in 63% and 61% of these cases, respectively. Courts and litigants therefore spend substantial time addressing whether the named plaintiff will render proper representation to the class. Yet as far as post-certification issues are concerned, courts demonstrate outright disregard for the representative; they rarely consult him on any relevant issue and often prefer the lawyer’s views over the views of the representative. In doing so, courts recognize the reality that


77. See Hansberry v. Lee, 311 U.S. 32, 42-46 (1940) (discussing the general requirement of adequate representation); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) (stipulating for the first time the specific test for Rule 28(a)(4)), vacated on other grounds by 417 U.S. 156 (1974); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (reiterating that named plaintiff must adequately represent absent class members); Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157-58 (1982) (highlighting the conceptual gap between suffering injury sufficient to share common questions of law or fact and having injuries typical of the class claims).


80. Id.

81. For example, although the court must consider any objections of the class representative to a proposed settlement, it may nevertheless approve it. See Manual for Complex Litigation § 30.44 (3d ed. 1995); see also Reed v. Gen. Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983) (upholding abuse of discretion standard for reviewing judge’s approval of settlement); Laskey v. Int’l Union
the named plaintiff has insufficient interest to monitor adequately and that she may seek to hold the class or its attorney hostage only to promote her own interests.82

Monitoring requires an investment of start up costs in studying the case, analyzing its merits, and establishing adequate reporting and monitoring procedures with the class attorney, as well as additional variable costs in applying these procedures throughout the pretrial period and—to a lesser extent because of the court’s direct supervision—in trial.83 Assuming the monitor’s compensation is a percentage of the class recovery, it immediately follows that there is a minimum, “break even” percentage below which the monitor would refrain from making the required investment because it would be more costly than his expected benefit.

This explains why courts do not involve representative plaintiffs in major decisions whenever their share in the total stake is small. Courts can be certain that such plaintiffs would not spend the costs necessary for monitoring, as the increase in their expected returns would not be sufficient to justify it. Even

82. See Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir. 1982) (discussing the plaintiff’s bad faith opposition to settlement in order to gain leverage).

83. For a more detailed discussion of these claims, see infra Part V.A.
if they would get some positive net return from monitoring, such small stake plaintiffs could be easily “bribed” by class attorneys into not monitoring, as the lawyers would need only to match that small net return. Thus, if they can select the representative plaintiff, class attorneys are sure to choose the one with the smallest share.

The ensuing status quo is inefficient. Lawyers choose plaintiffs with low stakes to represent the class, monitoring is not worth these plaintiffs’ costs and time, and courts do not trust them to monitor class attorneys nor reward them for representing the class.

B. The PSLRA

The concern over the ineffectiveness of monitoring by small stake class representatives underlined the PSLRA’s rebuttable presumption that the most adequate plaintiff is the person or group of persons that has the largest financial interest in the relief sought by the class. By establishing this presumption, the PSLRA intended to encourage large investors to compete for the lead plaintiff role.

Authorities have recognized that as long as courts do not favor large stake class members to represent the class, the status quo under Rule 23 could not be changed. Most class actions are...

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85. This intention is explicit in the legislative history, which notes that the lead plaintiff provisions were as follows:

[T]o encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class. These provisions are intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel.


86. Elliott J. Weiss & John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions,
initiated by lawyers who search for potentially profitable claims and for class members on whose behalf these claims can be filed. The costs involved in searching for claims and plaintiffs, the large investments required in litigation, and the risk of non-payment result in a small and specialized class action bar. Members of this specialized bar hold a significant advantage over other law firms when competing to be appointed to represent a class, as the data on appointment of class attorneys indeed demonstrates. Therefore, even when members whose stakes in the suit are high want to be appointed class representatives, they are likely to fail. Class action lawyers would prefer smaller class members because of the rent that

104 YALE L.J. 2053, 2105-06 (1995) (recognizing that by interpreting Rule 23 to require plaintiffs with the largest financial stake in the outcome of an action to serve as lead plaintiffs, courts would dramatically alter the dynamics of class action litigation); see also Janet Cooper Alexander, Rethinking Damages in Securities Class Actions, 48 STAN. L. REV. 1487, 1527-37 (1996) (proposing to require large investors to opt into class actions if they are to participate in the management of the action and recovery of any damages). Although the idea of monitoring by institutional investors was not adequately appreciated in the class action context before Weiss and Beckerman published the above article, the idea resembles earlier discussions of similar themes in the corporate finance literature. See, e.g., Bernard S. Black, Agents Watching Agents: The Promise of Institutional Investor Voice, 39 UCLA L. REV. 811, 820-29 (1992) (considering issues surrounding shareholder monitoring); John C. Coffee, Jr., Liquidity Versus Control: The Institutional Investor as Corporate Monitor, 91 COLUM. L. REV. 1277, 1336-67 (1991) (attempting to define the ideal corporate monitor).

87. HENSLE ET AL., supra note 3, at 72.

88. See HENSLE ET AL., supra note 3, at 71-72 (describing the characteristics of private class action attorneys).

89. Miller and Singer, have explored a sample of 127 class actions whose notices appeared in the New York Times in the years 1993-96. Miller & Singer, supra note 45. In thirty-four of these class actions, the firm of Milberg Weiss Bershad Hynes & Lerach was one of the law firms selected to represent the class. Moreover, the next five law firms, rated according to the number of class actions in which they were selected to represent the class, have accounted for another forty-two class actions. Miller & Singer, supra note 45, at 134 tbl. A4; see also THOMAS WILLGING ET AL., AN EMPIRICAL STUDY, supra note 78, at 115 (finding that twelve law firms appeared in sixty-three percent of the certified cases in the study); Joseph A. Grundfest & Michel A. Perino, Securities Litigation Reform: The First Year’s Experience, tbl. 11 (1997), available at http://securities.stanford.edu/report/pslra_yr1/index.html (last visited Jan. 26, 2001) (finding that the Milberg Weiss law firm has appeared in securities class actions against more than forty-five percent of the 109 companies sued between December 22, 1995, and December 31, 1996).
they can extract under inadequate monitoring and would be able to find such class members for most suits that they trace. High stake class members would only be able to hire attorneys who do not specialize in class actions, but these attorneys would usually fall short of being appointed to represent the class. This is a catch-22.\footnote{90} A class member must have sufficient stakes in the class action to justify monitoring, yet if she does she is unlikely to be chosen to monitor. The only way out could therefore be to impose a presumption in favor of large institutional investors, just as the PSLRA concluded.

However, experience since the enactment of the PSLRA proves that the legislation has failed to achieve its goal, as large institutional investors have rarely competed to be appointed lead plaintiffs.\footnote{91} Moreover, most institutional investors that were

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\footnote{90. The term Catch-22 derives from Joseph Heller’s novel of the same name:

There was only one catch and that was Catch-22, which specified that a concern for one’s own safety in the face of dangers that were real and immediate was the process of a rational mind . . . . Orr would be crazy to fly more missions and sane if he didn’t, but if he was sane he had to fly them. If he flew them he was crazy and didn’t have to; but if he didn’t want to he was sane and had to.

\textit{Joseph Heller, Catch-22} ch. 5 (1961).}

\footnote{91. U.S. Securities and Exchange Commission Office of the General Counsel, Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995 (April 1997), available at http://www.sec.gov/news/studies/lreform.txt [hereinafter SEC Report]. In this report, submitted to the President and the Congress on the first year of practice under the PSLRA, the Securities and Exchange Commission (SEC) found that in 105 cases filed in that period, institutions have moved to become lead plaintiff in only eight cases. In seven of these eight cases, the institution has been represented by a group of law firms that includes at least one traditional plaintiff’s law firm. In later testimony before the House of Representatives, Arthur Levitt, Chairman of the SEC, reported that in 124 lawsuits filed under the PSLRA, institutional investors sought to be appointed lead plaintiffs in only six. Testimony of Arthur Levitt before the Subcommittee on Finance and Hazardous Materials, Committee on Commerce, House of Representatives, October 21, 1997 [hereinafter Levitt Testimony]. He further reported that institutions were active as external monitors, objecting to what they perceived as unfair settlements in few class actions. \textit{Id.}; see also Joseph A. Grundfest & Michel A. Perino, \textit{Ten Things We Know and Ten Things We Don’t Know About the Private Securities Reform Litigation Act of 1995}, Joint Written Testimony Before the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs, U.S. Department of Housing and Urban Development, Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995, available at http://www.sec.gov/news/studies/lreform.txt [hereinafter SEC Report].}
appointed for that position were public pension funds whose shares in the class were relatively modest.\textsuperscript{92}

Why have large institutional investors refrained from proposing to be appointed lead plaintiffs? The reason, which Congress did not anticipate when it enacted the PSLRA, lies in the large costs that these investors incur if they are appointed to monitor. Having to bear these costs while enjoying only their share of the accrued benefit, institutional investors prefer to monitor from the outside as unnamed class members rather than represent the class. They would rather have someone else monitor, even if the monitor would do so less effectively, while they remain on the sidelines, objecting to a proposed settlement, opting out of the class or opposing other moves that they consider inadequate, and refraining from too active an involvement in the lawsuit.

According to institutional investors, the primary concern that has inhibited them from taking the lead plaintiff role is litigation-related expenses.\textsuperscript{93} Subjecting the institution’s records to review both by plaintiffs’ and defendants’ lawyers and making key personnel available for testimony may exact too heavy a toll, which private investors are not willing to bear.\textsuperscript{94} Additionally, private institutions express reluctance to disclose their proprietary investment strategies in the course of litigation.\textsuperscript{95} Also, institutions fear that service as class

\begin{footnotes}
\item[92] See Elliott J. Weiss, \textit{Comment: The Impact to Date of the Lead Plaintiff Provisions of the Private Securities Litigation Reform Act}, 39 ARIZ. L. REV. 561, 572 (1997) (admitting that this is a development that he and Beckerman had not predicted when proposing to appoint institutional investors as lead plaintiffs).
\item[93] Levitt Testimony, \textit{supra} note 91; SEC Report, \textit{supra} note 91.
\item[94] Levitt Testimony, \textit{supra} note 91.
\item[95] This is one cost that public institutions, as opposed to private, do not incur as they are usually subject to state disclosure rules. Levitt Testimony, \textit{supra} note 91.
\end{footnotes}
monitoring class action lawyers

representatives could expose them to liability to other class members.96 Finally, some institutions commented that they can get better returns if they proceed with their claims on an individual basis.97

These concerns indicate that large, private institutional investors have to bear higher monitoring costs than other class members or non-members and that they bear these costs only if they are appointed to be lead plaintiffs. Since the PSLRA has explicitly limited the recovery of lead plaintiffs to reasonable costs and expenses directly relating to the representation of the class,98 institutional investors are better off not monitoring.

Congress’s main reason for not allowing additional compensation to lead plaintiffs lies in its ambition to limit the practice of professional plaintiffs who file frivolous suits for a bounty or bonus.99 Congress had not anticipated that this provision would serve the opposite of its goal. Since institutional investors have refused to propose themselves as lead plaintiffs, the traditional plaintiff class action bar could retain control by recruiting smaller plaintiffs who would not monitor, yet provide the ticket to being appointed as class attorney.100 Congress’s expectation “[that] the plaintiff will

96. Levitt Testimony, supra note 91.
97. Levitt Testimony, supra note 91.
99. CONFERENCE REPORT , supra note 85.
100. This practice is documented in the SEC Report, supra note 91. It relies on the explicit language of the PSLRA, which provides that the lead plaintiff would be a “person or a group of persons.” Securities Exchange Act of 1934 § 21D(a)(3)(B)(iii) (codified at 15 U.S.C. § 78u-4(a)(3)(B)(iii) (1994 & Supp. V 1999)); see also In re Network Assoc., 76 F. Supp. 2d 1017, 1019-27 (N.D. Cal. 1999) (explaining that plaintiffs’ attorneys have perverted the PSLRA process for appointing lead plaintiff by racing to satisfy its requirements through the aggregation of large plaintiff groups rather than allowing large institutional investors to emerge as lead plaintiffs in order to maintain control over the suit). In the absence of large institutional investors, courts had to determine whether the PSLRA’s presumption for the person or group of persons having the largest financial interest in the relief sought by the class should be examined according to the aggregate financial interest of a proposed group or according to the individual stakes of each candidate. They also had to decide whether the number of members
choose counsel rather than, as is true today, counsel choosing the plaintiff\textsuperscript{101} was bound to fail since it did not take care to provide adequate motivation for institutional investors to compete for the lead plaintiff position.

It should be emphasized that large parts of the idiosyncratic costs to which institutional investors are exposed as lead plaintiffs are a consequence of the mere appointment to that role (e.g., disclosure and possible liability). Therefore, if an institutional investor is appointed to lead plaintiff, it is likely to perform its duties properly. Moreover, once appointed the institutional investor is likely to monitor well, not only to increase the class’s expected net recovery but also to minimize its future liability costs. The challenge is not to motivate large investors to monitor adequately when they are appointed lead plaintiffs but to motivate them to assume that position. Favorable accounts of the PSLRA that found support in evidence from case studies, demonstrating adequate monitoring by institutional investors, have nevertheless missed the point.\textsuperscript{102} The lead plaintiff provisions of the PSLRA have not achieved their main

\footnotesize{\textsuperscript{101} CONFERENCE REPORT, supra note 85, at 35.}

\footnotesize{\textsuperscript{102} For a favorable assessment of the PSLRA, see Weiss, supra note 92, at 565 (arguing that changes brought about by the PSLRA have made it easier for institutional investors to monitor class actions and assess their interests in litigation).}
goal—namely, to encourage large institutional investors to become lead plaintiffs.

V. Private Monitoring: The New Approach

Recognizing the large agency costs incurred when lawyers represent unnamed class members on the one hand and the numerous deficiencies in court monitoring and in monitoring by class members on the other, suggests that a novel approach must be taken. Monitoring should be performed by private parties, not necessarily class members. Monitors should be sufficiently compensated. A new set of competitors over class action control should evolve. The class action bar must face its match if it is to be dispossessed of its dominance over class actions.

The following proposal aims at exactly these goals. The proposal is divided into four parts: how the monitor would be paid, how he would be chosen, what powers he would have, and how to avoid collusion between the monitor and the class attorney. Finally, this Article suggests how this proposal may be implemented under the current legal framework, rendering legislative reform unnecessary if immediate application is sought.

A. The Monitor’s Fee

As the discussion of inadequate monitoring by small class members has demonstrated, the monitor must have a sufficient stake in the outcome of the class action to induce him to spend the necessary monitoring costs. Thus, monitors must be paid a high enough percentage of any judgment or settlement, net of all payments made to the class attorney and all other costs borne by the class, aligning their interests with the class.

The monitor’s share must be at least as high as what was perviously termed the “break even” percentage.103 Let $R_1$ be the

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103. See supra Part IV.B.
expected net recovery in litigation if monitoring is performed. \( R_0 \) be the expected net recovery in litigation if monitoring is not performed, \( s \) be the monitor’s share of the expected net recovery, and \( c \) be the expected monitoring costs. Then the court should set the monitor’s share according to the following condition: \( s > c/(R_1 - R_0) \).

Interpreting this condition, the monitor’s share must be such that his gain from monitoring is higher than his costs. Notice that the “break even” percentage is higher than the ratio between the monitoring costs and the expected judgment when monitoring is performed. This insight, although simple, has nevertheless not been mentioned in the literature, as no one has attempted to define the necessary conditions for motivating the monitor, be it a class member or anyone else, to perform his duties adequately if he is paid a share of the class recovery.

For example, imagine a scenario in which the monitoring costs are $4000, the expected judgment is $100,000 if monitoring is performed, and it is $50,000 if monitoring is not performed. Allowing the monitor 5% of the recovery, which would presumably more than cover the monitor’s costs, would actually fail to motivate him to spend these costs. Although the monitor’s expected recovery if he monitors is higher than his costs, he would still be better off not monitoring. If he monitors, his net payoff equals 5% out of $100,000 minus the $4000 costs, which comes to $1000. If he does not monitor, his net payoff is 5% out of $50,000, or $2500. When the monitor is awarded a percentage of the net recovery, he earns his share on the part of the recovery that does not depend on monitoring. This share is the monitor’s net rent from monitoring, and he must gain at least that rent if he monitors. Therefore, in this example the monitor must be paid at least 8% if he is to monitor properly.

The minimum fee necessary to induce monitoring is justified from the class’s perspective, as any lower fee would result in no more than $50,000, whereas if the monitor is paid the minimum 8%, the class would net $92,000. More generally, the class would benefit from appointing the monitor whenever

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104. \( R_i \) (\( i=0 \) or \( 1 \)) is the judgment’s mean value, or the weighted average of possible judgments, with weights assigned according to the probability of each judgment, net of all litigation costs including lawyer’s fees.
its net recovery, after paying that fee, is increased by an amount higher than that fee. 105

One may still wonder why the same problems that induce large inefficiencies in the lawyer-class members agency relations would not infect the relationships between the class and the monitor. After all, so the argument might go, the same moral hazard and adverse selection costs that are incurred because of the lawyer’s private information would be replicated when the monitor is paid a fixed percentage of the class’s net recovery. The reason that that would often not be the case lies in the different cost structure of the monitor and the lawyer.

1. Monitoring is Relatively Inexpensive

Compared to litigating a class action, monitoring is much cheaper and easier to perform. Periodical examination of relevant files and records, constant communication with the class attorney, and consistent participation in settlement conferences and important hearings would often suffice to supervise the class attorney. 106

105. In fact, since this Article proposes to auction the monitor’s job, part of his fee would be paid by his winning bid, thus reducing the cost of employing him for the class.

106. The following excerpt from the court’s decision in In re Network Associates Inc., Securities Litigation, 76 F. Supp. 2d 1017 (N.D. Cal. 1999), may suggest the scope and duties of the monitor. The court detailed the duties of the lead plaintiff under the PSLRA thusly:

In this case, the lead plaintiff shall take affirmative steps to keep itself fully informed at all times on the progress and status of the case, the strengths and weaknesses of the case, the prospects for settlement, and the resources invested in the suit or proposed to be invested. With respect to each major litigation event, such as important motions, settlement discussions, trial and trial preparation, the lead plaintiff shall actively inform itself in advance and shall have the authority and responsibility to direct counsel, after, of course, receiving the advice of counsel. To minimize reduction from recovery for attorneys’ fees, the lead plaintiff shall consult with counsel in advance to determine whether major tasks proposed by counsel are likely to add more value to the case than would be incurred in time and expense. In this connection, the lead plaintiff shall review monthly time and expense records prepared by class counsel. The lead plaintiff shall meet in person with counsel at least quarterly to review the progress and status of the case, shall attend all major hearings and shall attend all sessions of the trial, at a minimum, where the jury is present. Reasonable travel, telephone and business expenses incurred as a
Although these are all costly enough to discourage any class member whose stakes are too small from performing them, they do not require the same professional and financial resources needed to actually litigate the case.

2. Monitoring Costs are Easy to Predict

The costs involved in monitoring are, to a large extent, fixed and predictable. Once the proper reporting procedures are established, the monitor would be adequately informed of most relevant facts. Monitoring costs would not depend much on specific characteristics of the case beyond those that are readily identifiable, such as the stakes involved. Furthermore, since courts are currently monitoring class actions, estimating the required procedures and necessary costs is easier for them than similar estimations concerning attorney litigation expenditures.107

3. Monitoring Costs are Front-Loaded

Since trial proceedings are conducted in court, private monitoring is less of a necessity at that stage.108 To evaluate the lawyer’s performance in trial, the court need not consult the monitor because its direct observation would suffice. Furthermore, the conflicting goals of the defendant and the class attorney at the trial stage are likely to foreclose any opportunity for collusion between them and expose any faults and weaknesses in the class attorney’s performance, making them transparent to the court.

result of the lead plaintiff duties, if detailed and itemized, may be reimbursed as expenses from any recovery. The lead plaintiff shall recommend class counsel after completing the steps set forth below. To carry out its responsibilities, the lead plaintiff shall identify a single officer or internal counsel with experience in managing litigation to be primarily responsible for carrying out the duties set forth herein. In re Network Assoc. Inc., Securities Litig., 76 F. Supp. 2d 1017, 1032-33 (N.D. Cal. 1999).

107. See ALAN HIRSCH & DIANE SHEEHY, FEDERAL JUDICIAL CENTER, AWARDING ATTORNEYS’ FEES AND MANAGING FEE LITIGATION 95-117 (1995) (reviewing the practices used to review attorney’s fee motions in class actions).

108. The monitor would need to have his representative attend court hearings to be able to evaluate further settlement opportunities. Such attendance, however, would probably not be too costly as it does not require preparation and intensive staffing, as is required from the class counsel who conducts the trial.
monitoring requires setting the lawyer’s fee in advance, the problem of post-judgment fee litigation also becomes less important. Therefore, monitoring is essentially required at the pretrial stage, and that is when most monitoring costs are incurred.

Because the monitor’s costs are more predictable and since monitoring is much less costly than litigation, the court can guarantee adequate monitoring performance by setting a fixed, relatively low and simple percentage fee. Given such a percentage, the court is assured a sufficient level of investment and sufficient incentives to monitor properly. Moreover, monitoring investment is easy to verify (e.g., through periodical reports to the court) because it involves less complicated decisions and more routine procedures. Litigation decisions rely much more on case specific characteristics and on much more sophisticated, path dependent, strategic decisions, all of which the court would have to know if it were to properly verify an adequate investment by the lawyer. The court’s tasks in setting the monitor’s fee and in supervising the monitor are therefore much simpler and require much less information than the respective tasks regarding the class attorney.

As far as settlement goes, monitors would not benefit from selling the class cheap, unlike the lawyer who has a lot to lose by taking the case to trial. This is because monitors’ costs are front-loaded. Monitors need to exert only minimum effort at trial because at that point courts would be sufficiently informed to guarantee the class interests. Thus, the remaining monitoring costs after settlement negotiations would not significantly affect the monitor’s decision to accept a proposed settlement.

Finally, controlling against side payments between the class attorney or the defendant and the monitor is easier to perform than controlling for similar transfers between the lawyer and the defendant. Thus, the problem of collusive settlements would be easier to control when the monitor, instead of the class attorney, is in charge of the lawsuit.

109. See infra Part V.C.
110. See infra Part V.D (detailing ways to police such side payments).
B. Selecting the Monitor

The monitor would be selected by a price auction. 111 Bidders would submit the price that they are willing to pay to assume the role of monitor, and the highest bidder would be chosen. 112 The winner’s bid would either be distributed to the class or used to finance early litigation costs.

Candidates who can monitor more efficiently would expect higher rents and would therefore be able to bid higher for the job. Similarly, class members who believe that they would be able to better monitor the class lawyer would enjoy an additional rent on their existing share of the class and would also be able to bid higher if their monitoring costs are not significantly higher than outside bidders.

Courts could use different procedures than auctions to select the monitor. They could do so on the basis of the candidates’ past record serving in similar positions (e.g., special masters, mediators, or class action lawyers), their reputation, or the details of their proposed monitoring schemes. Nevertheless,

111. This Article does not specify the exact timing of the auction. It would seem advisable to select the monitor before the class is certified and return the selected monitor her bid if certification fails. This way the monitor could choose the purported class attorney and supervise her even before certification for the purposes of prior discovery, class certification preparation, and settlement negotiations. Auctioning of class actions as a whole has been proposed before. See Macey & Miller, The Plaintiffs’ Attorney, supra note 25, at 105-18 (addressing the role of plaintiff’s attorneys in class and derivative suits). More recently, some courts have experimented with auctioning the class attorney position to the bidder who offers the lowest percentage fee. See, e.g., In re Oracle Sec. Litig., 131 F.R.D. 688, 697 (N.D. Cal. 1990) (holding that selection of lead counsel would be through competitive bidding); see also In re Auction Houses Antitrust Litig., 197 F.R.D. 71, 85 (S.D.N.Y. 2000) (holding that an auction was an appropriate method for selecting lead class counsel); Andrew K. Niebler, In Search of Bargained-For Fees for Class Action Plaintiffs’ Lawyers: The Promise and Pitfalls of Auctioning the Position of Lead Counsel, 54 BUS. LAW. 763, 802-19 (1999) (evaluating past class action attorney auctions).

112. Although the proposal uses a “first price auction” procedure, in which the winner pays his bid, there is no inherent advantage in this type of auction. If it can be shown that a “second price auction”—in which the winner determined by the highest bid would pay the second highest bid—is more efficient from the class’s perspective, then such an auction should indeed be used. For an accessible review of the literature on auctions, see generally R. Preston McAfee & John McMillan, Auctions and Bidding, 25 J. ECON. LIT. 699 (1987).
advantages of the auction include its simplicity and its selection of the most efficient monitor. Moreover, the auction would inform the court about the likely value of the lawsuit, as a higher value would attract higher bids.\textsuperscript{113} Although bids would reflect the net value of monitoring, after subtracting the necessary costs, which must be lower than the value of the relative share awarded to the monitor, they may still serve to signal the true expected value of the case.

Finally, since the winning bidder must pay his bid, most of his rent would be extracted and transferred to the class, thus reducing the cost of employing him and rendering the whole proposal more attractive. Apart from the direct benefit to class members, this would also render the problem of evaluating the expected monitoring costs less critical. If the court overestimates these costs and awards the monitor a larger-than-minimum percentage, the class would still be compensated for the additional share through the monitor’s bid. Thus, although it is not necessary for implementing the monitoring scheme, it would seem that an auction would often be the most efficient way for doing so.

The pool of candidates may include class members, but it need not be restricted \textit{a priori} to class members alone. By allowing non-members to compete to monitor, that role may attract more experienced candidates with larger resources and expertise in the fields concerned in the class action. Former special masters, venture capital firms, and consulting groups are some of the professionals in law and finance who may compete for the monitoring position. Specialization in monitoring class actions is expected to evolve, in the same way that it developed in the outgrowth of the class action bar.

In fact, it is possible that the class action bar would enjoy, at least initially, an advantage in competing to monitor. The experience of the bar in managing class actions, financing it, and evaluating their merits should provide for enhanced

\textsuperscript{113} Since the auction may indicate to the court the expected value of the case, it may help to screen suits whose probability of success is lower. However, it is not clear whether low value suits should indeed be screened out, from the perspective of the society-at-large. See Shavell, \textit{supra} note 20, at 577 (addressing the economic viability of litigation).
capability to monitor. Assuming the potential for collusion between class action lawyers who serve as monitors and those who serve as class attorneys can be properly accounted for, the resulting mechanism may make use of a divide-and-conquer strategy. Class action lawyers would supervise their peers.

It should be emphasized that even if class action lawyers would act as monitors, the result would be significantly distinguished from the current practice of plaintiff steering committees. The linchpin of the private monitoring proposal, as compared to current practices, lies in the sharp separation between the two roles of monitoring and litigation and in the respective payoffs in these roles. Whereas members of plaintiff steering committees are initially inclined to enlarge their total slice of the pie and then to capture the largest possible share of that slice, the monitor’s slice is pre-defined. To increase its value, the monitor has to operate in ways that would benefit the class, thus extracting the optimal rent out of both the defendant and the class attorney.

By awarding the chosen monitor a share of the class, his interests are made very similar to those of class members. There are reasons to believe, however, that the problems in schemes like the PSLRA, which rely on class members’ supervision, would not be replicated under the private monitoring proposal.

First, the monitor is exposed to fiduciary duties, reporting, and external supervision by unnamed class members. If his share is sufficiently high, he would likely prefer to monitor adequately. The problem with the PSLRA has not been the lack of incentives to invest sufficiently in monitoring but the disincentives to volunteer to monitor. Since they already own a share of the class, large institutional class members have preferred not to be appointed to that position. By awarding the chosen monitor an additional share in the class action recovery,

114. For an elaborate analysis of the perverse incentives created by the democratic control in plaintiff steering committees, see Coffee, Rescuing the Private Attorney General, supra note 25, at 249-61.

115. See Coffee, Regulation of Entrepreneurial, supra note 25, at 888 (discussing an “interest group or ‘capture’ theory: namely, that lawyers have conspired to adopt the formula that maximizes their fees and discretion”).

116. See supra Part IV.B.
this proposal would motivate both class members and non-members to bid for the monitor’s role.

Moreover, a related problem that this proposal solves is the lack of coordination among large class members. It may well be that there are some large class members who would prefer to monitor if no one else does. Still, there is a problem of coordinating who among those class members would take the job since each of them is better off free riding on adequate monitoring performed by one of the others. The coordination problem might result in situations in which none of those class members monitors. The private monitoring proposal solves this problem. Non-members cannot enjoy any proceeds from the class action unless they are appointed to monitor. Once the monitor’s fee is structured properly, to ensure a net profit for the selected monitor, any non-member seeking this profit would bid to monitor.

Second, it may well be that class members are not the most effective possible monitors. Opening the monitor’s position to all professionals and institutions that might develop expertise in the field may only benefit class members. Large stake class members may still bid for the job, and they are likely to win it if they are indeed more efficient.

Third, large institutional class members exist mainly (if not only) in securities litigation. In other contexts like consumer protection, antitrust, or mass torts, class members usually hold a small share of the whole class. Our proposal would also guarantee adequate monitoring in these contexts, as it does not require membership in the represented class to compete for the monitoring position. This, clearly, is a substantial advantage of the proposed scheme over existing practice.

C. The Monitor’s Discretion and Authority

Once chosen, the monitor would select a lawyer after negotiating her fee agreement and submitting it to the court’s approval. By awarding the monitor a percentage of the recovery, his interests are effectively aligned with the class; he would choose the lawyer who would maximize the class’s net
recovery and offer the best possible fee arrangement for the class. By imitating a market structure, this scheme would allow the monitor to maintain more bargaining power in his negotiations with competing lawyers than he would otherwise, and he would likely be able to force the best conditions for the class.

Once the lawyer is chosen and the court approves her fee arrangement, the monitor should be allowed no further authority to replace her or change her fee because of the relationship-specific characteristic of the lawyer’s investment in the lawsuit. That problem is familiar from the literature on the economics of contracts. Because the lawyer’s effort is largely unverifiable by the court, the monitor might threaten to replace her after she has incurred a large part of her litigation costs unless the lawyer is willing to reduce her fee. Having her previous costs sunk, the

117. Absent any other restrictions, it is possible that lawyers would use ‘straw’ candidates to bid for the monitoring role and then assume the class attorney position and award themselves high rents. See infra Part V.D. for a discussion of such problems.

118. This Article has refrained from explicitly limiting the pool of lawyers to those who file a motion to certify the class action. It may well be that the monitor would choose a lawyer who was not previously involved in the case. One concern is that this structure may not provide sufficient incentives for lawyers to search for future causes of action because they may be appointed to represent the class even if they were not the ones to file the class action. One solution could be to compensate the lawyers who initiated the suit out of any fund created. Another would be to limit the pool of potential lawyers to those who filed motions to certify the class, similar to the current regime. Notice, however, that this alternative, like present practice, still allows lawyers to free ride others’ efforts and piggy back their filings. See Coffee, Rescuing the Private Attorney General, supra note 25, at 249 (arguing that “bad attorneys tend to drive out the good, as those most capable of fulfilling the role of the private attorney general find the unexpected economic return dissipated by ‘free-riding’ plaintiffs’ attorneys”).

119. See generally Oliver E. Williamson, The Economic Institutions of Capitalism (1985) (applying transactions cost economics to contractual relations); Paul A. Joskow, Vertical Integration and Long Term Contracts: The Case of Coal-Burning Electric Generating Plants, 1 J.L. ECON. & ORG. 33 (1985) (providing a theoretical and empirical analysis of the structure of vertical arrangements governing coal supply transaction and examining the transaction cost approach in this context); Benjamin Klein et al., Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J.L. & ECON. 297, 298 (1978) (explaining the possibility for opportunistic behavior when a specific investment is made).
lawyer would agree to any fee arrangement that would compensate her for her future costs. However, expecting this to happen, lawyers would tend to underinvest in the lawsuit, anticipating being left uncompensated for any early investment.

For example, suppose the lawyer’s fee is initially set at 20% of the class recovery; she has to spend $10,000 before trial and an additional $10,000 in trial. Suppose also that the expected recovery in trial is $100,000 if the lawyer makes the early preparations, and it is only $50,000 if she does not. The lawyer would agree to take the case on these terms if she were secure in the 20% fee.

However, if the lawyer’s investment is not verifiable, the monitor might threaten to replace her unless she agrees to reduce her fee to 10% after she had spent the early $10,000. Assuming that the lawyer’s investment cannot be verified, she would have no recourse against the monitor and would prefer to agree to the new terms, or to a slightly higher percentage, leaving her with a net profit from that point on. Yet to avoid a net loss, the lawyer would choose not to make the early investment. Her fee would remain 20% because this would be the minimum required to motivate any lawyer to take the case to trial, after no early investment was taken. Yet, the class would be much worse off, earning net $40,000 rather than $80,000 if the monitor were committed to the initial fee.

The monitor may still be allowed to petition the court to replace the attorney, but he would have to support such a motion with credible evidence as opposed to relying merely on his authority. Because of the unverifiable nature of the lawyer’s performance, such occasions are expected to be rare.

Finally, the monitor would retain the power to veto any proposed settlement. A settlement would therefore require agreement of both the class attorney and the monitor. After being endorsed by both, the settlement would be submitted for the court’s approval, which would be granted only after a fairness hearing is held, wherein all objecting class members can appeal to the court and notify it of their concerns.

120. The lawyer’s expenditures need not be monetary. They may reflect the alternative value of his time, if he were to take other legal work instead of pursuing the class action.
Adequate monitoring, as per this proposal, would significantly limit the opportunities for collusion between the class attorney and the defendant. Under current practices, collusion has to be proved to the court in the fairness hearing if a settlement is to be revoked. Since collusion is difficult to verify, courts are often inclined to dismiss claims asserting a collusive settlement as unfounded. Under the suggested scheme, monitors may veto any proposed settlement without being required to justify their decision. Verifiability of collusive agreements would thus become insignificant. Clearly, monitors would still have to take pains to identify any possible collusion. Yet, lawyers would want to provide monitors with assurances against collusion and with means for identifying it so that their fee would not be discounted in advance. Just as a lawyer would not want to make early investments if she is not assured her fee, so would the monitor refrain from awarding the lawyer a high fee if he knows the lawyer might take advantage of such fee and collude with the defendant. It would thus be in the best interest of both lawyer and monitor to commit to their initial terms and provide each other with sufficient assurances regarding the credibility of such commitments.

D. Controlling Against Collusion Between Class Attorneys and Monitors

Because the private monitoring proposal confers broad authority upon the monitor in choosing the class attorney, setting her fee, and approving settlement, it is sensitive to problems of collusion between the monitor and the lawyer. Separation between the monitor and the lawyer is necessary for

121. See Koniak & Cohen, supra note 45, at 1102-15 (detailing the reasons that courts tend to certify collusive settlements, even if judges are not self interested).

122. Collusion between the monitor and the defendant is also theoretically possible. However, it would be difficult for the defendant to pay the monitor in ways that would not be transparent to the court. Indirect collusion and facilitating payments from the defendant to the class attorney and from the class attorney (serving as the middleman) to the monitor are more likely. However, controlling for collusion in the attorney-monitor chain would render the greater scheme inapplicable.
the private monitoring proposal to be effective. Such separation would be assured through three mechanisms.

1. Limiting Repeated Interaction Between the Monitor and the Class Attorney

Collusion requires side transfers. As the literature on collusion clearly demonstrates, when side transfers cannot be simultaneously exchanged, repeated interaction between the monitor and the agent becomes the key factor in enforcing collusive agreements. Collusion is easiest if both monitor and lawyer operate under a joint organizational framework that may smooth transfers between them. Similarly, if the monitor and the law firm are operated and controlled by the same individuals, then payments can be exchanged easily. Finally, if both have a continuing contractual relationships beyond the class action context, it would possibly be difficult for the court to identify side transfers between them. Any relationship of this kind should therefore be banned, and both monitor and class attorneys should submit statements foreswearing such activity. Since the relationships, unlike the side payments within them, are easily identifiable and verifiable, false statements would subject the lawyer and the monitor to a high risk of being detected and sanctioned.

123. See, e.g., Jean Tirole, Hierarchies and Bureaucracies: On the Role of Collusion in Organizations, 2 J.L. ECON. & ORG. 181, 201-03 (1986) (modeling three-tiered principal agent relations with collusion and suggesting the optimal fee for the agent to minimize the costs of collusion).


125. See infra Part V.D.3 regarding such sanctions.
high, posing a realistic possibility that sanctions for false statements would be imposed.

A different type of cooperation and collusion that is more difficult to control might follow from allowing class action lawyers to be appointed monitors. It is possible that a lawyer who is appointed to monitor would agree to set a higher than optimal fee for the lawyer she chooses to represent the class who in return would guarantee that if she is chosen to monitor in another case, she would choose the current monitor to represent the class and would reward her accordingly.  

One possible remedy is to exclude class action lawyers from the competition to monitor by requiring that candidates would certify that their law firm has not represented plaintiffs in class actions during the preceding year or any other sufficiently long time period. A less extreme remedy against reciprocation would be to prohibit the monitor from choosing any lawyer who, as a monitor in an earlier class action, had chosen him to represent the class. This would render reciprocation, and consequently collusion, too costly to operate between the two lawyers.

2. Increasing the Monitor’s Share

Paradoxically as it may seem, the wider the opportunity for collusion, the higher the monitor’s fee should be. The rationale is simple. By colluding with the class attorney, the monitor gains side transfers that the attorney pays him, yet he shares the lost rent with the class. The higher his share in the class recovery, the larger his loss from collusion. Once this loss is higher than the possible side transfers, the monitor will not collude. The opportunity for collusion simply raises the monitor’s reservation value in case he does not perform his duties properly.

126. Some commentators have alleged that similar reciprocation currently exists in the selection of lawyers to plaintiff steering committees and in the choice of lead attorneys. See, e.g., Coffee, Understanding the Plaintiff’s Attorney, supra note 25, at 714-20. Monitor auctioning could render such collusion even more likely, as the colluding lawyers would gain combined high rents because of the inefficient monitoring that they provide and would thus be able to outbid other candidates for the monitoring position.

127. See Tirole, supra note 123, at 195-96.
The necessary increase in the monitor’s share would depend on the available “technology” for side transfers. The more difficult and risky it is to agree on, transfer, and enforce side payments, the more expensive—and consequently smaller—the side payments will be. The monitor’s share need only be increased to the point at which his potential cut of the lawyer’s excessive rents does not justify the reduction in his share of the class recovery.

Raising the monitor’s fee substitutes for direct restrictions on side payments and collusion. The more difficult it is for the lawyer and the monitor to exchange side transfers, the less necessary it will be to increase the monitor’s fee. Since restricting side payments is costly, the question of which measure to use is a matter for specific cost-benefit analysis. If, for example, class action lawyers are potentially more efficient and effective in monitoring, it may be better to allow them to compete for the monitor’s position yet increase the monitor’s fee so that collusion will not be beneficial. If, on the other hand, collusion is so easily facilitated through give-and-take relations within the class action bar, then the increase in the monitor’s fee might impose only an additional cost on the class without a substantial decrease in collusion. The court may then want to bar active class action firms from bidding to monitor.

3. Sanctioning Monitors

128 Some have suggested that effective enforcement and higher sanctions against class counsels would reduce many of the inefficiencies inherent in class actions. See, e.g., Koniak & Cohen, supra note 45, at 1068-80; Koniak, supra note 45, at 250-51. Yet, increased sanctions will only affect deterrence as far as verifiable information can be detected and provided to the court. As our previous discussion has demonstrated, many of the inherent inefficiencies in class actions relate to information that is either unobservable or very costly to verify, including information concerning projected trial outcomes, lawyers’ time investment, quality of representation, various forms of side payments, and settlement valuation. These types of information would not be available to external monitors, unnamed class members, or other interested parties. Even if they wanted to, courts would not be able to condition their decisions on such information, as the problem of opportunistic abuse would foreclose any such reliance. Again, information is the key. To obtain information and use it optimally, appointed private monitoring would be necessary.
Collusive agreements would expose monitors to the risk of sanctions. They may be sued for malpractice and breach of fiduciary duties as well as for statutory and common-law fraud. They might face grave reputational losses if such proceedings are indeed initiated, allowing competitors in future class actions to motion the court to disqualify them from further monitoring. Finally, if they are lawyers, monitors may face disciplinary actions if they abrogate their ethical and professional responsibilities. Increasing the sanctions following such proceedings may therefore be conceived of as an appropriate remedy against the various types of inappropriate conduct that adversely affects the class.

E. Implementing the Monitoring Proposal—Taking Legal Constraints Into Account

The proposal made here may be implemented through a legislative reform. Yet, it seems that it can be readily applied and experimented with under current doctrine. This section briefly outlines the issues at stake and possible solutions.

1. Appointing a Monitor

It has always been recognized that courts have ample judicial powers to manage class actions. Since the 1966 amendment to Federal Rule of Civil Procedure 23, these powers have been commonly practiced under the auspices of Rule 23(d)(5).\footnote{7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1796 (2d ed. 1986).} Rule 23(d)(5) allows the court to make appropriate orders concerning procedural matters that are not specified in other subsections of Rule 23(d).\footnote{FED. R. CIV. P. 23(d)(5).} It has been interpreted to allow broad discretionary powers to courts handling class actions, including the appointment of guardians \textit{ad litem} to review the fairness of proposed settlements to class members,\footnote{Ahearn v. Fibreboard, 6:93-CV-526, 1995 U.S. Dist. LEXIS 11532, *259-*77 (E.D. Tex. 1995).} to protect the class interests with regard to the class attorneys’
application for fee,\textsuperscript{132} or to represent future class members.\textsuperscript{133} Alternatively, courts have the power to appoint special masters according to Rule 53 and 16(c)(8) of the Federal Rules of Civil Procedure or experts according to Rule 706 to the Federal Rules of Evidence.\textsuperscript{134} Appointment of a non-judicial representative for the purpose of negotiating the class attorney’s fee had also been proposed by the Third Circuit Task Force in 1990\textsuperscript{135} and similar recommendations were incorporated in proposed, albeit unenacted, amendments to Rule 23 in 1993 and 1995.\textsuperscript{136}

\begin{footnotesize}
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\item 132. See Miller v. Mackey Int’l, Inc., 70 F.R.D. 533, 535 (S.D. Fla. 1976) (stating that “[a]lthough specific authority for the appointment of a guardian ad litem is not provided for in Rule 23, it is inherent within Rule 23(d)’’); see also In re THC Fin. Corp. Litig., 86 F.R.D. 721, 737-38 (D. Haw. 1980) (stating that a fair balance must be struck between the interests of the class and the need to have competent counsel undertake future litigation and elaborating that the fee awarded should be “just compensation” for the actual benefit received by the class); Haas v. Pittsburgh Nat’l Bank, 77 F.R.D. 382, 383-84 (W.D. Penn. 1977) (holding that the appointment of a guardian for the class members would aid in a fair determination of counsel fees).
\item 133. See In re Joint E. and S. Dist. Asbestos Litig., 129 B.R. 710, 796 (S.D.N.Y 1991) (stating that a court may find jurisdiction over absent class members even in the absence of minimum contacts); Meyer v. Citizens and S. Nat’l Bank, 677 F. Supp. 1196, 1209 (M.D. Ga. 1988) (giving notice to a guardian representing “the interests of unborn, unknown, incompetent, and minor members of the plaintiff class”).
\item 134. See MANUAL FOR COMPLEX LITIGATION § 23.14 (3d ed. 1995) (advocating the use of special masters to review the fairness of proposed settlements). Interestingly, the second edition of the Manual for Complex Litigation proposed to use a “special counsel” to conduct settlement negotiations on behalf of either of the parties. MANUAL FOR COMPLEX LITIGATION § 23.12 (2d ed. 1986). This suggestion was dropped from the third edition. Regarding the preference of masters over guardians in review of attorney’s fee motions, see Gottlieb v. Barry, 43 F.3d 474 (10th Cir. 1994).
\item 135. Task Force Report, supra note 57, at 256-57.
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\item (3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.
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Monitoring, as it is proposed here, shares the basic features of the guardian or the special master. It is merely an extension of these already practiced devices. In contrast to the special master or guardian ad litem who is usually appointed only after a settlement is proposed or after the case is concluded and the attorney’s fee is to be determined, the monitor’s representation begins right after the suit is filed and ends only when it is concluded. The monitor’s scope of authority is also broader, as he selects the class attorney, sets her fee, and supervises settlement and litigation throughout. Yet, these differences, although essential for effective monitoring, do not seem critical from a doctrinal perspective. Appointment of the monitor is thus well within the powers of the court presiding over the class action.

As far as the auction as a method for selecting the monitor is concerned, there are two separate issues to be addressed. First, there is the question of whether it is proper for the court to divest the choice of monitor to an external mechanism. The simple response is that the court maintains all powers to supervise the auction and to veto any choice of monitor if it sees fit.137 Second, it might be asserted that in paying for his position on the one hand and being paid a share of the class recovery on the other, the chosen monitor is in fact buying a share of the claim.138 However, the two should be separately examined. The monitor, like the class attorney, is paid a percentage fee, and the application of the common fund doctrine to his fee is possible, as discussed below.139 The fact that he pays for earning this position must be viewed as a mere advantage of the proposed scheme, as it benefits the class and provides an objective and efficient mechanism for the monitor’s selection.

137. As mentioned above, supra note 111, auctions are already practiced for selection of lawyers under the PSLRA.

138. In individual litigation, such sale might be considered a violation of the rule of against champerty. Even there, however, it is not clear how applicable that rule is in view of contingent fees for lawyers. See Stephen C. Yeazell, Collective Litigation as Collective Action, 91 U. ILL. L. REV. 43, 52 (1989) (explaining the intended role of champerty in a legal system).

139. See infra notes 142-146 and accompanying text.
2. The Monitor’s Discretion

It is the general rule that an appointed neutral can only assist and not replace the adjudicator in its decisions of fact and law. It would seem, however, that as long as the court approves the monitor’s decisions, this concern would not preclude the use of monitors. Furthermore, from a doctrinal perspective, the monitor’s role is not much different from that of the class attorney’s. Both are professionals who serve to represent the class. The monitor is not supposed to act as a neutral evaluator of the case or of the lawyer’s performance, and his discretion does not substitute for the court’s in any formal way. The court still remains in charge of protecting the absent class members’ interests and maintains all powers to that effect.

3. The Monitor’s Fee

The court’s power to allow the monitor a share in the proceeds from the lawsuit should be derived from the same doctrinal basis by which lawyers are allowed a share in the class action proceeds, namely, the common fund doctrine. The doctrine establishes the equitable entitlement of a litigant or his lawyer who recovers a common fund for the benefit of others to

142. See ALBA CONTE, ATTORNEY FEE AWARDS 22-30 (2d ed. 1993) (reviewing the common-fund doctrine); HIRSCH & SHEEHY, supra note 107, at 49-63 (discussing the common-fund doctrine and its application to class actions).
a reasonable attorney’s fee from the fund as a whole.\textsuperscript{143} It has been applied also to awards of incentive fees to representative plaintiffs\textsuperscript{144} and to payment of attorney fees and costs to intervening unnamed plaintiffs and their lawyers.\textsuperscript{145} Although it has usually been applied only to parties who rendered common benefit to the class, the doctrine is conceivably extendable to non-parties as well.\textsuperscript{146}

VI. Conclusion

This Article suggests private monitoring as a possible solution to class action abuse. Instead of concentrating on attorney fee regulation, as has most of the literature on class actions, this Article has focused on an optimal design of monitoring structures. It has examined the necessary requirements to facilitate adequate monitoring in class actions and has concluded that to satisfy these requirements, the pool of potential monitors must be expanded beyond class members, the monitors should be selected by a mechanism that would imitate the market, namely an auction, and the monitors should be


\textsuperscript{146} For example, in the past some courts have awarded costs and attorney fees to non-party amici who contributed to the class’s benefit. See, e.g., Bowling v. Pfizer, Inc., 922 F. Supp. 1261, 1285 (S.D. Ohio 1996) (allowing a fee paid to “Public Citizen,” an amicus whose objections to the proposed settlement were, according to the court, invaluable and beneficial to the class). But see Fiorito v. Jones, 72 Ill. 2d 73, 96-98 (Ill. 1972) (rejecting the award of attorney’s fees to non-members).
allowed a share of the class recovery if they are to perform their duties adequately.

The analysis presented significantly extends previous discussions of monitoring by examining why and how self-interested individuals and institutions can be induced to monitor properly. Courts and commentators alike have often complained that named class members are figureheads and that only large stakeholders can perform monitoring adequately. They have nevertheless refrained from explicit discussion of numerous relevant questions such as what it is in large stakeholders that would render them effective monitors, whether and how they should be paid for their work, whether monitoring should be restricted to class members only, and what scope of discretion monitors should be allowed. This lack of rigor is quite unfortunate, as the main reform aimed at facilitating monitoring—that attempted by the PSLRA in the securities litigation context—has failed to achieve satisfactory results exactly because care has not been taken to adequately compensate selected lead plaintiffs qua monitors.

Taking an analytical perspective, this Article has shown that, contrary to the common view, adequate representation by class attorneys can be guaranteed. However, to do so someone must keep an open and, more importantly, an informed eye over class lawyers. This Article sketches a comprehensive framework that can be readily applied by courts. This proposal promises better results for represented class members and at the same time saves judicial resources and allows courts to continue streamlining their dockets. It is a first step in understanding that the private attorney general must have an equally qualified, financed, and motivated monitor if class actions are to deliver on their promise of a more just and efficient society.