UNDER CLOAK OF SETTLEMENT

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* Professor of Law, Boston University School of Law. In the spring of 1995, I was contacted by a member of the office of United States Senator William Cohen (R-Me.), who told me about Hoffman v. BancBoston Mortgage Corp., No. CV-91-1880 (Ala. Cir. Ct. Jan. 24, 1994), discussed infra Section I.A.1. A number of Senator Cohen's constituents had been class members in this suit and were outraged by how they were treated by their lawyers, their bank (the defendant in the case) and the court system. After reviewing the matter, I concluded that the class members had a viable cause of action against the bank and class counsel. With the goal of helping class members obtain redress, I referred the case to the offices of the Maine and Massachusetts Attorneys General and to a private law firm. The private lawyers filed suit against the settling parties. That case was dismissed, although at the time this Article went to press the private lawyers were continuing their efforts to reverse that dismissal. Government lawyers from nine states appeared as amici in the private suit. I am serving as a consultant to the lawyers in the private action and may be compensated for my time.

I thank Scott Adams and Jennifer Wallace for their research assistance, my colleagues at Boston University for their helpful comments on this work, Hofstra Law School and the W.M. Keck Foundation for providing financial support for this research, and Ralph Wellington, Nancy Winkelman and their partners at Schnader, Harrison, Segal & Lewis as well as the partners of Wildman, Harrold, Allen & Dixon for their willingness to put themselves on the line to fight the injustice of class action abuse.

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LAWYER self-dealing on a grand scale is not new. At the end of Bleak House, Jarndyce and Jarndyce—the suit that had made the fortunes of generations of lawyers—"lapses and melts away," because "the whole estate is found to have been absorbed in costs." Dickens' description of the last lawyer to leave the court is masterfully damning: "[H]e gave one gasp as if he had swallowed the last morsel of his client, and his black buttoned-up unwholesome figure glided away to the low door at the end of the Hall." "Fog everywhere," Dickens wrote. And in that fog creep lawyers with bundles of money stepping neatly over the bodies of their destitute clients. An unwholesome picture indeed, but one that the American public has come to believe portrays the behavior of lawyers in class action suits. The public has heard enough about class lawyers to justify this image. It has heard about the class lawyers in the GM Truck...
case, who negotiated a settlement in which the lawyers would receive $9.5 million in fees, while their clients were to get coupons to buy another GM Truck. It has heard about the class lawyers in the Ford Bronco II case, who requested $4 million in fees for negotiating a settlement in which their clients were to receive a warning sticker, a safe driving videotape, a road atlas, an owner’s manual, a flashlight and a free vehicle inspection (but not free vehicle repairs) as compensation for having purchased a vehicle that allegedly was prone to roll over.

Is this unwholesome image accurate? And if so, what should be done about the problem? At one end of the spectrum are

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1992, (Mag.) at 11; Graef S. Crystal, At the Top: An Explosion of Pay Packages, N.Y. Times, Dec. 3, 1989, (Mag.) at 25; Arthur M. Louis, Executive Pay Has Gone Hog Wild; Problem Is Many Boards Won’t Say No to CEOs, S.F. Chron., May 24, 1993, at C1; Ronald E. Yates, Adding Up Arguments on CEO Pay, Chi. Trib., Mar. 3, 1996, (Bus.) at 1 (all decrying excessive corporate compensation packages) with Mal Vincent, Gimme Moore; $12.5 Million-a-Film Actress is Known for Getting Her Way in Hollywood, Virginian-Pilot (Norfolk), Oct. 18, 1995, at E1; Bernard Weinraub, Skyrocketing Star Salaries, N.Y. Times, Sept. 18, 1995, at D1 (both discussing compensation of celebrities such as movie stars and sports figures). Although the 1994 baseball strike generated some criticism for the high salaries routinely sought—and routinely earned—by sports figures, see, e.g., Bill Livingston, Growing 'Board' of Baseball's Greed, Plain Dealer (Cleveland), Sept. 4, 1994, at 1D (criticizing exorbitant salaries for players); Baseball Strike Plans, L.A. Times, Aug. 4, 1994, at B10 (Letter to the Editor) (same), little of the criticism that has been directed at corporate America and the legal profession has spilled over into criticism of athletes or entertainers.

But keying the pay of agents to the rewards they reap for their principals does not reflect only greed or malapportionment; such linkage is one way of aligning the interests of principals and their agents. See John C. Coffee, Jr., Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 696-99 (1986) (discussing the implications of paying class lawyers on contingency basis that gives the lawyer a greater percentage for greater awards). See generally Paul Milgrom & John Roberts, Economics, Organizations and Management 423-46 (1992) (discussing agency issues related to executive compensation). Such payment systems may result in some agents making megabucks, but they also may promote more faithful performance on the part of all agents thus compensated. In any event, our target is neither high fees nor the lawyers who make them legitimately. We also think it unlikely that all of the public’s hostility stems from ideological aversion to others making lots of money.

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9 Jesus Sanchez & Donald W. Nauss, Court Rejects GM Settlement on Value of Pickup Trucks, L.A. Times, Apr. 18, 1995, at D1, D15 (describing settlements in Ford Bronco II case and GM pickup truck case); Torry & Brown, supra note 8, at D6.
those who would deny that a serious problem with the current class action system exists, or who would maintain that the existing system, perhaps with a few minor modifications here and there, can handle any serious problems. After all, courts rejected both the Ford and the GM settlements, and in each case the court cited the likelihood of collusion between class lawyers and defendants as a prime reason for doing so. At the other end are those who view the class action device as so inherently corrupt that its availability should be restricted, either by making such suits harder to win or by reducing the monetary rewards for lawyers and claimants who bring them. In the "middle" are those who advocate incremental changes in the class action system to alleviate the most serious problems. We take


11 This approach is the one currently being considered in the proposed amendments to Federal Rule of Civil Procedure 23, which were published for public notice and comment just as this Article was being prepared for publication. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, August 1996 [hereinafter Preliminary Draft]. In our view, these proposed amendments not only do nothing to cure the abuse now present, but in fact, invite more collusion through a new provision that would sanction—with no apparent limit—the settlement of large class actions that could not be tried. We discuss this proposal infra Section II.E.


13 This approach is the one taken by the recent reform legislation in the securities and tort areas. See Note, Investor Empowerment Strategies in the Congressional Reform of Securities Class Actions, 109 Harv. L. Rev. 2056 (1996) (discussing and critiquing provisions of new statute that restricts the choice of representative plaintiffs and encourages greater participation by high-stakes investors in securities class actions); Note, "Common Sense" Legislation: The Birth of Neoclassical Tort Reform, 109 Harv. L. Rev. 1765 (1996) (discussing and critiquing tort reform bills designed to restrict the availability of punitive damages, eliminate joint and several liability, and adopt the English rule on attorney's fees). It is also the approach advocated by Wall Street Journal editorial page writer Max Boot. See Max Boot, Stop Appeasing the Class Action Monster, Wall St. J., May 8, 1996, at A15 (arguing for abolition of class actions in mass tort cases); Max Boot, Judges Rebel Against Mass Tort Excesses, Wall. St. J., Apr. 3, 1996 (same).

14 See, e.g., Judith Resnick, Dennis E. Curtis & Deborah R. Hensler, Individuals Within the Aggregate: Relationships, Representation, and Fees, 71 N.Y.U. L. Rev. 296 (1996) (raising issues to be addressed by "intermediate solutions" to rules of
a different approach. We agree with those who argue that lawyer abuse in class actions is rampant and that the current system, far from keeping this abuse in check, is set up to shield lawyers from the consequences of their misdeeds. But our proposed solution is not to restrict the availability of class actions; this overbroad approach risks leaving too much corporate and government misconduct undeterred without addressing lawyer self-dealing. Nor is our proposed solution to work within the class action system itself to improve it, though we certainly support such efforts; the participants in the system are likely to render such improvements inadequate. Instead, we propose removing the shield, or if you will, turning the system on itself.

In this Article, we discuss examples of class action settlements in which the conduct allegedly engaged in by class counsel—and in some instances by the defendants and their lawyers—could constitute a civil wrong or a criminal act under state or federal law, but a court nevertheless blessed the conduct by approving the settlement. We argue that the findings made by federal and state courts in blessing these settlements, namely, findings on the adequacy of class counsel, the lack of collusion between class counsel and the defendants, and the fairness of the settlement terms, should not immunize the conduct of the settling parties from the reach of state tort law, consumer protection law, criminal law or state and federal antitrust statutes. The process that results in these findings is simply not "full" or "fair" enough to allow those findings to trump the operation of other state or federal law designed to protect clients and the public from the misdeeds of lawyers. Moreover, we argue that

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aggregation reform proposals).

For example, we support currently pending legislation that would require class action notices sent to class members to be written in plain English, so that these class members could better understand the proposed terms, and that would also require state attorneys general to receive notice of class action proceedings, so that they might monitor the course of these actions. See infra notes 106-109. discussing such legislation. Moreover, we believe that stricter standards should be applied in assessing the adequacy of class counsel—standards that could be developed through the common law process, the adoption of court rules or the amendment of Rule 23 of the Federal Rules of Civil Procedure. See, e.g., Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. 1045, 1115-1126 (1995) (discussing the inadequacy of courts' adequacy review as they now conduct it and arguing that more stringent standards are needed).
the doctrines that work to exempt state action, the action of federal agencies and the conduct of parties in litigation from the purview of the antitrust laws do not, and should not, apply to the conduct of class counsel in negotiating a settlement or to the terms of the contract subsequently approved as a class settlement by a court.

In short, our answer to class action abuse is "sue the bastards." In more polite terms, through this Article we hope to dispel any notion that the procedural law used to facilitate the settlement of class actions should somehow operate to cancel the substantive law designed to protect us all from the wrongful conduct of our supposed champions.

I. JUDICIACTUS BLESSED W RONGDOING

A. How Many Wrongs Make a Right?

1. As Maine Goes, So Goes the Nation

Imagine opening a statement from the bank that holds the mortgage to your home and discovering a "miscellaneous deduction" of $145.65 from your escrow account. You call the bank to inquire about this debit and are told that a state court in Alabama authorized the bank to deduct this money to pay the

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16 Hoffman v. BancBoston Mortgage Corp., No. 91-1880 (Ala. Cir. Ct. Jan. 24, 1994). The discussion of Hoffman in this Article is based on the following documents on file with the Virginia Law Review Association: the January 24, 1994 Alabama Circuit Court opinion; the January 24, 1994 Consent Decree issued by the court; the Notice sent to class members; the brief filed by the Florida Attorney General's office objecting to the settlement and to the manner of awarding attorney's fees; a letter from Burr & Forman, Counsel to BancBoston, to Dexter J. Kamilewicz, a class member, explaining what happened in this suit and why the bank did not object to the award of attorney's fees; and a column written in the Maine Lawyers Review describing the effect of this settlement on Maine constituents. These materials were sent to Professor Koniak by the office of Senator William Cohen of Maine. See supra note *. We recognize that these documents may in some way misrepresent what actually occurred in this case; for example, the parties may not actually have followed the court's order. We therefore caution the reader that the discussion in this Article proceeds by assuming that the parties followed the court order, that the bank's lawyer honestly described the bank's position in the negotiation and class counsel's ultimatum to the bank, and that the Florida Attorney General's brief accurately presents the facts in evidence at the January 10-11, 1994 fairness hearing. If any of these assumptions proves incorrect, our description of what happened and the conclusions we draw from that description might need to be altered.
lawyers who were appointed by that court to represent you in a class action suit brought ostensibly on your behalf. You live in Maine.

You remember receiving a Notice in the mail about a year ago, informing you that there was such a suit pending. You read it, although you needed your reading glasses to do so because the print on the eight page document was very small, and, being a lawyer, you understood it more or less. It told you that your bank allegedly had been requiring you to keep more money in your escrow account than it had a right to demand and that this suit had been brought to stop that practice. “Good,” you thought at the time. You read on and discovered that class counsel had negotiated a settlement with the bank: The bank was to stop requiring you to keep an excessive cushion in your account; and it was to return to you the excess money that had accumulated in your account by deducting an equivalent sum from the interest payments due on your mortgage, or, upon your request, the bank would either apply the excess toward your principal or return it to you directly. You made a mental note to request at the appropriate time that the bank send your money home—a mental note you promptly forgot. There was more good news in the Notice: “interest payments” were to be paid to class members on the surplus that the bank had been keeping these past years.

You could, the Notice explained, opt out of this settlement, if you chose. Page eight of the fine-print Notice said that. The Notice stated, however, that anyone who opted out would “not receive any of the benefits set forth in the proposed [agreement].” You read that statement to mean that if you opted out, the bank could keep requiring the excessive cushion in your escrow account and you would not receive any interest payments under the settlement. The choice to stay in the class seemed a no-brainer: You would stay in and get whatever bene-

18 Id. at 1.
19 Id. at 3.
20 Id. at 4.
21 Id. at 8.
22 Id.
fit the settlement provided. Moreover, staying in required no effort on your part. You were in as long as you did not return the opt-out card. You understood that the benefit to you would likely be modest, as even without a lawsuit the bank would have returned the surplus in your escrow account to you when you finished paying off your mortgage. It was, after all, your money. The bank never maintained otherwise. What the lawsuit promised you was the opportunity to get your money now instead of having to wait for its return upon the expiration of your mortgage. You liked that idea: Money today is worth more than money tomorrow. The lawsuit gave you the opportunity to spend that money today or invest it as you pleased for the future, and while that benefit to you would be small, it was something. You also figured out that the interest payments you were likely to receive on the surplus that the bank had been carrying on your account in past years would be small. You found the interest formula buried in Paragraph (D)(7)(A) of the Notice:

BancBoston will make a one-time payment to the Subclass members in an amount equal to fifty percent (50%) multiplied by seven point five (7.5) multiplied by (four (4) percent minus the interest rate paid on escrow, if any), multiplied by the average escrow surplus, which has been determined to be $58.41. Math had never been your best subject, but you were able to tell without any calculation that this formula would not produce any windfall for you. The $58.41 figure in this formula, repre-

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23 Id.
24 Id. at 4.
25 Neither the Notice nor the unpublished court opinion approving the settlement explains the formula used to calculate past-due interest. It is easy enough to figure out that 4% is the interest rate the bank has agreed to pay on the past surplus, particularly given the provision that any interest actually paid is to be deducted from the 4% figure, although the interest is obviously not compounded. Notice at 4. In trying to account for the 7.5 number, we imagined that it might represent the average number of years that a surplus had been maintained in the escrow accounts. We were not creative enough to imagine what the 50% figure was doing in the equation. Are you?

We gained some insight into this formula by reading an opinion in another case approving a similar formula. GMAC Mortgage Corp. v. Stapleton, 603 N.E.2d 767 (Ill. App. Ct. 1992). In that case, also involving allegations of excessive escrow cushions, the defendant company agreed to pay: ".40 x (3.3 years) x (5 1/2% interest) x (ending escrow surplus)." Id. at 772. The court explained that "the .40 figure
senting the average escrow surplus, confirmed that the benefit of having your surplus returned today instead of some years from now would also be small. After all, how much money could you make investing $58.41? Given how small your gross recovery was likely to be, it did not seem worth it to retrieve your bank statement to check how much interest you had been receiving (a number you would need to be able to use the above formula) or to search for your calculator to multiply the numbers out. You were satisfied with the general knowledge that your recovery would be small, although probably just.

You noticed that your lawyers would be requesting that the court award "a reasonable attorney's fee to be paid out of each escrow account," and wondered why the defendant bank was not being asked to pay class counsel's fee, given how small the recoveries to class members would be. However, not being an expert in such matters, you were willing to assume that this method of paying class lawyers was acceptable, perhaps even routine. You thought of asking your colleague on the faculty who teaches complex civil litigation about this, but forgot or decided it was not worth worrying about. After all, the Notice made clear that the fee to be requested would not exceed "one-third of the economic benefit conferred" and lawyers

represents a litigation risk factor, and the 3.3 years figure pertains to the applicable statute of limitations period." Id. This explanation suggests that the 50% figure is also a litigation risk factor, although this figure seems somewhat low (that is, the assumed risk of losing seems too high) given that the Stapleton case, which had used a .40 risk factor, preceded Hoffman, and that in Hoffman, proving liability seemed relatively straightforward. The 7.5 figure, however, remains a puzzle. It does not seem to reflect the applicable statute of limitation period, so we are left with our previous guess that it represents the average length of time the bank had held the escrow surplus. Support for this guess comes from Law v. First Ala. Bancshares, No. CV-90-003351 (Ala. Cir. Ct. Oct. 3, 1995) (unpublished opinion) (on file with the Virginia Law Review Association), another bank escrow class action in which there was testimony that the average length of time until the mortgages would be satisfied was 7.5 years. Id. at 6. This doesn't completely explain the relevance of that figure for computing past interest. Perhaps the generous year figure may have something to do with the stingy litigation risk figure, or perhaps the .50 is not a litigation risk figure at all but rather simply an adjustment to the 7.5 years to account for the fact that those deserving back interest had already been paying down their mortgage and so may have had less than 7.5 years remaining on average. But, as you can see, we are left with only hazy speculation on how this formula was conceived.

26 Notice, supra note 17, at 5.
27 Id.
getting one-third sounded unremarkable enough. More important, you already had wasted enough time making your way through this complicated Notice. Soon you forgot about the whole thing.

Now a year later you are being told that the bank has debited the lawyers' fees, but obviously there has been a mistake. You cannot bring to mind the formula for calculating your interest payments, or any of the other details of the settlement for that matter, but you have a vague recollection that the amount you expected to receive was small. How could the lawyers' fee be so high? The lawyers were to get only a third. If the lawyers' fee is $145.65, the "economic benefit" to you should be at least $436.95: much higher than you had imagined, but either that is what you are owed or the bank took too much out of your account for the lawyers. The bank employee insists there is no mistake: "The lawyers' fee is $145.65, and you already received your benefit. See that $2.19 credit?"  

Chances are that you do not live in Maine and that, wherever you live, yours was not one of the over three hundred thousand families nationwide directly affected by the settlement in Hoffman v. BancBoston Mortgage Corporation. But BancBoston was not the only bank to be sued for keeping excessive money in escrow accounts, and it was not the only bank to have made a settlement agreement with class lawyers that provided for class members to pay attorney's fees under a formula that left many

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class members suffering a net out-of-pocket loss. In Hoffman and the cases like it, the winners lost, and their lawyers got rich.

The class lawyers devised the payment scheme, proposed it to the courts and defended it as fair. Moreover, according to BancBoston's lawyer, class counsel insisted that to settle the Hoffman suit the bank would have to agree not to object to class counsel's fee proposal. Although the Bank was obliged as a fiduciary to manage its customers' funds responsibly, it agreed to the plan. In other words, the bank decided to give away its customers' money to resolve its liability to those very customers. Finally, the Alabama court, like all class action courts, was supposedly sitting as guardian of the class's interests.

29 According to a letter written by BancBoston's counsel, Secor Bank entered into a similar settlement with the class lawyers who later represented the Hoffman class. Letter from T. Thomas Cottingham, Counsel to BancBoston Mortgage Corporation and Bank of Boston in Hoffman, to Dexter J. Kamilewicz 3 (Mar. 30, 1995) (on file with the Virginia Law Review Association) [hereinafter Cottingham Letter]. The First Bank of New Hampshire recently agreed to a similar scheme with another group of lawyers. Williams v. First N.H. Mortgage Corp., No. 94-5993 (Ala. Cir. Ct. Dec. 1, 1995). However, after the New Hampshire and Vermont Attorneys General objected to the attorney's fee formula, the bank and the class lawyers agreed to change the formula for calculating attorney's fees. Conversation with Walter Maroney, Senior Assistant Attorney General, State of New Hampshire, Feb. 8, 1996. Both the Secor and First Bank of New Hampshire settlements were filed in Alabama. Moreover, through confidential sources, we have learned that many other similar settlement agreements have been entered in excessive escrow cases involving banks throughout the nation. It appears that a good number of these class actions have been filed in Alabama.

30 On the propriety of the lawyers' actions, see discussion infra text accompanying notes 48-52.


32 Id. at 3. Note that according to BancBoston's lawyer, the bank simultaneously agreed or decided to kick in some of its own money toward the payment of attorney's fees, presumably to soften the blow that was about to be delivered to its customers. Id. We do not know how much money, if any, the bank kicked in. Nor do we know how any such contribution affected the money charged to class members. What seems clear is that the bank did not pay the entire amount of attorney's fees and that it did not kick in enough to avoid charging some class members more than they recovered. See Lund, supra note 28, at 19 and discussion infra notes 38-46 and accompanying text.

33 On the propriety of the bank making such a concession, see discussion infra text accompanying notes 58-62.

in theory, but obviously inadequate in fact. With fiduciaries like these, the class lawyers and corporate defendants who offer coupons to class members begin to look good by comparison.

The scheme in *Hoffman* was actually quite simple. Class counsel asked for attorney's fees equaling 33 1/3% of all the money the bank was wrongfully holding in escrow; that is, one-third of all the excessive cushion money. The trick was in characterizing all that money as money recovered by this lawsuit.35 Had there been no lawsuit, 100% of the excess cushion would have been returned to class members at the time their mortgages were repaid. Therefore, what the lawsuit recovered for each class member was (in addition to the back interest) only the difference between the value of the excess cushion money in the class member's hands today and the value of the money had the bank held it until the mortgage was paid off. The lawsuit and class counsel did not "recover" the excessive cushion money being held in escrow because that money was never lost. All that the class members had lost by the bank's allegedly wrongful acts was the use of that money today and the use of that money in years past.

Class counsel backed up their fee request with testimony at the fairness hearing stating that "a fee equal to one-third of the settlement proceeds was reasonable and fair under Alabama law," and that in this case a fee of even 40% would be justified.36 The Alabama court awarded class counsel only 28% of the surplus.37 The problem, however, lies not in the percent

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35 While the fairness hearing transcript reveals some confusion on this point, it appears that class counsel used the total excess amount as some kind of rough measure of the worth of this lawsuit to the class instead of arguing that the excess money was recovered by the suit. *Fairness Hearing Transcript, Hoffman v. BancBoston Mortgage Corp.*, No. 91-1880 (Ala. Cir. Ct. Jan. 10-11, 1994) (on file with the Virginia Law Review Association) [hereinafter *Fairness Hearing*]. Of course, the result is the same: The class is charged a percentage of all the excess money as if the excess money were a common fund created by the suit.


37 Id. at 13.
awarded. One-third of the "economic benefit" conferred by the suit, as the Notice put it, might indeed have been a reasonable fee. On the other hand, 389% of the economic benefit is not. Nor is 4,155%. Nor is the charging of any fee to a class member who received no economic benefit whatsoever. But, as we shall see, each of these scenarios was possible under the settlement.

For example let us consider a homeowner from Maine (or from any other state that requires, as Maine does, that banks pay 3% interest on money held in escrow) with eight years remaining on her mortgage and a surplus of $100.00 in escrow. A reasonable calculation of the economic benefit derived from this settlement is $7.19.\footnote{We have chosen the numbers in the first example to be close to the benefit that an "average" homeowner might expect to get from the class action settlement. According to the Florida Attorney General, the average surplus was $134.50 per account, which is close to the $100 we are assuming for simplicity. See Brief of Intervenor, Florida Attorney General's Office 3, Hoffman (No. 91-1880) (filed Jan. 21, 1994) [hereinafter Florida Attorney General's Brief]. We also assume that a homeowner who found herself with an extra $100 might put that money in a bank account yielding 3.5% interest; a higher rate of return would be fairly unrealistic given the small amount to be invested. Finally, we assume eight years remaining on the mortgage because apparently this was the average time remaining on the mortgages in question. Id. at 12. An additional reason for using eight years is that the benefit to the class members from changing the method of escrow accounting would shortly have accrued to those class members even absent the class action. According to the court in Law v. First Ala. Bancshares, No. CV-90-03351, at 6-7 (Ala. Cir. Ct. Oct. 3, 1995) (unpublished opinion) (on file with the Virginia Law Review Association):}

On October 26, 1994 [nine months after Hoffman], the Department of Housing and Urban Development ("HUD") published a rule, effective on May 24, 1995, establishing escrow accounting procedures under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq., 59 Fed. Reg. 53890 (Oct. 26, 1994). HUD has acknowledged that its rule was in part initiated by private class actions such as this suit. 59 Fed. Reg. at 53890. These regulations prescribe methods of accounting for escrow accounts that include members of the Class. 24 C.F.R. §3500.17; 60 Fed. Reg. 8812 (Feb. 15, 1995). Under the new regulations [the bank] must apply the "aggregate" or "cash" method of accounting to all escrow account analyses conducted after October 26, 1997. Escrow accounts must be analyzed at least once a year, so under these new regulations, the members of the Class would have received their refunds no later than October 1998 . . . . Although it is uncertain whether the lawyers in Hoffman could have anticipated this change in the rule, and whether Hoffman was one of the cases that induced HUD to act, the rule change at least argues for a conservative estimate of the length of time during which the class members would achieve benefits from the suit.

Given these assumptions, we compute the economic benefit to this "average" class member, which consists of back interest plus the benefit from getting the $100 back...
figure and class counsel’s formulation of the benefit of this suit sooner so the class member can invest it herself. First, we compute the back interest by referring to the formula in note 25, and by making use of the fact that Maine requires banks to pay 3% interest on escrow accounts. The formula yields $2.19 in back interest:

\[ .50 \times 7.5 \times (4\% - 3\%) \times $58.41 = $2.19. \]

(Note that despite the fact that the class member is assumed to have a $100 surplus, the back interest formula conclusively presumes that the surplus in past years was only $58.41.) Next, we compute the amount the class member can earn with her extra $100. In eight years, 3.5% interest compounded would yield a return of 32% or $32 on $100. Had the bank kept the surplus for those eight years and then returned it to the customer at the 3% compounded interest rate required by the state, the customer would get a return of 27%, or $27. Thus, the economic benefit from being able to invest the $100 at the higher interest rate would be $5.00. Adding $5.00 to the $2.19 back interest benefit yields $7.19, which we claim is a reasonable calculation of the economic benefit of this settlement to the “average” class member.

Economically oriented readers will recognize that the $5 benefit would have to be discounted to present value, because the $5 represents the difference in value between the homeowner’s potential return in eight years and the bank’s expected payment in eight years. Put another way, if the bank asked its customer today to give it $100 in return for a piece of paper worth $127 in eight years, the question is how much the bank would have to compensate the customer to take the deal. The bank would not have to pay the full $5 difference in value today but only the amount that would yield $5 if invested (which when added to the $127 yields a total of $132) in eight years. If we use 3.5% as the relevant discount rate in the present value formula the present value of the $5 is $3.79:

\[ \frac{5}{(1 + .035)^8} = 3.79. \]

Nevertheless we do not use the discounted figure in this or subsequent examples for the following reason. The escrow surplus resulted from the fact that the bank kept an extra amount of prorated real estate taxes in the escrow account. If real estate values, and hence real estate taxes, were increasing over time, then the $100 escrow surplus would not stay constant but would increase at the same rate at which real estate taxes increased. If, for simplicity, we assume that real estate taxes (and hence the surplus) were increasing at the same 3.5% we have been using to calculate the interest the homeowner could have earned on the $100, then the present value discount would be cancelled out, and $5 would again be the relevant benefit. In essence, the $100 surplus would grow with inflation. For those so inclined, the relevant formula for the benefit to the hypothetical class member is:

\[ 100 \times (1 + i)^n \times (1 + r)^n \times \left[ (1 - r)^n - (1 - r')^n \right] \]

where \( i \) represents the inflation rate for real estate taxes (assumed to be .035), \( r \) is the interest rate the homeowner could earn as well as the discount rate (also assumed to be .035), \( r' \) represents the interest rate the bank is required to pay on escrow accounts (.03 in Maine) and \( n \) is the number of years (assumed to be eight). The expression within the brackets represents the difference between money invested at the market rate of interest and money invested at the bank’s required rate of interest, which we have found to be $5. If \( r = i \), then the first expression equals one and becomes irrelevant; the discount rate and the inflation rate offset each other. We note that even if \( i \) is 10% (and every other value stays the same), the benefit is only $8.11, which when added to the $2.19 back interest, yields a total benefit of $10.30, which still results in attorney’s fees of 272%.
to the class, our hypothetical homeowner would be charged $28.00 in attorney's fees—fees that amount to 389% of the $7.19 economic benefit conferred upon her.\(^3\)

But the situation gets even worse because the formula in fact used to calculate attorney's fees to be deducted from a class member's escrow account was not based on the actual surplus of any class member. Instead, the formula provided that Banc-Boston was to add up all of the money it was holding in escrow accounts and calculate what percentage of that amount was surplus money, which it should not have been holding; that percentage, calculated at one point to be about 19%, would then be used to calculate how much attorney's fees each class member owed.\(^4\) Each class member would then pay attorney's fees

\(^{39}\) \((28/7.19) * 100 = 389\%\). It is important to note that the more protection a state offered bank customers under its laws, the smaller the economic benefit; and thus, the worse that state's residents did under the settlement. Using the same method of calculating economic benefit we outlined supra note 38, our hypothetical mortgage holder in a state mandating 2% interest on money held in escrow would pay 144% in attorney's fees. Past interest is $4.38:

\[
.50 * 7.5 * (.04 - .02) * \$58.41 = \$4.38.
\]

The remaining economic benefit (assuming that the discount rate and the inflation rate are the same), see supra note 38, is:

\[
100 * [(1 + .035)^8 - (1 + .02)^8] = 100 * (.32 - .17) = \$15.
\]

Thus, total benefit is $15 + $4.38 = $19.38. Assuming this person was charged 28% of only the $100 actual surplus yields attorney's fees of 144%:

\[
(28/19.38) * 100 = 144\%.
\]

Similar calculations reveal that in a state mandating 1.5% interest our hypothetical homeowner would pay 114% in attorney's fees. Past interest is $5.48:

\[
.50 * 7.5 * (4\% - 1.5\%) * \$58.41 = \$5.48.
\]

The remaining economic benefit is:

\[
100 * [(1 + .035)^8 - (1 + .015)^8] = 100 * (.32 - .13) = \$19.
\]

Thus the total benefit is $19 + $5.48 = 24.48. This benefit yields attorney's fees of 114%.

Similar calculations reveal that in a state mandating 1% interest the homeowner would pay 93% in attorney's fees; and finally, in a state that did not require banks to pay any interest on money held in escrow this person would pay 69% in attorney's fees.

\(^{40}\) See Order of Settlement Approval & Final Judgment, Hoffman (No. 91-1880) at 9. The 19% assumption is based on a preliminary calculation, made by BancBoston sometime prior to the fairness hearing in Hoffman, that 19% of all the money it was holding in escrow was surplus (excessive cushion) money. Florida Attorney General Brief, supra note 38, at 3. However, there was no finding that this 19% average was constant across the nation, and the Florida Attorney General argued that there was substantial variation in the percent that was surplus in mortgage holders accounts depending on the type of mortgage contract one had signed. Id. at 4. We remind our readers that 19% was simply the ballpark figure used at the Fairness Hearing.
equal to 19% (or some percentage near it) of the total escrow money in her individual account times 28%, which means attorney's fees equal to about 5% of the total money in her escrow account. That charge would be assessed against the escrow account regardless of the size of the actual surplus and even if there were no surplus at all. There is no question that there were some class members who had no surplus in their escrow accounts and that the lawyers and the court were aware of this fact. The maximum benefit these people could get from the settlement was the $2.19 back interest payment. This is precisely the situation in which Dexter Kamilewicz claims to have found himself. Yet he was allegedly assessed attorney's fees of $91 (presumably representing about 5% of the total in his escrow account). These attorney's fees are 4155% of the benefit Kamilewicz allegedly received from the class settlement.

Note that even if the 19% presumption were correct for every homeowner, it would be highly unlikely for anyone in Maine to have paid less than 100% in attorney's fees. To see this, compare the attorney's fees a class member would have to pay with the benefits she would presumably receive. If we let x represent the total amount held for this class member in escrow, then the "break-even" point at which the class member would pay in attorney's fees the full benefit received (that is 100% attorney's fees) can be computed by solving the following equation for x:

\[.28 \times .19 \times x = ((.32 - .27) \times .19 \times x) + 2.19\]

The lefthand side of the equation represents the attorney's fees paid by the class members, made up of a contingency rate of 28% multiplied by the percentage of the total amount held in escrow that is deemed to be surplus, namely 19%. The righthand side of the equation represents the economic benefit for Maine mortgage holders. This benefit consists of the extra interest that the class members could have received by investing the money themselves (.32-.27), see supra note 38, multiplied by the 19% of the total amount held in escrow that is deemed to be surplus (assuming that this 19% is an accurate estimate of the surplus), multiplied by x plus the $2.19 in back interest, see supra note 38. Solving the equation we get:

\[.05x = .01x + 2.19\]

\[x = $54.75\]

Thus, every class member with more than $54.75 in her escrow account would pay more than 100% attorney's fees. For example, a class member with $60 in escrow would pay $3 in attorney's fees, but receive only $2.79 in benefit.

See Order of Settlement & Approval, Hoffman (No. 91-1880) at 7 (discussing both surplus and shortage in escrow accounts).


Id.
But we are still not finished. Not all class members were entitled to the back interest benefit. In particular, those whose escrow accounts were more than 30 days in arrears or who had obtained loans after September 1, 1990, did not qualify for the back interest benefit.\(^4\) Certainly those in arrears, and probably some others, did not have an escrow surplus either. Yet, as long as they had some money in their escrow account, they too paid attorney’s fees as if 19% or some comparable figure of the total money in their accounts was surplus.\(^5\) We have now reached attorney’s fee fantasyland: To infinity and beyond! The existence of these infinity cases should not, however, cause anyone to lose sight of how extreme the non-infinity cases were in their own right: 4155% attorney’s fees, 389% attorney’s fees. Indeed, all the people who paid more than 100% attorney’s fees would have been better off if class counsel had lost the case. Some deal.

The Alabama court, ostensibly sitting as guardian for the class, approved these fees, and reaffirmed its judgment when it revisited the matter following the initiation of a lawsuit challenging class counsel’s conduct in federal district court in Illinois.\(^7\) Before we reach the central question of whether a class action court’s approval of such fees should bar later litigation about the fees, let us consider what remedies would be available to an ordinary client in an analogous situation.

2. All Blessings Aside

If a lawyer in an ordinary lawsuit behaved the way the lawyers allegedly behaved in *Hoffman*, the client would have numerous remedies available. It is black letter law that lawyer-client contracts “must be fully and fairly explained to the client, and are

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\(^4\) Notice, supra note 17, at 4.
\(^5\) See supra note 40. Ted Benn, a class member who filed suit against BancBoston, claims to be one of the class members who received no benefit whatsoever yet was assessed attorney’s fees. Brief in Opposition to BancBoston Mortgage Corporation’s Motion to Dismiss, at 9, Benn v. BancBoston Mortgage Corp., No. 96-CV-0974-J, filed May 13, 1996 (N.D. Tex.).
\(^7\) Although the decision was affirmed by the state court, see Order of Jan. 30, 1996, *Hoffman* (No. 91-1880) (on file with the Virginia Law Review Association), disgruntled class members undertook a collateral challenge to the settlement in federal court. See *Kamilewicz*, 92 F.3d 506.
strictly construed against the attorney." If a lawyer told an ordinary client that legal fees would be one-third of the economic benefit recovered for the client in the suit, it would not take strict construction of the contract to hold that the lawyer was not entitled to one-third of money the client indisputably owned. Thus, if a lawyer for an ordinary client tried to keep one-third of the client’s excessive escrow cushion based on such a contract, a client could bring suit to require the lawyer to disgorge most of the fee she had collected. And the client should win. But the client’s remedies would not be limited to disgorgement.

Individual clients could also sue their lawyers for malpractice and seek punitive damages for conduct like that apparently engaged in by class counsel in Hoffman. Punitive damages are available in legal malpractice cases in which the lawyer’s breach of fiduciary duty amounts to constructive or explicit fraud. In general, an award of punitive damages is deemed appropriate upon a showing that the tortfeasor’s actions were intentional, fraudulent or committed in wanton disregard of another’s rights.


49 See, e.g., Newman v. Silver, 553 F. Supp. 485, 496 (S.D.N.Y. 1982), aff’d in relevant part, 713 F.2d 14 (2d Cir. 1983) (holding that amount of fee, particularly in light of services rendered and the lack of specific contract, was enough to demonstrate that “a legal fraud was perpetrated on [the client]”). In Hoffman, testimony at the fairness hearing apparently demonstrated that class counsel had worked 10,000 hours in total. Florida Attorney General Brief, supra note 38, at 14 n.5. Class counsel’s fees in total amounted to about $11,800,000 or $1,180 an hour. See Lund, supra note 28, at 19. Moreover, the circumstances in Hoffman, including the deceptive Notice provision on calculation of fees, do nothing to ameliorate the presumption of overreaching created by the amount of the fee itself.

50 See, e.g., Mar Oil, 982 F.2d at 843-44 (finding no abuse of discretion in trial court’s refusal to award punitive damages against lawyer who withdrew money from client’s escrow account based on buried language providing for such fees, but noting in dicta that award of punitive damages probably would have been sustained on appeal); Hall v. Wright, 156 N.W.2d 661 (Iowa 1968) (upholding award of punitive damages against lawyer who had knowingly and falsely represented to client that seller had clear title to home that client was to purchase). See generally Annotation, Allowance of Punitive Damages in Action Against Attorney for Malpractice, 13 A.L.R. 4th 95 (1995).

51 See, e.g., McClain v. Faraone, 369 A.2d 1090 (Del. Super. Ct. 1977) (no punitive damages without showing that lawyer’s conduct demonstrated ill will, malice or an intent to cause injury); Welder v. Mercer, 448 S.W.2d 952, 954 (Ark. 1970) (requiring
settle their claims for a negative recovery would have an easy time establishing that their lawyers had demonstrated wanton disregard for their interests.\footnote{52}

Moreover, there is other evidence available on the conduct of the lawyers in \textit{Hoffman} that would seem to support a claim for punitive damages based on intentional wrongdoing or reckless disregard for the clients' interests. According to a letter written to a disgruntled class member by BancBoston's lawyer, the bank had offered to pay class counsel's fees and to provide the class "essentially the same terms" ultimately accepted by class counsel.\footnote{53} BancBoston's lawyer explained that class counsel had refused the bank's offer to pay attorney's fees and instead had insisted that they were entitled to "a percentage of the 'economic benefit of the settlement to the class.'"\footnote{54} The lawyer stated in the letter that after many months of negotiations the bank "decided to agree to the plaintiffs' position on attorneys fees on condition that BancBoston be allowed to object to the attorneys

\footnote{52} In Rodriguez v. Horton, 622 P.2d 261 (N.M. App. 1980), the court upheld an award of punitive damages amounting to two times the award of actual damages against a lawyer who had advised his client to accept an unreasonably low settlement award. The lawyer had represented to his client that the client would receive sums from other lawsuits, which did not happen, and the lawyer failed properly to advise the client of rights to certain compensation under state law. Id. at 264-65. The lawyer in that case had advised settling for $8,000, which advice the client accepted. Actual damages were assessed at $10,574.81, punitive damages at $25,000. Id. at 263. If treble damages are appropriate when one's lawyer advises settling for 30\textcent on the dollar—a court should have no difficulty awarding them when the lawyer advises accepting a settlement that amounts to negative 3.89\textcent on the dollar. Even those people whose banks would otherwise have paid them no interest on their surplus escrow money apparently ended up receiving only about 31\textperthousand on each dollar of actual economic benefit. See supra note 39 and accompanying text (explaining how some such clients may have paid 69\textperthousand of the economic benefit in attorney's fees).

\footnote{53} Cottingham Letter, supra note 29, at 2.

\footnote{54} Id. It is interesting that BancBoston's lawyer placed the words "economic benefit of the settlement to the class" in quotation marks. That phrase is a verbatim quote from the Notice sent to the class, but BancBoston's lawyer was referring to the settlement negotiations, not the Notice, when he used the quotation marks. By quoting this language the author of the letter avoids having to explain to the addressee (a class member and BancBoston customer) exactly what money was used to pay attorney's fees and avoids personally vouching for the accuracy of the description enclosed in the quotes.
fees at a fairness hearing to be scheduled by the court." But class counsel "would not even accept that position and insisted that they would not settle unless they were allowed to apply to the court for a percentage of the settlement without any objection by BancBoston." The bank thought it over and gave in, agreeing not to object to class counsel's scheme.

We will return to the bank's decision not to object to the fees in a moment. First, consider what this account of the events appears to demonstrate about class counsel's intent to make off with client money being held in trust by the bank. According to BancBoston's lawyer, class counsel held up the settlement of their clients' claims until the bank promised not to speak up on behalf of those clients. According to BancBoston's lawyer, class counsel proposed that BancBoston keep the money it had offered to pay in attorney's fees and instead give up its customers' money (class counsel's clients' money) to the class lawyers. And according to BancBoston's lawyer, even that deal was not sweet enough to convince the bank to agree to raid its customers accounts, so the lawyers added a new incentive for the bank: avoiding the costs of a trial. The class lawyers added that incentive when they allegedly made the settlement contingent on BancBoston's agreeing not to object to the fee proposal. If this is what happened, to describe it as an intentional breach of a lawyer's duty to his client or wanton disregard for the client's interest seems mild.

As to the bank, it too stands in a fiduciary relationship to the class, its customers. The money that the bank agreed to help class counsel obtain by not objecting to the request for attorney's fees was money the bank held in escrow for its customers. A depository may be guilty of conversion when it disburses

55 Id. (emphasis added).
56 Id.
57 Id. at 3. However, before accepting this posture, the bank had filed objections to the settlement. Those objections demonstrate that the bank knew what effect the scheme would have on their customers. The objections stated that if the court approved class counsel's formula for calculating attorney's fees "every class member will suffer an actual net out-of-pocket loss as a result of this lawsuit." Defendants' Objections to Plaintiffs' Proposed Notice of Class Action, at 5, Hoffman, (No. 91-1880) [hereinafter Defendants' Objections]. "That loss," the bank continued, "will be paid to their lawyers." Id. These objections were apparently withdrawn and labeled "moot" after the bank accepted class counsel's proposal.
money held in escrow contrary to the express terms of the escrow agreement. The bank apparently agreed to allow such a disbursement because the bank determined it was in its own financial interest to go along with class counsel on this matter.


59 Considering [certain cases cited by BancBoston's lawyer for the proposition that attorney's fees of one-third of a settlement fund were reasonable] the fact that the court had granted a motion for partial summary judgment in favor of the plaintiffs, and the fact that a trial was scheduled, with all its attendant uncertainties and expenditure of time and money by BancBoston, BancBoston finally agreed to the lawyers for the plaintiffs and the class' position on attorney's fees. Cottingham Letter, supra note 29, at 3.

In fact, the cases cited by BancBoston's counsel do not support the position that class counsel's fee request was reasonable. Three of the four cases cited stand for the proposition that between 18% and 33 1/3% of the fund recovered by the settlement is an appropriate measure of attorney's fees. City of Ozark v. Trawick, 604 So. 2d 360 (Ala. 1992); Ex parte Brown, 562 So. 2d 485 (Ala. 1990); Reynolds v. First Ala. Bank of Montgomery, 471 So. 2d 1238 (Ala. 1985). None of those cases supports the notion that an appropriate award of attorney's fees is one-third of money no one disputed belonged to the clients. In all of the cases cited, the common fund was a pot of money that belonged to the class, after the class action, as a result of class counsel's efforts, not a pot of money whose ownership was never in dispute. "[A] litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable fee from the fund as a whole." Brown, 562 So. 2d at 495 (emphasis added).

In the fourth case cited, an unpublished opinion in a case against another bank involving allegations similar to those against BancBoston and brought by the same class lawyers, the court purportedly bought the same scheme as the one advanced here—awarding one-third of the surplus escrow money in attorney's fees. Cottingham letter, supra note 29, at 3. BancBoston's lawyer provides no citation for this case in his letter, nor does he supply a court, state or date for this decision. Thus, we have not verified that another court actually approved a similar scheme. On the other hand, we have no reason to doubt this assertion. Secor Bank, which the letter identifies as the settling defendant in this other case, is apparently headquartered in Alabama. If class counsel sued in Alabama and got a judge there to accept this novel scheme for the awarding of attorney's fees, it may explain why the suit against BancBoston was brought in Alabama—a choice that otherwise appears difficult to explain. These lawyers might have wanted to stick with a winning forum.

One unreported state trial court decision hardly seems compelling precedent. The bank's reliance on this precedent seems even less compelling given its citation of
Ordinarily, punitive damages are available in an action against a fiduciary for willful breach of the duties owed the beneficiary. Therefore, absent the Alabama court's approval of the attorney's fee request, a plaintiff would stand an excellent chance of recovering punitive damages against the bank based on its agreement to cooperate with class counsel in their request for attorney's fees, particularly given that the bank stood to gain financially by going along with class counsel's request. Finally, had the bank proposed this scheme and sold it to class counsel

Reynolds, a reported opinion by the Alabama Supreme Court. In Reynolds, class counsel had been awarded one-third of the judgment rendered against the defendant bank and the class plaintiffs appealed, arguing that the bank had an obligation to pay the attorney's fees, not the class, given the court's order that the class be made whole for the defendant's breach of its fiduciary duty. Id. at 1241. As the Reynolds court explained, class counsel was not seeking any more money:

"They agree that they have been adequately compensated for their hours... but they appear before us because they believe they have a professional responsibility to see that their clients are made whole as per the law of the case as expressed by Judge Hooper and by this Court. The sole purpose of the appeal is to shift the responsibility of the fee from [the class's] shoulders to the bank."

Id. at 1241.

The Alabama Supreme Court agreed on the ground that "ample authority" supported a state court's power to shift attorney's fees from "the beneficiaries to their paid trustee." Id. at 1244. It thus reversed the trial court's refusal to shift the cost of attorney's fees to the bank and ordered the bank to pay those fees. Id. Clearly, then, BancBoston was aware of precedent suggesting that it could be required to pay fees based on some percentage of the actual recovery. Cf. Secor Bank, 644 So. 2d at 1142 (suggesting in dicta that an express provision in escrow agreement making the mortgagor liable for attorney's fees incurred by the bank in action it brings against mortgagor would raise an issue of public policy).

60 See Rivero v. Thomas, 194 P.2d 533, 542 (Cal. Ct. App. 1948) (punitive damages permissible against trustee when there is evidence of fraud or malice, express or implied); DeToro v. Dervan Inves. Ltd., 483 So. 2d 717, 723 (Fla. Dist. Ct. App. 1985), on reh'g, op. replaced in part, 11 Fl. Law. Wk. 739 (punitive damages permissible for breach of fiduciary duty and evidence of profit made by fiduciary admissible to show willfulness of breach); In re Marriage of Pagano, 607 N.E.2d 1242, 1250 (III. 1992) (punitive damages permissible when trust relationship violated, there is gross fraud or willfulness is shown).

61 See Ramsey v. Culpepper, 738 F.2d 1092 (10th Cir. 1984) (applying New Mexico law in upholding punitive damages awarded against agent who intentionally and recklessly misled principal about principal's real estate to encourage principal to accept a deal beneficial to the financial interests of the agent). The Notice sent to class members mentioned that BancBoston had agreed not to object to the attorney's fees. Notice, supra note 17, at 5. The bank apparently acquiesced in the distribution of this Notice to class members without ever asking the court to order a clearer description of the method for calculating attorney's fees in the Notice.
instead of what appears to have happened here, the bank might be liable, whether or not it had a fiduciary duty to the class, for inducing other fiduciaries (class counsel) to breach their duties to the class.\(^6\)

This observation brings us back to class counsel. Like the bank, class counsel also might be liable for punitive damages for inducing the bank to breach its fiduciary obligations to its customers by remaining silent about class counsel's request for attorney's fees. Thus, we have shown that several legal theories would support the award of punitive damages to a non-class-action client who proved that her lawyer and her bank had engaged in conduct similar to that which we have described. But, as to the apparent misconduct of the lawyers, there is more.

In *Phillips Petroleum Co. v. Shutts*,\(^6\) the Supreme Court held that a state court could exercise jurisdiction over plaintiff class members from other states in an action for money damages without violating due process, provided that: (1) those representing the class (the named plaintiffs and class counsel) adequately represent the class's interests; (2) absent class members are provided notice; and (3) absent class members are given an opportunity to opt out of the litigation.\(^6\) *Shutts* provides the basis for the *Hoffman* court's jurisdiction over class members from states other than Alabama. The class members in *Hoffman* were provided some form of notice and some opportunity to opt out, although we do not believe the notice or opt-out rights were sufficient to satisfy the due process requirement elaborated in *Shutts*.\(^6\) But those matters aside, it is still highly questionable whether *Shutts* licenses the jurisdiction exercised in this case.\(^6\)

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\(^6\) Restatement (Second) of Torts § 774A (1979) (punitive damages recoverable in appropriate circumstances for the intentional tort of interfering with a contractual relationship).

\(^6\) 472 U.S. 797 (1985).

\(^6\) Id. at 811-12.

\(^6\) We believe that the Notice was constitutionally deficient because it did not provide enough information for a rational actor to be able to determine whether it was in his economic interest to remain in this suit—indeed, it misled class members with its faulty description of how attorney's fees would be calculated. Further, we believe that the Notice denied a meaningful opportunity to opt out because it did not explain that negative recovery was possible or how high attorney's fees would actually be for some class members.

\(^6\) We thank Rhonda Wasserman for bringing this point to our attention.
In *Shutts*, the defendants had argued that state court jurisdiction over absent out-of-state plaintiff class members should be no greater than state court jurisdiction over out-of-state defendants.67 The Court rejected this argument: "The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant."68 A defendant may "be forced to respond in damages," and "may also face liability for court cost and attorney's fees."69 In contrast, absent class-action plaintiffs "are almost never subject to counterclaims or cross-claims, or liability for fees or costs."70 Here, the Court inserted this footnote:

Petitioner places emphasis on the fact that absent class members might be subject to discovery, counterclaims, cross-claims, or court costs. Petitioner cites no cases involving any such imposition upon plaintiffs, however. We are convinced that such burdens are rarely imposed upon plaintiff class members, and that the disposition of these issues is best left to a case which presents them in a more concrete way.71

Enter *Hoffman*, in which a foreign state court apparently ordered absent class members to pay more money than they received—a concrete case presenting the issue left open by *Shutts*. A lawyer who neglects to raise jurisdictional objections to a court order that will cost his client money, when there are serious grounds for making such an objection, will be liable for the damages caused by this neglect.72

But here there appears to have been more than ordinary neglect. The lawyers did more than fail to assert their clients' rights under the Due Process Clause; they urged the state court

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67 472 U.S. at 802.
68 Id. at 808.
69 Id. (emphasis added).
70 Id. at 810 (footnote omitted).
71 Id. at 810 n.2.
72 See generally 3 Ronald E. Mallen and Jeffrey M. Smith, Legal Malpractice § 29.21 (4th ed. 1996) (discussing issues and citing cases concerning attorney's liability for failure to establish defense). Cf. id. § 29.26 (regarding errors in selecting venue and jurisdiction). The jurisdiction problem under *Shutts*, which we have just discussed, provides another reason to deny collateral estoppel effect to the ruling of the Alabama court. On the assumption that most state courts avoid taking money from out-of-state absent class members, we do not refer to this argument later when we address whether later suits should generally be estopped based on the prior approval of the class action.
to enter the order on attorney's fees, the constitutionality of which is in serious question. Moreover, they apparently urged this course of action to further their own financial interests. This motive for neglecting the constitutional problems with the settlement proposed, combined with the active role played by the lawyers in devising and advocating the arguably unconstitutional result, should suffice to show intentional disregard of the clients' interests or, at the very least, wanton disregard for their clients' rights. Either of these showings would justify an award of punitive damages.

In addition, an individual client whose lawyer had acted like the class lawyers in *Hoffman* appear to have acted would have a viable cause of action against the lawyer for common law fraudulent misrepresentation. The basic elements of the intentional tort of fraudulent misrepresentation are: (1) a false statement of a material fact or, when there is a duty to disclose, an omission without which the statement made is materially misleading; (2) knowledge or belief by the speaker that the representation is false; (3) the intent to deceive; (4) reasonable reliance by the person to whom the statement is made; and (5) consequent harm. The statement presumably drafted by class counsel for inclusion in the Notice to their clients said that the lawyers would not request a fee that exceeded one-third of the economic benefit realized from the settlement. This statement is false, if, as we have argued, the lawyers requested a fee amounting to somewhere between 69% and 4155% (or more) of the economic benefit conferred on individual class members.

At best, the statements on attorney's fees appear to be materially misleading in that they fail to mention that a client might

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73 The deprivation of the class members' constitutional rights could also give rise to an action under 42 U.S.C. § 1983 (1994). "Although [lawyers] are themselves private actors, private parties who corruptly conspire with a judge in conjunction with the judge's performance of an official judicial act are acting under color of state law for the purpose of § 1983 ...." *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (holding that attorneys accused in § 1983 action of conspiring with judge to deprive plaintiff of constitutional rights cannot, consistent with Supremacy Clause, invoke state law litigation privilege, nor do they enjoy common law immunity under federal law).


75 Notice, supra note 17, at 5.

76 See supra text accompanying notes 38-46.
end up paying more money in attorney’s fees than she realizes from the suit.\textsuperscript{77} Intent to deceive may be demonstrated by evidence that the speaker knew the statement was false or materially misleading when it was made and that he made it to induce another to act in reliance on it.\textsuperscript{78} Given that class counsel apparently devised the attorney’s fee proposal, a jury could infer that class counsel knew that the fee proposal would leave individual class members paying more than one-third of their economic benefit in fees. The intent to induce reliance is shown by class counsel’s apparently having offered these statements for inclusion in the Notice, upon which class counsel knew people would rely in deciding whether to stay in the class and thus incur an obligation to pay attorney’s fees.

Actual reliance would have to be demonstrated by testimony that class members read the statements on attorney’s fees in the Notice,\textsuperscript{79} but presumably some number of the class read the Notice and relied on these statements. At the least, damages would equal the difference between what the clients paid in attorney’s fees and what they might have paid had the statement been true.\textsuperscript{80} Moreover, the entire fee paid to the lawyers might be considered damages, given BancBoston’s statements that it was ready itself to pay class counsel a reasonable fee and provide the class with essentially equivalent relief—another instance of material information not disclosed to the class.\textsuperscript{81} And, collateral estoppel problems aside for the moment, the fact that the Notice was authorized by a court should not present a serious obstacle to showing that the lawyers’ conduct caused the damage, given that it should be easy to show that the statements contained in the Notice were either actually or constructively those of class counsel.\textsuperscript{82}

\textsuperscript{77} In addition to common law fraud, such omission constitutes a breach of fiduciary duty. As a fiduciary, a lawyer has a duty to his client not to omit material information from statements upon which the client might reasonably rely. Restatement (Second) Agency § 381 (1958).
\textsuperscript{78} Keeton et. al., supra note 74 § 107.
\textsuperscript{79} Id. § 108.
\textsuperscript{80} Id. § 110.
\textsuperscript{81} Cottingham Letter, supra note 29, at 2.
\textsuperscript{82} See infra text accompanying notes 381-82.
Punitive damages are available in cases of intentional misrepresentation. And, to the extent that the bank understood the wrongfulness of what the lawyers proposed and knew that those lawyers owed a fiduciary duty to the class, the bank's agreement to cooperate with class counsel in what we have just argued was intentionally tortious conduct might render the bank liable as a joint tortfeasor, irrespective of and in addition to its independent fiduciary duties to its customers.

Finally, every state has enacted some form of consumer protection statute. Many of these statutes provide for double, treble or punitive damages and the award of attorney's fees, even in the absence of proof of bad faith. Several states have

83 See, e.g., Hoff v. Bower, 492 N.W.2d 912 (S.D. 1992) (punitive damages award proper for intentional misrepresentation); Keeton et. al., supra note 74 § 2, at 9-10 ("Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award . . . 'punitive' or 'exemplary' damages . . . .") (footnote omitted). Further, class counsel might be liable under the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1961-1968 (1994), which also provides for treble damages. RICO includes mail and wire fraud as "racketeering activities." Id. § 1961. This makes lawyers vulnerable to RICO charges. See United States v. Teitler, 802 F.2d 606 (2d Cir. 1986) (applying RICO statute to law firm and its members as "enterprise" in connection with lawyer's insurance fraud scheme). RICO prohibits, in any activity involving interstate commerce, the following: (1) investing income derived from a pattern of racketeering; (2) acquiring or maintaining an interest through a pattern of racketeering; (3) participating in the enterprise's affairs through a pattern of racketeering; and (4) conspiring to engage in any of these activities. Id. § 1962. Two acts of racketeering and the threat of continuing racketeering activity suffice to establish a "pattern" of racketeering. Id. § 1961(5). A criminal conviction is not necessary to support civil RICO liability. A private party who prevails on the merits in a RICO action is entitled to treble damages and litigation expenses, including attorney's fees. Id. § 1964(c).

Even if the BancBoston scheme were considered only one predicate act of fraud notwithstanding that it affected over 300,000 mortgagors, RICO liability would lie if there were evidence that class counsel perpetrated the same wrongs in an earlier suit. See supra note 59.

84 See Defendant's Objections, supra note 57, at 5 (quoting bank's own papers to demonstrate that the bank knew the effect of the attorney's fee proposal).

85 Restatement (Second) of Torts § 875 (1979) (each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm).


applied those laws to lawyer-client contracts. These laws generally prohibit, as deceptive, acts that have the "likelihood of inducing a state of mind in a consumer that is not in accord with the facts," whether those acts are written or verbal and when


89 See, e.g., Uniform Consumer Sales Practices Act § 3(a) cmt., 7A U.L.A. 237
ever the misrepresentation is accomplished through affirmative words or by nondisclosure. The statutes commonly define as per se deceptive any act misrepresenting the actual price to be paid for the services rendered. Telling a client that she will be charged one-third of the economic benefit of the settlement, when the attorney's fees she is actually to be charged exceed 100% of her actual recovery (or equal 69% of that recovery) would seem to fit into this per se category and also within the general definition of a deceptive practice given above.

The statutes also commonly proscribe unconscionable practices. In determining what constitutes an unconscionable practice these statutes generally instruct courts to consider whether the seller knew or had reason to know that she: took advantage of the consumer's "inability to understand the language of an agreement"; sold the services at a price "grossly exceed[ing] the price" of similar services readily available to like consumers; sold the services to consumers unable to receive any substantial benefit from the transaction; or induced the consumer to enter into a transaction "excessively one-sided in favor of the supplier." Arguably, all of these factors are present here.

(1971) [hereinafter UCSPA]. While few states have adopted this model in its entirety, many states use it as a model in enacting their own statutes. See Spanogle et. al., supra note 87, at 70.

UCSPA, supra note 89, § 3(a) cmt., at 237.

Id. § 3(b)(8) cmt.

One commentator has endorsed the approach taken by Texas, see Tex. Bus. & Com. Code Ann. § 17.49 (West 1987 & Supp. 1995), and Washington, see Short, 691 P.2d at 168, which limits the application of consumer protection laws to lawyer conduct involving "entrepreneurial" aspects of the attorney-client relationship, such as pricing, billing and collecting fees. See Gatlin, supra note 86, at 413. The conduct alleged in Hoffman unquestionably falls within the entrepreneurial category.

UCSPA, supra note 89, at § 4(b).

Id. § 4(c)(1).

Id. § 4(c)(2).

Id. § 4(c)(3).

Id. § 4(c)(5).

The consumer fraud laws generally provide some form of exemption for acts required by federal or state law, id. § 14(a)(1), or in some versions of these statutes acts "in compliance with," or "permitted under" federal or state law. See, e.g., Or. Rev. Stat. § 646.612 (1988); R.I. Gen. Laws § 6-13.1-3 (1992). The broad question of whether conduct that would otherwise be malpractice, fraud or some other violation of law should be considered immunized by the implicit or explicit licensing of that conduct by a court in the process of approving a class action settlement is addressed infra Part III. Given our position that any such approval or licensing should not be
3. All I Know is What I Read in the Papers

It is tempting to imagine that Hoffman is an aberration. We believe, however, that it is all too representative of the kind of treatment class members in suits for money damages receive. Not only do the incentives of the active participants—class lawyers, defendants and their lawyers, and the courts—lead us to this conclusion, but unfortunately, recent experience confirms it. In Part II, we explain why the incentives of the participants would lead to such abuse, but first a word about the anecdotal evidence available.

The decision in Hoffman was not published. Nor was the similar settlement against Secor Bank alluded to by BancBoston's lawyer in his letter explaining what went on in Hoffman. Neither settlement is available on LEXIS. Nor could one considered a substantive determination of those questions for purposes of collateral estoppel, see infra text accompanying notes 308-352, it follows that the findings made by a court approving a class action settlement should not be considered as "law" for purposes of the standard exemption in consumer fraud statutes. Here, we simply note that even if these exemptions were read to prevent a challenge in Maine to Hoffman-like conduct approved by a Maine court or a federal court in a class action settlement, a Maine court would not be likely to read this to exempt the conduct approved by a court in Alabama. If a foreign state licenses an act otherwise prohibited under the forum state's consumer protection law, the reach of forum law is determined, not by the exemption provision mentioned above, but by: (1) the Due Process Clause of the Fourteenth Amendment, which requires a forum state to have an interest sufficient to justify the exercise of sovereignty; (2) the Full Faith and Credit Clause, which requires a balancing of the possible competing interests of separate state sovereignties; and (3) the Commerce Clause, which requires a determination of whether the state's choice of law discriminates against or otherwise unduly burdens interstate commerce. Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir.), cert. denied, 425 U.S. 943 (1975). Of this list, we believe only the Full Faith and Credit Clause is relevant to an assessment of whether a court in Maine would be required to hold that the Alabama court's approval of the attorney's fee award in Hoffman prevents the operation of Maine's (or any other state's) consumer protection law. Given the arguments we offer infra Part III, we believe the Full Faith and Credit Clause would not apply because the original Alabama judgment would have limited estoppel effects. The Full Faith and Credit Clause requires that courts give only that effect to a foreign court judgment that such judgment would receive in the jurisdiction of origin. 28 U.S.C. § 1738 (1994).

99 Cottingham Letter, supra note 29, at 3.

100 Moreover, a NEXIS search on August 31, 1995, uncovered only one article on Hoffman, which announced that the Florida Attorney General would intervene in the case, but otherwise gave few details on the proposed settlement in that case. See Kimberly Blanton, Florida Sues Boston Bank in Escrow Case, Boston Globe, Nov. 26, 1993, at 89. The article by Will Lund, supra note 28, was published in the Maine Lawyers Review, which does not appear on NEXIS. On October 2, 1995, the
find out from published opinions that three similar settlements were offered to three separate courts, two in New York state and one in Alabama.\textsuperscript{101} We know about those three cases only because the following people read drafts of this Article and then reported to us that they had received notices in those cases: a law professor,\textsuperscript{102} a lawyer in private practice\textsuperscript{103} and lawyers in the offices of attorneys general.\textsuperscript{104} Had these people not brought these Hoffman clones to our attention, we would never have known about them. In short, had Senator Cohen’s office not brought Hoffman to our attention, we would have been unaware and unable to find these other examples of apparent class action abuse.\textsuperscript{105}

In response to the problem of inadequate information about class action settlements,\textsuperscript{106} Senator Cohen, at our suggestion and

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Hoffman settlement was briefly discussed (and criticized) by Jane Bryant Quinn in her Newsweek question and answer column. See Jane Bryant Quinn, Leading Questions, Newsweek, Oct. 2, 1995, at 71.
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\textsuperscript{101} See infra notes 102-103.

\textsuperscript{102} After presentation of a draft of this paper at Boston University Law School, Professor Robert Seidman of B.U. received a class action notice that he thought looked suspiciously like the Hoffman settlement discussed in our draft and brought the notice to our attention. Notice of Class Action Proposed Settlement and Hearing, Murray v. Shawmut Mortgage Co., No. 3037/94 (N.Y. Sup. Ct. Feb. 12, 1996) (on file with the Virginia Law Review Association). We thank him.

\textsuperscript{103} Ralph Wellington of Schnader, Harrison, Segal & Lewis, the lawyer to whom Professor Koniak referred the class members who believed themselves wronged by the judgment in Hoffman and the lawyer who now represents those class members, himself received notice that he was a member of a class settlement that looked suspiciously like that in Hoffman. See Susan Adams, Deliberate Obfuscation, Forbes, Sept. 9, 1996, at 152-53. Mr. Wellington filed objections to the settlement, which resulted in the lawyers agreeing to refrain from seeking fees from the mortgage accounts of their clients. Id. The judge nonetheless rejected the proposed settlement on the ground that the class received no real benefit from the settlement proposed. Mr. Wellington sent us the judge’s unpublished opinion, a copy of which he received from the judge in the case. See Objections to the Terms of the Settlement Agreement, Lerose v. PHH U.S. Mortgage Co., No. 08544 (N.Y. Sup. Ct. Mar. 23, 1996) (on file with the Virginia Law Review Association).

\textsuperscript{104} Conversation with Walter Maroney, Senior Assistant Attorney General, State of New Hampshire, Feb. 8, 1996.


\textsuperscript{106} Some information about class action settlements does exist in certain types of
with our help, introduced legislation designed to increase available information about these settlements.\(^\text{107}\) The bill would require attorneys for class action plaintiffs to give notice of proposed settlements 120 days prior to any hearing on those settlements to the Department of Justice and state attorneys general from states where class members reside, so that these agencies might have the information and time necessary to intervene to protect the interests of class members.\(^\text{108}\) The bill also specifies that court orders in class actions must be made available for publication in court reporters, so that lawyers, academics and the press can monitor such cases. Last, but certainly not least, the bill contains plain-language requirements for communications to class members.\(^\text{109}\)

Given the present state of affairs, one simply cannot say how many viable claims of malpractice or breach of fiduciary duty exist. What we do know, however, is that Hoffman and other cases. For example, the Federal Securities Law Reports include information about proposed and actual settlements in class actions, as do the Class Action Reports. We believe that the available information is inadequate, however.


\(^\text{108}\) See Protecting Class Action Plaintiffs Act, supra note 107, § 1711(c)-(d).

\(^\text{109}\) See id. § 1711 (f)-(g). The most recent available empirical study suggests that “[m]any, perhaps most, of the notices present technical information in legal jargon” and concludes that “most notices are not comprehensible to the lay reader.” Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 134 (1996). Moreover, the study found that “notices did not appear to include sufficient information for an individual class member to appraise the net value of a settlement to the class or to calculate an expected personal share in the settlement.” Id. at 133. Even notices that provide relevant information may do so in a deceptive way. For example, the notice for one of the bank escrow cases contains a paragraph that states: “[Bank] agrees to make a payment toward court-awarded attorney's fees, costs and expenses not to exceed $150,000.” Adams, supra note 103, at 152. Does this provision ensure that the class lawyers will not ask for more than $150,000 and that no money will be paid by class members for the attorney's fees? Read it again carefully.
bank cases like it\textsuperscript{110} are not the only class action suits that might give rise to later suits against the settling parties.

We do not have the space here to discuss other cases with the attention to detail that would be necessary to demonstrate with any certainty that they involve malpractice, breach of fiduciary duty or fraud. And, unfortunately, hypotheticals do not help; they would only leave us open to the charge that courts would never approve settlements like those in our hypotheticals. Would you have believed courts have approved settlements like the one in Hoffman had we suggested as much through a hypothetical? Nevertheless, those tempted to believe that Hoffman and its sister bank cases are the only cases egregious enough to warrant the remedy we propose, we provide the following brief summaries of settlements approved by federal district courts to dispel that notion.

\textsuperscript{110} In addition to the bank cases we have just alluded to, see Brundidge v. Glendale Federal Bank, 659 N.E.2d 909, 911 (Ill. 1995) (discussing class action settlement in bank escrow case in which lawyers apparently asked for percentage of the total refund, but not revealing who was to pay those fees).
In *Georgine v. Amchem Products, Inc.*, a federal district court approved a class action settlement involving hundreds of thousands of claims arising from exposure to products containing asbestos. Class counsel defined the class to include all people who were presently ill from exposure to the defendants’ asbestos products, as well as all those who might become ill from exposure to those products in the future—well, almost all. The definition excluded thousands of people with asbestos claims indistinguishable from those included within the class except for the fact that the excluded people were “present clients” of class counsel or other asbestos lawyers. The gerrymandered

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111 157 F.R.D. 246 (E.D. Pa. 1994), vacated, 83 F.3d 610 (3d Cir. 1996), cert. granted sub nom. Amchem Prods. v. George Windsor, 65 USLW 338 (U.S., Nov. 1, 1996) (No. 96-270). For a description of the wrongdoing in *Georgine* that provides an example of the level of detail necessary to demonstrate that misconduct occurred, see Koniak, supra note 15. Professor Koniak served as a paid expert witness for the objectors to the *Georgine* settlement, testifying on the ethics of class counsel’s conduct. Id. at 1146-47. *Georgine* is the case that first got us thinking about the importance of later suits for misconduct in class actions. We thank Roger Cramton for helping us to develop our thoughts on the misconduct in *Georgine*.

The Third Circuit recently overturned the *Georgine* settlement. 83 F.3d 610 (3d Cir. 1996). But as we argue below, this form of redress for class action abuse is rare. See infra note 186 (citing empirical evidence on the small number of class settlements overturned on appeal). In our view, the fact that the *Georgine* settlement was overturned is attributable not to the fact that the conduct in that case was so much more egregious than in other class actions, but rather to the fact that in that case, unlike most others, the objectors were well-financed and therefore able to mount an impressive (and very expensive) challenge to the settlement. Other asbestos lawyers had a significant incentive to challenge the *Georgine* settlement because, if approved, it would have significantly restricted the future income they might otherwise have expected to achieve through handling asbestos cases individually. But the lawyers who financed the challenge to the *Georgine* settlement have told us that, given what everyone understands to be the small chance of derailing such a deal, they believe class counsel and the defendants were surprised that they were met with a well-financed challenge and had calculated that no more than a challenge-on-the-cheap would be mounted. Interview with with Fred Baron, Counsel for Objectors in *Georgine*, Jan. 1994.

112 The class included all people exposed to the asbestos products of the twenty defendant corporations (and their immediate family members) except those people who had filed suit against the companies by Jan. 15, 1993. *Georgine*, 157 F.R.D. at 257-58.

113 Id. at 296. Because class counsel knew the cut-off date before the class settlement was filed with the court, they were able to exclude people from the class at will by getting a lawsuit on file with a court prior to Jan. 15, 1993. Moreover, there is evidence that class counsel did just that. Koniak, supra note 15, at 1057-59. The phrase “present clients” was used by class counsel to refer exclusively to those
class definition allowed class counsel to settle approximately 14,000 individual cases against the defendants for amounts that appear to be much higher than the recoveries provided class members under the class settlement. But neither the absent class members nor the named class representatives were informed that their lawyers had negotiated better deals on identical claims against the same defendants for their 14,000 “present clients” than the lawyers had negotiated for the class. Nor was the class informed that the defendants told class counsel that a condition of settling those 14,000 cases was a class settlement that would roll up all the future cases that might be filed against the defendants and settle them at a price the defendants could accept. In our opinion, these facts give rise to a plausible malpractice suit against class counsel because they strongly suggest that class counsel sold out the class in favor of 14,000 non-class members to further class counsel’s own interest in their share of the attorney’s fees from those 14,000 cases, which is money paid to class counsel by the defendants in addition to the fees awarded by the district court for representing the class. An ordinary client whose lawyer traded part of the value of that client’s claim to further the financial interest of some other person, such as the 14,000 “present clients,” would have a viable claim of malpractice against her lawyer and a fair chance of excluded from the class. We put the phrase in quotation marks because class counsel had an obligation to class members to treat them as if they were present clients too. See also id. at 1074-78 (explaining how class counsel’s efforts to distinguish the claims of their present clients from those of class members were specious, although adopted by the federal district court).

114 Id. at 1064-74 (describing evidence that appears to show that one of the law firms serving as class counsel in Georgine negotiated settlements for its “present clients” that were 54% better than those negotiated for the class, and that the other firm negotiated settlements that were 72% better).

115 Id. at 1137-42.

116 To quote testimony from one of the representatives of the defendants offered at the fairness hearing: “Without a degree of confidence that the Georgine discussions would be successful, we would not have done the present inventory settlements with [class counsel] or the other numerous unaffiliated [plaintiffs'] firms [that] we did inventory deals with, that is correct.” Transcript of Fairness Hearing at 193-94, Georgine v. Amchem Prods., No. 93-0215 (E.D. Pa. Feb. 23, 1994) quoted in Koniak, supra note 15, at 1081-82 (testimony of Lawrence Fitzpatrick) [hereinafter Georgine Fairness Hearing]. See also id. at 1078-86 (describing evidence that the present clients’ settlements were made in exchange for defendants getting the class settlement they wanted in Georgine).
receiving punitive damages.\textsuperscript{117} Although the Third Circuit rejected the \textit{Georgine} settlement, the Fifth Circuit in \textit{Ahearn v. Fibreboard}\textsuperscript{118} recently approved a similar scheme in another asbestos class action developed by some of the same lawyers as the lawyers in \textit{Georgine}. And we know of at least one other class suit, involving polybutylene pipe, in which the same scheme has been used.\textsuperscript{119} Because lawyers are quick to recognize a profitable opportunity, we would expect that \textit{Georgine}-style class gerrymandering will (if Rule 23 and the courts continue to permit it) become at least as ubiquitous as \textit{Hoffman}-style "benefit enhancement" apparently is.

One final example before we move on. In 1990, lawyers for Imperial Corporation of America (ICA), the parent company of Imperial Savings Association (ISA), a failed savings and loan, negotiated a $13 million settlement of shareholder derivative claims and class action claims arising out of ICA's investments in junk bonds and consumer loans in the late 1980s.\textsuperscript{120} ICA's insurers were to pay $12.5 million toward the settlement and ICA, $500,000.\textsuperscript{121} The settlement provided that of the $12.5 million paid by the insurers, $2.5 million was to be "deemed" in settlement of the derivative suit; the rest was "deemed" in set-

\textsuperscript{117} See supra notes 73-85 and accompanying text.
\textsuperscript{118} See \textit{Ahearn v. Fibreboard}, 162 F.R.D. 505, (E.D. Tex. 1995), aff'd on appeal, \textit{In re Asbestos Litig.}, 90 F.3d 963 (5th Cir. 1996) (petition for reh'g pending) (approving class action settlement which, like the \textit{Georgine} settlement, appears to define the class so as to exclude other clients of class counsel).
\textsuperscript{119} See \textit{Spencer v. Shell Oil Co.}, No. 94-074 (Ala. Cir. Ct. 1995) (on file with the Virginia Law Review Association). For more on the polybutylene pipe class actions, see Richard B. Schmitt, \textit{Leaky System: Suits Over Plastic Pipe Finally Bring Relief, Especially for Lawyers}, Wall St. J., Nov. 20, 1995, at A1 (discussing polybutylene ("PB") pipe case then pending in Alabama in which class definition excluded clients who individually signed a retainer with class counsel). That case was one of several class suits filed in several state courts on behalf of homeowners with PB piping. John C. Coffee, Jr. & Susan P. Koniak, \textit{Rule of Law: The Latest Class Action Scam}, Wall St. J., Dec. 27, 1995, at 11. Ultimately, the plaintiffs' lawyers in these various suits, which sought to include all the same people or overlapping groups of homeowners, agreed to join one "global" settlement to be executed by a state court in Tennessee. Schmitt, supra, at A5. The Alabama suit was dropped in favor of the Tennessee settlement, id., but we have no reason to believe that the side settlements negotiated as part of the Alabama suit were affected in any way.
\textsuperscript{120} Durkin v. Shea & Gould, 92 F.3d 1510 (9th Cir. 1996); Robert Ablon, \textit{Settlements Don't Bar Malpractice Suits, Circuit Says}, The Recorder, Aug. 20, 1996, at 1 available \textit{in LEXIS, News Library Curnws file}.
\textsuperscript{121} \textit{Durkin}, 92 F.3d at 1512.
tatement of the class actions.\textsuperscript{122} The settlement released the directors and officers of ICA from any claims related to the risky investments that those directors allegedly promoted or approved.\textsuperscript{123} After obtaining approval of the settlement from ICA's Board of Directors, ICA's lawyers and the shareholders' lawyers jointly petitioned a federal court to approve the consolidated settlement of the class and derivative claims.\textsuperscript{124} The district court obliged.\textsuperscript{125} On the same day that the judge approved the settlement, federal regulators ordered the seizure of ISA and placed it into conservatorship under the Resolution Trust Corporation (RTC).\textsuperscript{126} One week later, ICA filed for bankruptcy.\textsuperscript{127}

The bankruptcy trustee subsequently sued ICA's lawyers, ICA's directors and the plaintiff shareholders' lawyers alleging: (1) the directors assisted by ICA's lawyers and the shareholders lawyers breached their fiduciary duties to the company and engaged in a fraudulent transfer of the corporation's funds by virtue of arranging the settlement; (2) that ICA's lawyers and the plaintiffs' lawyers colluded to keep the court in the dark about ICA's insolvency, the imminent seizure of ICA by the regulators, and the strength of the case that could be made against the directors; (3) that ICA's lawyers failed to advise the directors either of the conflict of interest the directors had in approving the settlement or of the unfairness of settling the shareholder derivative claims for a mere \$2.5 million; and, (4) that the plaintiffs' lawyers committed malpractice, although the basis of that claim is not spelled out in the court opinion.\textsuperscript{128}

Although the district court dismissed the malpractice claims against the plaintiffs' lawyers,\textsuperscript{129} and the court of appeals

\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 1513.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 1514. Just as the court of appeals does not explain on what theory the bankruptcy trustee sued the plaintiffs' lawyers for malpractice, the court does not explain on what grounds the district court dismissed the claim. We were unable to get a copy of the unpublished district court opinion or any of the unpublished orders issued by the district court in time to include it in this Article, so we are unable to
dismissed the claims against the directors, the Ninth Circuit in *Durkin v. Shea & Gould* held that the malpractice claims against ICA’s lawyers could proceed, the prior court’s approval of the settlement notwithstanding. Moreover, the court of appeals did not rule on the breach of fiduciary claims and fraudulent transfer claims that are apparently still pending against both ICA’s lawyers and the lawyers for the shareholders.\(^{132}\)

*Durkin*, which was decided as this Article was in the process of being published, not only tracks our argument on the inapplicability of collateral estoppel to the kinds of suits we advocate,\(^ {133}\) it provides another example of the kind of abuse that may well be widespread in the settlement of class and derivative actions—company lawyers arranging a settlement that shortchanges the company and its shareholders but serves the interests of directors by releasing them from liability at no cost to those directors. Once again, the fairness hearing process does not appear adequate to prevent this abuse. And once again there is no reason to think this abuse is rare. Moreover, malpractice and fraud are not the only form of wrongdoing that may lurk beneath the surface of class and derivative suit settlements. We now turn to the antitrust violations that may occur in connection with settling these cases.

**B. Is There a Trust in This Class?**

To most people, and certainly to most lawyers, it is unthinkable that the antitrust laws could possibly have anything to do with regulating lawyer conduct in litigation. And in simpler times, this view made perfect sense. Lawyers were “professionals,” not “businessmen” competing in some market. Even if they were businessmen to some extent, at least when they put on their litigators’ hats they were not engaging in economic competition in some market, but competition of a different sort.

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enlighten our readers further on the claims against the plaintiff firm.

\(^{130}\) The case against the directors was dismissed in a companion opinion to *Durkin*, *In re Imperial Corp.*, 92 F.3d 1503 (9th Cir. 1996). We come back to the reasoning on claim preclusion in that opinion later. See infra Section III.B. and notes 291, 306.

\(^{131}\) *Durkin*, 92 F.3d at 1518.

\(^{132}\) Id. at 1514-15.

\(^{133}\) See infra text accompanying notes 329-331.
Even if their conduct in litigation affected some market, courts oversaw and regulated this conduct, and everyone knew that once government regulation intruded on the marketplace, it blunted any antitrust enforcement. Finally, even if court oversight was imperfect, lawyers were representing their clients’ interests in litigation, and any attempt to beat down their conduct with the antitrust club would at the same time strike the helpless client whose access to the courts would thereby be threatened.

But these simpler times have vanished. Because of the increased use of the class action device, especially in mass tort cases, as well as the evolution of antitrust law, the once unthinkable is now thinkable. And it is time that lawyers started thinking hard. In the face of the sometimes-expressed view that the antitrust laws are effectively dead, the Supreme Court has in fact been chipping away at protections lawyers might reasonably have thought they had. It has found that the antitrust laws can reach lawyer conduct, especially when their fees are involved.\(^1\)\(^2\)\(^3\)\(^4\)\(^5\)\(^6\)\(^7\)\(^8\)\(^9\)\(^10\)\(^11\)\(^12\) It has rejected the notion that either “pervasive” regulation or the approval of a government agent automatically displaces the antitrust laws. And it has recognized that private parties cannot shield themselves from the antitrust laws by incidentally connecting their activities to some government agency.\(^13^5\) As people have come to recognize the limits of regu-

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\(^{134}\) See Federal Trade Comm’n v. Superior Ct. Trial Lawyers Ass’n, 493 U.S. 411 (1990) (holding per se illegal boycott in support of higher wages by lawyers representing indigent criminal defendants); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (holding minimum fee schedule for lawyers enforced by state bar association a violation of § 1 of the Sherman Act). The Trial Lawyers case is especially significant, because it applied the per se rule despite some indications in earlier cases that professionals were entitled to rule of reason treatment. See FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458 (1986) (applying the rule of reason to a boycott by a group of dentists in part because “we have been slow to condemn rules adopted by professional associations as unreasonable per se”); National Soc’y of Prof. Eng. v. United States, 435 U.S. 679 (1978). But see Arizona v. Maricopa County Medical Soc’y, 457 U.S. 332 (1982) (maximum price-fixing scheme by doctor group held per se illegal). The Court’s approach parallels the approach of some states in applying their consumer protection laws to lawyer conduct, see supra notes 88-92: where fee agreements are involved, lawyers get no special antitrust treatment.

\(^{135}\) See infra Sections IV.B. and IV.C.
lation that displaces the market, antitrust has in fact enjoyed new stature as regulation that supports the market.\textsuperscript{136}

There are at least three practices connected to the settlement of class action suits that raise serious questions under the antitrust laws. The first practice is agreements among plaintiffs’ lawyers to support each other’s bid to be class counsel in a particular suit. Consider, for example, what happened when Oracle Systems Corporation’s stock dropped sharply on March 27, 1990. Within a week of the stock plunge, fourteen separate class actions had been filed on behalf of the various classes of Oracle shareholders, and four more were filed the following week.\textsuperscript{137} “[M]ore than 25 of the leading plaintiffs’ class action law firms in the country” had filed suit on behalf of someone in that short span of time.\textsuperscript{138}

By April 2, 1990, two of the firms filing class actions were busy setting up a meeting of the plaintiffs’ firms to achieve “consensus” on how the “litigation should be structured.”\textsuperscript{139} Two firms refused to attend, “sensing that they would be outvoted on any decisions made at the meeting.”\textsuperscript{140} But fifteen firms sent lawyers to the meeting, which was held on April 12.\textsuperscript{141} At the meeting, these lawyers “voted on an organization of the litigation and a leadership structure of two co-lead counsel.”\textsuperscript{142} Nominations for the post of lead counsel were made, and thereafter a vote was taken, resulting in an agreement among these firms on the two firms to be presented to the court as co-lead counsel in this litigation.\textsuperscript{143} On May 4, 1990, the two firms elected sought the court’s “ratification” of the agreement. The two firms that had boycotted the April 12 meeting objected. “The

\begin{itemize}
  \item \textsuperscript{136} See Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 19.2, at 649 (1994) (arguing that the deregulation movement of the 1970s and 1980s has greatly increased the role of antitrust in regulated industries).
  \item \textsuperscript{137} In re Oracle Sec. Litig., 131 F.R.D. 688, 690 (N.D. Cal. 1990).
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} Id.
  \item \textsuperscript{142} Id. (citation omitted).
  \item \textsuperscript{143} Id. Minutes of the meeting were prepared and signed, presumably by the attendees. Id.
\end{itemize}
two camps . . . squared off, sending volleys of disparagement at each other." \[144\]

Judge Vaughn Walker asked the two camps to compete for the position of lead counsel on the basis of price, requesting each camp to submit an anticipated budget for the litigation within ten days. \[145\] Upon request, the court granted a brief extension, but "[w]hen that deadline rolled around, the [two camps] filed a joint proposal to serve as co-lead counsel." \[146\] According to the court "[t]he prospect of competition, it seems, had whistled an end to the shouting match." \[147\]

Judge Walker rejected this joint bid and ordered the firms to compete by submitting, in camera, applications to the court for the post of lead counsel, detailing the applicant firm's qualifications for the post and "specifying the percentage of any recovery" the firm would charge "as fees and costs." \[148\] The lead firm's costs were to include any fees or costs that firm found necessary to pay any firm that it hired to assist in the litigation. \[149\] Most interesting, the court believed it necessary to order each firm submitting a bid to certify to the court that "its compensation proposal was prepared independently and that no part thereof was revealed to any other bidder prior to filing with the court" and, further, to order the applicants "not to confer in any manner with other firms during the preparation of bids." \[150\] The judge apparently believed that absent his order the lawyers would continue to engage in conduct that, in any other setting, would be considered a violation of the antitrust laws.

Our point, of course, is not that Judge Walker was wrong to question what more these lawyers might do to forestall competition. The April 12 meeting and the joint bid proposal gave him more than just cause to be concerned. And we applaud the judge's efforts to insist that these lawyers compete, \[151\] particular

\[144\] Id.
\[145\] Id. at 690.
\[146\] Id. at 691.
\[147\] Id.
\[148\] Id. at 697.
\[149\] Id.
\[150\] Id.
\[151\] Other commentators have endorsed and enlarged upon Judge Walker's approach. See Jonathan R. Macey & Geoffrey P. Miller, A Market Approach to Tort Reform
ly given how few courts have made any similar efforts. Rather, our point is that this judge, who represents the outer limits of concern with competition in the class action setting, was apparently willing to overlook the antitrust problems with the April 12 meeting. He asked the two camps to submit competing bids. It was not until the two remaining competitors decided to forego competition that he expressed concern with the meeting that ensured that only two camps would be competing in the first place.

In fairness to Judge Walker, in his opinion rejecting the joint bid from the two camps, he did remark in a footnote that the April 12 meeting demonstrated "a rather cavalier indifference to at least the spirit of the anti-trust laws" on the part of law-

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Via Rule 23, 80 Cornell L. Rev. 909, 912, 917 (1995) (arguing for "auction" approach to class actions); John C. Coffee, Jr., Regulating Plaintiffs' Attorneys, N.Y. L.J., Sept. 22, 1994, at 5 (assessing problems and possibilities of auctions in regulating plaintiff's attorney conduct). Our point here is not to debate the merits of any particular bidding scheme, but rather to insist (as apparently no one yet has) that the antitrust laws regulate any such scheme.


At least one other judge has attempted to follow Judge Walker's lead. See In re Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (Shadur, J.). In that case, the court conducted an auction and awarded the class counsel position to a firm that offered a fee of 20% of the first $5 million recovered, 15% of the next $10 million, and 10% of the next $10 million, with no additional fee for any recovery over $25 million. Id. at 1198. Thus the bid capped the lawyers' fees at $3.5 million:

\[ 0.2 \times 5M + 0.15 \times 10M + 0.1 \times 10M = 1M + 1.5M + 1M = 3.5M. \]

The problem with this bid was that by capping the lawyers' fees, it eliminated any incentive for the lawyers to secure a recovery greater than $25 million. Although the court apparently recognized this problem and suggested that it would "give consideration to a motion for the award of some bonus fee" for any recovery in excess of $25 million, id. at 1199, the chosen lawyers settled the case three months later for an amount many have argued is inadequate. See Laurie Cohen, Thomas M. Burton & Scott Kilman, Bargain at the Bar: Archer-Daniels Cuts Surprisingly Good Deal in Price-Fixing Suit, Wall St. J., Apr. 12, 1996, at A1, A6. The settlement agreement, filed with the court on April 12, is reprinted in CCH Trade Regulation Reports. Lysine Price Fixing-Class Action Settlement, 416 Trade Reg. Rep. (CCH) ¶ 50,155, at 49,177 (Apr. 17, 1996).
yers, "many of whom claim expertise" in those laws. But even this comment is revealing. Why "spirit?" Put aside, as we asked you to do earlier, the fact that class counsel's selection was ratified ultimately by a court. Is there much doubt that in any other setting the conduct just described would violate more than the spirit of the antitrust laws?

Nor is the conduct engaged in by the plaintiff's firms in Oracle rare. To the contrary, it is apparently commonplace, albeit perhaps not always so well documented. Every class action suit displaces competition among lawyers for individual litigants and by consolidating cases creates what might be thought of as a

153 Oracle, 131 F.R.D. at 690 n.3. Judge Walker also made reference to the antitrust laws in his more recent efforts to maintain competition. When two of the leading class action plaintiff firms that had been acting as "de facto" class counsel offered to submit a joint bid and act as co-counsel, Judge Walker warned that "joint ventures which substantially lessen competition are not tolerated under our competition laws." Wells Fargo, 156 F.R.D. at 226 (citing sources). Moreover, Judge Shadur responded to a request by lawyers to submit a joint bid or to discuss the case among themselves in Amino Acid Lysine by stating that it is:

[M]ore than somewhat ironic in this litigation, finding its origin as it does in the antitrust laws, because any such cooperation among counsel that could cut back on the number of prospective bidders or could otherwise inhibit the independent judgment of those who bid would clearly seem to operate in restraint of trade. 918 F. Supp. at 1192 n.7.

Market allocation by competitors is per se illegal under the antitrust laws. See Palmer v. BRG, 498 U.S. 46, 49 (1990) (per curiam). In fact, many view market allocation as more anticompetitive than ordinary price fixing, because it eliminates all competition, not just price competition, among competitors. See, e.g., Stephen F. Ross, Principles of Antitrust Law 148 (1993) ("[M]arket division schemes are more insidious than price-fixing agreements. A firm that enters into a price-fixing agreement can . . . still engage in non-price competition—by offering . . . products of higher quality or better or quicker service. By contrast, a market division scheme eliminates any competition among the carlteners.") Moreover, agreements among competitors to rotate bids constitutes "bid rigging," which is punishable criminally under the antitrust laws. See generally United States v. Heffernan, 43 F.3d 1144 (7th Cir. 1994) (Posner, C.J.) (discussing meaning of bid rigging for purposes of sentencing guidelines).

154 This is certainly Judge Walker's view. See Oracle, 136 F.R.D. at 649 (explaining how competitive bidding might break up "the lawyer consortiums" often found in class action cases); Wells Fargo, 156 F.R.D. at 226-27 (noting that "the steering committee device . . . puts a real damper on competition" and suggesting that "this is why plaintiff class action lawyers like the device so much"); In re California Micro Devices Sec. Litig., No. C-94-2817-VRW, 1995 U.S. Dist. LEXIS 11587, at *13 (N.D. Cal., Aug. 8, 1995) (suggesting that the fact that Judge Walker received competitive bids from only two out of twelve firms that had originally been involved in the litigation was an "indicia of . . . cooperation" which "raises serious doubts about the conditions of competition in this segment of the legal services industry").
monopoly. But nothing about that fact necessitates the elimination of competition to represent the monopoly. Lawyers apparently feel free to eliminate that competition on their own by entering agreements not to compete.\footnote{We do not mean to suggest that all aggregations of lawyers in litigation raise antitrust concerns. "Litigation groups" evidently developed in mass tort cases where lawyers representing individual clients found it useful to join in a group to share information and conduct joint discovery. See Paul D. Rheingold, The Development of Litigation Groups, 6 Am. J. Trial Advoc. 1 (1982). Such cost-saving activity is akin to "trade association" exchanges of information which receive rule of reason treatment under the antitrust laws. United States v. U.S. Gypsum Co., 438 U.S. 422, 440-41 & 441 n.16 (1978). Agreements among lawyers from different firms to conduct class action litigation jointly, combining their resources and sharing the risks and rewards, would be a joint venture and might also receive more lenient antitrust treatment. Such agreements have occurred in mass tort class actions. See Richard A. Nagareda, Turning from Tort to Administration, 94 Mich. L. Rev. 899, 910 & nn.38, 39 (1996). But in many class actions (such as those involving securities, antitrust and consumer law), clients are all but an after-thought, necessary to the suit but easy to find when a suit looks promising. Thus, there is no evident need for joint activity, other than for risk-sharing purposes. In these cases, "allowing all the interested plaintiff lawyers to form a steering committee for each class action in which more than one plaintiff firm is interested essentially permits these lawyers to create an ad hoc monopoly in each such case." Wells Fargo, 156 F.R.D. at 226. Moreover, as Judge Walker also recognized, "to permit a joint bid by two dominant firms... might very well eliminate whatever possibility remains... of a meaningful competition to secure class counsel designation." Id. Nor would joint bidding be necessary to achieve cost saving if, as in Wells Fargo, the firms seeking to bid jointly were "two of the largest and most amply capitalized plaintiff law firms in the country," which "have demonstrated that they know exactly how to go about achieving leverage and risk spreading in their practices." Id. at 227. Even if the formation of a litigation group is itself a lawful joint venture under the antitrust laws, that does not mean that all agreements made by that group would be lawful. For example, in Jones Knitting Corp. v. Morgan, 244 F. Supp. 235 (E.D.Pa. 1965), rev'd on other grounds, aff'd in relevant part, 361 F.2d 451 (3d Cir. 1966), a group of manufacturers jointly hired a lawyer to investigate possible challenges to the validity of a patent held by a competitor. The group agreed further that "[n]o member was to approach [the patent holder] individually regarding a license until after completion of the search [by the lawyer], without first consulting with the others," and if approached by the patent holder a "member would do nothing until after he had notified others in the group." 244 F. Supp. at 236. After the lawyer recommended that the group file a declaratory judgment action against the patent holder, the group agreed to fund the action. Furthermore, the "agreement... that no member would negotiate with [the patent holder] without notifying the others was to continue in effect until a judicial decision was obtained." Id. at 237. The court held this agreement to be a group boycott, per se illegal under the antitrust laws. The court found that the "group was formed not only for purposes of bringing suit, but also for purposes of refusing to negotiate with [the patent holder] for licenses," and that the "freedom of each plaintiff to deal freely with [the patent holder] was restrained by the requirement of giving notice." Id. at 239. Cf. Lemelson v. Bendix Corp., 104 F.R.D.}
In *Oracle*, the April 12 meeting was well documented. Minutes were kept and participants signed in.\(^{157}\) We assume in most cases that anti-competitive agreements are more hidden.\(^{158}\) If

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1. \(^{157}\) 131 F.R.D. at 690.
2. \(^{158}\) In Judge Walker’s most recent class action suit, he suggested that the fact that he received only two competitive bids although more than a dozen firms had been involved earlier in the litigation was evidence of collusion. *California Micro Devices*, No. C-94-2817-VRW, 1995 U.S. Dist. LEXIS 11587 at *12. Of course, the nonbidding firms vehemently denied the accusation and chastised the judge for not holding an evidentiary hearing before leveling his charge of collusion. Howard Mintz, A Class Action in Disarray, The Recorder, Feb. 20, 1996, at 1 available in LEXIS Genfed Library, Pubs File. Several firms suggested that the “case was simply not lucrative enough to justify that much work,” even though the company had all but admitted fraudulent activity. More interesting, several firms blamed Judge Walker’s innovative bidding scheme itself, claiming that it “deterred any desire to take a lead role in his court.” Id. One lawyer called Judge Walker a “loose cannon on deck,” while another asked, “Why fool around in his laboratory?” Id. Others have argued that “lawyers are hesitant to compete in the judicial forum.” Resnik, Curtis & Hensler, supra note 14, at 388. These same commentators suggest that the fact that the defendant’s lawyers had already conducted secret settlement negotiations with a leading plaintiffs’ firm made other plaintiffs’ lawyers “understandably reluctant to compete for appointment as lead counsel,” id., even though the judge had rejected conditional approval of this settlement and specifically invited new bidders. *California Micro Devices*, No. C-94-2817-VRW, 1995 U.S. Dist. LEXIS 11587 at *3-*4.

We do not argue that Judge Walker’s charge of collusion was necessarily correct; rather, we argue that because it would have been very difficult and costly for him to determine the validity of the claim at the time, the question would best be addressed in a subsequent suit under the antitrust laws. Under the antitrust laws, the question would be whether the reasons given for refusing to allow bids by other firms are really “independent” business reasons that would motivate rationally self-interested firms,
so, should the fact that a court later approves the law firm as class counsel and finds that the firm adequately represented the class immunize the earlier anti-competitive behavior? And even if the court knows about the anti-competitive agreement, and approves class counsel then, should that suffice to immunize the anti-competitive conduct? We will argue that the answer to both questions is no.

Although the agreements we have just discussed interfere with the market to represent the class, the other two practices connected to class action suits that raise serious antitrust questions interfere with a different market: the market for legal services in the private dispute resolution system set up by the class action settlement. It has become common in the settlement of mass tort class actions for the settlement agreement to set up a dispute resolution system administered by private parties for the purpose of processing the individual claims of class members. What is “settled” for individual class members is that their claims will be resolved, not in the court system, but in this private system. Generally, the settlement sets out the structure of the new process: who will serve as decisionmakers, what appeal from decisions, if any, will be allowed, and what conditions, if any, will allow class members to exit the process to seek recovery in a court of law. The settlement generally sets out the criteria for establishing a class member’s right to some recovery or whether the decisions make sense only if there were an implicit understanding among the plaintiff firms not to bid; that is, whether the decisions were really “interdependent.” See Hovenkamp, supra note 136 § 4.5, at 167-69.

159 Professor Nagareda refers to this market as an “aftermarket.” Nagareda, supra note 156, at 936. This use of “aftermarket” is not the same as the use of the term in antitrust law. Antitrust law understands “aftermarkets” to involve purchases by consumers of a “system,” composed of components purchased at different points in time, which “lock-in” consumers in the sense that consumers have an interest in sticking with that system to recover their “sunk costs” rather than switching to a new system. See Carl Shapiro, Aftermarkets and Consumer Welfare: Making Sense of Kodak, 63 Antitrust L.J. 483, 486 (1995). The Supreme Court affirmed that the antitrust laws can reach anticompetitive conduct in a derivative aftermarket even if the primary market is competitive. Eastman Kodak Co. v. Image Technical Servs. 504 U.S. 451 (1992). To the extent that private administrative compensation systems in class actions are set up for future claimants rather than current clients (ignoring for the moment that future claimants should be viewed as current clients for purposes of class counsel’s ethical obligations), then the “market” the future claimants face is not really an aftermarket in the antitrust sense. They are getting a new “system.”
under the system and dictates a range of recoveries for class members who can demonstrate specific injuries. In short, these settlements set up a potential new market for legal services: the market for representing individual claimants in the private administrative system set up by the settlement. And like any market it is subject to both collusive and exclusionary behavior.

The potential for collusive behavior stems from the fact that class action settlements that set up private administrative systems may include a ceiling on the fee that a lawyer working within that system may charge. These caps may be written into the settlement agreement by class counsel and the defendants and later approved by the class action court, as opposed to being imposed by the court on its own motion. Class courts have so far been enthralled with these caps, describing them as benefits to class members who might otherwise be gouged by lawyers charging unconscionable contingent fees in a system that eliminates most, if not all, of the contingency that would attend a trial of the same claim.\footnote{See, e.g., In re Joint Eastern & Southern Dists. Asbestos Litig. (Johns-Manville), 878 F. Supp. 473, 556-58 (E. & S.D.N.Y. 1995) aff'd in relevant part, vacated and remanded in part, 78 F.3d 764 (2d Cir. 1996) (finding reasonable 25% cap on attorney's fees for representing future claimants in subsequent administrative procedure); id. at 561 ("The fee cap provision strikes an appropriate balance and assures reasonable compensation to future attorney and claimants alike."); Georgine, 157 F.R.D. 246, 285 (E.D. Pa. 1994), vacated 83 F.3d 610 (3d Cir. 1996), cert. granted sub. nom. Amchem Prods. v. George Windsor, 1996 WL 480936 (U.S. Nov. 1, 1996) (No. 96-270) (finding 20-25% cap on attorney's fees for representing future claimants in subsequent administrative procedure "reasonable and fair to the class"); Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 530 (E.D.Tex. 1995) (approving of 25% cap as superior to attorney fee provisions in alternative proposed settlement), aff'd, 90 F.3d 963 (5th Cir. 1996).}

Although in antitrust cases the judiciary is quite skeptical of the proposition that capping prices by self-interested groups benefits consumers,\footnote{See Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982). In that case, the Court held per se illegal a maximum fee schedule agreed upon by doctors for purposes of obtaining reimbursement for health services provided from insurance companies. The main source of the Court's skepticism was the fact that it was not necessary for the doctors to do the price fixing. Id. at 352-54. According to the Court, the same asserted benefits of lower prices and reduced administrative costs could be achieved without the anticompetitive risks if the insurance companies or the government set the schedules. The same argument could be made in the class action context: The court could set, rather than merely approve, the fee schedule in the private administrative system.} in approving class settlements courts accept this proposition without a moment's
hesitation.\textsuperscript{162} Most strange, however, courts have so far agreed not just that caps are good, but that the caps they approve are too high.\textsuperscript{163}

This apparent paradox can be explained only if courts are not freely choosing the cap to be applied as an exercise of some independent power to regulate the bar, but rather are accepting ceilings on fees that have been agreed to first by some group of lawyers, in most cases those on the plaintiffs' steering committee.\textsuperscript{164} Were it not for court approval these caps would seem to

\textsuperscript{162}This is ironic because one of the main criticisms of Maricopa—that sophisticated and powerful insurance company buyers of medical services would thwart any attempt by doctors to convert a maximum price into a cartel minimum price, see Hovenkamp, supra note 136, § 5.6, at 236—is not applicable in the class action context. Class member “buyers” have no meaningful control over their lawyers and, as we argue below, neither the defendants (who could be viewed as providing “insurance” to class members, see Nagareda, supra note 156, at 926, 963) nor the judges adequately protect class members against cartel prices.

\textsuperscript{163}For example, in In re Joint Eastern & Southern Districts Asbestos Litigation (Johns-Manville Corp.), 878 F. Supp. 473, 557, (E. & S.D.N.Y. 1995), aff'd in relevant part, vacated and remanded in part, 78 F.3d 764 (2d Cir. 1996), Judge Weinstein noted that the court “initially requested that attorney's fees for future representation of Trust claimants be limited to 20% of each claimants recovery.... [o]n the persistent insistence of plaintiffs' counsel, the contingency fee percentage was raised to a compromise figure of 25%, which the Courts approved as 'reasonable' . . ..” Judge Weinstein went on to add:

Undoubtedly, there are some instances where the 25% cap will lead to a large windfall for lawyers on an hourly basis. This is highly probable given the large concentration of asbestos cases in the hands of a few attorneys. In other instances, particularly in view of the relatively fixed and small amounts of recovery available under the [settlement] the fee limitation may result in too small a fee to warrant legal representation. Such unfairness is almost impossible to avoid without consideration of individual claims. The transactional costs that would accompany consideration of fees for each claim are too great in view of the small amounts involved. As to the relatively small claims, in almost all instances no attorney will be required under the settlement arrangement. If an attorney is required the claims structure insures that in almost all cases the amount of work will [be] minimal.

\textsuperscript{164}If the court imposed the cap unilaterally and the lawyers simply adhered to it there would be no “agreement” for antitrust purposes. See Fisher v. City of Berkeley, 475 U.S. 260, 267 (1986) (“A restraint imposed unilaterally by government does not
violate the antitrust laws. The question is what, if anything, about court approval should change that result.165

Class settlements may contain even more troublesome restrictions than caps on lawyer fees. Lawyers may try to include provisions that exclude competitors from the market for representing claimants post-settlement in the private administrative system. The class settlement in *Georgine*, for example, contained provisions designed to ensure that historically strong competitors in the market for asbestos clients in the tort system retained their advantage in the market that was to be created by the settlement.166 The intention of the class lawyers and their cohorts in drafting this provision (if not in crafting the entire settlement) was to eliminate competition.167 In the *Georgine*

become concerted-action within the meaning of [§ 1 of the Sherman Act] simply because it has a coercive effect upon parties who must obey the law."). On the other hand “[w]here private actors are ... granted ‘a degree of private regulatory power,’ ... the regulatory scheme may be attacked under § 1.” Id. at 268.

165 It may be difficult to prove that the steering committee members “agreed” to the cap if they were not class counsel. And co-class counsel might be treated as “a single enterprise” for antitrust purposes. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 753 (1984). But express agreement is not necessary under the antitrust laws. See Interstate Circuit v. United States, 306 U.S. 208, 227 (1939) (“Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.”). An agreement might be inferred in *Georgine* from the fact that plaintiffs’ lawyers settled their “inventory” cases with the defendants on the condition that the settlement be approved. This condition made the acquiescence of the other plaintiff firms a necessary part of the deal. Ironically, Professor Nagareda cites the agreement between the *Georgine* defendants and the non-class counsel lawyers as evidence of the fairness of the deal. Nagareda, supra note 156, at 967. He argues that class counsel’s willingness to offer the fee cap was a solution to the “holdout” problem caused by recalcitrant members of the steering committee. Id. Under our scenario, such “holdouts” may have been nothing more than unwilling participants in a cartel. In antitrust law, such holdouts are desirable; some attempts to solve holdout “problems” may do nothing more than facilitate a cartel that might not otherwise succeed.

166 157 F.R.D. at 281.

167 See Koniak, supra note 15, at 110 n.312 and accompanying text (referring to testimony by plaintiff's lawyer at *Georgine* fairness hearing expressing concern that “new lawyers [who] were getting into the asbestos litigation, feeding on the success of the original plaintiffs [sic] bar,” which “led plaintiffs’ lawyers to begin “consolidating trials” and “fill[ing] class actions” to prevent the new lawyers from “kill[ing] the goose that was laying the golden egg”). Moreover, there was testimony that suggested the provision arose out of an agreement among more plaintiffs’ lawyers than just class counsel. See id. (quoting testimony from CEO of defendant organization that
settlement, one of the factors in determining a claimant's recovery under the settlement's dispute resolution system was the identity of the law firm representing the claimant.\textsuperscript{168} Claimants who hired law firms with a historically high settlement average against the defendants in \textit{Georgine}—that is, firms that were successful in the pre-settlement market—were to be offered more money than claimants who hired law firms without such a record.\textsuperscript{169} We view such exclusionary restraints as more troubling than caps on attorney's fees because there is no plausible cover story that can be told about the restraint that explains how it benefits class members.\textsuperscript{170} Yet the district court in \textit{Georgine} approved a settlement that included such a provision. The court seemed unenthusiastic about the provision, but put provision was “negotiated [at the request of class counsel] after a report [from] . . . many plaintiffs' counsel”).

\textsuperscript{168} \textit{Georgine}, 157 F.R.D. at 281.

\textsuperscript{169} Id.

\textsuperscript{170} One could try to tell the following efficiency story. Lawyers need to recoup their investments in “generic assets” (discovery, expert witness fees, and the like) made in developing their cases in the tort system. See Nagareda, supra note 156, at 909. If provisions allowing such recoupment are prohibited by the antitrust laws, class counsel will either (1) not make these investments (and perhaps not bring meritorious class actions); (2) charge a higher fee for their role as class counsel; (3) refuse to settle; or (4) settle for too little because their fees will be lower. There are various objections that could be made to this story—the main one being that it is far from clear that a restraint that gives certain lawyers a guaranteed market advantage is necessary to prevent such consequences. Courts have long been skeptical of similar justifications for private price-fixing arrangements. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940):

\begin{quote}
Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated . . . .
\end{quote}

Moreover, there are reasons to think that such arrangements are broader than necessary to protect any legitimate interests plaintiffs' lawyers might have. (It should be noted that Professor Nagareda does not specifically support \textit{Georgine}'s market advantage provision in his article; he does not discuss it at all.) Even without such a provision, claimants would probably continue to make use of these firms anyway and perhaps be willing to pay a premium for their experience in handling such cases if that would mean a faster recovery. See Nagareda, supra note 156, at 935-36 (discussing fact that Dalkon Shield claimants continued to use lawyer services in filing of administrative compensation claims and noting advantage that class counsel would have in attracting clients under administrative system). Moreover, investments are not necessarily specific to one class action. They can be recouped over the course of many lawsuits. See id. at 936-37.
whatever doubts it had about the matter to the side on the ground that settlements should be judged as a whole. Approval, in other words, would not be denied based on one troubling provision. What's a little anti-competitive agreement among friends?

II. THE NEED FOR SUBSEQUENT SUITS

In this Part, we argue that subsequent suits against class counsel are necessary to deter class action misconduct. Other remedies for abuse are inadequate and the incentives of the main participants in class actions will lead these participants to thwart any other solution. Thus, we believe that courts should allow subsequent suits regardless of what current doctrines say. But as we shall see in the next Part, current doctrine does not stand in the way.

A. Abuse by the Truckload

Class members harmed by a trial court's approval of an unfair or collusive settlement have remedies. Objectors, if there are any, may be permitted to appeal the trial court's approval of the settlement and claim that the court's judgment on the fairness of the settlement, the adequacy of representation or the reasonableness of the attorney's fees was an abuse of discretion. Even after an appeal has been denied or the time for appeal has

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171 Georgine, 158 F.R.D. at 281, 322-23.
172 See, e.g., Plummer v. Chemical Bank, 668 F.2d 654, 655 (2d Cir. 1982) (holding that district court’s rejection of settlement proposal due to concerns raised by objectors was not abuse of discretion); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) (rejecting objector’s contention that settlement and fairness hearings were inadequate but holding fee award excessive). Some courts have held that absent class members have no absolute right to appeal. See, e.g., Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 680 (8th Cir. 1992), cert. denied, 507 U.S. 908 (1993); Gottlieb v. Q.T. Wiles, 11 F.3d 1004, 1013 (10th Cir. 1993); Guthrie v. Evan, 815 F.2d 626, 628 (11th Cir. 1987). See generally 2 Newberg on Class Actions § 11.60, (Alba Conte ed., 3d ed. 1992) (discussing appeal of judgment after settlement approval under an abuse of discretion standard); Christopher R. Thyer, Note, Un-Appealing Class Action Settlements: Why No One Has Standing to Challenge Settlements after Haberman v. Lisle, 49 Ark. L. Rev. 375 (1996) (discussing Arkansas Supreme Court decision dismissing on lack of standing grounds a class member’s appeal of the portion of a class settlement pertaining to attorney’s fees); Timothy A. Duffy, Note, The Appealability of Class Action Settlements by Unnamed Parties, 60 U. Chi. L. Rev. 933 (1993).
lapsed, absent class members may challenge the binding effect of the settlement by bringing another action against the settling defendant for the same wrong. If they can show that they were not adequately represented in the first action, the class settlement will not preclude their maintenance of this second suit.\textsuperscript{173} Finally, members of the class may seek to escape the effects of a class settlement by invoking procedural rules that provide for reopening or vacating final judgments.\textsuperscript{174}

Why aren’t those remedies, offered in addition to the trial court’s obligation to conduct a fairness hearing to determine that the settlement is fair, the representation adequate and that there has been no collusion, enough? The simplest answer is that none of those remedies provides adequate incentives for lawyers and defendants to desist from illegal conduct in negotiating a class action settlement. All of those remedies share this in common: If a court finds misconduct, it simply denies wrongdoers the benefit of their misdeeds. That penalty, given the small risk of its being inflicted and the substantial sums to be made through misconduct, is inadequate to deter lawyers from abusing the class action settlement process.\textsuperscript{175}

The incentive structure created by the current system of class action settlements suggests that abuse is rampant. All lawyer-client relationships create agency problems because the interests of lawyers and clients are not perfectly aligned. Lawyers are interested primarily in the size of their fees. Clients are interested primarily in the size of their recovery. Lawyers may engage in conduct that increases their fees even if this comes at

\textsuperscript{173} In Hansberry v. Lee, 311 U.S. 32, 45 (1940) the Supreme Court allowed plaintiffs to bring a suit that was already ostensibly resolved in a prior class action on the grounds that an absent class member not adequately represented in the class action was not bound by the first judgment. See also Richards v. Jefferson County, 116 S.Ct. 1761, 1769 (1996) (“Because petitioners received neither notice of, nor sufficient representation in, [prior] litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property.”). See generally 2 Newberg on Class Actions, supra note 172, § 11.64 (alternative to Rule 60(b) relief is collateral suit challenging judgement in original suit).

\textsuperscript{174} See Fed. R. Civ. P. 60(b); 2 Newberg on Class Actions, supra note 172, § 11.63 (discussing vacating settlement judgments).

\textsuperscript{175} This, of course, is one of the traditional justifications for punitive damages that many class lawyers rely on in their class action suits. See Keeton et. al., supra note 74, § 2, at 9-10.
the expense of the client's recovery. Class actions exacerbate this problem.

In ordinary lawyer-client relationships, clients can mitigate the agency problem in two ways: ex ante contracting and ex post monitoring. These solutions are unavailable or particularly ineffective in the class action setting. The reason is that absent class members, by definition the majority of the class, neither contract with the lawyer, nor are present to monitor the lawyers' actions. Although client monitoring of lawyer performance is, at best, an imperfect check on lawyer self-dealing in ordinary cases, it is effectively unavailable in almost all class actions. That is, of course, the reason Rule 23(e) requires court monitoring of class action settlements, but that check too is ineffective.

We believe that court monitoring is ineffective as a check on abuse, for two reasons: The fairness hearings that courts typically hold are, by and large, non-adversarial proceedings, making it relatively easy for lawyers to hide abuse from the court;\(^{177}\)

\(^{176}\)Class representatives are present, but in general courts have not insisted that class counsel consult with these representatives about the progress of the suit. Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir.), cert. denied, 459 U.S. 880 (1982) (representation is found to be adequate despite the fact that class representative "displayed a complete ignorance of facts concerning the transaction that he was challenging"); J/H Real Estate v. Abramson, No. 95-4176, 1996 U.S. Dist. LEXIS 1546, at *8 n.3 (E.D. Pa., Feb. 9, 1996) ("class counsel, not the class representative, guides and orchestrates the litigation") (citing the United States Court of Appeals for the Third Circuit as authority).

Indeed, class settlements are regularly approved even though the class representative has only the vaguest idea of what the settlement provides. As the United States Court of Appeals for the Seventh Circuit stated in 1981:

>[T]he class representative's role is limited. It was found not to be enough to defeat a class certification in Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966), that the named plaintiff did not understand her complaint at all, could not explain the statements in it, had little knowledge of what the lawsuit was about, did not know the defendants by name, nor even the nature of the misconduct of the defendants. Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 779, 896 (7th Cir. 1981), cert. denied, 455 U.S. 1017 (1982). See also Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669, 676-77 (N.D. Ill. 1989) (quoting Eggleston and accepting as adequate a named plaintiff who was unfamiliar with the details of the claim).

\(^{177}\)The proposed amendment to Rule 23(e) would simply require all courts to do what almost all courts now do anyway—hold a fairness hearing before accepting the dismissal or settlement of a class action. The drafters of the accompanying Advisory Committee Note apparently believe that codifying the prevailing practice will somehow solve the problems associated with class action settlements:
Under Cloak of Settlement

and, judges are biased in favor of settlements, particularly in class suits, and are thus ineffective monitors of abuse. We put aside the question of judicial self-interest for the moment because we recognize that many judges and even some legal academics take umbrage at the suggestion that judges allow their own interests to interfere with their duty to protect absent class members.\textsuperscript{178} To these defenders of judicial integrity, judicial self-interest is all but an oxymoron, which, if it exists in some obscure corner of reality, plays no role in class action litigation. Because we believe, to the contrary, that judicial self-interest is an important part of the class action abuse story and that denial of this fact leads to misguided efforts to increase the already considerable discretion of judges to accept settlements and approve them on appeal, we will later discuss in some detail these judicial incentives (with apologies in advance to all those who see this point as somewhat obvious).\textsuperscript{179} The case that judges are ineffective monitors of class settlements is fairly strong, however, judicial self-interest aside.

Fairness hearings are more akin to ex parte proceedings than adversarial ones. A recent empirical study by the Federal Judicial Center of class actions in four federal district courts found that 42\% to 64\% of the fairness hearings were concluded without any presentation of objections to the proposed settlement by "class members and other objectors."\textsuperscript{180} In many of the cases

Preliminary Draft, supra note 11, at 54. Unfortunately, as we argue, the "cure" the drafters propose for the problems they recognize—a nonadversarial fairness hearing—is no cure at all.

\textsuperscript{178} One academic colleague, who has read a draft of this Article, stated that he considered the "accusation" that judges approve class settlements that are collusive because they are blinded by self-interest, defamatory. When asked why he did not think discussing lawyer self-interest in selling out their clients was similarly defamatory, he replied: "Because the judge self-interest story isn't true." When pressed for the basis for his conviction, this colleague simply repeated that he knew judges were not self-interested in accepting class settlements and that was that.

\textsuperscript{179} See discussion infra Section II.C.

\textsuperscript{180} Willging, Hooper & Niemic, supra note 109, at 140. See also Thomas E. Willging,
with objectors, the objections were made, not in person, but in writing before the hearing. According to court files, class members, other than the named plaintiffs, or objectors actually attended only 7% to 14% of the settlement hearings. In the absence of anyone to present the problems with a proposed settlement, the likelihood that a judge could ferret out corruption or illegality leading to or embedded in a proposal presented jointly by class and defense counsel, who come well prepared to portray the deal as fair, legal and just, is quite small.

Moreover, pro se objectors will generally be no match for the lawyers presenting the settlement as fair. The Federal Judicial Center study does not say how many of the small number of objectors who appeared at fairness hearings had counsel, but it is probably safe to assume that many objections to class action settlements are raised pro se. The current system provides little incentive for lawyers to seek out corruption or illegality in proposed settlements. Objecting lawyers stand little chance of

Laural L. Hooper & Robert J. Niemic, Federal Judicial Center, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 57, 178 (Tbl. 38) (1996) (on file with author) [hereinafter FJC Study]. For some anecdotal evidence, see California Micro Devices, 1996 U.S. Dist. LEXIS 1361 at *28 (citing letter written on behalf of objectors claiming that "once plaintiff and defense counsel agree to settle a securities class action, there is typically no one before the court with an incentive to challenge the merits of the settlement"); see also Woodward v. Nor-Am Chem. Co., No. 94-0780-CB-C, 1996 U.S. Dist. LEXIS 7372, at *27 (S.D. Ala. May 23, 1996) (noting that at the fairness hearing on the proposed class action settlement the "Court heard arguments presented by Class Counsel and counsel for the defendant. At the hearing the Court specifically asked whether anyone in attendance wished to object to the fairness of the Settlement; no one objected.").

For example, in the recent California Micro Devices class action, a big issue in evaluating the fairness of the settlement was whether or not the defendant was on the verge of bankruptcy. The lawyers proposing the settlement claimed to have "confirmatory evidence" of this fact, but declined to share this evidence with either the court or other class members. 1996 U.S. Dist. LEXIS 1361 at *30. Judge Walker struck down the settlement without knowing the validity of the bankruptcy claim. Although he may have been correct in doing so, the downside risk was large. This may explain why according to one plaintiff's lawyer involved in the case, "If it was before any other judge . . . it would have been a done deal." Howard Mintz, A Class Action in Disarray, The Recorder, Feb. 20, 1996, at 1, available in LEXIS, Genfed Library, Pubs File.

See, e.g., California Micro Devices, 1996 U.S. Dist. LEXIS 1361 at *31 (noting that "input from actual class members and indirectly affected parties who have hired independent counsel . . . is very unusual in securities class actions.").
Lawyers are sometimes motivated to challenge proposed settlements in the hope of reaping some later economic benefit, such as success in one's own bid to be class counsel in a later suit or continued income from individual suits, which would be more lucrative than processing people through a claims procedure set up for class members under a proposed settlement. However, because the chances of convincing a trial judge to reject a settlement are extremely slim,

184 In the Federal Judicial Center study, the researchers found “no fee awards to, and few fee requests by counsel other than plaintiffs' counsel.” Willging, Hooper & Niemic, supra note 109, at 155. We have found no case in which a court has awarded attorney's fees to objecting counsel for raising arguments that caused the court to disapprove a class action settlement. In approving a settlement, courts sometimes award fees to objectors upon a finding that the objectors conferred a monetary benefit upon the class by raising objections that resulted in the court modifying some part of the settlement (usually class counsel's request for attorney's fees). See Uselton v. Commercial Lovelace Motor Freight, 9 F.3d 849, 855 (10th Cir. 1993) (fee awarded to objecting counsel, citing Herbert Newberg, Attorney Fee Awards § 2.24, at 84 (1986)); Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971) (an objecting attorney should not be denied reasonable compensation for a benefit conferred on the class); Bowling v. Pfizer, Inc., 922 F. Supp. 1261, 1285 (S.D. Ohio 1996) (awarding attorney's fees to objectors for their role in improving the settlement for the class); 1 Alba Conte & Herbert Newberg, Attorney Fee Awards § 2.25, at 91-92 (2d ed. 1993). But see Grunin v. International House of Pancakes, 513 F.2d 114, 126-27 (8th Cir.), cert. denied, 423 U.S. 864 (1975) (objector denied fees). See also Alpine Pharmacy v. Chas. Pfizer & Co., 481 F.2d 1045, 1053-54 (2d Cir.), cert. denied, 414 U.S. 1092 (1973); Milstein v. Werner, 58 F.R.D. 544, 552 (S.D.N.Y. 1973); Newman v. Stein, 58 F.R.D. 540, 543-44 (S.D.N.Y. 1973) (securities cases denying fees to settlement objectors who conferred no class benefit).

When a court rejects a settlement, there is by definition no common fund from which to award attorney's fees to objecting counsel. To award counsel fees to objecting counsel who exposed a settlement as the product of collusion and thus unworthy of approval, would require the courts to find some other source of funds from which to pay those fees. Thus far, no court has taken that step, and there are no pending changes to Rule 23 that would authorize courts to pay objecting counsel when rejecting a settlement. Most troubling, the surest way for objecting counsel to receive fees is to drop their objections in exchange for a piece of the fees to be awarded to class counsel. For examples of cases in which objecting counsel switched sides to become cooperating class counsel or mysteriously disappeared, see Bowling, 922 F. Supp. at 1265, 1271-73; (most of the objecting lawyers became co-counsel for class and requested attorney's fees); Price v. Ciba-Geigy Corp., No. 94-0647-B-S, (S.D. Ala. 1995) (all objecting counsel dropped their objections, although changes to settlement were minor).
the chances on appeal may not be high enough to justify the added expenses, the expected benefit from derailing the settlement would have to be enormous to make it rational to launch a serious challenge.

We support proposals that would encourage objectors to mount challenges to collusive settlements, such as Senator Cohen's bill that would provide state attorneys general with notice of class suits in which citizens of their respective states were absent class members. We also encourage courts and rule-makers to devise methods to pay objectors who are successful in scuttling a class action settlement. But we recognize the problems with such proposals. State attorneys general have already expressed doubts about Senator Cohen's bill, which they are afraid will raise expectations that they will intervene to stop abusive settlements when they lack the resources to meet those expectations. As for paying attorney's fees and costs to lawyers who persuade a judge to reject a proposed settlement, where would the money come from? If the parties were required to post a bond to settle, would that not encourage frivolous objections, where the court awarded the full fee requested. Id. Thus, the likelihood that proposed attorney's fees would be reduced was only 2% of all settlements and 10% of all settlements in which objections were raised.

In the Federal Judicial Center study, only three approved settlements were appealed, and one of those three, the only appeal filed by objectors, was reversed. In re General Motors Pick-Up Truck Litig., 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995); FJC Study, supra note 180, at 191 (Thl. 51), 193 (Thl. 53). Ten appeals, including GM Truck, were filed concerning attorney's fee issues. Of the remaining appeals, two courts affirmed the fee award, two courts dismissed the appeal, one court reversed a denial of fees, one court reversed a trial court's reduction of fees, one court remanded for reconsideration and two other appeals were pending. Id. at 77, 191-94 (Thls. 51-54). The data, though sketchy, suggest that the chances of overturning a trial court's approval of a fee award or making a trial court's reduction of fees stick is no more than 40%, and probably significantly less.

It happens. Georgine, 157 F.R.D. at 246. See also California Micro Devices, 1996 U.S. Dist. LEXIS 1361 at *1 (rejecting proposed securities class action settlement in light of objections by various institutional investors); Henry J. Reske, Two Wins for Class Action Objectors, 82 A.B.A. J., June 1996, at 36 (discussing successful objections to class settlements in recent antitrust and heart-valve mass tort cases). However, the economics suggest that it will happen rarely.


Conversation with staff members from Senator Cohen's and Senator Kohl's offices, August 1996 (reporting on comments from state attorneys general).
lous objections? Would not the settling parties simply pay off potential objectors, keep most of the benefits of the collusive deal and save everyone a lot of work? How would such pay-offs be detected?  

Even if these problems could be overcome, another obstacle remains: The discovery accorded objectors in the settlement process is limited. In the small number of class actions in which objectors appear, discovery is not currently a right but a privilege. When courts allow discovery, they severely limit its scope. It is not uncommon for a court to allow the objector to take the deposition of the named plaintiffs to ascertain their adequacy. It is, however, all but unheard of to grant objectors the right to depose class counsel or the defense lawyers on the course of the negotiations—the type of deposition that would be most useful for uncovering the type of wrongdoing with which we are concerned. Although we agree with those courts that

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190 See supra note 184. One solution to this problem, which we support, has been suggested to us by John Leubsdorf: requiring courts to appoint advocates for the class whose job would be to raise any non-frivolous objections to the settlement. Unfortunately, this idea received a chilly reception from judges and lawyers alike at a November 22, 1996 hearing of the Advisory Committee on the Federal Rules of Civil Procedure, and we do not foresee its implementation in the near future.

191 "While an objectant must be given leave to be heard, to examine witnesses and to submit evidence, it is within the Court's discretion to limit the proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision." Glicken v. Bradford, 35 F.R.D. 144, 148 (S.D.N.Y. 1964) (citing Cohen v. Young, 127 F.2d 721 (6th Cir. 1942)). Cf. In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 (7th Cir.), cert. denied, 444 U.S. 870 (1979) (court abused discretion by not allowing objectors discovery or examination of settlement negotiations). See generally 2 Newberg, supra note 172, §§ 11.45, 11.57 (noting that if negotiations violated the pretrial order, plaintiff objectors would be entitled to discovery and outlining the factors relevant to the court's decision to permit discovery).


193 See Georgeine, 157 F.R.D. at 260 n.9 (court maintains that it gave the objectors the "opportunity to probe into facts surrounding that proposed settlement through depositions of relevant persons."). The Georgeine court did not mention that it refused to order the depositions of the two most relevant individuals, class counsel and the lawyers for the defendant, Center for Claims Resolution (CCR). This left the
have held that discovery, including depositions of class and defense counsel, should be granted in those cases in which the objectors can make out a plausible case that collusion or other wrongdoing has occurred in the course of the negotiation, we also understand that there are reasons for a rule that generally disfavors the taking of such depositions. Those reasons include "the sensitive nature of the material exchanged in the settlement negotiations, the undue delay and expense of deposing the negotiating lawyers, and the potential that routine discovery into settlement negotiations may deter settlements, unduly protract negotiations, or chill candid conversation."

Finally, special masters appointed by the court to review class settlements, or guardians appointed by the court to protect absent class members' interests, suffer from many of the obstacles that now face objecting counsel: insufficient funds to do a thorough job, necessary reliance on the settling parties' unsworn characterization of their association and the benefits of the deal to the class and, unfortunately, their own self-interest in cultivating a reputation for not scuttling deals. Anyone who gained that reputation might never work as a class guardian again. The next pair of settling parties would vigorously protest the ap-

...
pointment of such a person and a court would be unlikely to insist in the face of that protest.\textsuperscript{196} Moreover, we can report without attribution, for whatever it may be worth, that the guardians we have talked to understand their job is to approve the deal that the settling parties have constructed, after suggesting a few minor changes, not to recommend that the settlement be chucked. For all the above reasons, even if judges were thoroughly motivated to weed out collusive settlements (something we do not believe), they would be hard-pressed to find facts that would betray abuse in the class settlement system. This problem would not be so troubling if there were reasons to think that abuse is rare. But unfortunately, there are good reasons to think that serious abuse is rampant.

Defendants and their lawyers understand the powerful agency problem in class suits created by the inability of class members to monitor their lawyers. They understand that judges are well motivated to accept settlements, and how difficult it would be for courts, even if they were not predisposed toward settlement, to ferret out abuse in fairness hearings. Defendants understand how valuable class settlement can be: liability and transaction costs can be minimized and finality achieved.\textsuperscript{197} Moreover, defendants care only about the total amount they must pay out in settlement, not how the payoff is distributed between class members and the class lawyer. Thus, they are well-positioned

\textsuperscript{196} We note that the Civil Rules Advisory Committee rejected the suggestion that Rule 23(e) be amended to require or encourage the use of special masters to ensure some form of independent review, particularly when no objectors appear. We think it likely that the Committee did this not because of the problems we identify, but simply because of the fear that the special masters would make class action settlements more costly. See Draft Minutes in Preliminary Draft, supra note 11, at 38 (rejecting suggestion that Rule 23(e) be amended to require or encourage the use of special masters to ensure some form of independent review, particularly when no objectors appear).

\textsuperscript{197} Defense attorneys helped develop the notion of “settlement class actions,” class actions in which the suit and settlement agreement are filed simultaneously, for just such purposes. See Note, Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23 109 Harv. L. Rev. 828, 843 (1996) (“When defense attorneys first started to experiment with the settlement class action model, they did so with one clear goal in mind: to achieve a global settlement with res judicata effect on as many present and future claimants as possible.”); Roger C. Cramton, Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction, 80 Cornell L. Rev. 811 (1995); James A. Henderson, Jr., Comment, Settlement Class Actions and the Limits of Adjudication, 80 Cornell L. Rev. 1014 (1995).
and well-motivated to propose a deal that gives class counsel a huge slice (high attorney's fees) of a small pie (a low overall settlement for the class) and pretty well-assured that class counsel will accept it, given how expensive and risky it can be to get a class action certified and ready for trial.\footnote{Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1 (1991). See also Roberta Romano, The Shareholder Suit: Litigation without Foundation?, 7 J.L., Econ. & Org. 55, 84 (1991) ("The principal beneficiaries of [derivative] litigation therefore appear to be attorneys, who win fee awards in 90 percent of settled suits."); Andrew Rosenfield, An Empirical Test of Class-Action Settlement, 5 J. Legal Stud. 113, 119-20 (1976) (settlements of class action suits tend to result in monetary bonuses to attorneys at the expense of class' interests).}

Collusion between class counsel and defendants and their lawyers to sell out the class is facilitated by the fact that class counsel typically does not bargain in advance of the settlement with the class representative or the court over the fee arrangements. Indeed, in contrast to ordinary clients, class members do not even know at the start of the litigation, all questions of bargaining aside, what the lawyer will later claim that fee to be. This is another example of the consequences of inadequate monitoring by the class of class counsel, and another reason the agency problem discussed earlier is exacerbated in the class action context. Because class counsel's fee is not set in advance, collusion can occur no matter how this fee is structured. If the court uses the "lodestar" method, which involves multiplying the number of hours worked by some hourly rate and then adjusting further based on a risk factor, then class counsel can collude with defendants and their lawyers by exaggerating or unnecessarily running up the class lawyer's hours.\footnote{See Coffee, supra note 7, at 717-18; Macey & Miller, supra note 198, at 22-26.} When class counsel's fee is based on a percentage of the recovery, class counsel can collude with defendants and their lawyers by agreeing to support a higher contingency rate in return for a lower settlement.\footnote{See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1349 (1995) [hereinafter Coffee, Class Wars]. Other analyses have tended to focus on the fact that fees based on a percentage of the recovery give lawyers an incentive to settle early for an amount lower than the client would want. The reason is that a self-interested lawyer would spend an extra dollar to continue the litigation only if it was less than the additional expected benefit to him from his share of the additional recovery. The client, on the other hand, wants the lawyer to}
lawyers cannot manipulate the contingency rate, they may be able to control other variables and so achieve a collusive result. In *Georgine*, the lawyers manipulated the definition of the class. In *Hoffman*, they manipulated the definition of "economic benefit." When monitoring is absent, fraud flourishes.

Of course, honorable plaintiffs' lawyers could try to resist offering or accepting collusive settlement with defendants. But if plaintiffs' lawyers balk at the prospect of selling out their clients, the defendant can engage in what Professor Coffee has dubbed a "reverse auction" by offering the right to bargain on behalf of the class to lawyers willing to accept the lowest payment for class members. The fact that defendants often have effective control over who represents the class may seem surprising. They get that control as a result of several features of class action law. First, the defendant can credibly threaten to resist class certification. Winning certification for a class action when the defendant is committed to resisting certification is likely to be a difficult, expensive and, in many large mass tort cases, an all but impossible feat. Second, if courts allow "settlement
class actions," that is, class actions that are filed and settled simultaneously, then the defendant can easily shop around for the most desirable plaintiffs' lawyers. Finally, if defendants do not like the proceedings in one forum, they can have (or threaten to have) a second class action suit instituted against them in a different forum. They can then stall the first suit and settle the second suit, leaving the class lawyers in the first suit unpaid.

Thus, even without considering judicial self-interest, we have a situation in which agency problems make the potential for abuse enormous and in which the mechanism for checking that

(1995) (granting defendants' mandamus petition to deny class certification in mass tort class action by hemophiliacs alleging they became contaminated with HIV after blood transfusions involving blood processed by defendants, in part because a federal sitting in diversity cannot apply a single federal legal standard under Erie, but must apply the law of the relevant state). Cf. Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996) (holding that there is no absolute bar to the certification of multi-state product liability class action, but finding that the district court abused its discretion in certifying the class because there was no showing that common issues predominated over individual ones). Note that the same circuit that refused to certify the class in Castano on the grounds that it was too large and heterogeneous some months later certified a class "for purposes of settlement," which was as heterogeneous on the ground that heterogeneity was no bar to settlement, just to trial. Ahearn v. Fibreboard, 162 F.R.D. 505, (E.D. Tex. 1995), aff'd on appeal, In re Asbestos Litig., 90 F.3d 963 (5th Cir. 1996). We return to the problems with this approach later. See infra Section II.E.

These two problems are likely to get worse, not better, because recent proposals for "reform" promise simultaneously to make it more difficult to secure class certification when the defendant is opposed and easier when it is in the interest of the defendant to dispose of all its liability in one fell swoop, in a so-called global settlement. We have in mind the recently proposed revisions to Rule 23, which make it more difficult to secure certification in a class action for money damages, but allow courts to certify such class actions for settlement purposes, despite the fact that they could not be certified for trial. We come back to this proposal later. See infra Section II.E.

This is no mere theoretical problem: the GM Truck settlement was refiled in Texas state court complete with the coupon relief already rejected by the Third Circuit. See Joe Darby, Suit May Spell Cash for Parish, The Times Picayune, July 10, 1996, at B4 available in LEXIS, News Library, Curnws File. And the PB pipe national class action failed first in Texas, was refiled with some changes in Alabama and Tennessee, and ultimately approved by the Tennessee court. See supra note 119. Note that even if one court rejects class certification, there is generally no collateral estoppel effect on the ability of a second court in a different jurisdiction to consider certifying the class. See, e.g., J.R. Clearwater, Inc. v. Ashland Chem. Co., 93 F.3d 176 (5th Cir. 1996) (federal district court's denial of class certification does not permit federal court to enjoin state court from certifying similar class action in state court).
potential, judicial review and approval of the settlement, is poorly constructed, and to a large extent inherently ill-suited, for its assigned task. For these reasons, we maintain that class action abuse in which the class is sold out to benefit others must be quite common, not rare, and that new approaches to this problem are necessary.207

B. He Who Lives by the Sword

To see the inadequacy of disgorgement and the advantage of the availability of subsequent legal action against class lawyers with the possibility of punitive damages, we will consider a simple numerical example based on Hoffman. Had the class lawyers in a case like Hoffman asked for what we contend would be the upper limits of a reasonable fee—one-third of the actual economic benefit conferred on the class—they would have realized no more than $5 million.208 On the other hand, by agreeing

207 Further evidence can be found in Professor Romano's study of all shareholder suits brought from the late 1960s through 1987, which found that the court-approved settlements in these cases exhibited "two striking features." Romano, supra note 198, at 61. "First, only half of all settlements have a monetary recovery (46 of 83). Second, awards are paid to attorneys far more frequently than to shareholders (75 of 83). In seven cases (8 percent) the only relief was attorney's fees." Id. (footnote omitted). After examining both the monetary recoveries and structural changes provided by these settlements, Professor Romano concluded that monetary recovery to the class was infrequent; when such recovery was provided, per share recovery was small; and structural relief was generally cosmetic. Id. at 84. In short, defendants' lawyers and plaintiffs' lawyers benefited from these suits, but neither the corporation nor the shareholders that constitute it did. Of course, one interpretation of this data is that shareholders and corporations are never ripped off for substantial sums by incompetent, disloyal or otherwise dishonest officers and directors and that the securities laws are overwritten, if not totally unnecessary. But an equally plausible, indeed we believe more plausible, explanation is that the corporation and shareholders are often abused twice: first by their officers and next by the lawyers who represent them in these shareholder suits.

208 Although we do not know how much BancBoston finally calculated to be the total amount of escrow surplus, according to the Florida Attorney General’s brief objecting to the settlement, the available evidence at the time of the fairness hearing showed that the total escrow surplus was about $42 million. Florida Attorney General’s Brief, supra note 38, at 4; see also supra note 40 (noting the fact that the surplus figure used at the hearing was an approximation that was to be, and was, adjusted later). The maximum possible benefit would accrue to people in states where banks are not required to pay any interest on mortgage escrow accounts. Those homeowners could have earned on average 32% more on their money had they been able to have it today to invest. See supra note 38. Thus, the maximum possible benefit to the class
with the bank that the class would pay the attorney's fees, the lawyers arguably stood to gain as much as $14 million on the same investment. The risk of ending up with no money due to the disgorgement remedies discussed above would have to exceed 64% for a risk-neutral actor to refrain from the conduct alleged in Hoffman.

from returning the surplus money would be ($42 million surplus * .32) = $13.44 million. To this must be added the back interest benefit. In a zero interest state, back interest would be $8.76 per homeowner. There were approximately 315,000 mortgage holders, so the total maximum back interest would be $8.76 * 315,000 = $2.76 million. Total economic benefit would then be $16.2 million (= $13.44 million + $2.76 million). Assuming a reasonable attorney fee is 33 1/3%, attorney's fees would be $5.4 million. We round this down to $5 million because we know there were mortgage holders who did not receive the maximum benefit because they lived in states that required banks to pay interest on their escrow accounts. We recognize that $5 million is still higher than a reasonable attorney's fee would probably be, but we use this generous figure to emphasize that even at this high rate, the incentives to engage in wrongdoing would be substantial.

The $14 million figure is based on the assumption that the lawyers reasonably could have assumed that they could get an award of one-third of the total escrow surplus of $42 million, see supra note 208, even though the court in fact awarded only 28%. See supra notes 36-37 and accompanying text. If we assume that the bank would not have assented to paying the $14 million in attorney's fees, then the bank stood to gain the $5 million in "reasonable" attorney's fees, see supra note 208, by agreeing to class counsel's attorney fee proposal to have the class pay $14 million in attorney's fees.

A risk-neutral actor is one who bases investment decisions only on expected values. See A. Mitchell Polinsky, An Introduction to Law and Economics 53-58 (2d ed. 1989). Risk neutrality may be a reasonable assumption if the class lawyer has a portfolio of lawsuits pending simultaneously, as many prominent class action lawyers do.

Assume that a class lawyer could obtain a settlement with 100% certainty if he requests that the bank pay $5 million in attorney's fees, and that if he requests $14 million in fees to be paid by class members there is some risk that the court will reject the settlement, leaving him with nothing. Assume further that the lawyer's costs, c, are less than $5 million, so that an honest lawyer would take the case, and that these costs are the same regardless of which settlement he proposes. The lawyer will propose the Risky settlement if:

$$P(14 - c) + (1 - P)(0 - c) > 5 - c,$$

where P is the probability that the court will accept the settlement. Solving for P, we get:

$$14P - cP + cP - c > 5 - c$$

$$14P > 5$$

$$P > \frac{5}{14} > .36.$$
But, as we have discussed, the risk of the class lawyers winding up with nothing is simply not that high. The Federal Judicial Center Study found only one case in which class counsel who agreed to a settlement got no recovery because the settlement was overturned and two cases in which attorney's fees were reduced, but not to zero.\(^2\) Thus, although there is no precise data available, the risk of having a settlement undone by collateral attack for inadequate representation, or vacated for some other reason, seems quite slim.\(^2\) Although we cannot offer a

\[64\%\] or lower.

Note that this analysis assumes that the lawyer faces no risk by proposing that the bank pay a $5 million fee. But if the bank would rather not pay this amount and can shop around for a lawyer who would accept a higher fee in return for a lower settlement, then the alternative to the risky fee might be zero (or negative if the lawyer incurred costs before making the decision to accept the settlement terms). This could significantly increase the likelihood of the lawyer's accepting the settlement. The lawyer now accepts the settlement if:

\[P(14 - c) + (1 - P)(0 - c) > 0.\]

Solving for \(P\) now yields:

\[14P - cP + cP - c > 0\]

\[14P > c\]

\[P > c/14.\]

Recall that we assumed \(c < 5\). If \(c = 1\), then \(P = .07\). Thus the settlement rejection rate would have to be over 93% for a rational lawyer to reject this deal.

\(^2\) See supra notes 180-187 and accompanying text. It is important to note that even when plaintiff firms are rebuffed in their attempts to be class counsel and their proposed settlements are rejected, they may still wind up with more than nothing. A recent example occurred in the California Micro Devices case discussed supra note 158 and accompanying text. Judge Walker, after rejecting the bid and the settlement of the Lieff Cabraser firm, and essentially accusing the firm of collusion, allowed the firm to serve as local counsel for the designated class counsel, at an hourly rate with the possibility of a multiplier. See Robert Ablon, Defrocked Lieff, Cabraser Back on Cal Micro Case as Local Counsel, The Recorder, May 14, 1996, at 4 available in LEXIS, Genfed Libarary, Pubs File. This is also another example of the judicial incentive problem discussed below. See infra Section II.C.

\(^2\) See generally 2 Newberg on Class Actions, supra note 172, § 11.64, at 11-176; 11-177 (discussing collateral attack on judgment and noting that “[t]here has been limited consideration of the nature and scope of collateral review of class action judgments,” also that the class action goal of conserving judicial resources might be lost if collateral review were too liberally allowed). Although Newberg states that the standard of review on collateral attacks is de novo, id., this becomes irrelevant if the case is returned to the judge who made the initial ruling, because there is little likelihood that the judge will overturn himself. The example of Judge Weinstein’s ruling in Ryan v. Dow Chem. Co. (In re “Agent Orange” Prod. Liab. Litig.), 781 F. Supp. 902 (E.D.N.Y. 1991), aff’d, 996 F.2d 1425 (2d Cir. 1993), cert. denied, 510 U.S. 1140 (1994), demonstrates the strong propensity of judges to reach the same outcome they did the first time around. In Agent Orange, a group of veterans and their family
precise estimate of the likelihood of lawyers winding up with nothing, it would seem that any reasonable estimate would be much less than the 64% that would deter a rational class lawyer from wrongdoing in our example.\footnote{To see how important the settlement acceptance rate is, return to our previous example. See supra note 211. Let $H$ be the collusive (high) rate (which we assumed was $14$ million above) and $L$ be the noncollusive (low) rate (which we assumed was $5$ million above), and assume $c=0$ for simplicity. The lawyer will accept the collusive fees if:}

\[
PH + (1 - P)0 > L,
\]

\[
PH > L,
\]

\[
H/L > 1/P.
\]

Equivalently, $(H - L)/L > (1/P - 1)$. The left-hand side is the minimum percentage increase over the noncollusive fee that the collusive fee would have to be for the lawyer to accept the settlement. For example, if the settlement acceptance rate $P$ is 99%, the collusive fee $H$ would need to be only 1% higher than the noncollusive fee $L$. If the settlement acceptance rate drops to 90%, the collusive fee would need to be only 11% higher. One can easily see that the temptation to sell out the class members would be very great given the likely values in our example.
an unrealistically high risk of disgorgement, say 10%, then damages of $76 million—more than treble damages of $42 million—would be necessary to deter rational class lawyers from the kind of conduct that appears to have occurred in Hoffman. If, however, the risk of having to pay treble damages increased just slightly to 16%, that would be sufficient to deter lawyer misbehavior. And actually, the risk of treble damages would not have to be that high because the award of treble damages is more likely to result in costs not typically a consequence of the disgorgement type remedies we have described. The collateral consequences we have in mind include a decreased likelihood of having a court approve one's bid to be class counsel in subsequent cases and some possibility of disciplinary action.

215 Let D be the damage measure and assume c=0 for simplicity. The lawyer would make or accept the high fee proposal if:

\[ 14P + (-D)(1 - P) > 5 \]
\[ 14P - D + DP > 5 \]
\[ D(1 - P) < 14P - 5 \]
\[ D < (14P - 5)/(1 - P). \]

If \( P = .90 \) (corresponding to a 10% risk of disgorgement), then the lawyer would accept the collusive fees for any damages less than $76 million.

Actual damages to the class would be the entire $14 million fee because the defendants ordinarily would have paid the class attorney's fees. Thus, treble damages would be $42 million: not enough to deter lawyer misbehavior.

216 Assume that the only two possibilities are that the settlement is accepted or that the lawyer is successfully sued in a subsequent action and again that costs are zero. The lawyer would make the high fee proposal if:

\[ 14P + (-D)(1 - P) > 5 \]
\[ 14P - D + DP > 5 \]
\[ P(D + 14) > 5 + D \]
\[ P > (5 + D)/(14 + D). \]

If actual damages are 14, so treble damages are 42, then the likelihood of having to pay these damages would have to be at least \( 1 - [(5 + 42)/(14 + 42)] \) or 16%.

217 To go back to our numerical example, the lawyer would not be deterred if \( P > (5 + D)/(14 + D) \). See supra note 216 Added costs are essentially like a higher damage payment. The higher D is, the closer to 1 the fraction would get; that is, the likelihood of successful misbehavior would have to get higher. Conversely, the probability of a successful action against the class lawyers \( (1 - P) \) necessary to deter lawyers \( [1 - (5 + D)/(14 + D)] \) would get closer to zero as D increased.

218 In malpractice actions in which the allegations amount to constructive fraud, courts may refer the matter to disciplinary authorities. See, e.g., Greycas, Inc. v. Proud, 826 F.2d 1560, 1568 (7th Cir. 1987), cert. denied, 484 U.S. 1043 (1988). On the implausibility of disciplinary action being taken against class counsel class counsel in the absence of the kinds of suits we propose, see infra notes 220-221 and accompanying text.
The lawsuits we propose would not only increase the size of the punishment assessed against misbehaving class lawyers, but would also increase the likelihood of punishment. The main reason is that treble or punitive damages, as well as attorney's fees, which are available in many of the suits we propose, provide adequate incentive for lawyers to discover and litigate instances of class action abuse. If serious challenges to collusive or otherwise illegal settlement deals are to be brought, we believe that they must be brought by attorneys, not pro se objectors. As the reader understands by now, class settlements are replete with complex terms and obscure formulas, and sophisticated proponents (class and defense counsel) are present at every fairness hearing and well-motivated to defend the deals they have cut. To encourage adequate challenges requires an examination, not of the incentives of class members injured by a corrupt deal, but of the lawyers who might act on their behalf.\textsuperscript{219} If we assume that attorney's fees in a subsequent treble damage action against the previous class lawyers would be about one-third of the award to the class, lawyers would have as much incentive to ferret out corruption, thereby deterring future misconduct, as class lawyers now have to engage in the corruption.

In theory, one could create the same incentive structure other ways. One set of solutions would involve attempting to increase greatly the chance of having collusive settlements rejected by trial courts or appellate courts. Theory, however, is one thing; practice, another. There is no chance in the real world that class settlements will ever be rejected at a high enough rate (recall that a 64\% rejection rate would have been necessary in our Hoffman-based example). Moreover, if courts rejected settlements that often, much of the incentive to spend time crafting good settlements would likely dissipate. One advantage of our solution is that an otherwise acceptable settlement, for example, one that enjoined a bank from keeping excessive escrow on deposit, could be left intact, while the fraudulent conduct associated with the settlement, like paying class counsel over 100\%
attorney’s fees, could be punished and deterred by an award of damages. An alternative solution would be to impose a high penalty on misbehaving class lawyers outside the liability system, namely through discipline. Again, however, there is no chance that misbehaving class lawyers will be disciplined with a high enough probability and a severe enough sanction to deter most misbehavior. Class members would often be ignorant of the wrong or reluctant to incur the time and expense of filing and pursuing a complaint.220 Disciplinary boards are notoriously underfunded and would be unable or reluctant to mount the effort needed to do battle with wealthy class action lawyers and powerful members of the defense bar.221 Moreover, it is in the institutional interests of the defendants’ bar and an influential subgroup of the plaintiffs’ bar (class action lawyers) as well as the judiciary—a matter we will discuss next—to promote the kinds of class action settlements we are criticizing here. To expect the disciplinary authorities to resist these interests to the degree necessary to deter significant lawyer misconduct—with absolutely no monetary incentive to do so—is simply wishful thinking.

So far, we have tried to show that allowing subsequent suits against misbehaving class lawyers—suits that are allowed against lawyers in any other context—would be the most effective meth-

220 See David B. Wilkins, Who Should Regulate Lawyers, 105 Harv. L. Rev. 799, 829 (1992). Much of the argument we use to support our thesis—that a fairness hearing on approving a class action settlement is a poor forum in which to regulate lawyer misconduct associated with class actions and that independent legal actions are needed to do that work—parallels the analysis set forth by Professor Wilkins in his excellent article.

221 Id. See also Charles W. Wolfram, Mass Torts—Messy Ethics, 80 Cornell L. Rev. 1228, 1234 (1995):

Professional discipline of class-action lawyers who have been suspiciously generous with themselves at the expense of the class is out of the question. Most disciplinary staffs are overworked and underfinanced and can rather readily be out-lawyered if the stakes are sufficiently high. Moreover, disciplinary counsel would have to take on the class-action bar in a matter already decided by the judge adversely to a possible prosecution.

For an example of this problem, see the discussion of the numerous difficulties the Texas State Bar faced in prosecuting ethics charges against John O’Quinn, a prominent plaintiff’s attorney, in Max Boot, The Untouchable Lawyer, Wall St. J., Feb. 1, 1996, at A18.
od for deterring the collusive behavior that the class action incentive structure encourages. Of course, allowing such suits would be costly and we must consider whether those costs might outweigh the benefits. But before we turn to the matter of costs, the matter of judicial self-interest has been long enough delayed. It is time to speak of judges.

C. Blind, Not Merely Blindfolded, Judges

Courts in class actions are supposed to fulfill the monitoring role that the client cannot. Ostensibly, the court stands in for the client as a fiduciary to ensure that the settlement is fair to the client and does not merely serve the lawyer’s interest. But this arrangement simply replaces one imperfect agent (class counsel) with another (the court). Although the court has no monetary interest in the settlement, its interests are not perfectly aligned with the interests of class members.\(^{222}\) Judicial self-interest may lead judges to seek power, prestige, and autonomy,\(^{223}\) or may lead them to seek greater leisure.\(^{224}\) Courts’ strong disposition toward settlements\(^{225}\) stems from both types

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\(^{222}\) The self-interested behavior of judges has only recently begun to receive serious scholarly attention. See Richard A. Posner, What Do Judges Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1, 3-4 & nn.3 & 4 (1993) (collecting articles analyzing judicial behavior from economic perspective). For a recent study of the role of judicial self-interest in issues such as court administration and bureaucracy, judicial salaries and habeas corpus reform, see Christopher E. Smith, Judicial Self-Interest: Federal Judges and Court Administration (1995).

\(^{223}\) See Smith, supra note 222, at 7. For example, Justice Scalia in his first major address to the ABA after being appointed to the Supreme Court, gave a speech in which he argued that the federal courts have lost their elite status because they are overloaded with too many, and in particular too many routine, cases. Id at 75-76.

\(^{224}\) See Posner, supra note 222, at 10 (“Because the judiciary has been placed on a nonprofit basis, we should expect that judges on average do not work as hard as lawyers of comparable age and ability.”)

\(^{225}\) See Coffee, supra note 7, at 714 n.121: Judge Henry Friendly observed that “[a]ll the dynamics conduce to judicial approval of [the] settlement[]” once the adversaries have agreed. See Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting), aff’d en banc by equally divided court, 340 F.2d 311 (2d Cir. 1965), cert. dismissed, 384 U.S. 28 (1966). Although the case law may require full and elaborate judicial review before a settlement is approved, it is doubtful that courts have much incentive to be very demanding. Their deferential attitude is probably best expressed by one recent decision which acknowledged that: “In deciding whether to approve this settlement proposal, the court starts from the familiar
of judicial self-interest: Settlements dispose of cases that do not involve "interesting" legal issues; and settlements clear crowded dockets with minimal court effort. Class actions magnify these effects, because the alternatives—trying the class action or, worse yet, trying the multitude of suits that make up the class action individually—are particularly burdensome alternatives. Either of those alternatives would take up significant court time and resources, and the second would have judges presiding over repetitive individual suits that they may view as boring, if not trivial. On the other hand, while presiding over a major class action settlement may entail a significant amount of work, a judge seeking power, and even prestige, could hardly do better than to preside over the settlement of such a suit. Moreover, while presiding over most class action settlements will not bring prestige or power, neither is it an onerous duty. The Federal Judo-

axiom that a bad settlement is almost always better than a good trial." In re Warner Communications Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985).


It is interesting to note that even Judge Posner, who is usually quite sensitive to the possibility of self-interested behavior, overlooked the extent of this problem in his recent Rhone-Poulenc decision. In re Rhone-Poulenc Rorer, 51 F.3d 1293 (7th Cir.), cert. denied, 116 S.Ct. 184 (1995). In overturning the district court's certification of a class action, he noted: "We do not mean to suggest that the district judge is engaged in a deliberate power-grab. We have no reason to suppose that he wants to preside over an unwieldy class action." Id. at 1299. But if the class action is likely to settle and the alternative is multiple individual suits, that may be exactly what the judge wants. Judge Posner did recognize the problem of judicial incentives in asbestos litigation, remarking that "[t]he number of asbestos cases was so great as to exert a well-nigh irresistible pressure to bend the normal rules." Id. at 1304. In our view, asbestos litigation is not the exception in this regard.

227 For example, Judge Weinstein, the judge who presided over the Agent Orange class action settlement, has received an enormous amount of attention and prestige due to his handling of that case. See, e.g., Peter Schuck, Agent Orange On Trial: Mass Toxic Disasters in the Courts 111-42 (1987) (describing Judge Weinstein's handling of this major litigation); Wayne Roth-Nelson & Kathey Verdeal, Risk Evidence in Toxic Torts, 2 Envtl. Law. 405 (1996) (discussing Judge Weinstein's views of scientific evidence in Agent Orange litigation); Wade Lambert, Peter D. Sleeth & Foster Church, Critics Call Lawsuits by Groups 'Rackets,' Portland Oregonian, Apr. 23, 1996 at B16. See also Implants: A Spark of Hope, The Detroit News, June 5, 1996, at A10 (discussing U.S. District Court Judge Pointer's handling of breast implant litigation); Jay Reeves, Unbiased Expert on Breast Implants Hard to Find, The Cincinnati Enquirer, June 7, 1996, at A20 (same).
cial Center's Study shows that the average fairness hearing takes up about 40 minutes of court time, putting aside the outlier class actions that involve more time but also have a greater chance of bringing prestige.\textsuperscript{228}

It is possible that trial courts' enthusiasm for settlement could be tempered by the possibility of reversal on appeal. One might think that appellate judges, one step removed from the mess of clogged dockets and the prospect of repetitive trials, have considerably less interest in approving every class settlement that a trial judge has accepted.\textsuperscript{229} But being one step removed also means that appellate judges are to a large extent necessarily dependent on the findings of the trial judge as to the fairness of the terms, the adequacy of the representation and the appropriateness of the request for attorney's fees. As a consequence of this distance, appellate courts review such matters under the abuse of discretion standard,\textsuperscript{230} which seems appropriate, but which also makes it easy for appellate judges to accept settlements. The question remains, however, what incentives, if any, would encourage appellate judges to ignore the possibility that trial judges routinely abuse their discretion in their haste to approve every class settlement—which is what we contend is going on. Empathy for the plight of lower court colleagues and

\textsuperscript{228} See FJC Study, supra note 180, at 169 (Table 19).

\textsuperscript{229} In some important cases appellate judges are not so removed from the negotiation of the settlement. In the \textit{Ahearn} case, the district judge appointed Judge Patrick Higginbotham of the Fifth Circuit as "settlement facilitator." Yet even the dissent, which objected to the district court's involvement in the settlement, stated that "there can be no criticism of Judge Higginbotham's role." In re Asbestos Litig. (Flanagan v. Ahearn), 90 F.3d 963, 1014 n.73 (5th Cir. 1996) (Smith, J., dissenting). The dissent can perhaps be forgiven for not wanting to criticize the role played by a fellow jurist. But the point is that, however honorable Judge Higginbotham's intentions and however effective his actions as mediator, it is hard to believe that his participation in the settlement (and the fact that the trial judge was now also a colleague on the court of appeals) did not influence the judgment of his colleagues on the Fifth Circuit who were asked to review the settlement agreement.

\textsuperscript{230} The abuse of discretion standard is the most deferential standard of review. "[A]ny rulings that are within the discretion of the trial judge will be reviewed under an abuse of discretion standard. . . . [which means that] [o]nly if an appellate court is convinced that the court below was clearly wrong will it reverse a discretionay decision." Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, Civil Procedure § 13.4, at 608 (2d ed. 1993). See, e.g., Saunderson v. Saunderson, 379 So. 2d 91, 92 (Ala. Civ. App. 1980); Keith Gas Co. v. Jackson Creek Cattle Co., 570 P.2d 918, 921 (N.M. 1977); Primm v. Primm, 299 P.2d 231, 235 (Cal. 1950).
a frustration with the apparent indifference of the public and politicians to what appellate and trial judges insist is an onerous workload seems to make appellate judges as fond, or nearly as fond, of class action settlements as trial judges. Appellate judges' own preferences for leisure may also play a role in their willingness to uphold class settlements approved by lower courts.

It is true that courts have an interest in promoting their reputation for fairness. That interest should encourage them to safeguard the interests of absent class members. At least so far, however, individual judges have little reason to expect negative reputational effects from approving bad class deals. The press...

231 Dean Mary Kay Kane of the Hastings College of Law, who served as Reporter for the U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation, a committee appointed by Chief Justice Rehnquist, testified at the Georgine fairness hearing that the judges on the Ad Hoc Committee were "very concerned" with cases "piling up . . . [and] clogging the court system." She testified that "they were concerned that not only were the courts being cluttered with criminal litigation, but now asbestos was coming in as a major piece of litigation. . . . The judges decided . . . not to "suggest to Congress that they were indeed legislating because that was not their task, and that it would be more prudent instead simply to write a report . . . to be forwarded to Congress setting out the history, the kinds of problems that were posed by asbestos litigation," . . . The judges, however, apparently thought it unlikely that Congress would make an active effort to pass comprehensive legislation. They were concerned that . . . [such legislation] "as a practical matter . . . simply wasn't going to happen."

Koniak, supra note 15, at 1148-49 (quoting from Kane's testimony at Georgine fairness hearing). See also Richard L. Marcus, They Can't Do That, Can They? Tort Reform Via Rule 23, 80 Cornell L. Rev. 858, 860-66, 902-04 (1995) (describing how the "substantive preferences" of federal appellate and trial judges for reform of state tort law may be interfering with the duty of those judges to protect the legal rights of absent class members). Professor Marcus's point parallels our own, although what he labels "substantive preferences," we see as "preferences" for fewer cases and less work. In any event, we agree that trial and appellate judges have interests that may make them poor guardians for absent class members.

232 See Posner, supra note 222, at 21 (discussing variety of devices used by appellate judges that enable them "to reduce their work as well as to avoid the hassle involved in wrestling with difficult, politically sensitive issues").

233 A good example of judicial attitudes toward settlements in class action cases as well as toward the fairness hearings objecting to these settlements can be found in Hoffman. The class lawyers put on the testimony of an accountant who argued that if the class members had taken their refunds and applied it to reduce the principal of their mortgages or to reduce high-interest credit card debt, the "benefit" to the class could be in excess of the "surplus" (the class members' money, recall) wrongly held by the bank. Hoffman, Fairness Hearing, supra note 35, at 17-22. On
and academia have imperfect access to class settlements, a problem the legislation we have proposed and Senator Cohen has introduced is designed to help remedy.\textsuperscript{234} Even when settlement documents are readily accessible, they are likely to be so lengthy and complex that sorting out what happened is very difficult. Class settlements are, if nothing else, heavily-lawyered affairs, and discerning fraud through reams of legalese drafted to conceal any such activity requires effort few reporters, few lawyers and few academics have thus far made. To the extent the general public, media or academics blame anyone for the abuse they perceive, albeit find difficult to document, that blame tends to land on the doorstep of lawyers, not the judiciary. We believe too that judges may, in part, have escaped their share of responsibility for whatever class action abuse exists because criticizing judges for self-interested behavior—turning a blind eye to facts that would be discomforting for them to see—is considered by many to be as profane as accusing the Pope of a lecherous eye, a charge well-nigh outside the bounds of civilized discourse.\textsuperscript{235} And we believe judges understand all of this, which

cross-examination, the Florida Attorney General, Hoffman (no relation to the named plaintiff), tried to make two points: first, that the accountant’s calculations were based on an average length of time remaining on mortgages that did not take into account the possibility of refinancing; second, that using the refund to pay down the principal on a class member’s mortgage was not the default, or even a recommended, usage, and was therefore unlikely to occur and should not be presumed. Id. at 22-34. The court responded to this line of inquiry as follows:

Mr. Hoffman, I don’t know how you all do it in Florida, but we’re not going to sit around here all day and ask inane questions. I’m not interested in—if this is the best settlement for the class, what they can do with the money or can’t do with the money is immaterial to the issue of whether or not they are getting the best deal. What I want you to do is get to the point and let’s get on with it.

Id. at 30. Perhaps if the judge had known that the Hoffman settlement would wind up being publicized to the degree it has, he would have been more judicious in conducting the hearing.

\textsuperscript{234} See supra notes 106-109 and accompanying text.

\textsuperscript{235} See Posner, supra note 222, at 25-26 (referring to “the piety in which the public discussion of judges is usually wrapped” as one reason people have not considered self-interested interpretation of judicial behavior). While some other academics have pointed out the judiciary’s self-interest in approving class actions, which have all the markings of a sell-out, most soften the point by either suggesting that the problem is limited to a few “lazy or overworked judge[s],” Wolfram, supra note 221, at 1233, or by suggesting that the “preferences” of judges are preferences worthy of respect and that only in cases of extreme system overload will judges allow these preferences to override the rights of absent class members or otherwise distort the law. Marcus,
means that they would see little risk of negative reputational effects from approving a class settlement that looks amazingly like a collusive deal, or a settlement that suggests questionable conduct under the antitrust laws.

Even more important, courts worry not only and perhaps not chiefly about their reputation among the general public, but about their reputation with their peers—other judges and lawyers. Accepting a settlement that clears the dockets of one's colleagues is very likely to win one praise from those colleagues as well as gratitude from the lawyers presenting the deal; rejecting such a settlement, on the other hand, may subject the judge or panel of judges to not-so-subtle rebuke from colleagues. That judge or panel may expect to suffer negative reputational effects from the lawyers involved in the deal as well as other lawyers who see the rejection as bad news for deals they might someday advance.

In addition to self-interest, the judicial habit of neutrality may lead judges to accept class action settlements too readily. The traditional paradigm of judging is that of a neutral arbiter, rather than partisan or protector. In a fairness hearing, this paradigm may interfere with the court's role as guardian of, and fiduciary for, the class members. What could seem more "neutral" than accepting a settlement agreed to by both sides? And what could seem less neutral than rejecting a settlement on the ground that one side, the class members, got a raw deal? While the judiciary's obligation to protect absent class members seems too weak to break through the paradigm of "neutrality" the judiciary's fondness for settlements does not. All too often judges appear to be acting as advocates for the settlement itself, a troubling role for a guardian who is supposedly there to ensure that the settlement, arrived at without the actual consent of

supra note 231, at 904, 907-08.


237 It is also quite plausible that in states in which the judiciary is elected, such as Alabama (where Hoffman occurred), this "gratitude" will take the concrete form of campaign contributions to help finance the judge's reelection bid.

238 See Koniak, supra note 15, at 1116-17, 1119 (describing courts' reluctance to suggest that lawyers before them colluded or otherwise broke the law in connection with a class settlement or any other matter); see also supra notes 152-158, 212 and accompanying text.
absent class members and in some cases over their objections, is good for the class and not just the judicial system or the lawyers. For the reasons given in this Part and those expressed earlier on the defects inherent in the fairness hearing procedure, it is predictable that courts would be generally unreliable monitors of class counsel's performance and ineffective protectors of class members' interests.

By arguing that judicial incentives and not just the procedure in fairness hearings make judges ineffective monitors of class action abuse, however, we raise the following problem for ourselves: Perhaps judges will be as hostile to the later suits we propose as they are to stopping class action abuse ab initio. Unfortunately, there is some evidence that this is true, and

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239 See Marcus, supra note 231, at 900 (arguing that the judicial policy in favor of settlements should not be imported wholesale into the class action arena).

Some commentators have noted that too little attention has been paid to the potential problems created when judges involve themselves in the dynamics of class action settlement negotiations and then purport to judge the fairness of settlements they have helped to create. See, e.g., Carrie Menkel-Meadow, Ethics and the Settlements of Mass Torts: When the Rules Meet the Road, 80 Cornell L. Rev. 1159, 1183 (1995) ("The Code of Judicial Conduct provides little guidance, and few standards in the rules or cases set limits on when a judge should refrain from examining the fairness of a settlement he has helped broker.") (footnote omitted). This problem seems ripe for more serious attention, however. Compare In re Asbestos Litig. 90 F.3d 963, 989 (5th Cir. 1996) (finding that the district judge did not need to recuse himself from deciding the fairness of the settlement because his involvement was "insubstantial") with id. at 1013-1015 (Smith, J., dissenting) (arguing that the judge should have recused himself because he "had a personal stake in finding [the settlement] to be fair," and because the settlement negotiations took place before any lawsuit had been filed).

240 The courts' self-interest in settlement would not be entirely eliminated. Courts might surmise that allowing the kinds of suits we propose to succeed could result in a higher future caseload by deterring class action settlements. And entertaining subsequent suits would entail at least an indirect finding that the court should not have approved the class settlement, a finding courts might be loath to make.

241 For example, in Diaz v. Sheppard, 85 F.3d 1502, 1506 n.5 (11th Cir. 1996), although the court remanded to state court, on the ground that removal was improper, the plaintiff's malpractice action against class counsel who purported to represent him in settlement of a federal class action, the appellate judges could not refrain from adding: "We have read the dissent [arguing against recognition of a malpractice claim against class counsel] and personally would not be sorry if the law compelled the result Judge Logan advocates for this case." Notice that while two appellate judges were able to resist such a broad holding, they could not refrain from expressing their desire for such a rule and one judge was ready to put in place a complete ban on such actions. The majority stressed that they were not deciding the merits of the malpractice claim. Id. at 1505.
one of our aims is to make judges more aware of the interests they might have before they too quickly block this path to deterring class action abuse. But aside from our hope that this Article will help forestall judges from dismissing these later suits without adequately considering the benefits thereby lost, there are other reasons to believe that judicial self-interest will play less of a role in the later suits we advocate than in the initial approval of class settlements. First, interfering with these suits would require, as we shall endeavor to show, some major rewriting of longstanding doctrine on res judicata, collateral estoppel and/or the constitutional protections afforded absent class members. Second, the suits we propose are less of an interference with class action settlements than rejecting class settlements would be. A settlement can be left intact, while damages are awarded for malpractice or fraud, for example, committed on the class in the course of the representation. Third, should injured class members and others (e.g., the Justice Department in the case of an alleged antitrust violation) be allowed to maintain the suits we propose, a jury would be available to assess whether wrongdoing had in fact occurred, which distinguishes our suits from fairness hearings or independent actions for fraud under rules like Federal Rule of Civil Procedure 60(b) in which the fact-finder is a judge. If juries, who we have no reason to believe are biased in favor of class settlements, were allowed to decide what conduct by counsel breached legal duties to the class or otherwise violated the law, we believe that alone might

_Diaz_ is not the only evidence that the “anything goes” attitude might interfere with the later suits we propose. In Kamilewicz v. Bank of Boston, 92 F.3d 506, 512 (7th Cir. 1996), the case spawned by the escrow class action described in Section I.A.1. of this Article, the unanimous panel justifies its holding that a federal suit against the class lawyers and the bank for conduct in a state court class action cannot be maintained in federal court, in part, on the ground that such a suit “could have ramifications far beyond this case.” And in **In re VMS Limited Partnership Sec. Litig., 976 F.2d 362, 369 (7th Cir. 1992)**, the court in denying the plaintiffs’ attempt to appeal the district court’s approval of the class settlement, mentions that the plaintiffs may have other remedies (presumably a suit against class counsel) but refuses to elaborate because it might “encourage one or more avenues of alternate litigation.” This last quotation made us consider calling this Article or some section of it, “The Suits That Dare Not Speak Their Name,” but, having no desire to encourage such judicial squeamishness, we elected not to.

242 See infra Sections III.B.,C.
243 See infra text and accompanying note 286.
help restore some public confidence in the class settlement process deemed so essential by judges and other interested observers. That result might serve at least the long-range interests of judges and everyone else in the country too.

D. The Costs of Allowing Later Suits

Having set forth the need for subsequent suits against lawyers involved in class actions, we need to consider the costs of these suits. One set of costs that we may readily dispose of is the potential loss of public confidence in the legal system that later suits might occasion. Indeed, we have just argued that our suits might restore public confidence. Nonetheless, it is true that the lawsuits we propose all imply that the court which approved the class action settlement failed to protect the class in some important respect. The question is whether the gain we have outlined in reduced corruption outweighs any loss in public confidence that might follow from regular admissions by the court system that, as guardians in class actions, judges often leave much to be desired. That question, however, assumes that there is some level of public confidence present to be eroded; it is not at all clear that this is so when it comes to class actions.

Outside the class action arena the public is quite comfortable with the availability of malpractice actions against lawyers. Moreover, as we have already suggested, allowing juries of ordinary citizens to judge the behavior of lawyers should serve in the class action context, and we believe does serve in ordinary malpractice suits, to enhance public confidence in the legal system, not to diminish it. We assume that most citizens would be appalled by a legal system that would immunize lawyers for wrongdoing that they somehow slipped past a judge, and would applaud efforts to hold those lawyers accountable for their misdeeds. In short, a judicial system willing to admit and provide some redress for the

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244 The public's attitude toward class actions may be summed up by a recent comic strip in which an enterprising lawyer awakens an unsuspecting person and announces, "Good Morning, Sir . . . My Name is Bernard, and I'll be your attorney for today. May I suggest starting with our special class action lawsuit against a major manufacturer?" After getting rid of the lawyer with a perfunctory "Sure, what the hell," the homeowner returns to bed exclaiming, "Wake me when the nineties are over . . ." Wiley, Non Sequitur, The Daily Progress (Charlottesville, Va.) Jan. 21, 1996.
wrongs everyone seems to understand are now tolerated by the system would inspire more, not less, confidence.\footnote{Moreover, we do not believe that procedural rules against relitigation are actually or appropriately aimed at bolstering public confidence in the courts, particularly if those rules prevent the unearthing of corruption or illegality connected to previous court process. Writing in praise of Justice Traynor for having boldly extended the ban against relitigating issues in subsequent proceedings, see Traynor’s landmark decision in Bernhard v. Bank of Am. Nat. Trust & Savings Ass’n., 122 P.2d 892 (Cal. 1942), Professor Geoffrey Hazard scorned the idea that the rule could be justified as a means of inspiring public confidence in the judiciary: “Res judicata doctrine has little direct relevance to maintaining ‘public confidence’ in the courts. Whatever the number and significance of the elements that instill such confidence, a more or less inhibiting relitigation rule is surely minor compared to such problems as corruption, delay and inconsistency.” Geoffrey C. Hazard, Jr., Res Nova in Res Judicata, 44 S. Cal. L. Rev. 1036, 1041 (1971). Nor do the antitrust immunity doctrines we discuss below have anything to do with promoting or maintaining public confidence in courts or other government agencies.}

A second set of costs associated with subsequent suits against class action lawyers involves the transaction and institutional costs of further litigation, the costs of encouraging satellite litigation generated by an earlier suit. But restricting the availability of subsequent suits to save these costs seems particularly unpersuasive.\footnote{It also seems unrelated to the purpose behind the policy against relitigation. These concerns could be used to justify or condemn any procedural rule, which leads us to believe that some more specific social benefit undergirds the rule against relitigation. As Professor Hazard put it: “The burdens of time and inconvenience involved in a policy which liberally allows relitigation are minuscule when compared with those burdens now imposed by elaborate discovery and pre-trial procedures, prolonged trials, and multiple appeals.” Hazard, supra note 245, at 1041.} Conserving court time and decreasing the transaction costs of parties are reasons that have already been used, so to speak, to justify both the class action device and the power of a court to bind absent class members to what is essentially a contract drawn up by lawyers they never hired and the defendant who allegedly caused the class harm. Those cost-saving devices themselves often produce significant costs—costs imposed on the class itself, the original aggrieved party. The subsequent suits we propose are designed to correct for that unjustified result.

There is no reason to expect subsequent suits to cancel all the cost savings legitimately realized by the availability of class action suits or procedural devices that encourage their settlement. Given the fact that the suits we propose impose no novel obliga-
tions on lawyers, and that they would entail great difficulties of proof as well as being significantly costly to maintain, we are confident that courts would not be flooded with subsequent suits.\footnote{247} To conclude that subsequent suits of the type we propose would kill off all cost-saving benefits of class action settlements, one must assume either that all class actions are corrupt or otherwise unlawful; or that the procedural devices to prevent frivolous suits are so inadequate that we can no longer afford to recognize long-standing causes of action, such as malpractice, breach of fiduciary duty or antitrust violations. We reject both those possibilities.\footnote{248} If we are wrong, and corruption or illegality permeates every class action settlement, then ending such settlements is a good idea. And, if the rules on frivolous suits are so weak that later suits threaten good settlements as well as bad ones, then the rules designed to deter frivolous suits are the

\footnote{247} The Connecticut Supreme Court recently reached the same conclusion in a case in which the court allowed a claim for malpractice arising out of a divorce settlement. Grayson v. Wofsey, Rosen, Kweskin & Kuriansky, 646 A.2d 195 (Conn. 1995). In rejecting the defendants' assertion that allowing such suits would open the floodgates, the court responded:

[W]e have no reason to believe that our resolution of the defendants' claim will prompt an increase in malpractice suits against attorneys because, in declining to narrow the existing common law remedy for attorney malpractice, we create no new claim or theory of recovery. Moreover, as the New Jersey Supreme Court has recently stated in response to the same concern expressed by the defendants here, "plaintiffs must allege particular facts in support of their claims of attorney incompetence and may not litigate complaints containing mere generalized assertions of malpractice. We are mindful that attorneys cannot be held liable simply because they are not successful in persuading an opposing party to accept certain terms. Similarly, we acknowledge that attorneys who pursue reasonable strategies in handling their cases and who render reasonable advice to their clients cannot be held liable for the failure of their strategies or for any unprofitable outcomes that result because their clients took their advice. The law demands that attorneys handle their cases with knowledge, skill, and diligence but it does not demand that they be perfect or infallible, and it does not demand that they always secure optimum outcomes for their clients.\footnote{248} In Grayson the Connecticut Supreme Court rejected an argument by the defendant lawyers that allowing malpractice suits would discourage settlements: "Because settlements will often be in their clients' best interests, we harbor no doubt that attorneys will continue to give advice concerning the resolution of cases in a manner consistent with their professional and ethical responsibilities." Id. at 200. If malpractice suits against class action lawyers were allowed, we believe the same would hold true for them. For a further discussion of Grayson and similar cases, see infra notes 321-323 and accompanying text.
problem, not our proposal, and those rules should be strengthened—a course of action we support.249

Others may object to our proposal on the ground that the lawyers who bring the subsequent suits against the class lawyers or defendants will face the same incentive problems and, therefore, could be liable themselves in yet another round of subsequent suits. Our response to this objection is threefold. First, the same potential exists for lawyers outside the class action setting who represent plaintiffs in legal malpractice actions. And we assume that no one would advocate eliminating lawyer malpractice actions for this reason.250 Second, allowing our suits should deter both misconduct in the original class action as well as misconduct in the malpractice class action. Third, we believe that when a lawyer brings a malpractice suit, he is ordinarily acutely aware that he must himself be well-nigh beyond reproach. In fact, malpractice suits against malpractice lawyers are extremely rare birds.251

Finally, having addressed some of the costs of allowing the suits we advocate as a remedy for class action abuse, we want to encourage other "reformers" in this area to do the same.

249 Indeed, although we do not believe these rules are so weak as to be useless, we do believe that they should be stricter. See, e.g., Geoffrey C. Hazard, Susan P. Koniak & Roger C. Cramton, The Law and Ethics of Lawyering 414-17 (2d ed. 1994) (detailing the debate over sanctioning lawyers for filing frivolous cases).

250 See Wilkins, supra note 220, at 830-35 (discussing costs and benefits of malpractice actions compared to other methods of attorney regulation).

251 For an example of lawyer misbehavior in a malpractice suit that occurred in somewhat unique circumstances and resulted in sanctions under Fed. R. Civ. P. 11, see Jackson v. O'Hara, Ruberg, Osborn & Taylor, 875 F.2d 1224 (6th Cir. 1989). In that case, a lawyer for the plaintiff in a wrongful death action against a truck driver and his employer brought a malpractice suit against the employer's lawyers after obtaining an assignment of this supposed claim from the truck driver. The lawyer for the plaintiff was sanctioned because the employer's lawyers had refused to represent the truck driver in the wrongful death action, which the plaintiff's lawyer could have discovered by reasonable inquiry, because the truck driver had not suffered any damages that could be proved in a malpractice claim, and because the plaintiff's lawyer had filed the malpractice suit for improper purposes. Id. at 1230-31. Needless to say, this is not a typical malpractice case.
E. The Inadequacy of the Current Proposal to Amend Rule 23

As we were revising this Article in April 1996, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States approved for publication and comment revisions of Rule 23 recommended by the Advisory Committee on Civil Rules. Although we doubt that any reform of Rule 23 would obviate the need for the types of suits we propose, we feel compelled to add a few words about the reforms that have been proposed for those who would like to believe that procedural reform is a more promising and less costly solution than subsequent suits. We have two general responses to the Committee’s proposed revisions. First, both the substance of the revisions and the process leading up to their adoption support our assertions about the incentives of all the players in the class action game to advance their own interests at the expense of class members. Second, and related, the specific changes made by the revisions would actually make matters worse for class members and therefore make our proposed subsequent suits more, rather than less, necessary.

Most notably, Proposed Rule 23(b)(4) broadly licenses courts to certify for settlement purposes class actions in which the defendants and some plaintiffs’ lawyer (unappointed and unsupervised during the negotiation process by any judge) have agreed, prior to the filing of a class action in court, to settle some set of cases that might otherwise not qualify to be tried as a class action. The proponents of this provision are adamant in their

252 Preliminary Draft, supra note 11.

253 We do not address all aspects of the proposed revisions here. Some parts of the Committee’s proposal seem innocuous enough to us and may even do some good; for example, proposed Rule 23(f) makes appeal of a district court’s decision to grant or deny class certification more readily subject to judicial review. Other reforms we support are suggested in the Committee Note accompanying the Rule, but not in the Rule itself. See id. at 53 (“One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement.”). On the danger of using committee notes to make substantive changes or additions to the text, see Laurens Walker, Writings on the Margins of American Law: Committee Notes, Comments, and Commentary, 29 Ga. L. Rev. 993 (1995) (courts should give little if any weight to commentary).

254 Proposed Rule 23(b)(4) reads: “An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement
assertion that this change is "minimalist," arguing that so-called settlement class actions are old-hat and that this provision is designed to do no more than clarify that such actions are proper in light of the Third Circuit's decisions in *Georgine* and *GM Truck*, which suggest that settlement classes are not sanctioned by Rule 23. Even if the claim of modest revision were true, it is no answer to the argument that such settlement class actions, old or new, are particularly prone to abuse—a point that the proponents of this Rule do not dispute or address.

Even though the requirements of subdivision (b)(3) might not be met for purposes of trial." *Id.* at 41-43.

255 Draft Minutes in Preliminary Draft, supra note 11, at 35. See also Committee Note in Preliminary Draft, supra note 11, at 44 (amendments are "modest").

256 See Committee Note in Preliminary Draft, supra note 11, at 51:

Subdivision (b)(4) is new. It permits certification of a class under subdivision (b)(3) for settlement purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 170-171, 173-178 (5th Cir. 1979). Some very recent decisions, however, have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768 (3d Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.

257 It is debatable whether the provision recognizes something old-hat or not. Although courts have been considering the fact of settlement for some time in deciding whether to certify a class, See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 170-71, 173-78 (5th Cir. 1979), one could argue that those decisions stand for nothing more than the quite sensible proposition that in cases in which no party has contested whether a class meets Rule 23's requirements for certification (because the parties have agreed to settle) the court can say no more than that the class appears to be certifiable, but that judgment is necessarily contingent on the settlement because no one has argued any differently. That statement is quite different than what the court in *Ahearn* said and the court in *Georgine* was invited to say, which is that a class that could not be certified for trial may be certified for settlement. This arguably "new" statement raises problems that the "old" statement does not.

258 According to the unofficial Committee minutes, one Committee member warned that settlement classes "offer a bribe to plaintiffs' counsel to take a dive and sell res judicata" and offered that "Professor Jack Coffee's views on this subject are sound." Draft Minutes in Preliminary Draft, supra note 11, at 35. The only response to this point noted in the minutes was that "[c]lass members will opt out if the settlement represents a bargain to sell res judicata on terms favorable to the defendant." *Id.* at 36. We note that the proposed Rule 23(b)(4) does not explicitly guarantee opt out rights, though the Committee Notes insist they are preserved. See Committee Note, in id. at 51. Nor does it include any reforms to ensure that class members will have
Class actions that can be settled, but not tried, are particularly prone to abuse because they invite defendants to shop around for the plaintiffs' lawyer who will sell out the class at the cheapest price. Although most class actions are settled anyway, licensing settlements when no class action trial is possible gives all the leverage in the settlement negotiation to one side, the defendant. The would-be class lawyer cannot threaten to bring the case to trial. If he walks away from the settlement negotiation, he gets at most the fees for handling the individual clients who have actually retained him, assuming he settles or successfully tries those cases. But rejecting a defendant's inadequate settlement on behalf of the inchoate class makes him automatically ineligible for any class attorney's fees. The next lawyer who sits down and cuts the deal gets those fees.

Moreover, the proponents of this provision acknowledge that it does make one change from current practice. The new provision—at least as interpreted by the Committee Note—demands that a settlement be fully in hand and agreed to before lawyers can request (b)(4) status for the inchoate class. Although the Advisory Committee Note states that this requirement gives added protection for the class, we believe that the opposite is true. Contrast the Committee's approach with an alternative: that settlement class status would be granted only to those lawyers whom a court had both appointed for the purpose of negotiating the settlement on behalf of some set of people, and had monitored during the negotiation process through some agent sufficient information to make a rational decision whether to opt out. The Committee defeated a motion to omit any reference to settlement classes in the revised rule by a vote of 8 to 5. Committee Note, in Preliminary Draft, supra note 11, at 51.

259 See supra notes 231-239.

260 See Letter from Steering Committee to Oppose Proposed Rule 23, to the Hon. Alicemarie Stotler, Chair, Standing Committee on Rules and Procedure 5 (May 28, 1996) (on file with the Virginia Law Review Association). Professor Koniak played a leading role in organizing the "Steering Committee," and along with Professor Cohen and over 140 other academics signed the letter.

261 "Certification is not authorized simply to assist parties who are interested in exploring settlement, not even when they represent that they are close to agreement and that clear definition of a class would facilitate final agreement." Committee Note in Preliminary Draft, supra note 11, at 52. This limitation does not explicitly appear in the text of the Rule itself, but the Committee believes it implicit in the use of the phrase "parties to a settlement," because it rejected the insertion of "proposed" before "settlement." Draft Minutes in Preliminary Draft, supra note 11, at 37-38.
or device. That alternative (which we are not championing because of our extreme doubts about the entire concept of settlement classes but which we set out to make a point) would demonstrate that the judges and others who were responsible for writing these rules were taking the risk of abuse seriously, instead of merely promoting class settlements at any cost. The approach of the Committee, however, ensures only that abuse will be more difficult to ferret out because all the action will take place off-stage, so to speak. The new come-with-settlement twist may protect defendants from coerced settlements, as the Minutes of the Advisory Committee suggest was the drafters' intent,262 in contrast to what the Committee Note says about protecting the class, but it leaves class members only more vulnerable.263

Draft Minutes in Preliminary Draft, supra note 11, at 38:
A later motion to reconsider proposed (b)(4) to add "proposed," so that it would recognize a request for certification by the parties to "a proposed settlement." [sic] It was objected that this change would encourage certification that could coerce settlement, based in part on the fear that the certification might be carried forward to trial of an unmanageable class. Certification for settlement purposes should not be available merely because the parties "have an idea about settlement." The motion failed with 2 supporting votes and 11 opposing votes.

The Committee Notes offer no clue as to how proposed Rule 23(b)(4) might benefit class members. The only suggestion in the Draft Minutes is the following: Clients are better off, particularly when the defendants have insurance. Settlement also has the advantage of treating alike people who, although similarly situated, would be treated differently in separate actions. Choice-of-law, differences in local courts and procedure, problems of proving individual causation, and the like ensure disparate treatment if class disposition is not available.

Draft Minutes in Preliminary Draft, supra note 11, at 36. It is not clear to us how the presence of insurance makes settlement classes more desirable for class members. Differences in applicable law, local courts and procedure seem to be the essence of our federal system, and it is odd in this era of "devolution" that the one area in which citizens should be thought to prefer national (or, to use class action jargon "global") solutions is class actions. Finally, difficulties of proof may lead some "class members" to favor a settlement class (though even that depends on what the alternatives are), but others who do not face these difficulties would oppose it. The idea that "the class as a whole" would be better off is far from obvious. In fact, the Committee Notes themselves recognize this problem:
Definition of the class also must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interest among people who are urged to form a single class.

Committe Notes in Preliminary Draft, supra note 11, at 53. It is reasonable to ask,
The proposed amendments include only one change specifically designed to address the problems of collusive or otherwise illegal conduct associated with class action settlements: Rule 23(e) would be amended to require that courts hold fairness hearings before approving a settlement—something courts already do as a routine matter. The Advisory Committee decided not to include in the Rule any specific suggestion, much less a requirement, that trial courts appoint special masters or guardians. The Committee did not even include such a requirement or encouragement for those class actions in which no objectors appear to present an adversarial view of the settlement. Nor did the Committee do anything to ensure that objectors who do show up have easier access to the information needed to mount a plausible challenge, although the Advisory Note recognizes this is a problem without suggesting any solutions. The Committee declined to set forth factors to guide (and possibly constrain) a trial court’s discretion in approving a settlement, included no mention in the Notes or the text of the Rule of the signs that might indicate collusion, and—in what we can only call an excess of diplomacy—refrained from identifying a greater chance of collusion as one of the “special risks” associated with settlement classes. In short, despite the Committee's reservations, whether the Committee really thought that Rule 23(b)(4) would redound to the benefit of class members.

Given these reservations, whether the Committee really thought that Rule 23(b)(4) would redound to the benefit of class members.

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264 Committee Note in Preliminary Draft, supra note 11, at 54.
265 The Committee specifically rejected a “special master provision” recommended at a prior meeting. Draft Minutes in Preliminary Draft, supra note 11, at 38-39. The Draft Minutes also make reference to an “independent counsel [who] might be appointed to assist in evaluation of a proposed settlement,” but only to state that the Committee has not “considered the question” of whether such an independent counsel might be desirable. Id. at 35.
266 See Committee Note in Preliminary Draft, supra note 11, at 54 (“A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared.”)
267 Id. at 52.
268 The Draft Minutes record that someone proposed an option “amending [Rule 23(e)] to include the list of factors for reviewing settlements recommended by Judge Schwarzer in his Cornell Law Review article.” Draft Minutes in Preliminary Draft, supra note 11, at 35 (referring to but not citing, William W. Schwarzer, Settlement of Mass Tort Class Actions: Order Out of Chaos, 80 Cornell L. Rev. 837 (1995)). Nothing more is said about this (or any other similar) proposal.
269 Id. at 52.

For all the potential benefits, settlement classes also pose special risks. The
Under Cloak of Settlement

mittee's understanding that "[t]here is evidence that some state court judges are simply rubber-stamping class settlements," the Committee recommended no substantial steps to address abusive settlements; instead, it approved in Proposed Rule 23(b)(4) a broad new provision encouraging so-called settlement class actions—class actions that can be settled but could not be tried. If ever there were a provision that seems tailor-made to meet the interests of judges in encouraging class settlements and the interests of lawyers and defendants who would short-change the class for their own gain or violate other laws designed to protect the public, like the antitrust laws, Proposed Rule 23(b)(4) is it. What the proposed amendment does do is ensure that the time and resources of judges will be taxed as little as possible, while preserving the possibility of a judge garnering prestige for having presided over some gigantic settlement that solves some overwhelming problem of personal injury inflicted by some defendant's product or practice. The Proposed Rule also ensures that abuse will flourish.

Along with over one hundred other law professors, we urged the Standing Committee to reject this rule and demand that the Advisory Committee come up with a more responsible draft, but the pleas of academics had no discernible effect on the Standing Committee's membership. We still hope that the settle-

court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, or was shaped by a settlement agreement worked out even before the action was filed.

Draft Minutes in Preliminary Draft, supra note 11, at 38. Notice that the Committee made up largely of federal judges acknowledged this evidence as to state judges, but not as to their own colleagues.

Some members of the Committee acknowledged this problem as well. See id. at 35 ("Opposition to [approval of settlement class provision] was expressed on the ground that it might encourage judges to certify classes simply in the hope that a settlement would clear the docket."). As with other objections, this one was ignored.

Letter from Peter G. McCabe, Secretary, Standing Committee on Rules of Practice and Procedure, to Susan P. Koniak, Steering Committee to Oppose Proposed Rule 23 (July 2, 1996) ("Although there was some disagreement [at the June 19-20
ment class provision will be rejected after the public comment period, but given our assessment of the institutional interests at play we are not confident that reason will prevail. Yet however dangerous we view the proposed rule to be, our main point is that for those who expect procedural reforms to check the abuse that we have described and somehow make unnecessary the suits we propose, we submit that the current state of procedural "reform" and the apparent priorities of the rule-makers makes that expectation a long shot and the suits we propose more necessary.

III. WHERE ESTOPPEL STOPS

The later suits we have proposed are novel. To our knowledge, no successful malpractice suit has ever been brought against class action lawyers, though as of this writing several are pending.274 There are several possible explanations for this phenomenon. One is that the malpractice elements of causation and damages, always difficult to prove, would be especially difficult in the class action settlement context.275 But that is not always the case. We focus in this Part on a second possible reason for the lack of such suits: Lawyers considering bringing such suits fear that they would be barred by claim or issue preclusion, or some similar procedural doctrine. We have been able to find only a handful of opinions that address the question of whether malpractice suits can be brought against lawyers involved in class action settlements. Some cases simply take it for granted that such suits are viable without discussing the question in any detail.276 A few courts have held such suits are

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274 Note that we are limiting our inquiry to suits against class counsel who agree to settlements that a court approves. Other suits against class counsel are possible. For a recent example, see Mark Hansen, A Drive to Stifle Litigation, 82 A.B.A. J. 22 (June 1996) (describing recently filed malpractice suit by Chrysler against lawyer who had filed a class action suit against it on the grounds that the class lawyers had previously represented Chrysler and used confidential information about Chrysler to launch the class action).


276 Diaz v. Sheppard, 85 F.3d 1502 & n.2 (11th Cir. 1996) (holding that a state law
barred by one of the relitigation doctrines.\textsuperscript{277} A few other cases have held such suits to be maintainable, and have either explicitly or implicitly rejected defenses based on the doctrines against relitigation.\textsuperscript{278} We argue in this Part that the doctrines barring relitigation do not and should not apply to the suits we propose. Courts that have barred these suits have done so by playing fast and loose with the elements and purposes of these doctrines.

\textbf{A. The Reasons for the Rules against Relitigation}

Before delving into doctrinal detail, we begin by asking what purposes undergird the rules against relitigation, and whether we risk jeopardizing those purposes with our proposal. Although the answer may seem counterintuitive or even shocking, the rules against relitigation confer substantial, efficient and legitimate social benefits by leaving most wrong verdicts in place. In general, our procedural system rejects relitigation as a method of correcting court decisions that simply get it "wrong"; that is, decisions in which the found facts supporting

\textsuperscript{277} Kamilewicz v. Bank of Boston Corp., 92 F.3d 506, 512 (7th Cir. 1996) (Rooker-Feldman doctrine bars claims); Golden v. Pacific Maritime Ass'n, 786 F.2d 1425 (9th Cir. 1986); Laskey v. International Union, 638 F.2d 954 (6th Cir. 1981) (collateral estoppel bars claims).

the judgment deviate from an accurate account of the event. De novo review of factual determinations is the rare exception, not the rule. Proceduralists as diverse as Geoffrey Hazard and Robert Cover have recognized these social benefits as central to the rules against relitigation. Professor Hazard suc-

279 Appellate courts review factual findings under the "clearly erroneous" standard, which is designed to allow most judgments based on simple factual inaccuracies to stand. Fed. R. Civ. P. 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). The more limited view is that this standard "would prevent reversal unless the judge based his finding on a misunderstanding of the law or it was without adequate evidentiary support." Friedenthal, Kane & Miller, supra note 230, § 13.4, at 604-05 (footnote omitted). "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." U.S. v. National Ass'n of Real Estate Bds., 339 U.S. 485, 495 (1950). A new trial is ordered based on factual errors only when those errors are so blatant that only the willfully blind, corrupt or seriously inattentive could fail to see them. This standard suggests that the purpose of ordering a new trial in such instances is not a belief that relitigation is appropriate to correct ordinary error but that relitigation is appropriate to correct error that suggests corruption, bias or some other serious institutional defect in the original forum.

280 See supra note 213. The Supreme Court's recent pronouncements suggesting that the innocence of a prisoner condemned to death is not in itself enough to justify de novo review of otherwise final judgments reflects just how far the general principle against relitigation as a method of correcting errors has been stretched. See, e.g., Herrera v. Collins, 506 U.S. 390 (1993) (newly discovered evidence showing possible innocence does not require de novo review); Jacobs v. Scott, 31 F.3d 1319 (5th Cir. 1994), cert. denied, 115 S.Ct. 711 (1995) (same). Our reference to these cases should not be read as sympathetic. While irrelevant to the argument we present here, which is based on the premise that "errors" in class action settlements are not the product of ordinary factual error, we believe that the consequences of ordinary error should be a factor in considering whether and how stringently to apply the general rule against relitigation to correct ordinary error. See Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970). On the question of whether criminal convictions should be subject to liberal federal habeas review because there are significant institutional biases present in state courts and important counterbalancing biases present in federal courts, compare Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035 (1977), with Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963).

281 See Hazard, supra note 245, at 1041-42 ("If our trial procedure produced truth at every trial, the need for doctrines against relitigation would be relatively weak; all that we would be assuring against is the cost of relitigation—a value, but not a compelling one if everyone knew the results would always be the same.") (quoting with approval Professor Preble in conversation). See also note 245 and accompanying text.

As for Professor Cover, he put it thus:
cinctly described the social benefit to be derived from leaving most mistaken verdicts alone:

The law, particularly litigation, is in Harry Kalven's phrase, a system for managing doubt and doubt requires strict management because its dissolving power is so strong. Where the system of procedure gives, as ours does, ample opportunity for developing contentions and discovering evidence, as ours does, a correspondingly extensive rule against relitigation is not merely warranted, but is essential for otherwise the procedural armory is turned on itself. ²⁸²

The good to be realized by leaving wrong decisions alone is not, however, boundless. These proceduralists agree that it makes sense to leave uncorrected almost all erroneous decisions in which the error is attributable to the inevitable tendency of humans and their institutions to make mistakes—when the error is simple error and not error due to bias or some other defect inherent in the court that decided the case. But they also agree that the general rule against relitigation should end when the error is not simple, but is instead a function of forum bias or defect. ²⁸³ And our procedural rules generally reflect that view. ²⁸⁴

²⁸² Hazard, supra note 245, at 1042-43.
²⁸³ Id. at 1041-42; Cover, supra note 281, at 658-68.
²⁸⁴ For example, federal rules provide that a judgment may be vacated many years after it is entered, if it shown that it was obtained as the result of fraud on the court.
The suits we propose do not aim to redress simple error. Rather, they aim to redress the effect of self-dealing made possible by the absence of real parties in interest from the first proceeding, as well as the other inherent defects and biases in the first proceeding that make detection of such self-dealing unlikely. Thus, our proposal does not interfere with the primary social good served by our rules against relitigation: the management of doubt created by inevitable and otherwise innocent error. On the other hand, allowing a system infected with systematically biased behavior to continue unchecked is not a goal of our rules against relitigation nor is it a goal any civilized legal system should promote.

The rules against relitigation do serve another legitimate goal: ensuring that individuals are not subject to inconsistent verdicts. But our suits would not compromise that goal. Nothing about the suits we propose would necessitate subjecting anyone to conflicting obligations. For example, the lawyers in Hoffman could simultaneously pay damages and carry out whatever obligations they might have under the class action settlement. They would face no conflicting obligations. The bank, it is true, might be liable for damages for doing what it was ordered to do by the Alabama court—disburse escrow money to the lawyers—but it would appear that the bank caused this problem for

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Fed. R. Civ. P. 60(b)(6). Another example is the general principle that an issue may be relitigated when the previous proceeding did not provide a full and fair opportunity to litigate it in the first instance. See, e.g., Restatement (Second) of Judgments § 26 (1982) (claim may be relitigated when first procedure excluded opportunity to present theory or remedy advanced in second proceeding).

285 Professor Hazard identifies this as one of the two satisfactory justifications for the general rules against relitigation, the other being the management of doubt created by simple error. "[S]o far as possible, the courts should avoid imposing conflicting legal obligations on a single individual." Hazard, supra note 245, at 1042.

286 To give an even more extreme example, in Derrickson v. City of Danville, which we discuss in detail below, the Seventh Circuit held that a court-approved voting rights settlement that preserved the jobs of current city officials did not preclude prosecution of those officials for violating state conflict-of-interest laws. 845 F.2d at 723 (7th Cir. 1988). In the midst of describing the defendant's argument, the court made the following parenthetical aside: "Mayor Curley of Boston showed that one can run a city from jail; anyway, the resignation of a Department Head would not change or violate the decree." Id. at 720. If prosecution of participants in a settlement does not interfere with the settlement, then surely the payment of damages by participants does not interfere with the settlement.
itself by breaching its duty to protect that money when it agreed not to raise any objections to the attorney's fee plan.\footnote{287}

**B. Claim Preclusion**

Under the doctrine of claim preclusion, sometimes referred to as res judicata, a party who has once had the chance to litigate a matter is generally denied the opportunity to relitigate it against the same opposing party.\footnote{288} Claim preclusion, when it applies, bars later litigation of any claim a plaintiff could have raised against the defendant arising out of the transaction or occurrence that was the subject of the earlier suit, whether or not those claims were actually raised.\footnote{289} It also bars any defenses a defendant could have raised to the claim presented in the earlier suit and any compulsory counterclaims that were available at the time of the first suit.\footnote{290}

Because claim preclusion applies only when the parties in the second action are the same as those in the first action,\footnote{291} it would not apply in most of the suits we propose. Class lawyers are not parties to the settlement of class actions (the first proceeding), so claim preclusion should not bar later suits brought by class members (or anyone else) against class counsel for allegedly illegal conduct in connection with a class settlement.\footnote{292}

\footnote{287}{We address below arguments that it would be fundamentally unfair to punish people for conduct a court had in some manner blessed, see infra Section III.D.}


\footnote{289}{Id. § 11.7, at 589.}

\footnote{290}{Id. § 11.15, at 603-05. Noncompulsory counterclaims are not barred. See, e.g., Mercoid Corp v. Mid-Continent Inv. Co., 320 U.S. 661, 671 (1944) (failure to bring separate statutory antitrust counterclaim in patent validity suit does not render patent validity judgment res judicata with respect to the antitrust suit).}

\footnote{291}{Generally, the parties to the first suit are the persons and entities designated as such in the complaint and other pleadings. James et. al., supra note 288 § 11.7, at 586-87. There are, however, a few situations in which the parties for purposes of claim preclusion are not limited to those designated as such in the pleadings. Id. See, e.g., In re Imperial Corp. of America, 92 F.3d 1503, 1507-08 (9th Cir. 1996) (holding that a wholly-owned subsidiary with a board identical to its parent is entitled to be treated as a party for purposes of claim preclusion, although only the parent was technically a defendant in the first suit, a class action).}

\footnote{292}{“A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity.” Restatement (Second) of Judgments § 36(2) (1980).}
The same is true for suits against the lawyers who represented the defendant in the class settlement; defense counsel are also not considered parties to the class action settlement. In only two situations would the parties to the second suit be identical to the parties in the underlying class action thus satisfying this requirement of claim preclusion. First, class members might bring a subsequent suit against the defendants for engaging in illegal conduct in connection with the class action settlement, for example, conspiring with class counsel to defraud the class and its guardian, the court, by misrepresenting the costs and benefits to the class of the settlement or of class counsel's petition for attorney's fees. Second, a state or the federal government might bring a subsequent suit against the defendants for fraud or some other illegal activity connected to the settlement negotiation (such as violating the antitrust laws) when the government entity had previously intervened to object to the settlement.

Identity of parties is not, however, all there is to claim preclusion; not every later suit between parties who have previously been adversaries is barred. In general, only those claims that are part of the same transaction or occurrence as the claims alleged

None of the cases that preclude later suit against class counsel invokes claim preclusion to achieve that result. See Kamilewicz v. Bank of Boston Corp., 92 F.3d 506, 512 (7th Cir. 1996) (Rooker-Feldman doctrine bars claims); Golden v. Pacific Maritime, 786 F.2d 1425, 1428-29 (9th Cir. 1986) (issue preclusion); Laskey v. Internation Union et al., 638 F.2d 954, 957 (6th Cir. 1981) (issue preclusion); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 632-34 (N.D. Cal. 1978), aff'd, 645 F.2d 699, 700 (adopting district court's opinion), cert. denied, 454 U.S. 1126 (1981) (statute of limitations). Rather, recognizing that class counsel was not a party to the first proceeding but the plaintiffs in the later suit were, the courts rely on issue preclusion, which does not generally require identity of parties, see infra Section III.C. (discussing elements of issue preclusion), or some other procedural bar like the statute of limitations.

See, e.g., Durkin v. Shea & Gould, 92 F.3d 1510, 1518 (9th Cir. 1996) (allowing suit against defense counsel for conduct connected to settling a derivative action and rejecting both claim and issue preclusion as bars to such a suit).

E.g., Benn v. BancBoston Mortgage Corp., No-96-CV-0974-J, filed May 13, 1996 (N.D. Tex.) (another suit arising out of the Hoffman class action, but naming only the bank as a defendant). Even in this situation, the first element of claim preclusion, identity of parties, is not a simple matter. If those suing in the second suit had been absent class members in the first suit, they should not be presumed conclusively to have been parties in the first suit. Absent class members are bound by a judgment only if they were adequately represented. Hansberry v. Lee, 311 U.S. 32 (1940). Cf. text accompanying notes 409-414.

See, e.g., Derrickson v. City of Danville, 845 F.2d 715 (7th Cir. 1988).
in the first suit are barred.\textsuperscript{296} By definition, the wrongs that our later suits are designed to redress arise out of a different transaction or occurrence than the wrongs that were settled on behalf of the class.

Consider the facts in \textit{Derrickson v. City of Danville}.\textsuperscript{297} The \textit{Derrickson} story begins with a voting rights class action against the City of Danville, Illinois, in which class counsel and four city officials assisted by the city's lawyer negotiated a settlement. The settlement included a provision allowing the four officials to retain their jobs during a three-year transition period to a new form of elected government set forth in the settlement.\textsuperscript{298} The state conflict-of-interest law made it a crime for city officials to negotiate on behalf of the city a contract that included provisions inuring to the personal benefit of city negotiators.\textsuperscript{299} The state attorney general believed that by negotiating the settlement with its three-year job guarantee, the city officials and city lawyer had violated that law and convened a grand jury to indict them. The federal judge, before whom the voting rights settlement was pending, enjoined the attorney general's attempt to indict the city negotiators, and, upon motion of the plaintiffs, made the state attorney general a party to the class action suit.\textsuperscript{300} The federal district court then approved the settlement after conducting a fairness hearing on the deal. No one appealed.\textsuperscript{301} After the court approved the class action settlement, the state attorney general reconvened the grand jury and secured the indictments he had tried to secure earlier, and for the second time, the federal district court enjoined him.\textsuperscript{302} The Seventh Circuit, in an opinion by Judge Easterbrook, reversed the district court, lifted the injunction and allowed the state prosecution to proceed, holding that neither claim nor issue preclusion barred the later state action against those who had negotiated the class settlement.\textsuperscript{303}

\textsuperscript{296} See Cound, et. al., Civil Procedure 1228-29 (6th ed. 1993).
\textsuperscript{297} 845 F.2d at 716 (7th Cir. 1988).
\textsuperscript{298} Id.
\textsuperscript{299} Id.
\textsuperscript{300} Id.
\textsuperscript{301} Id.
\textsuperscript{302} Id.
\textsuperscript{303} Id. at 721.
Claim preclusion was an issue in *Derrickson* because the state attorney general had been made a party to the class action proceeding, albeit against his will, and the defendants he sought to prosecute in the later suit were also parties to the class action suit. Judge Easterbrook, however, had no trouble seeing that the self-dealing alleged to be criminal by the state attorney general was not the same "transaction or occurrence" as the voting rights violation that was resolved by the class action settlement.\(^3\)\(^0\)\(^4\) Moreover, the Illinois Supreme Court later adopted this analysis in its decision upholding the convictions that the state attorney general eventually obtained.\(^3\)\(^0\)\(^5\) Were these courts too narrowly defining "transaction or occurrence?"

We think not. The underlying class action was about one occurrence (a form of city government that allegedly denied people rights guaranteed by the voting rights law), while the later prosecution was about another (the use of public office for personal gain in the process of settling a lawsuit). The facts and law necessary to establish the first cause of action were not the same as those important to the second case. And the same would be true in the other situations in which claim preclusion might arguably be relevant to the later suits we propose. For example, the facts and law necessary to establish whether BancBoston committed a wrong by demanding that its customers deposit more money in escrow than their contracts required are different than the facts and law that would be relevant to determining whether the bank breached a fiduciary duty to its customers by agreeing not to object to class counsel's request for

\(^{304}\) Id. ("The criminal prosecution also did not grow out of the same 'transaction or occurrence' as the Voting Rights Act claim.") Judge Easterbrook gave a number of reasons why claim preclusion was inapplicable to the case before him. In addition to the different transaction argument, he relied on the rule that only compulsory counterclaims are considered barred by res judicata (claim preclusion) in later suits brought by a defendant against his former adversary. Id. at 721. The attorney general had been "a defendant" in the class action proceeding. "A state criminal prosecution is not a compulsory counterclaim in a federal civil suit, not least because the forum lacks the jurisdiction to try the criminal case." Id. Moreover, Judge Easterbrook explained, the authority of a government agent to enter into a settlement may generally be challenged later if overlooked in the first proceeding. Id. (citing, inter alia, United States v. Beebe, 180 U.S. 343, 351-55 (1901) and Stone v. Bank of Commerce, 174 U.S. 412 (1899)).

\(^{305}\) People v. Scharlau, 565 N.E.2d 1319, 1329-30 (Ill. 1990) (adopting the Seventh Circuit's claim preclusion analysis).
attorney's fees. To argue that wrongs committed in the process of litigation are properly treated as arising from the same transaction as the wrong originally litigated requires one to accept some ridiculous results. For example, that argument suggests that all later prosecutions for perjury or bribery of witnesses should be barred because such acts necessarily occur in the process of resolving a prior legal controversy.

Of course, when the parties are the same, even if the later suit is not barred by claim preclusion, it may be barred by issue preclusion, otherwise known as collateral estoppel. We turn next to that matter.

C. Issue Preclusion

In most later suits of the type we propose, the identity of parties necessary for an assertion of claim preclusion is lacking: the class suing its counsel; the class suing the defendant's lawyers; a government that had not objected suing or prosecuting class counsel or the defendants; other plaintiffs' lawyers suing class counsel for violations of the antitrust laws. In those cases, as well as the cases in which the assertion of claim preclusion would meet the "identity of parties" requirement but fail the "same transaction" requirement, the relevant relitigation question would be whether the party bringing the second suit was precluded from litigating an issue because it had been determined in the first proceeding. "Issue preclusion applies when an issue (a) was actually decided, (b) after a full and fair opportunity to litigate, and (c) was necessary to the decision." We consider these requirements in turn.

306 But see In re Imperial Corp. of America, 92 F.3d 1503, 1507-08 (9th Cir. 1996) (holding that claim preclusion bars a later suit against the defendant when the new claims of breach of fiduciary duty and mismanagement repeat claims made in the class action litigation, e.g., that the defendant invested in bad loans and failed to establish reserves).

307 Derrickson, 845 F.2d at 721 (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)); United States v. Ryan, 810 F.2d 650, 654 (7th Cir. 1987); Schellong v. INS, 805 F.2d 655, 658-59 (7th Cir. 1986); Restatement (Second) of Judgments § 27 (1980)).
1. Was the Issue Actually Decided in the First Suit?

In many of the suits we propose, the issue will not have been "actually decided." For example, the district court in Georgine did not consider, no less decide, whether the terms of the settlement that gave certain plaintiffs' firms a built-in advantage in the market created by the settlement violated the antitrust laws, or, for that matter, whether the caps on attorney's fees violated those laws. Indeed, we know of no decision approving a class settlement that purports to have decided that the antitrust laws were complied with in selecting class counsel, that those laws were not violated by the terms of the settlement or that the attorney fee caps for the market created by the settlement are valid under the antitrust laws. Furthermore, in approving class action settlements courts do not make findings on whether the defendant, as opposed to the class, was adequately represented. Thus, a later malpractice or fraud action against defense lawyers who negotiated and recommended to their client a class action settlement that harms the client, for example by unduly shifting officer liability to the corporate-defendant, would not involve the redetermination of an issue previously determined in the prior proceeding.

In approving a class action settlement the court is supposed to (and generally does) decide that the class was adequately rep-

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308 Moreover, as we shall discuss later in detail, any explicit or implicit finding that such terms were "reasonable" is not the equivalent of a finding that no violation of the antitrust laws has occurred, see infra Section IV.C.1.

309 In Durkin, which involved just such a suit by the corporation's successor-in-interest against the defense lawyers who negotiated and recommended the class settlement, the Ninth Circuit in rejecting issue preclusion made precisely this point: [A]s required by Rule 23.1, . . . [the class action judge] determined that the shareholder plaintiffs adequately represented similarly situated shareholders. [He] did not decide that the shareholder plaintiffs and their attorneys adequately represented the full corporate interests of [the defendant]; nor did [he] specifically find that [the defense lawyers] adequately represented the interests of a corporation on the eve of its bankruptcy. 92 F.3d at 1516 (citation omitted).

310 In approving class action settlements, courts do not always remember to make the required findings. Of course, we take this to be further evidence of how inattentive many judges are to their responsibilities as guardians for the class. Whether it shows that or not, the fact remains that the "required" findings do not always appear on the record. For example, in Laskey v. International Union, 638 F.2d 954 (6th Cir. 1981), which held that issue preclusion prevented a later suit for malpractice against class
resented, that the settlement terms are fair and reasonable and that the attorney's fees awarded to class counsel are reasonable. Do these findings mean that the class action court has actually decided whether class counsel committed malpractice or fraud upon the class? We are convinced that the answer in both instances is no, although we hasten to add that even were our answer yes, the absence of a full and fair opportunity for absent class members to litigate these matters would, as we shall later argue, still defeat issue preclusion.\textsuperscript{311}

The purpose of a class action court's inquiry into whether the class was adequately represented is to ensure that absent class members have received due process, and that the requirements of Rule 23(a) or its state counterpart are met.\textsuperscript{312} Courts are notoriously vague on what constitutes "adequate representation."\textsuperscript{313} In particular, they do not define "adequate" to be
counsel, the district court may have neglected to find class counsel adequate, and the appellate court in its rush to find preclusion fudged the question of whether there was an "actual decision" on the issue. The appellate court said:

Since appellants had the opportunity to object to the legal representation at the prior settlement hearing and since a finding that the class was adequately represented is necessary for finding the settlement was fair and reasonable, which in turn was essential to approving the settlement, appellants are collaterally estopped from now asserting that the legal representation was not adequate and that the UAW committed legal malpractice.

Id. at 957 (internal citation omitted). When parsed, this sentence falls short of stating that the question of adequacy was actually decided. Why? An examination of the lower court decision in Laskey, rendered by the same court that had previously approved the underlying class action, strongly suggests that the class action court did not make a separate finding on adequacy, a lapse perhaps attributable to the fact that no one challenged adequacy during the fairness hearings. All the district court says it "expressly found" was that the terms of the settlement were "fair and reasonable to the absent members of the plaintiff class in light of the merits of this action and other pertinent factors, and that the settlement is in the best interests of the class members." Laskey v. International Union, 27 Fed. R. Serv. 2d 473, 478 (E.D. Mich. 1978). Although courts often base their finding of adequacy of representation on the fact that the terms of the settlement were fair, see infra notes 315-320 and accompanying text, the court did not even make this connection (weak as we later argue it is) explicit. Given the apparent absence of an actual earlier decision on this matter, the Sixth Circuit's attitude toward this element of issue preclusion can only be described as lax.

\textsuperscript{311} See infra Section III.C.3.

\textsuperscript{312} Fed. R. Civ. P. 23(a); 2 Newberg on Class Actions, supra note 172, § 11.41, at 11-85 to 11-89.

\textsuperscript{313} See Koniak, supra note 15, at 1116-17 (describing the emptiness of "adequacy" as a standard for judging class counsel's representation).
“nonnegligent” or “without fraud.” Given the lax standards on “adequacy,” as evidenced by the high approval rates for class action settlements, it is difficult to understand how a court attentive to the elements of issue preclusion could hold that a finding of adequacy amounts to a decision that class counsel caused no damages to any part of the class through carelessness or fraud in the representation, the issue to be decided in a malpractice case.314

The little that class action courts do say about the finding of “adequate representation” supports our view that this finding bears little relationship to the issues to be decided in a malpractice suit.315 Most telling, courts often reduce the question of adequacy to a question of whether the settlement terms are fair and reasonable. In the oft-quoted words of the Fifth Circuit:

It is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is ei-

314 Compare the collateral estoppel treatment of a different issue in class actions, namely whether the finding by a federal court that a proposed class action does not satisfy the certification requirements of Rule 23 collaterally estops a subsequent state class action alleging the same facts and making the same legal claims. Even if the state has a class action rule similar to Rule 23, courts have held that because state courts might apply the relevant criteria differently, the subsequent class action is not collaterally estopped. Morgan v. Deere Credit, 889 S.W.2d 360 (Tex. Ct. App. 1994). If collateral estoppel does not bar a subsequent class action suit when the issues are this similar, how could it bar a subsequent malpractice suit when the issues are not even defined in a similar way?

315 In addition to the quite common refrain on adequacy that we discuss next in the text, courts often treat violations of the ethics rules as irrelevant to the question of adequacy. See, e.g., Georgine, 157 F.R.D. at 330 (“This Court need not decide, however, whether or not a state bar disciplinary board would conclude that . . . [counsel] technically violated [ethics] Rule 5.6 [by having bound themselves in another settlement with the defendants to recommend to others the settlement being put before the court] since that issue is not before this Court in determining the adequacy of counsel.”); Harris v. General Dev. Corp., 127 F.R.D. 655, 662 (N.D. Ill. 1989) (“[A]lthough the fee arrangement may give rise to a technical deviation from ethical standards, denial of class certification [based on a finding of inadequate representation] is unwarranted.”). However, in malpractice actions a violation of an ethics rule is admissible and occasionally creates a rebuttable presumption that the lawyer has breached his duty to the client, an essential element of the malpractice claim. See Hazard, Konik & Cramton, supra note 249, at 190. For a rare example of a class action court taking an ethics violation seriously, see Wagner v. Lehman Bros. Kuhn Loeb, 646 F. Supp. 643, 662 (N.D. Ill. 1986) (holding that the ethics violation rendered class counsel unfit to represent the class). It is interesting to note that the ruling in Wagner did not require the court to reject a class settlement because no settlement had been reached. Id. at 645.
ther vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.\footnote{In re Corrugated Container Antitrust Litig., 643 F.2d 195, 212 (5th Cir. 1981) (emphasis added). See also Georgine, 157 F.R.D. at 326 (quoting Corrugated Container); and In re Asbestos Litig. (Flanagan v. Ahearn), 90 F.3d 963, 975 (5th Cir. 1996) (same).}

But a finding based on an assumption is fundamentally different than one based on evidence, and a finding that the settlement terms are fair is a far cry from a decision on whether malpractice, fraud or a violation of the antitrust laws has occurred. This is especially true given the fact that, in assessing fairness, the court is to consider the settlement as a whole,\footnote{See, e.g., Armstrong v. Board of Sch. Dirs., 616 F.2d 305, 315 (7th Cir. 1980) (individual components of an agreement are to be evaluated in light of the settlement as a whole).} which allows courts to approve settlements as fair even when those settlements include provisions that damage the class or some subgroup within it, and which would not have been included absent the lawyer’s breach or self-dealing.

Moreover, in an ordinary malpractice action, a finding that the settlement terms were reasonable will not relieve the lawyer of responsibility for malpractice in negotiating or recommending the settlement. In class action suits, the idea that a reasonable-looking settlement might nonetheless be the product of woefully inadequate representation is considered, in the words of the Fifth Circuit, too “conjectural” and in any event, “irrelevant.” But lawyers for ordinary clients may be held liable for their negligence whenever the negligence is shown to have caused the client a loss.\footnote{See generally Charles W. Wolfram, Modern Legal Ethics, §§ 5.6.2-5.6.3, at 209-23 (1986) (reviewing elements of legal malpractice and negligence generally).} That showing is always conjectural in some sense because it is counterfactual, but courts in lawyer malpractice suits take it for granted that such a showing may be made. Most jurisdictions that have addressed the question have held that if the plaintiff can show that the lawyer’s lack of diligence or breach of loyalty caused a settlement to be lower than it
would have been absent the lawyer's breach, the lawyer may be found liable for the resulting harm.\textsuperscript{319}

As the New Jersey Supreme Court put it: "The fact that a party received a settlement that was 'fair and equitable' does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent."\textsuperscript{320}

Thus, the legal finding that a settlement is objectively fair is

\textsuperscript{319} See, e.g., Edmondson v. Dressman, 469 So. 2d 571, 574 (Ala. 1985) (allowing suit for malpractice in settlement to go forward); Grayson v. Wofsey, Rosen, Kveskin, & Kuriansky, 464 A.2d 195, 199 (Conn. 1994) (holding that client's agreement to a settlement does not preclude later malpractice action); Keramati v. Schackow, 553 So. 2d 741, 746 (Fla. Dist. Ct. App. 1989) (malpractice claim not estopped, although clients had agreed to the settlement); McCarthy v. Pederson & Houpt, 621 N.E.2d 97, 101-02 (Ill. App. Ct.), app. denied, 624 N.E.2d 809 (1993) (malpractice suit not barred, although plaintiff had agreed to settle the underlying case after the settlement was reviewed by independent counsel); Sanders v. Townsend, 509 N.E.2d 860 (Ind. Ct. App. 1987), aff'd in relevant part, vacated in part, 582 N.E.2d 355 (Ind. 1991) (malpractice suit not barred, but holding on facts that summary judgment was properly granted in attorney's favor because the plaintiff failed to show that had the attorney not been negligent, the settlement or verdict award would have been greater); Braud v. New Eng. Ins. Co., 534 So. 2d 13 (La. Ct. App. 1988) (same); Fishman v. Brooks, 487 N.E.2d 1377 (Mass. 1986) (same); Lowman v. Karp, 476 N.W.2d 428, 431 (Mich. App. 1991) (per curiam) (client's agreement to settle does not bar later suit against lawyer for malpractice); Cook v. Connolly, 366 N.W.2d 287 (Minn. 1985) (same); McWhirt v. Heavey, 550 N.W.2d 327 (Neb. 1996) (client's agreement to divorce settlement does not bar subsequent malpractice action against client's lawyer for alleged negligence in settlement advice); Malabon v. Garcia, 898 P.2d 107, 110 (Nev. 1995) (per curiam) (client may sue lawyer for malpractice even after agreeing to a settlement); Ziegelheim v. Apollo, 607 A.2d 1298, 1304 (N.J. 1992) (malpractice suit proper when lawyer fails to exercise the same level of skill, knowledge and diligence with respect to a settlement that is required of lawyers in other contexts); Mazzel v. Pokorny, Schrenzel & Pokorny, 509 N.Y.S.2d 100 (N.Y. App. Div. 1986) (same). But cf. Douglas v. Parks, 315 S.E.2d 84 (N.C. Ct. App. 1984) (holding that because plaintiff affirmed the settlement agreement, he was precluded from bringing a malpractice suit against the attorney who represented him in the original action); Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 598 A.2d 27 (Pa.), cert. denied, 112 S.Ct. 196 (1991) (barring malpractice suit against former lawyers when client agreed to the settlement absent some showing of fraud by the attorney); Schlomer v. Perina, 473 N.W.2d 6 (Wis. Ct. App. 1991), aff'd, 485 N.W.2d 399 (Wis. 1992) (rejecting as against public policy a malpractice claim that attorney's three years of inactivity caused a lesser settlement and caused the client loss of use of money from an earlier and larger settlement). See generally James L. Regenbaupt, Jr., Annotation, Legal Malpractice in Settling or Failing to Settle Client's Case, 87 A.L.R.3d 168, §§ 3-5 (1978) (collecting cases where malpractice alleged due to attorney's settlement of case for unreasonable amounts).

\textsuperscript{320} Ziegelheim, 607 A.2d at 1305.
distinguishable from a finding that the client was not damaged by the lawyer's breach. The fact, assuming it is a fact, that the result in the underlying lawsuit was objectively fair may make it more difficult for the client suing for malpractice to show that a better result would have been obtained, but there is no reason for it to be a fatal fact as a matter of law.

Indeed, outside the class action context, courts have held that clients may sue their lawyer for malpractice in negotiating and recommending a settlement that was not only explicitly accepted by the client, but also found to be fair by an earlier court charged with the responsibility of reviewing the settlement to ensure that the client was protected.\footnote{See, e.g., \textit{Grayson}, 646 A.2d at 200 (court review of the settlement does not immunize lawyer from later claim of malpractice); \textit{Ruffalo v. Patterson}, 285 Cal. Rptr. 647, 648 (Cal. Ct. App. 1991) (court approval of settlement does not preclude later suit for malpractice against lawyer); \textit{Garcia v. Borelli}, 180 Cal. Rptr. 768, 772 (Cal. Ct. App. 1982) (same); \textit{McWhirt}, 550 N.W.2d at 335 (court review of divorce settlement and determination that settlement was not unconscionable does not preclude subsequent malpractice action); \textit{Cook}, 366 N.W.2d at 291 (rejecting collateral estoppel argument because "at a hearing on approval of a proposed minor settlement, the trial court is not adjudicating issues of legal malpractice").} For example, in \textit{Grayson v. Wofsey, Rosen, Kweskin & Kuriansky}, the Connecticut Supreme Court refused to bar malpractice actions involving the settlement of divorce proceedings, despite the fact that in such proceedings courts are obligated "to conduct a searching inquiry to make sure that the settlement agreement is substantively fair and has been knowingly negotiated."\footnote{\textit{Grayson}, 646 A.2d at 200.} The Connecticut court put the point succinctly:

\[\text{[T]he court's inquiry does not serve as a substitute for the diligent investigation and preparation for which counsel is responsible. Indeed, the dissolution court may be unable to elicit the information necessary to make a fully informed evaluation of the settlement agreement if counsel for either of the parties has failed properly to discover and analyze the facts that are relevant to a fair and equitable settlement.}\footnote{Id. (citations omitted).}

True, malpractice suits involving court-approved settlements, like \textit{Grayson}, generally involve divorce settlements, not class action settlements. But what is so special about class actions that they require greater immunization of participating lawyers
than divorce actions? In fact, the differences between class actions and divorce cases, if anything, cut in favor of less protection for class action lawyers, not more. The risks of negligent and fraudulent behavior surely increase as the likelihood of meaningful monitoring by the client decreases, but as surely as the client in a divorce action may have trouble monitoring the lawyer, the absent class member will have more trouble still. This makes all the more puzzling and troubling the Ninth Circuit's opinion in *Golden v. Pacific Maritime Association,*\(^3\) which held that a class member was collaterally estopped from suing class counsel for malpractice and fraud in negotiating a settlement, in part because the class action court had made specific findings on class counsel's competence and performance.\(^4\) *Golden* relied on an earlier case that had collaterally estopped a suit for fraud against lawyers (and other participants) involved in a bankruptcy settlement.\(^5\) That earlier case reasoned that the Bankruptcy Act could not be administered by federal courts without the participation of attorneys, who thus deserved as much protection from relitigation as the parties to the original action.\(^6\) Transposed to the class action arena, the *Golden* court's reasoning suggests that because lawyers are necessary for class actions, they deserve greater immunity from subsequent suits.\(^7\) But lawyers are just as necessary for divorce actions, or

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\(^3\) 786 F.2d 1425 (9th Cir. 1986).

\(^4\) Id. at 1428.

\(^5\) Samuel C. Ennis & Co. v. Woodmar Realty Co., 542 F.2d 45 (7th Cir. 1976), cert. denied, 429 U.S. 1096 (1977). In *Ennis,* the Seventh Circuit reversed a district court order refusing to enjoin a state action for fraud allegedly committed in connection with bankruptcy proceedings that had taken place five years earlier. Id. at 46. The precedential value of *Ennis* in the Seventh Circuit is, we believe, somewhat diminished in light of its later decision in *Derrickson,* 845 F.2d 715, which does not cite *Ennis.*

\(^6\) *Ennis,* 542 F.2d at 49.

\(^7\) It is possible to read *Golden* as standing for a narrower proposition, namely that when a lawyer brings a subsequent suit merely to "harass," collateral estoppel will bar it. 786 F.2d at 1429. The court in *Ennis* had stressed the fact the charges of fraud made by the lawyer in the subsequent suit were made "in gross bad faith," 542 F.2d at 47, suggesting that they were so frivolous as to amount to unethical conduct. *Golden* not only relied on this aspect of *Ennis,* but also suggested that the charges brought against the lawyers were frivolous and being brought for harassment purposes. 786 F.2d at 1428. The problem is that in *Ennis* there was more evidence that the subsequent suit was in fact frivolous than there was in *Golden,* where the court relied solely on the fact that the lower court "found an inference of harassment" in the state suit. 786 F.2d at 1427.
any other type of litigation, as they are for class actions. Although clients may be more dependent on lawyers in class actions, in our view this fact cuts in favor of a need for greater client protection, not greater lawyer immunity. Moreover, if the point is that lawyers would not participate in class actions unless they were guaranteed greater leeway to engage in negligent or fraudulent behavior, we believe that argument is highly implausible given the large amount of money lawyers can earn doing class actions without misconduct. If the only way to get lawyers to participate in class actions is to allow them to commit malpractice and fraud with impunity, then we should abolish class actions (a solution we do not espouse).

Even if the Ninth Circuit’s reasoning in *Golden* were more defensible, the precedential weight of the case is substantially undermined by *Durkin v. Shea & Gould*, the case that most strongly supports our view that a class action court’s finding of adequacy does not preclude a second suit for malpractice. In *Durkin*, the first court had ruled that a derivative suit settlement was fair and reasonable, but the Ninth Circuit distinguished that finding from the issues to be decided in the malpractice case before it. In doing so, the Ninth Circuit recognized the obvious relevance of the divorce settlement cases to the class action settlement context:

> [A]lthough the California courts have not considered issue preclusion in the context of a Rule 23.1 settlement, they have consistently held that a court-approved settlement or judgment does not immunize an attorney from a subsequent malpractice action. As the California Court of Appeal has observed: “To hold otherwise would be to rule that where an attorney’s negligence has caused a court to make an erroneous adjudication of an issue, the fact that the court has made that adjudication absolves the attorney of all accountability and responsibility for his negligence.”

One might argue that *Durkin* does not broadly support the suits we propose because it involved a malpractice suit against the defendant’s lawyers rather than against class counsel, and the first court had not found that the defendant’s lawyers had “ade-

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329 92 F.3d 1510 (9th Cir. 1996).
330 Id. at 1517-18 (citations omitted).
quately represented" the defendant. But much of the Durkin court's reasoning applies equally to malpractice suits brought against class counsel, as the court's reliance on the divorce cases suggests.\footnote{As we have already noted, the court below in Durkin did dismiss the malpractice claims against class counsel, although on what ground is not clear. As that dismissal was not before the appellate court in Durkin, we cannot be sure whether the appellate court would have accepted what we claim to be the implications of its reasoning. The fact that the appellate court seemed to emphasize that the first court did not rule on the adequacy of the defense lawyers may suggest that it might distinguish a suit against class counsel. On the other hand, the court also emphasized that the plaintiff's malpractice action "does not even accrue until after the settlement becomes final," id. at 1517, which could serve as an independent basis to reject issue preclusion, and one that would apply equally to a malpractice action by class members against class counsel. For further discussion of the "not accrued" point, see infra text accompanying note 372.}

Another case that supports our argument that a class action court's finding that class counsel was adequate is not the equivalent of a finding that class counsel has fulfilled all duties owed to class members is Zimmer Paper Products v. Berger & Montague, P.C.\footnote{758 F.2d 86 (3d Cir.), cert. denied, 474 U.S. 902 (1985).} In Zimmer, a corporate member of the plaintiff class sued class counsel for negligence and breach of fiduciary duty in failing to provide adequate notice to it of the class settlement, which allegedly caused Zimmer to lose its chance to share in the recovery.\footnote{Id. at 88.} Zimmer made essentially two claims: that class counsel's chosen notice procedure was itself negligent, despite the fact that the class action court approved it; and that even if the notice procedure itself was acceptable, class counsel negligently implemented that procedure.\footnote{Id. at 94.} Although the court rejected both claims, it did so on the particular facts before it, leaving the door open to future malpractice suits against class counsel.\footnote{Id.}

As to the first claim, Zimmer argued that given the large sums of money involved, class counsel was negligent to have proposed notice by first class mail; instead, class counsel should have proposed notice by certified mail, return receipt requested, and should have suggested follow-up procedures after the first notice.
was sent. In rejecting this claim, what the Third Circuit did not say is as important as what it did. The Third Circuit did not say that court approval of the notice precluded class members from a later malpractice suit against class counsel. The Third Circuit did not say that satisfying due process or Rule 23 was the equivalent of satisfying one's fiduciary duties to the class. What the Third Circuit said was:

The bounds of fiduciary duty are undoubtedly not easy to define, but certainly we must be guided by the fact that the practice here alleged to breach such duties is a customary one, and has been approved, after careful judicial scrutiny, not only in this case but in legions of others. If class counsel in this case have breached their fiduciary duties, attorneys throughout the country who have complied with court orders and a Supreme Court-approved notice procedure may well be subject to malpractice lawsuits by anyone who alleges that he or she did not receive notice of the opportunity to file a claim.

We do not hold today that first-class mail and publication will always suffice, either under a due process or a fiduciary duty analysis. Indeed, given the large sums involved and the low response rate, it might have been preferable for the district court in the [underlying antitrust class action] to have required certified mail or follow-up procedures. We hold only that in this case, where the procedure employed was customary and court-approved, where there was no suggestion before the district court that a different type of notice be employed, and where the plaintiffs have offered little support for the proposition that more was required, class counsel cannot be said to have breached their duties.

This language seems to say no more than that the plaintiff failed in the case before the court to establish an element of malpractice, performance that falls below that of a reasonably competent lawyer. The fact that the court referred separately

336 Id. at 91.
337 The Zimmer court states, however, that in challenging any action by counsel that was explicitly approved by court order, such as the design of the notice plan to class members, the plaintiff “faces a standard at least as high as abuse of discretion in seeking to show malpractice by counsel who followed the court’s order.” Id. at 93. We think this is the wrong standard even in the limited context suggested by the Zimmer court. See supra notes 213 & 280 and accompanying text.
338 Id. at 91-93 (footnotes omitted).
to due process and fiduciary analysis suggests that it accepted the possibility that due process might be satisfied and a fiduciary breach, actionable as malpractice, might nonetheless exist. In addition, the court emphasized that the practice was customary, not just court-approved. This suggests that the Third Circuit was applying standard tort doctrine to this suit. In every malpractice suit, whether a practice is customary is considered important in determining whether there has been a breach of duty. Further, the Third Circuit suggested that even a customary practice might be negligent, also standard tort doctrine, but that the plaintiff in this case had “offered little” to demonstrate that the customary practice here was, nonetheless, negligent.

399 Id. at 93 n.8 (“[C]lass counsel did all they were ordered [by the court] and expected [by custom] to do.”).

340 Keeton et al., supra note 74 § 33, at 193-4.

341 The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), cert. denied, 287 U.S. 662 (1932).

342 Zimmer, 758 F.2d at 93. In our view, it should not be hard to make such a showing in most class actions. Custom as a defense works best when the tort victim is a customer who can contract with the defendant for the desired amount of safety. “But a firm will have no incentive to take precautions against accidents dangerous only to people with whom the firm does not, and because of high transaction costs cannot, deal.” Richard A. Posner, Economic Analysis of Law 168 (4th ed. 1992). Class members typically fit this category of victim. And the available empirical evidence seems to bear out the conclusion that at least with respect to the content of the notice, class action “custom” is generally suboptimal. See Willging, Hooper, & Niemic, supra note 109, at 131-34.

As to the court’s reference to the fact that no one suggested to the district court that different notice be employed, that comment runs counter to standard tort doctrine. It seems to reward class counsel for failing to devise a better notice procedure in the first place. But under standard tort doctrine that failure would work against counsel, as it would help demonstrate that counsel’s breach had caused the damage. Standard tort doctrine would sensibly exonerate class counsel who had fought hard for a court to accept a better notice plan, not one who stood idly by while a defective plan was adopted. That the district court heard no other plan would seem thus to be an important, if not essential, part of the plaintiff’s case. What then could the Third Circuit mean by holding it against the plaintiff?

While not as clear as it could be in the opinion, what the Zimmer court apparently had in mind was that the class member/plaintiff, a sophisticated player who had access to lawyers other than class counsel and who had actual notice that the suit was pending, should itself have suggested some other form of notice. Zimmer, 758 F.2d at 92 (arguing that it would have been reasonable for Zimmer, given the amount of money at stake, its sophistication, its access to independent counsel and its actual notice of the suit, to have instructed its own lawyers to monitor the litigation and presumably class counsel’s performance).

Even in this context we think that suggestion unwise. If sophisticated clients cannot
The court's response to Zimmer's second claim was even more clearly grounded in tort, rather than preclusion, doctrine. The court's response to the claim that the notice procedure was negligently implemented by class counsel even if it was not negligently crafted was that plaintiff's "extensive discovery has failed to develop any material issue of fact regarding class counsel's negligence." Nowhere did the court suggest that the first court's finding of adequacy means that class counsel took every step carefully. Nor do we believe any court seriously considering what was "actually decided" by a ruling of adequacy could justify any other result. In fact, the very nature of Zimmer's second claim reinforces the absurdity of equating a finding of adequacy with a finding that class counsel has not been negligent in any stage of the class action settlement process.

rely on class counsel to protect their interests, but instead must retain individual lawyers to monitor class counsel's performance, why allow non-mandatory plaintiff class actions with sophisticated class members? Be that as it may, it is certainly ridiculous to expect ordinary class action plaintiffs to bring deficiencies with the notice procedure or other matters to a court's attention or risk losing their right to complain later of the performance of their lawyers.

The only other way to read the Third Circuit's reference to the arguments presented to the class action court on notice is as some veiled reference to an estoppel argument: No one raised the defects in the earlier proceeding, so the class (and individual members) are precluded somehow from raising them now. This argument is not supported by standard preclusion doctrine. Claim preclusion doctrine would prohibit raising arguments later that could have been raised earlier, but that doctrine only applies when the parties to both actions are identical. Class counsel, the defendants in Zimmer, were not parties to the first suit.

343 Id. at 93.
344 Judge Weis, dissenting from the majority opinion in Zimmer, assumed arguendo that class counsel's proposed notice plan was non-negligent because it was customary, but rejected the majority's conclusion that the plaintiff had not made out a prima facie case of class counsel's negligence in implementing the notice plan. Id. at 94 (Weis, J., dissenting). He renounced the idea that "no further action" was required of class counsel after so few class members responded to the notice in the case. Id. Further, he commented on the class counsel's attempt to justify their inaction by suggesting it too was customary. The lawyers had cited evidence showing that a return rate of 12% was customary in similar class action suits. Id. at 95. Presumably they offered this evidence to show that most class counsel took no further action to notify class members of their right to a share in the recovery when there was such a low return. Commenting on this argument, Judge Weis stated that the accepted low return rate raised "a very serious question about the legitimacy of class action damage suits," in which recovery and attorney's fees were calculated on the assumption that 100% of the class would seek recovery from the fund. Id. at 95 n.2. He may have missed the point here. The serious question about class action suits raised by the 12% return rate may have more to do with the adequacy of the representation provided by class
In addition to making findings on adequacy of representation, courts in approving a class action settlement are supposed to ensure that the settlement was not the product of collusion between the class lawyers and the defendant. Unfortunately, courts are no better at explaining what a finding of "no collusion" means than they are at explaining what they mean when they find class counsel adequate. However, the few courts that have addressed the question of what constitutes collusion seem to equate collusion with intentional fraud. It is thus plausible to argue that whenever the class action court bothers to find no collusion, it "actually decides" that class counsel and the defendant have not committed fraud, at least jointly. We disagree, but we defer full discussion of this question for the moment to consider the other necessary elements of issue preclusion.

2. Was Resolution of the Issue Necessary to the Earlier Decision?

In some instances the court that approved the settlement may have opined on the precise issue raised in the later suit, but for issue preclusion to apply the issue must have been necessary to the first court's decision. For example, the district court in Georgine might have said, although it did not, that the antitrust laws were not violated by the provision giving certain plaintiffs' firms an advantage in the market created by the settlement. But could such a statement reasonably be construed to have been necessary to any of the issues before the court: whether

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counsel than with the legitimacy of making defendants pay for all the damage they cause, instead of just 12%. Judge Weis pointed out that class counsel were invested with important responsibilities to protect absent class members and were "not only fiduciaries, but well compensated ones as well." Id. at 97. To hold such "well compensated fiduciaries" to any lesser standard of performance than ordinary lawyers makes no sense to us and apparently made little to Judge Weis.

345 See Georgine, 157 F.R.D. at 331 (citing Point Pleasant Canoe Rental v. Tincum Township, 110 F.R.D. 166, 169-70 (E.D. Pa. 1986)). The court quoted Black's Law Dictionary to define collusion:

An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose. A secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose.

Id. (quoting Black's Law Dictionary 240 (5th ed. 1979)) (emphasis added).
the settlement as a whole was fair and reasonable or whether class counsel adequately represented the class? In Derrickson, the first court in ruling that the consent decree was "fair, adequate and reasonable," had praised the city officials and city lawyer, who would later become the Derrickson defendants, for having negotiated such a fair decree:

The defendants did not violate their fiduciary relationship to the city or secure a personal advantage in conflict with their duty to serve the city. . . . If the Illinois statutes are in conflict with the settlement, and I conclude they are not, then the state statutes should give way to the policy of the federal law. I conclude that the proposed decree is fair, adequate and reasonable and that it does not violate state or federal law.346

But, in analyzing the elements of issue preclusion, the Seventh Circuit held that this comment was not necessary to the district court's decision.347 According to Judge Easterbrook, although the district court had to find that the decree itself comported with state law before approving it because parties cannot liberate themselves from law through court-approved settlements,348 it did not have to decide that the manner of negotiation was lawful. Implicitly, then, Judge Easterbrook separated the findings a judge must make before approving a settlement—findings on adequacy of representation and a lack of collusion—from a finding that the conduct of the parties in reaching agreement comported with other law.349

Concurring separately in Derrickson, Judge Cudahy acknowledged that the majority's distinction between the validity of the decree and the alleged illegality of the negotiations was plausible, but argued that the distinction was unworkable in practice: "[E]ither consent decrees must address and resolve all state law problems, including the lawfulness of the means of settlement, or there should be no consent decrees."350 He argued that let-

346 Derrickson, 845 F.2d at 723 (quoting district court order approving the consent decree).
347 Id.
348 Id.
349 The Seventh Circuit also found, despite the language from the district court quoted in the text supra at note 346, that the district court had not actually decided the question of whether the terms of the settlement violated state law. Id. at 723.
350 Id. at 724 (Cudahy, J., concurring).
ting a decree stand, while sending the negotiators to prison is "the height of hypocrisy." Although Judge Cudahy did not elaborate on the hypocrisy charge, what he must have meant was that the judgment in a subsequent suit implicitly criticizes the protection afforded the class or the public in the first suit, while leaving the first judgment intact. The law, however, leaves settlements in ordinary suits in place in the interest of finality, while allowing the plaintiff to sue his lawyer for negligently having advised the client to settle or negligently handling the client's suit so that settlement was the best option. The settlement is left intact but the lawyer is liable. What makes a similar result unbearably "hypocritical" in the class action context?

351 Id. at 725 (Cudahy, J., concurring).
352 Some insight into this question may be gleaned from court cases that bar a criminal defendant who remains incarcerated from recovering damages against his lawyer for malpractice on the ground, inter alia, that the justice system cannot tolerate awarding damages for an imprisonment it otherwise affirms. See, e.g., Zeidwig v. Ward, 548 So. 2d 209, 214-15 (Fla. 1989) which concludes that approving a policy that would approve the imprisonment of a defendant for a criminal offense after a judicial determination that the defendant has failed in attacking his conviction on grounds of ineffective assistance of counsel but which would allow the same defendant to collect from his counsel damages in a civil suit for ineffective representation because he was improperly imprisoned. . . . is neither logical nor reasonable.

The legal standard for obtaining a reversal of one's conviction on the ground of ineffective assistance of counsel is more difficult to meet than the ordinary malpractice standard. See Susan P. Koniak, Through the Looking Glass of Ethics and the Wrong with Rights We Find There, 9 Geo. J. Legal Ethics 1, 5-12 (1995). The reality is that we imprison some people, though their lawyers committed malpractice in defending them. See, e.g., Smith v. Ylst, 826 F.2d 872, 874 (9th Cir. 1987), cert. denied, 488 U.S. 829 (1988) (psychiatric reports showed that the defendant's lawyer suffered "paranoid psychotic reaction[s]" during the trial, but the court upheld the conviction because the defendant failed to show prejudice); Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985), cert. denied, 476 U.S. 1164 (1986) (no presumption of prejudice on showing that defense counsel was addicted to drugs, and prejudice not shown by counsel's stipulation to virtually all elements of the crime when state could easily have proved the elements). See generally Martin C. Calhoun, Note, How to Thread the Needle: Toward A Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims, 77 Geo. L.J. 413 (1988) (advocating list of minimal criteria to evaluate ineffective assistance of counsel claims). Denying that reality is a lot more hypocritical than admitting the truth and trying to explain the societal interests that supposedly justify using a tougher standard in cases aimed at reversing convictions. Having drawn an analogy between the misconduct of criminal defense lawyers and that of class counsel, we would like to point out that it is reasonable to assume that lawyers who represent indigent defendants cannot bear the costs of their own misconduct because
If some class actions approved by courts as fair and reasonable involve collusion or malpractice, denying that fact seems to us much more hypocritical than admitting it, providing some redress, and yet leaving the settlements in place. If there are legitimate reasons for the lax standards used by courts in approving class action settlements—standards that allow a fair amount of collusion and malpractice to go unnoticed by the class action court and the courts reviewing such settlements, then those reasons should be articulated. They should not, however, be used as an excuse to deny the reality of abuse. That is hypocrisy.

3. Full and Fair Opportunity to Litigate

Although a finding that the first court did not actually decide the issue to be litigated in the second suit or a finding that the resolution of the issue was not necessary to the first action would suffice to defeat issue preclusion, no court need rely on such findings to allow the later suits we propose. The final requirement of issue preclusion is that a party against whom preclusion is sought had a full and fair opportunity to litigate the issue in the first proceeding.\(^3\) We maintain that in none of the later suits that we propose could a court find that the class action provided a full and fair opportunity to litigate the kind of misconduct we have described.

First, as class action courts now conduct fairness hearings, these hearings are not adversary proceedings.\(^3\) To hold that hearings, which are in many cases essentially ex parte presentations to a judge, are the equivalent of a fair opportunity to litigate is absurd.\(^3\) Second, even class members who appear in general they are poorly compensated by the state for their efforts. Class lawyers and defendants in class action are not similarly undercompensated for having participated in a class action settlement. Thus, an important argument for restricting later suits against criminal defendants is not available to support similar restrictions on suits against class counsel and defendants in class actions.

\(^3\) Restatement (Second) of Judgments § 27 (1980). We note that a similar requirement applies to claim preclusion as well. In addition to showing that the parties are the same and the transaction is the same, to establish claim preclusion, one must show that “the procedure in the first action (including the possibility of appeal) did not exclude an opportunity to present the matter advanced in the second action.” James, Hazard & Leubsdorf, supra note 288, § 11.15.

\(^3\) See supra notes 177-196 and accompanying text.

\(^3\) Once again, courts outside the class action context have recognized this point in
through independent counsel to object to the settlement or to object to class counsel's representation of the class do not receive a full and fair opportunity to litigate malpractice, fraud or antitrust claims. This is so as a factual matter because courts conducting fairness hearings severely restrict objectors' access to the evidence that would be necessary to sustain a finding on any of these matters. As we have already pointed out, discovery during a fairness hearing is tightly controlled and considered a privilege, not a right. In any of the later suits we propose, the access to evidence afforded to the plaintiffs would be far greater than that typically available during the fairness hearing.

In *Derrickson*, Judge Easterbrook's rejection of issue preclusion begins by making just this point about the availability of evidence. The Illinois Attorney General had not been afforded discovery rights in the class action proceeding, which meant for the Seventh Circuit that he had not had a full and fair opportunity to litigate whether the defendants and their counsel rejecting the collateral estoppel defense in a malpractice action arising out of a settlement. See *Cook v. Connolly*, 366 N.W.2d 287, 291 (Minn. 1985):

> Neither is the hearing on a proposed minor settlement designed to afford a full and fair opportunity to consider the issue of lawyer competence. The minor's guardian, a layperson, is ill-equipped to raise the issue, much less present it; counsel for both the minor and the defendant are interested in obtaining approval, not disapproval, of the proposed settlement, and the minor's attorney, surely, is unlikely to use the occasion to confess any professional inadequacy.

356 See supra notes 191-195 and accompanying text.

357 The Ninth Circuit ignored these problems in *Golden*, 786 F.2d at 1426. In *Golden*, the plaintiffs who brought the later malpractice suit had objected to the adequacy of counsel on the same ground during the fairness hearing, but their objections had been rejected. Id. at 1426, 1428. The Ninth Circuit, without considering the limited evidence available to objectors in the first proceeding, simply asserted that their first opportunity to litigate had been full and fair. Id. at 1429. The failure to consider the nature of the first proceeding and the impediments that might have prevented the objectors from making their case limits the persuasive power of the *Golden* decision. In any event, the holding in *Golden* seems limited to later suits for malpractice brought by class members who had actually objected to class counsel's adequacy during the fairness hearing on the same ground now being pressed in the malpractice suit—the facts in *Golden* emphasized by the court. Whether after the Ninth Circuit's recent decision in *Durkin*, 92 F.3d 1510, which did not bother to cite *Golden*, even that limited holding would be adhered to by the Ninth Circuit is unclear. Consider, for example, that *Durkin* emphasizes that issue preclusion is inapplicable to malpractice claims because they do not accrue until the first proceeding has concluded.

Id. at 1517.

358 845 F.2d at 721-22.
had violated state conflict-of-interest laws in negotiating the settlement.\textsuperscript{359} Of course, one could imagine a procedural change that would allow broad rights of discovery in fairness hearings.\textsuperscript{360} However, not only is no such change likely to occur any time in the near future,\textsuperscript{361} but even were such a change to be implemented it would not be enough to transform fairness hearings

\textsuperscript{359} Id. The Seventh Circuit suggested that the lack of discovery in the class action settlement process was particularly decisive on the question of opportunity to litigate because the Attorney General was denied an alternative forum for discovering the information by the injunction that stopped his first attempt to convene a grand jury. Of course, any class member or state attorney general who, while the class action settlement was pending before a federal judge, tried to invoke an alternative forum to investigate whether misconduct had occurred during the class action negotiations would in all likelihood be similarly enjoined. If the class action was pending before a state court that lacked the ability to enjoin the parallel proceeding because it was brought in federal court or in a court of another state, the result would nonetheless in all likelihood be the same. The parallel court probably would not exercise jurisdiction during the pendency of the first filed suit. In either case, no alternative forum would be available to get the information necessary to litigate fully and fairly whether the conduct in the ongoing class suit was wrongful.

Moreover, we do not believe that the availability of another route to the information necessary to litigate a matter fully should redound to the benefit of the forum that denied the necessary information. The class action forum is not rendered any fairer by the fact that some other forum assisted the litigant, at considerable added expense to that litigant. We therefore assume that the Seventh Circuit's reference to the injunction was meant to emphasize how inhospitable the first forum had been to the litigant and was not meant to suggest that the availability of another forum makes the primary forum fairer.

The Seventh Circuit did, however, make another point on the opportunity to litigate that is important. Noting that the "district court was not the right forum for litigating a criminal case," the court remarked that the state's attorney "was understandably reluctant to try to prove" his case there and thus did "no more than express concern about possible violations." Id. Would not a federal prosecutor or a federal attorney from the antitrust division who suspected civil violations of the antitrust laws feel similarly restrained, even assuming the class action settlement was pending before a federal court? In the case of a potential criminal violation, the situation would be almost directly analogous: Without a grand jury indictment a federal prosecutor would have no more freedom to press his case that a crime had been committed than the state attorney general in \textit{Derrickson}. As for a civil claim, the federal attorney would undoubtedly feel obligated not to make such allegations without having conducted an appropriate investigation first. But how likely is it that that could be accomplished before the fairness hearing proceeding commenced? Presumably, private lawyers would be similarly reluctant to press forcefully any serious charges without an opportunity to make their case or the evidence to back up those charges.

But see supra note 195 (discussing plausible objections to allowing broad discovery rights in every fairness hearing).

See supra notes 264-271 and accompanying text.
into full and fair opportunities to litigate issues of misconduct
connected with the settlement.

Putting factual assertions about the nature of fairness hearings
aside, we see a deeper problem with equating fairness hearings
with a full and fair opportunity to litigate misconduct in connec-
tion with the settlement. To explain that problem we start with
a longstanding exception to the rules against relitigation (both
issue and claim preclusion). Preclusion will not be recognized
when claims were not presented or were unsuccessfully pre-
sented by a party because of fraud or concealment on the part
of one's adversary or one's own attorney. Implicitly, just such
a claim of concealment of (class or defense) counsel’s negli-
gence, of counsel’s (and the defendant’s) fraud, or of other mis-
conduct by counsel lies at the heart of the later suits we pro-
pose. The Restatement (Second) of Judgments provides that
preclusion will not apply when "the party sought to be pre-
cluded, as a result of the conduct of his adversary or other spe-
cial circumstances, did not have an adequate opportunity or
incentive to obtain a full and fair adjudication in the initial ac-
tion."

The Comment to this section makes clear that "other
special circumstances" specifically includes concealment by a
fiduciary. The Comment also makes clear that the exception
is designed to protect persons not in a position to litigate the
matter fully in the earlier proceeding because, for example, they
were then suffering from some "mental or physical disability
that impeded effective litigation." Absent class members are
in an analogous position to those suffering from some mental or
physical disability or those who otherwise lacked, through no
fault of their own, the "incentive" to obtain a full adjudication

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362 See Restatement (Second) of Judgments § 26 cmt. j (1980):
A defendant [in a later action] cannot justly object to being sued on a part or
phase of a claim that the plaintiff failed to include in an earlier action [or a
fortiori failed to fully adjudicate] because of the defendant's own fraud.

363 Id. § 28(5)(c).
364 Id. § 28 cmt. j.
365 Id.
in the earlier proceeding. Absent class members are told in the
class notice that they need not appear, that they will be repre-
sented and that their interests will be protected. The class no-
tice thus in a sense disables them; it is designed to decrease
whatever incentive they might have to appear.\footnote{366}

At its core, our argument against preclusion is a variant of this
longstanding concealment exception. In the earlier suit, the
class was represented by the very party, class counsel, whose
conduct the class now wishes to place in issue.\footnote{367} Moreover, the
defendants were aligned with class counsel in the first suit in
seeking court approval of the settlement. Together, class coun-
sel and the defendants, central players in the first suit, have
every reason and opportunity to conceal from the class and the
class action court the true nature of their association.\footnote{368}

\footnote{366} Contrast \textit{Laskey}, in which the Sixth Circuit disposes of all the elements of issue
preclusion in one sentence:

Since appellants had the opportunity to object to the legal representation at the
prior settlement hearing and since a finding that the class was adequately
represented is necessary for finding the settlement was fair and reasonable,
which in turn was essential to approving the settlement, appellants are
collaterally estopped from now asserting that the legal representation was not
adequate and that the UAW committed legal malpractice.

\textit{Laskey} v. \textit{International Union}, 638 F.2d 954, 957 (6th Cir. 1981) (internal citations
omitted).

The idea that class members who were not represented by independent counsel in
the class action proceeding had a full and fair opportunity to litigate an issue
(adequacy of representation), which no one in the former proceedings, including the
court, ever mentioned was a legal issue is untenable. See supra note 310 (explaining
how the class action court in \textit{Laskey} appeared to ignore the issue of adequacy). The
Sixth Circuit suggested that class members should have retained independent counsel
during the class action proceeding, who then would have known that adequacy was an
issue to be raised. \textit{Laskey}, 638 F.2d at 956-57. But those same class members had
been apprised that class counsel was their lawyer. They had been told in the Notice
they could seek independent representation, but they were also told they had a lawyer.
Id. at 956. The idea that class members, present or absent, have a full and fair
opportunity to litigate the adequacy of their own lawyer's conduct in the very
proceeding in which that lawyer is representing them, even when they are
unrepresented by independent counsel and when the court generally provides no funds
for such a lawyer, is ludicrous. We do not think the \textit{Laskey} sentence constitutes a
precedent worth following.

\footnote{367} If the plaintiff in the later suit is the prior defendant suing defense counsel, as in
\textit{Durkin}, the point is the same. If it is a state agency who unsuccessfully objected as
an intervenor to the class settlement, the point is inapposite, but our other arguments
on claim and issue preclusion would apply.

\footnote{368} See also supra text accompanying notes 316-317 (noting that class action courts
rely on class counsel representations in assessing whether a settlement is fair and
All the critical findings made by a class action court—that the settlement was fair, class counsel adequate, and collusion absent—may be a product of class counsel's negligence or fraud, either or both accepted without objection by the all-too-congenial defendant. Consider that in assessing the fairness of the settlement the court is to consider, inter alia, the extent of discovery completed, the stage of the proceedings, and the experience and views of counsel. All those factors are subject to manipulation by class counsel. The findings of the class action court are thus not severable from class counsel's performance.

And that is true even when there are objectors who mount an adversary challenge to the settlement terms because of the limited ability objectors have to discover what the settling parties actually did and did not do. This intractable agency problem accounts for the general rule that absent class members are entitled to have a second court rule on whether they were adequately represented in the class suit; and underlies our arguing that it is inappropriate to treat the fairness finding as preclusive on the issue of whether the class suffered damages as a result of class counsel's alleged malpractice).


As the court pointed out in Grayson, 646 A.2d at 200 ("Indeed, the . . . court may be unable to elicit the information necessary to make a fully informed evaluation of the settlement agreement if counsel for either of the parties has failed properly to discover and analyze the facts that are relevant to a fair and equitable settlement.").

Hansberry v. Lee, 311 U.S. 32, 45 (1940) acknowledges implicitly the seriousness of this agency problem and seeks to solve it by guaranteeing that absent class members have a chance to litigate for themselves subsequently the question of whether they were adequately represented in the first suit. In a recent unanimous decision by the Supreme Court, Hansberry was reaffirmed. Richards v. Jefferson County, 116 S.Ct. 1761 (1996). See also Gonzalez v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973) (allowing class members to avoid claim preclusion by challenging the class action judgment on the ground that they were inadequately represented in the class action).

We believe that the rule of Hansberry—that due process requires that absent class members be allowed to challenge the adequacy of the representation they received before they can be considered bound by the first judgment—provides sufficient justification by itself for rejecting the defenses of claim and issue preclusion in most, if not all, of the later suits we propose. See infra text accompanying notes 409-414. But we do not rest our arguments entirely on Hansberry for two reasons. First, some of the later suits might be held not to imply that class counsel was inadequate; for example, suits brought by the defendant against defense counsel or an antitrust suit brought by the class. Second, one might argue that Hansberry should be read narrowly to prescribe only one remedy for the agency problem we describe, namely relitigation of the original wrong against precisely the same defendants.
ment that the first proceeding should not count as a full and fair opportunity to litigate misconduct connected to the settlement.

In *Durkin*, the court stated that the earlier fairness hearing could not have afforded the plaintiff a full and fair opportunity to litigate because "a malpractice action does not even accrue until after the settlement becomes final." This statement can be seen as another way of pointing out the absurdity of expecting parties to discover and adjudicate a wrong in a proceeding tainted by the wrong itself. Any such requirement would make a farce of the concept of "full and fair opportunity to litigate." In sum, we argue that fairness hearings are intrinsically incapable of providing a full and fair opportunity to litigate whether class counsel (and/or the defendant and/or its counsel) intentionally, recklessly or negligently breached a duty to the class (or to the defendant), or whether class counsel or the defendant and its agents violated any other duty in the course of negotiating the settlement. For that reason alone there is no basis to hold that the later suits we propose are precluded.

**D. "But the Court Said I Could"—Or Why Equitable Estoppel Will Not Do**

After *Derrickson*, the state attorney general indicted and obtained a conviction of the city officials and the city lawyer who had negotiated the Voting Rights Act consent decree, and on appeal the Illinois Supreme Court affirmed the conviction. The Illinois Supreme Court accepted Judge Easterbrook's understanding of claim and issue preclusion in its opinion. The court also addressed another argument made by the defendants: Even if the criminal prosecution was not estopped under ordinary preclusion rules, it should be estopped as a matter of equity. The defendants argued that they justifiably relied on the

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372 *Durkin*, 92 F.3d at 1517.
374 Id. at 1329.
375 Id. at 1329-30. The equitable estoppel argument was also made in Chief Judge Bauer's dissenting opinion in *Wright* v. *DeArmond*, 977 F.2d 339, 350 (7th Cir. 1992), cert. denied, 507 U.S. 1051 (1993) (Bauer, C.J., dissenting), another post-*Derrickson* proceeding. In *Wright*, the Seventh Circuit denied a habeas petition filed by the city officials and the city lawyer whose prosecutions *Derrickson* allowed. Id. at 340-41.
blessing of their conduct by the federal judge.\textsuperscript{376} The Illinois Supreme Court answered that any reliance on the federal judge’s statements was not justified, given that the federal judge’s comments did not deal with the “substantive issues underlying [their] eventual conviction.”\textsuperscript{377} Thus, findings on adequacy, the fairness of settlement terms and the lack of collusion in a class action should be understood as limited-purpose statements and not as grants of immunity for all conduct in the course of negotiating a settlement. Any broader statements by the class action judge, approving of the parties’ conduct, should be seen as a form of extrajudicial comment. We will return presently to this point.\textsuperscript{378}

But the problems with the justifiable reliance argument run deeper. Although it possesses some superficial appeal, the justifiable reliance argument will not wash. In most cases it is counterfactual and, in all, it is inconsistent with well-accepted principles of law.

As to the factual difficulty, to paraphrase the Illinois Supreme Court’s rejection of the equitable estoppel argument in the post-

\textit{Derrickson} proceeding: “What reliance are you talking about anyway?”\textsuperscript{379} The actions that violated state law—negotiating a contract that secured the defendants a personal advantage—took place prior to any court statements blessing the conduct.\textsuperscript{380} Given that class action settlements are negotiated off-stage, so to speak, and court approval comes only later, the same lack of reliance will be present in almost every instance of abuse for which we propose a later suit be allowed.

Judge Bauer asked “how these defendants were to know that what they were up to was wrong—not just morally but criminally,” given that a federal judge approved their conduct. Id. at 350 (Bauer, C.J., dissenting).

Other cases that we have discussed make only suggestive references with respect to equitable estoppel. Zimmer expresses concern about the fairness of imposing “new notice requirements retroactively.” 758 F.2d at 93. The equitable estoppel concern also finds expression in the allusions in \textit{Golden} to “harassment,” 786 F.2d at 1427, and the broad language in \textit{Ennis}, 542 F.2d 45, on which \textit{Golden} relies regarding protection of lawyers in the same degree as parties.

\textsuperscript{376} Scharlau, 565 N.E.2d at 1329.

\textsuperscript{377} Id.

\textsuperscript{378} See discussion infra notes 391-399 and accompanying text.

\textsuperscript{379} Scharlau, 565 N.E.2d at 1329-30.

\textsuperscript{380} Id. at 1329.
It is true that courts approve some actions of class counsel before the action is taken; for example, courts evaluate a notice plan for consistency with due process and Rule 23 requirements, and approve the plan before it is implemented. But in the case of settlement class actions, the plan is normally devised by class counsel with the cooperation of the defendants, and is presented to the court generally without adversarial challenge.\(^{381}\) The key point is that class counsel, with or without the defendants, drafts a plan and urges it upon the court, not the reverse. If the court accepts it, the court does so in large part because the *court* is relying on counsel's arguments that the plan is adequate. It bewilders us how those facts can give rise to a plausible claim that class counsel justifiably relied on the court's ruling.\(^{382}\)

As a matter of law, the reliance argument is particularly weak when made by lawyers. Although courts are generally loath to recognize policy exceptions to the rules of estoppel,\(^{383}\) they have long accepted one policy as capable of trumping the rules against relitigation: the special obligation of courts to protect clients from their lawyers.\(^{384}\) This exception was first articulated in *Spilker v. Hankin*,\(^{385}\) which denied a lawyer the benefit of claim preclusion in an action by the lawyer to collect a fee from a client. The client sought to contest the validity of the underlying fee contract, and the lawyer claimed that the matter was res judicata, having previously won a judgment against the client, after trial on the merits, for payment on the fee contract. In *Spilker*, the court held that the judiciary's special obligation to protect clients from their lawyers was "more important to the

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\(^{381}\) Even when the defendants oppose the notice plan, their interests are not coextensive with those of the class who might be damaged by inadequate notice.

\(^{382}\) Our bewilderment is not idiosyncratic. Generally, people are not entitled to rely on judgments they have induced by even innocent misrepresentations. Restatement (Second) of Judgments § 26, cmt. j (1980).

\(^{383}\) See, e.g., Westwood Chem. Co. v. Kulick, 656 F.2d 1224, 1229-31 (6th Cir. 1981) (discussing the very few public policy exceptions that have been recognized to the rules against relitigation).

\(^{384}\) Id. at 1229 (discussing this exception, which was first articulated in Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951)). *Spilker* is also cited as authority for there being rare policy exceptions to the rules against relitigation in the Restatement (Second) of Judgments § 26 reporter's notes on cmt. i (1980).

public than universal application of res judicata." The identical balancing of interests supports our position in this Article and makes particularly unpersuasive any reliance argument put forth by lawyers. If the lawyer in Spilker, even absent actual fraud, was not permitted to rely on a previous judgment in his favor after a trial, why should class lawyers be allowed to claim justifiable reliance on the findings of a court that relied on the lawyers' representations to the court in making those findings?

A similar form of equitable estoppel argument is often heard from persons or entities that claim to have relied on statements by government agents to the effect that certain conduct is lawful under some statute or other. There is, however, a long line of Supreme Court cases rejecting equitable estoppel in those situations. Moreover, those cases, which many in the corporate community bemoan as unfair, reflect sound jurisprudential theory. To estop the government, or anyone else for that matter, from arguing to a court that conduct was unlawful, on the ground that a government agent had blessed the conduct would be to transfer the power to say, with binding authority, what the

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386 Westwood, 656 F.2d at 1229 (describing the holding in Spilker).
387 An additional reason for the lawyer exception to equitable estoppel is that lawyers understand better than others that seemingly inconsistent holdings are possible in our legal system.
388 As we have argued, we do not think standard estoppel doctrine provides for estoppel in the cases we propose. For that reason we have not relied on the Spilker exception to justify the suits we propose. It should, however, be noted that for those who dispute our analysis of whether estoppel applies, Spilker provides an additional doctrinal argument in favor of our position.
389 The modern line of cases runs from Office of Personnel Mgmt. v. Richmond, 496 U.S. 414 (1990) (holding that the government may never be estopped based on an agent's erroneous disposition of government money and emphasizing that, if there is any situation in which it would be appropriate to equitably estop the government based on its agents words, the circumstances would have to be "extreme"), back to Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) (government not bound by interpretation of law given by administrative agents). In Richmond the Court expressed dismay that lower federal courts had read its longstanding refusal to rule out any possibility of equitable estoppel as a license to find circumstances that justify estopping the government based on its agents representations. Id. at 422. The Court pointed out that it had "reversed every finding of estoppel that we have reviewed," in an effort to make it as clear as possible to the lower courts that in almost no instance was such estoppel appropriate. Id. The only two Justices to dissent in Richmond, Justice Brennan and Justice Marshall, are no longer on the Court.
390 See, e.g., Jay A. Sigler & Joseph E. Murphy, Interactive Corporate Compliance 160-65 (1988).
law means from the judiciary to thousands of executive branch agents. The result would be a Tower of Babel of law—thousands upon thousands of binding interpretations of law privately dispensed in conversations between government agents and individuals or corporate entities.

Of course, the interpretations the Derrickson defendants sought to invoke to estop later charges of illegality were offered by a judge, not by an executive branch official, and were offered in a court opinion, not a private conversation. The jurisprudential point is, nonetheless, important. A judge's power to interpret law extends only so far as the court's rightful jurisdiction. A judicial determination made without a full and fair opportunity to litigate the matter before the judge differs from a statement by an executive branch agent only because it is made by a person dressed in a black robe. But it is not the judge's costume, the court chamber or the mere fact that a judge writes his thoughts down in an opinion that make what judges say about the law authoritative. It is that they speak after process, not before it and not in the absence of it.

Judge Easterbrook seemed to acknowledge this point at the end of his opinion in Derrickson. There he returned to the question of what the class action court actually decided, concluding that the district court "did not in fact resolve the lawfulness of the negotiating process [and therefore]... could not enjoin the state proceedings." He cited Chick Kam Choo v. Exxon Corporation, interpreting the scope of the so-called relitigation exception to the Anti-Injunction Act, which authorizes a federal court to issue injunctions "to protect or effectuate its judgments." In Chick Kam Choo, the Supreme Court stated that the relitigation exception applied only to issues that were "previously... presented to and decided by the federal court," emphasizing that these requirements were to be strictly applied and that the record, not merely the opinion of the court, was to be examined in deciding what was actually de-

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391 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
392 845 F.2d at 723 (emphasis added).
395 486 U.S. at 147 (emphasis added).
396 Id. at 148.
As we read the Seventh Circuit opinion, it uses *Chick Kam Choo* to deny that all the holdings and findings that judges make are entitled to equal respect. In effect, the Seventh Circuit refused to read a court opinion as having "actually decided" matters the court should not have decided, given the evidence and arguments presented to it.398

We agree. Words that judges speak without the benefit of process are no more worthy to be called authoritative interpretations of law than the words any one of us speaks. That is the

397 Id. (quoting Atlantic Coast Line R.R. Co. v. Locomotive Eng'rs, 398 U.S. 281, 290 (1970)).

398 Having held that in deciding whether to approve a class action settlement, a judge is not required to decide whether the negotiations leading to the settlement were conducted in accordance with state law, the Seventh Circuit added, however, that the better practice would be to consider such matters:

It is not wise to approve a consent decree if a crime has been committed. As the concurring opinion soundly observes, "a consent decree purchased at such a price should not be accepted, regardless of other benefits it may provide." A court ought to avoid approving a decree negotiated by illegal means—it ought to resolve on the merits all issues necessary to ensure that the decree is a lawful, binding obligation of the persons who agree to it. *Derrickson*, 845 F.2d at 723. In context, we believe it is wrong to read the "ought" in the last phrase to mean "must." And to the extent that it is obvious that a settlement was negotiated by illegal means, we agree. Any other position seems absurd. Moreover, we take it this is all Judge Easterbrook meant. Or more precisely, we take it he did not mean that a judge approving a class action should try to determine conclusively, although he does not have to, whether any state or federal law was violated in the course of negotiating the settlement. Proceedings devoted to that goal would not only be unwieldy, but with no trained advocate present in most settlement proceedings to make the case that other law had been violated in the course of reaching the settlement, any such broad findings would also be inherently unreliable and ultimately disrespectful of the interests underlying the state or federal laws under consideration.

In a separate and strongly-worded concurrence, Judge Cudahy agreed with the preclusion law articulated by the majority but only in light of the "case's strangely contorted history." Id. at 724 (Cudahy, J., concurring). For Judge Cudahy, the critical facts in *Derrickson* were that the state attorney general sought to raise his concerns to the district court, was denied a full hearing and was nonetheless subjected to an adverse determination of the question by the district court. Id. (Cudahy, J., concurring). Although Judge Cudahy seems most concerned about the possibility that state action might undo federal policy reflected in the Voting Rights Act contrary to the Act's intention and general principles of federalism, his argument sweeps more broadly. Id. at 724-25 (Cudahy, J., concurring). See supra text accompanying notes 349-352.
difference between a system based on due process and one founded on idolatry or the arbitrary use of power.\textsuperscript{399}

We thus find no factual, legal or jurisprudential reason to accept the general argument of equitable estoppel. In the later suit, the actor's intent should be judged as of the time the alleged breach or otherwise unlawful action was contemplated. Moreover, the actor's role in convincing the court to accept a particular course of conduct should be considered of critical importance in assessing whether the actor can be held liable for damages resulting from the license issued by the court. Inaction by one charged with a duty to protect the class, like class counsel or a defendant with a pre-existing fiduciary relationship to the class, should suffice to show not only a breach of duty but also a causal relationship between the breach and the damage to the class resulting from court approval against which no fiduciary argued.

One last matter before we move on: Should it matter in equity that the plaintiff in the later suit chose not to appeal the fairness determination, chose not to file a motion for relief from the judgment under Rule 60(b) and chose not to relitigate the original matter as, at least, absent class members might under \textit{Hansberry v. Lee}?\textsuperscript{400} Should these alternative avenues operate somehow to foreclose the later suits we propose? We have already explained why those avenues are inadequate to deter the abuse that we hope will be deterred by our later suits.\textsuperscript{401} Thus, if precedent suggested that actions for damages should be estopped even when the elements of estoppel were not satisfied so long as some relief might be available in some other proceeding, like an action to vacate the judgment, we would argue that prece-

\textsuperscript{399} It is true that \textit{Walker v. Birmingham}, 388 U.S. 307 (1967) (holding that in general the unconstitutional orders of a judge must be obeyed until they are overturned by a higher court), runs contrary to this point. We believe the holding in \textit{Walker} to be misguided, but even that decision acknowledges that the order must be one issued by a court of competent jurisdiction over the subject matter in dispute and that orders with only a "frivolous pretense to validity" do not fall under the general rule. Id. at 315. Be that as it may, the judicial statements at issue in the present context are generally not orders to the parties insisting that they take certain action, and the issue is not the right to disobey them without resorting to court process. The statements are more akin to blessings, a form of after-the-fact licensing, not orders at all.

\textsuperscript{400} See discussion supra note 371 and accompanying text.

\textsuperscript{401} See text accompanying notes 175-187.
dent should not be applied here. But there is no such line of precedent. Indeed, what precedent there is suggests the opposite result.

In *Derrickson*, Judge Easterbrook explained that claim preclusion was particularly inappropriate in the context before the court because Supreme Court precedent held that a governmental agent's "lack of power to bind the sovereign, overlooked in negotiating a settlement, may be raised later on." The Supreme Court cases he cited, however, *United States v. Beebe* and *Stone v. Bank of Commerce*, both involved actions to set

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402 The Seventh Circuit opinion in *Kamilewicz v. BancBoston*, 92 F.3d 506 (7th Cir.), suggests, although it falls short of actually holding, that class members' remedies for fraud or malpractice committed by their counsel are limited to reversing the judgment on appeal or vacating the judgment under Rule 60(b) or some state equivalent. See Id. at 511-12. The Seventh Circuit held that federal courts lack subject matter jurisdiction over later actions for fraud and malpractice based on conduct connected to a settlement approved by a state court. Id. at 512. The absence of subject matter jurisdiction was grounded in the *Rooker-Feldman* doctrine, which holds that Congress has not vested subject matter jurisdiction in lower federal courts to hear appeals from state court judgments. Id. at 509-10. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The Seventh Circuit, in a unanimous opinion by Judge Evans, held in effect that the later suit for fraud and malpractice was in the nature of an appeal. Id. at 512. We say that this case suggests that appellate review or a 60(b) action are the exclusive remedies open to class members, because if a malpractice/fraud action is in the nature of an appeal no federal or state court has jurisdiction to hear the claims except the appellate court above the original class action court. That is true because one trial level state court has no more jurisdiction over an appeal from another trial level state court (from the same state or from another state) than a lower federal court would have. The logical extension of the Seventh Circuit's holding then would be that class members are restricted to appeals or actions to vacate the class judgment that they claim was tainted by fraud or other illegality. We believe the Seventh Circuit's opinion is wrong for many reasons, one of which is that a malpractice action is not and never has been an action in the nature of an appeal.

403 See *Edmondson v. Dressman*, 469 So. 2d 571, 574 (Ala. 1985) (rejecting defendant lawyer's "contention that a party must have the underlying judgment set aside before proceeding against an attorney who negligently caused the compromise or settlement of his client's case for an unreasonable sum of money"); *Cook v. Connolly* 366 N.W.2d 287, 291 (Minn. 1985) (holding that "plaintiff's malpractice action is an independent cause of action not subsumed in the plaintiff's personal injury action, and, consequently that setting aside the court-approved settlement is not a prerequisite to maintenance of plaintiff's malpractice action").

404 *Derrickson*, 845 F.2d at 721. This rule may be seen as a variation on the general exception based on misrepresentation, innocent or fraudulent, in the first suit. See supra text accompanying notes 362-365.

405 180 U.S. 343 (1901).

aside judgments agreed to by government attorneys, who lacked the authority to enter into the agreements, not later actions to punish the wayward government agents. Implicitly, then, Judge Easterbrook, by relying on these cases to hold that a later suit is permissible, is saying that there is no reason to confine the government to one remedy, vacatur, as opposed to another, damages or imprisonment, when a government agent has acted unfaithfully. Indeed, for him the existence of one remedy implies the existence of the other.

If that is so, why should class members be limited in their choice of remedy? Like the government, absent class members may seek to avoid the effects of a settlement by claiming their lawyer has exceeded her authority to enter into the settlement. Specifically, absent members can allege that they were inadequately represented by counsel, notwithstanding that the class action court appointed plaintiffs' counsel and apparently found otherwise in its approval of the settlement. Neither of the Supreme Court opinions cited by Judge Easterbrook relies on sovereignty as a ground for decision; both rely instead on the general principle that agreements made by lawyers without authority are not binding on their clients. Thus, neither citation easily supports granting a choice of remedy to the government, while denying that choice to others bound by settlements negotiated by unfaithful agents.

The State of Illinois did not appeal the Voting Rights Act settlement or otherwise seek to nullify it, but the Seventh Circuit refused to restrict the government to that remedy. The reason it makes sense not to restrict the government to an action to set aside the settlement is that the settlement overall might be acceptable to the state, while the faithless conduct might not be. The state might nonetheless have been harmed by the faithless activity, and the conduct might nonetheless be conduct worthy of deterring by a suit for damages or imprisonment. The same analysis would seem to apply whether the

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407 *Hansberry*, 311 U.S. at 41-46.
408 See *Beebe*, 180 U.S. at 352 (relying on Robb v. Vos, 155 U.S. 13 (1894), for this proposition); and *Stone*, 174 U.S. at 423 (“We are also of the opinion that as city attorney he had no greater power to bind the city by that agreement than would an attorney have in the case of an individual.”).
faithless agent was negotiating on behalf of the state or on behalf of a class.

Moreover, only parties to an action have a right to appeal or to seek relief under Rule 60(b) or its state counterparts. At least since Hansberry was decided in 1940, it has been clear that absent class members are considered parties and not strangers to the class action litigation only if those absent class members were adequately represented in the class proceeding, a principle unanimously reaffirmed last term by the Supreme Court in Richards v. Jefferson County. To hold that absent class members, seeking to sue their own lawyers for fraud or malpractice or the class action defendant and its lawyers for fraud or some other wrong, are limited to appealing the initial decision or moving to vacate it is to presume conclusively that they are parties to the first proceeding. That presumption is unjustifiable so long as the claims they seek to raise in their later suit necessarily include an allegation that they were denied adequate representation or adequate notice as the later suits we advocate by class members generally will. Any holding to the contrary conflicts not only with the due process protection guaranteed by Hansberry and Richards, but also with the due process analysis in Martin v. Wilks.

We rest our case on estoppel.

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409 Fed. R. Civ. P. 60(b).
410 Hansberry, 311 U.S. at 41-46.
412 It passes unjustifiable and moves to ridiculous in those jurisdictions in which absent class members have no right to appeal a final judgment in a class action unless they were granted a right to intervene. For cases holding that absent class members have no absolute right to appeal, see supra note 172.
413 The presumption is also unjustified in any later suit alleging denial of a meaningful opportunity to opt out of the class action, at least when the original class action involved a money suit for damages brought under Rule 23(b)(3) or in a state court that otherwise would lack personal jurisdiction over the absent class members having no minimum contacts with the state court presiding over the class action. Fed. R. Civ. P. Rule 23(b)(3) (guaranteeing the right to opt out); Phillips Petroleum v. Shutts, 472 U.S. 797, 811-12 (1985) (allowing a state court to take jurisdiction over out-of-state absent class members who otherwise lack minimum contacts with a state only if those people are guaranteed adequate representation, adequate notice and an opportunity to opt out of the suit).
414 490 U.S. 755, 758 (1989) (holding that nonparties are not bound by a class action court's entry of a settlement or consent decree).
IV. EVERYTHING THE ANTITRUST BAR SHOULD KNOW ABOUT ANTITRUST LAW BUT IS AFRAID TO ASK

A. All I Want is a Room Somewhere

So far we have discussed the variety of lawyer wrongdoing that can occur within class actions, the need for subsequent suits to deter and punish such wrongdoing, and the fact that court approval of class action settlements does not shield this wrongdoing as a matter of procedural law, such as collateral estoppel. In this Part, we focus on a subset of lawyer wrongdoing, namely antitrust violations. The idea of antitrust suits against class action lawyers is even more novel than the idea of malpractice suits; no antitrust actions have ever been brought, let alone brought successfully. Although making out a prima facie case might sometimes be difficult, and finding a party other than the government with standing to bring an antitrust claim arising from conduct in a class action will not always be easy, we do not believe that those problems explain the complete absence of the antitrust claims we advocate. Rather, we think that the false but nonetheless widely held belief that court involvement in the class action settlement process somehow suspends the operation of other laws threatens to lull lawyers into lapses in the antitrust context, where longstanding immunity doctrines beckon lawyers engaged in anticompetitive behavior to feel safe when a government actor—particularly a judge—blesses that behavior. The three immunity doctrines that offer this siren song are the state action doctrine, federal regulatory immunity, and the Noerr-Pennington doctrine. But as we shall argue, the imagined comfort of these doctrines is ephemeral. The antitrust laws lie in waiting, a trap for the unwary.

415 We do not focus in this Article on state antitrust laws and the parallel immunity doctrines that would apply, but these laws are largely similar in the relevant respects to the federal antitrust counterparts, and where they are not, the arguments we would make in favor of rejecting the immunity defenses would be essentially the same.

416 This doctrine, derived from the Supreme Court's decision in Eastern R.R. Presidents Conf. v. Noerr Motor Freight Co., 365 U.S. 127 (1961), and elaborated upon in United Mine Workers v. Pennington, 381 U.S. 657 (1965), generally immunizes from antitrust liability private petitioning of the government for favorable legislative, judicial, or administrative action. The doctrine is commonly referred to as the "Noerr-Pennington doctrine," "Noerr immunity" or petitioning immunity.
The essence of the three antitrust immunity doctrines can be captured in terms of simple dichotomies. The antitrust laws condemn private restraints, not governmental restraints; they address competition, not regulation; they reach commercial activity, not petitioning activity. To illustrate, if lawyers who make fee agreements in class actions are engaged in private, commercial activity that restrains competition, the antitrust laws should apply; if they are engaged in activity that seeks governmental restraints or activity that is subject to governmental regulation, the antitrust laws should not apply. Despite the attraction of such simple dichotomies, stating the issue in this way does not get us very far.

The problem is that the anticompetitive restraints we allege exist in some class actions raise unique issues in antitrust immunity. First, class actions are at the same time a form of litigation and a form of regulation. To the extent that the litigation aspect of class actions predominates, the applicable immunity doctrine would not be state action or federal regulatory immunity, but Noerr immunity. The typical issue in Noerr immunity cases, however, is usually whether the litigation itself is an anticompetitive weapon, not whether the litigation provides a backdrop for anticompetitive (lawyer) activity. This suggests that class actions, for antitrust immunity purposes, are more like a kind of regulatory regime in which the court's role is like that of an administrative agency. Like administrative agencies, courts in class actions are called upon to approve private contractual arrangements—settlements. But most antitrust immu-

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417 Regulation is usually viewed as characteristically different from litigation: it takes place ex ante; it covers a broad range of persons; it is continuous; and it is done by legislatures and administrative agencies thought to have expertise in a particular area. Litigation, by contrast, takes place ex post; is narrow in scope, in that it covers only the parties to the litigation; is a one-shot proposition; and is handled by non-specialized courts. See Posner, supra note 342, at 367-69 (discussing the differences between regulation and litigation). Whatever the merits of distinguishing between regulation and litigation in general, class actions certainly make the distinction less tenable.

418 See generally Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (noting that, from the plaintiffs' perspective, the class action "resembles a 'quasi-administrative proceeding, conducted by the judge'") (citations omitted); Nagareda, supra note 156, at 899 (1996) (drawing an analogy between recent class action settlements in mass tort cases and administrative regimes, but not addressing the application of antitrust laws to such regimes).
nity cases involving administrative agencies involve anticompetitive conduct by the parties who are the primary subject of the regulation, not the lawyers whose conduct is only incidentally regulated, if at all. Thus, class actions present unique issues which the Supreme Court has never explicitly addressed: How do the immunity doctrines apply to litigation as a regulatory system? How should the immunity doctrines view settlements that must be approved by a court? How should the immunity doctrines deal with regulatory schemes that predominantly regulate one area and only incidentally regulate another? We address these questions next.

B. When a Rose Is Not a Rose or Why State Action Will Not Work

The state action doctrine, derived from the Supreme Court's decision in *Parker v. Brown*,\(^{419}\) aims to promote the values of federalism and state sovereignty by immunizing from antitrust liability conduct mandated or permitted by state regulatory schemes.\(^{420}\) The Court in *Parker* reasoned that in enacting the Sherman Act,\(^{421}\) Congress did not intend "to restrain a state or its officers or agents from activities directed by its legislature" or "to nullify a state's control over its officers and agents."\(^{422}\)

\(^{419}\) 317 U.S. 341 (1943).

\(^{420}\) In light of this purpose, class lawyers would probably be able to raise the state action immunity defense only when they had brought the class action in state court. The mere fact that a class action was filed in federal court under its diversity jurisdiction, and so involved state substantive law (for example, tort law), would not make the state action doctrine applicable, because the relevant regulation for state action doctrine purposes would be the rules governing a class action, which are federal. See Fed. R. Civ. P. 23. There would be no relevant state action. The only possible exception would be if some state statute or ethics rule regulated the relevant lawyer conduct. As we argue below, there are no such state statutes or ethics rules, with the possible exception of state maximum contingent fee statutes. See infra note 457.

Although filing patterns could change (an unlikely event if the proposed changes to Rule 23 are enacted), most class actions involving the types of provisions we are concerned with have been filed in federal courts, not state courts. Thus, the state action doctrine—probably the strongest defense that could be raised to an antitrust challenge—is currently of limited applicability.


\(^{422}\) 317 U.S. at 350-51.
However, the Court cautioned that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, ... and we have no question of the state ... becoming a participant in a private agreement or combination by others for restraint of trade." Thus, federal competition policy does not automatically trump state regulatory policy, but neither can state regulatory policy freely displace federal competition policy. The two must co-exist. Figuring out what that means in practice is the trick.

The Supreme Court offered general guidance as to how federal competition and state regulatory policies might coexist in California Retail Liquor Dealers Association v. Midcal Aluminum, by formulating a two-part test for determining whether the state action exemption applies. First, the challenged activity must be authorized by a "clearly articulated and affirmatively expressed" state regulatory policy. Second, any private activity authorized by such a policy must be "actively supervised" by an appropriate government agency. Both prongs of the Midcal test attempt to determine how committed a state is to a regulatory regime that supplants the federal antitrust law policy of competition.

Therefore, to qualify for state action immunity, the state must supply evidence of its commitment to a regulatory regime ex ante, by adopting a regulatory program that displaces existing competition (a clear articulation), and must supply evidence of its commitment ex post by enforcing that program (active super-
If the state demonstrates the requisite commitment, the federal antitrust laws will not question the correctness of the state’s decision, as the concern of state action immunity is more with the process and structure of state regulation—the demonstration of commitment—than with the substance of the state regulation. Still, the presumption is against finding immunity: “[S]tate-action immunity is disfavored, much as are repeals by implication.”

In determining the applicability of the state action doctrine to an antitrust suit against lawyer conduct, we first look to who may articulate state regulatory policy in the class action context. We next look carefully at the *Midcal* prongs and consider whether lawyers could demonstrate that the state action doctrine ought to apply to their anticompetitive conduct in class actions.

We conclude that lawyers defending an antitrust suit against their conduct in class actions would have a hard time showing that their anticompetitive fee agreements made prior to or contemporaneously with class action settlements would satisfy either of the *Midcal* prongs. States have not demonstrated any commitment to regulate such agreements, either ex ante or ex post, in a way that displaces federal antitrust policy. The lawyers creating and controlling the terms of these restraints are private parties pursuing their own financial interests. They are not

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428 The active supervision requirement does not apply where the actor is a municipality rather than a private party. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985).

429 See, e.g., Hovenkamp, supra note 136, § 20.3, at 677 (1994) (“This [state-action] test is ‘non-substantive’ in the sense that the state is free to regulate in as anticompetitive a manner as it pleases, provided that it takes its own regulatory policy seriously and ensures that private firms act consistently with the stated policy.”) See also Einer R. Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667 (1991) (discussing various “process views” of the state-action doctrine).

430 *Ticor Title*, 504 U.S. at 636 (citation omitted). The more a state cedes decisionmaking authority to private parties with financial, as opposed to political, interests in the result of those decisions, the less likely the courts are to exempt the resulting decisions under the state action doctrine. Id. at 633 (“Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.”) See also Cantor v. Detroit Edison Co., 428 U.S. 579, 593 (1976) (When a case involves “a mixture of private and public decisionmaking,” the issue is whether “the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.”).
pursuing a public anticompetitive interest articulated by the state.

1. **Who May Articulate State Policy**

   As a preliminary matter, we need to identify the source of state regulatory policy. The Supreme Court applies state action immunity without requiring that the *Midcal* prongs be satisfied when the challenged action is that of the "state itself" rather than that of private actors.431

   The "state itself" notion captures the idea that only certain agents of the state may articulate a state policy to displace the antitrust laws by some form of regulation. Nonsovereign state representatives and private parties merely implement the policy articulated by a sovereign state representative; they may not articulate state policy themselves. When the "state itself" acts, "the danger of unauthorized restraint of trade does not arise."432

   However, because the anticompetitive conduct of nonsovereign state representatives and private parties in implementing the policy could diverge from the state policy articulated by the sovereign, this conduct is subject to greater scrutiny (in the form of the *Midcal* test).433

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431 Hoover v. Ronwin, 466 U.S. 558, 567-69, 579 n.33 (1984); Community Communications Co. v. City of Boulder, 455 U.S. 40, 52, 57 (1982) (citations omitted). In determining whether challenged anticompetitive conduct is that of the "state itself," the answer cannot be determined by simply looking to what party is the named defendant in the suit, because the state itself may be the real party in interest. See Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 58-59 (1985) ("The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant."); Hoover, 466 U.S. at 575 (noting that in *Bates* the Court had determined that the claims were "against the State" and that the state "was the real party in interest" rather than party actually named in the litigation) (quoting *Bates* v. State Bar of Arizona, 433 U.S. 350, 361 (1977)).

   Characteristic of its perhaps overly elaborate doctrinal machinations in this area, the Court, in deciding whether the state itself has acted, has sometimes considered whether the state policy is clearly articulated and actively supervised, despite the Court's disavowal of the *Midcal* test in such cases. See, e.g., *Bates*, 433 U.S. at 361-62 (noting that appellants' claim was against an "agent of the court [the state bar] under [the court's] continuous supervision", and that "disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior"). Thus, the analysis tends to be largely the same as it would be under the *Midcal* test.

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432 Hoover, 466 U.S. at 569.

433 Id. at 568 ("Closer analysis is required when the activity at issue is not directly that of the [state], but is carried out by others pursuant to state authorization.").
The question of who may articulate state policy is important for the antitrust actions we propose because these actions would not directly challenge any action of the two entities that most clearly articulate the state's regulatory policy as the "state itself," namely the state legislature and the state supreme court acting in its rulemaking capacity.\textsuperscript{434} State statutes and supreme court rules govern the conduct of lawyers in class actions, and supreme court ethics rules govern the conduct of lawyers generally.\textsuperscript{435} But although state action protection is strongest when the regulatory policy articulated by the state legislature or the state supreme court is challenged directly,\textsuperscript{436} an antitrust suit challenging anticompetitive lawyer conduct in class actions would not directly challenge either statutes or procedural rules governing class actions or any ethics rule.\textsuperscript{437} At most, such a suit would...
challenge an inferior state court's application of the state's class action rules which govern the approval of settlement agreements by private parties. Thus, unless the trial court acts as the "state itself," the protection afforded by the state action doctrine to anticompetitive lawyer conduct in class actions is governed by the Midcal test.\textsuperscript{438}

The trial court does not act as the "state itself" in making or approving either class action settlements or class counsel fee arrangements. Political subdivisions of the state cannot articulate state regulatory policy for state action doctrine purposes.\textsuperscript{439} Nor can state regulatory agencies acting alone authorize anti-
competitive behavior merely because the state creates them and
gives them broad powers.\textsuperscript{440} Therefore, it seems that in the
judicial sphere, a trial court, as a subordinate court, could not by
itself authorize a state regulatory policy even if the state grants
that court broad powers which could be construed as "legisla-
tive" or "rulemaking" powers in the class action context.

If, however, the trial court acts as an arm of the state supreme
court in its supervisory capacity, the trial court may speak for
the "state itself." In \textit{Hoover v. Ronwin},\textsuperscript{441} a disgruntled appli-
cant to the bar challenged the denial of his admission, alleging
that the lawyer members of the court-appointed bar committee
had conspired to "artificially reduc[e] the numbers of competing
attorneys in the State of Arizona."\textsuperscript{442} The Court found that
because the state supreme court "retained strict supervisory
powers and ultimate full authority over [the committee's] ac-
tions,"\textsuperscript{443} the applicant was challenging conduct of the state su-
preme court itself despite the fact that the committee adminis-
tered and graded the bar examination. In addition, to support
its conclusion that the applicant was challenging conduct of the
state supreme court itself, the Court pointed to the following
facts: that the committee's authority was limited to making rec-
ommendations directly to the state supreme court, which "itself
made the final decision to grant or deny admission to prac-
tice";\textsuperscript{444} that the state supreme court required the committee to
submit its grading formula to the court before each exam;\textsuperscript{445} and
that "a disappointed applicant was accorded the right to seek

We therefore disagree with Professor Elhauge's assertion that \textit{Southern Motor Carriers}
stands for the proposition that, "all that must be clearly shown . . . [to establish clear
articulation] is a general intent to create a regulatory agency." Elhauge, supra note
429, at 692 n.123.

\textsuperscript{441} 466 U.S. 558 (1984).
\textsuperscript{442} Id. at 565.
\textsuperscript{443} Id. at 572.
\textsuperscript{444} Id. at 573. See also id. at 575-76 ("Only the Arizona Supreme Court had the
authority to grant or deny admission to practice in the State."); id. at 575 n.27 ("Under
Arizona law, the responsibility is on the court—and only on it—to admit or deny
admission to the practice of law."); and id. at 581 (noting "the incontrovertible fact
that under the law of Arizona only the State Supreme Court had authority to admit
or deny admission to practice law").
\textsuperscript{445} Id. at 572.
individualized review by filing a petition directly with the court."\textsuperscript{446}

In the class action context, by contrast, there is no similarly direct state supreme court supervision and control over trial courts. The trial court makes a final judgment, not a mere recommendation, in approving settlements. Even if objectors to an approved settlement can appeal the trial court's decision to the state supreme court,\textsuperscript{447} the state supreme court does not use its supervisory powers to oversee specific class action rules on appeal; it merely acts in its judicial role as a court of last resort.\textsuperscript{448}

Although the trial court is not "authorized" to speak as the state itself of its own authority, a trial court's approval of a class action settlement that includes an anticompetitive agreement by lawyers may still be an "authorized" implementation of state law. In \textit{City of Columbia v. Omni Outdoor Advertising},\textsuperscript{449} the Supreme Court held that "in order to prevent Parker['s state authorization requirement] from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the [nonsovereign state actor's] action under state law."\textsuperscript{450} \textit{Omni} stands for the principle that, for purposes of the state action doctrine, the authority of a nonsovereign state actor can be established even if "the nature of [the nonsovereign actor's] regulation is substantively or procedurally defective."\textsuperscript{451}

\textsuperscript{446} Id. at 576.
\textsuperscript{447} See supra note 172.
\textsuperscript{448} The Court in \textit{Hoover} suggests that the state supreme court's denial of the applicant's petition after initially denying him admission was itself state action. \textit{Hoover}, 466 U.S. at 577 ("[T]here was state action by the court itself explicitly rejecting Ronwin's Claim.") This statement raises the possibility that the supreme court acting in its adjudicative capacity alone might constitute state action. But the Court seems to back off from this notion in an accompanying footnote, which states: "Our holding is based on the court's direct participation in every stage of the admissions process, including retention of the sole authority to admit or deny." Id. at 577 n.30.
\textsuperscript{450} \textit{Omni}, 499 U.S. at 372. When the Court refers to authority in this context, it refers to "authority to implement" rather than "authority to articulate" an anticompetitive state policy. On the two meanings of "authorization," see supra note 433.
\textsuperscript{451} \textit{Omni}, 499 U.S. at 371. The Court held that "an expansive interpretation of the Parker-defense authorization requirement would have [the] unacceptable consequence[ ]" of transforming "state administrative review into a federal antitrust
In the class action context, many states' laws authorize trial courts to approve class action settlements so long as they are fair, adequate, and reasonable.\textsuperscript{452} Under this standard, a trial court might be able to approve, consistent with state law, a class action settlement containing an anticompetitive agreement among lawyers. But even if class action settlements that contain anticompetitive lawyer agreements violate state law, under the Court's reasoning in \textit{Omni}, the trial court's approval of those anticompetitive agreements may still be "authorized" for purposes of the state action doctrine.

But although under \textit{Omni} a settlement agreement containing anticompetitive provisions could be considered "authorized" for state action purposes, even if unlawful under state law, that type of authorization is not sufficient to establish a state action immunity defense. The "clear articulation" and "active supervision" requirements set forth in \textit{Midcal} would still have to be met to establish antitrust immunity. Thus, we must look to the pronouncements of the state legislature and state supreme court (in its rulemaking capacity) and evaluate these pronouncements under the two \textit{Midcal} prongs. We turn to these prongs next.

2. \textit{Clear Articulation}

We must first look to see whether a state's rules governing class actions contain a "clear articulation" of a policy to displace competition in some market. If these rules evidence a state policy to promote competition in a particular market\textsuperscript{453} or to

\textsuperscript{452} See, e.g., Adams v. Robertson, 676 So. 2d 1265 (Ala. 1995), cert. granted, 1996 U.S. LEXIS 4538; 65 U.S.L.W. 3254 (October 1, 1996). This standard usually derives from case law rather than the class action rules themselves. Many states have class action rules based in whole or in part on the Federal Rules of Civil Procedure; thus, the rules on settlement typically track the language of Fed. R. Civ. P. 23(e), which simply states that "[a] class action shall not be dismissed or compromised without the approval of the court." See, e.g., N.Y. Civ. Practice Law, Rule 908; Ill. Civil Practice Law, 735 I.L.C.S. 5/2-806; Mass. R. Civ. P. 23(c); Pa. R. Civ. P. 1714(a); Tex. R. Civ. P. 42(e).

\textsuperscript{453} An explicit statement that a particular regulatory regime is not intended to displace competition also precludes a finding of clear articulation. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 789 & n.19, 791 (1975). However, the party seeking federal antitrust enforcement is not required to show an explicit intent not to displace competition to avoid the state action defense.
remain neutral with respect to competition in a particular market, state action immunity does not apply. On the other hand, if the state mandates conduct that would be considered anticompetitive under the federal antitrust laws, that is a sufficiently clear articulation. For example, if a state statute or supreme court rule established a required fee schedule for lawyers in class actions, that would be a clearly articulated policy to displace competition. No state has done so, however.

454 See Community Communications Co. v. City of Boulder, 455 U.S. 40, 55 (1982) ("Plainly, the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere neutrality respecting the . . . actions challenged as anticompetitive.").

455 See, e.g., Bates v. State Bar of Arizona, 433 U.S. 350, 360, 362 (1977) (holding that restrictions on lawyer advertising contained in the state supreme court's disciplinary rules are "'compelled by direction of the State acting as sovereign'" and so "reflect a clear articulation of the State's policy") (quoting Goldfarb, 421 U.S. at 791).

456 Cf. Hoover, 466 U.S. at 579 n.32 (distinguishing the Court's holding of no state action immunity in Goldfarb on the ground that in that case, "state law did not refer to lawyers' fees, the Virginia Supreme Court Rules did not direct the State Bar to supply fee schedules, and the Supreme Court did not approve the fee schedules established by the State Bar").


Although these statutes could be interpreted as clearly articulating a policy to displace competition among lawyers, we think that they would not pose a significant threat to most of the suits we envision. First, only a minority of states have these statutes, and in some states, the statutes apply only to a small subset of cases, normally medical malpractice actions, which to date have not been the subject of class actions. Hazard, Konia, & Cramton, supra note 249, at 537. In class actions that extend to claimants in multiple jurisdictions, it is unlikely that all of these jurisdictions will have fee cap statutes. Second, it is not clear that the statutes apply to the conduct we are concerned with, namely bid rotation and price fixing in the private administrative system.

In addition, all state ethics rules proscribe "unreasonable" fees, but none attempts to establish a fee schedule. See ABA Model Rules of Professional Conduct Rule 1.5
mandated anticompetitive conduct is not necessary. Express statements in state statutes or procedural rules that permit or contemplate anticompetitive conduct would also be sufficient to satisfy the clear articulation requirement. None of the applicable state statutes or procedural rules specifically contemplates lawyer agreements concerning fees or class counsel selection, however.

But express statements permitting or contemplating anticompetitive conduct are also not necessary to satisfy the clear articulation requirement. The state need not authorize the specific restraint challenged, nor need it articulate an intention to permit

(1994); ABA Model Code of Professional Responsibility DR 2-106 (1981). These rules certainly express no state policy to displace competition.

458 Southern Motor Carriers, 471 U.S. at 61 (stating that "a state policy that expressly permits, but does not compel, anticompetitive conduct may be 'clearly articulated' within the meaning of Midcal") (citation omitted). This conclusion was implicit in New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978), in which the Court held that a regulatory scheme that expressly allowed, but did not require, an automobile franchisee to protest the establishment of a competing dealership in its market area was "clearly articulated and affirmatively expressed, designed to displace unfettered business freedom." Id. at 109.

459 Some state class action rules based on the Federal Rules of Civil Procedure have no explicit provision on attorney's fees at all, leaving it up to case law. See, e.g., Mass. R. Civ. P. 23; Tex. R. Civ. P. 42. States that do have rules on fees neither set these fees nor say anything about lawyer agreements concerning them. See, e.g., N.Y. Civ. Prac. L., Rule 909 (McKinney 1976) ("If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorney's fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class."); Pa. R. Civ. P. 1716 ("In all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things, the following factors . . . ."). The Uniform Class Action Act does contain a provision concerning attorney's fee agreements that could be interpreted as covering the type of agreements we are concerned with, but simply requires the class lawyers to file such agreements with the court. Uniform Class Action Act, § 17; see also id. §12(c)(3) (requiring notice of proposed settlement sent to class members to include "any agreements made in connection with the dismissal or compromise"). In our view, this provision expresses no state policy against competition among lawyers. In any event, only two states, Iowa and North Dakota, have adopted the Uniform Class Action Act. See 12 Uniform Laws Annotated, 1995 Supplementary Pamphlet, at 28-29 (prefatory note to Uniform Law Commissioners' Model Class Actions Act Rule).

460 The Supreme Court has made this clear in Southern Motor Carriers and Omni, both of which we discuss more fully infra notes 463-480 and accompanying text. See also Hovenkamp, supra note 136, § 20.4, at 679 (noting that "most of the details of the regulatory scheme itself may be left to the state agency or governmental subdivision that carries it out").
anticompetitive effects. It is sufficient if the state demonstrates a commitment to displace competition by adopting a regulatory scheme that is clearly inconsistent with competition.

For example, in *Southern Motor Carriers Rate Conference, Inc. v. United States*, the Court held that a statute requiring a state agency to prescribe "just and reasonable" rates for intrastate transportation satisfied the clear articulation requirement, and authorized the agency to allow private common carriers to combine into "rate bureaus" for the purpose of collectively proposing rates which the agency could accept or reject. The Court read the statute to create an "inherently anticompetitive rate-setting process," which demonstrated that the state "clearly intend[ed] to displace competition in a particular field with a regu-
latory structure." But just what makes the state’s intent so clear is not so clear from the Court’s opinion.

The Court’s only explanation of what made the state’s intent clear comes in a footnote, in which the Court stressed the fact that under the statute, the agency “is not authorized to choose free-market competition. Instead, it is required to prescribe rates for motor common carriers on the basis of statutorily enumerated factors. . . . [which] bear no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market.” The Court’s implicit assumption in *Southern Motor Carriers* seems to be that the state statute reduced the incentive of any individual trucker to propose lower rates than other truckers, because the state agency would determine just and reasonable rates and apply them in any event. The Court thus seems to be saying that once the state chooses to preclude individuals from setting their own prices, there is no competition in the sense that matters for antitrust purposes, so it is fair to assume that the state has clearly authorized other forms of anti-competitive behavior, such as the creation of cartels to propose rates to the state.

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465 Id. at 64. The Court acknowledged that it had reached a different result in *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), in which the question was “whether Congress intended to immunize a federal regulatory program from the antitrust laws.” *Southern Motor Carriers*, 471 U.S. at 56 n.18. We discuss this inconsistency infra at note 554.

466 *Southern Motor Carriers*, 471 U.S. at 65 n.25.

467 Although this interpretation is consistent with the Court’s view that antitrust policy is a price competition policy above all else, it is inconsistent with another part of the reasoning in *Southern Motor Carriers*. In an earlier part of the opinion rejecting the notion that a state must compel anticompetitive conduct to get the protection of state action immunity, the Court stated:

> Most common carriers probably will engage in collective ratemaking, as that will allow them to share the cost of preparing rate proposals. If the joint rates are viewed as too high, however, carriers individually may submit lower proposed rates to the Commission in order to obtain a larger share of the market. Thus, through the self-interested actions of private common carriers, the States may achieve the desired balance between the efficiency of collective ratemaking and the competition fostered by individual submissions.

Id. at 59 (emphasis added). The Court was referring to the states that had statutes expressly allowing collective rate-setting, which evidence a stronger intent to allow anticompetitive behavior. But if a state statute does not mention collective rate-setting and if the possibility of individual submissions to the state “fosters competition,” then how has the statute “not authorized [the state or its commission] to choose free-market competition.” Id. at 65 n.25. In other words, in what sense has
In City of Columbia v. Omni Outdoor Advertising, the state statute restricted competition, not by directly interfering with price competition by authorizing rate setting or cartels that might propose rates to the state but by restricting free entry into a market. Free entry facilitates undercutting of a competitor's prices, and because new firms are attracted to industries with excessive profits (that is, high prices relative to costs), excessive costs, or both. Free entry also drives a firm's prices down to its costs and forces it to minimize its costs. In Omni, the Court held that a city ordinance regulating billboards was entitled to state action immunity. The Court reasoned that a state statute authorizing a city to regulate zoning was sufficient articulation of a policy to displace competition in the market for land use. The basis of this reasoning is that a zoning statute inherently allows local governments to grant restrictive licenses that deny free entry. Thus, zoning (like collective rate-setting) is a form

developed. 

the state “clearly articulated” a policy that allows cartels to propose rates? The state commission did choose to allow collective rate-setting, but the agency itself, as the Court recognized, could not authorize anticompetitive conduct for state action purposes. Id. at 62-63. Perhaps the Court was assuming, however tacitly, that the statute in question prohibited the state agency from approving an individual rate simply because it was lower than those of competitors. To that extent, although some competition could exist, the state agency could not choose completely free competition. Although we do not believe that our attempt to rescue the Court from the inconsistency inherent in Southern Motor Carriers is very powerful, we believe our argument's weakness reveals not our failure of imagination but the fundamental flaws in the Court's decision in this case. We return later to a criticism of Southern Motor Carriers. See infra note 554. For the time being, however, we treat it as binding precedent, however flawed, that we have no reason to believe will soon be reversed and proceed to analyze whether this flawed case presents major problems for the suits we propose.

469 Economists refer to these beneficial effects of competition as allocative and productive efficiency, respectively.
470 According to the Court:
The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers.
Id. at 373.
471 We can now see why Hoover, despite all its discussion of whether the “state itself” acted, can be viewed as merely an application of the clear articulation requirement. In Hoover, the Court placed great reliance on the fact that, “the
of state regulation inconsistent with one of the basic premises of competition (as defined for antitrust purposes)—in this case, free entry.\footnote{472}

The class action context presents a different situation. Consider first lawyer agreements to make proposals to a trial court concerning the selection of class counsel and the proper fee to be paid to class counsel. At first glance, these agreements seem similar to the collective rate bureaus permitted (but not required) by the state statutes in \textit{Southern Motor Carriers}. The key difference, however, is that the rules governing class actions do not in any way inhibit meaningful competition from occurring. They do not direct the court to determine just and reason-

Committee could not reduce the \textit{number} of lawyers in Arizona." \textit{Hoover}, 466 U.S. at 575. Instead, the state supreme court by its rules "reserv[ed] the ultimate authority to control the number of lawyers admitted to the Arizona Bar." Id. at 578 n.31. Like the zoning statute in \textit{Omni}, the state supreme court rules controlling the number of lawyers inherently restrict free entry. In fact, controlling entry is the essence of creating a profession. To allow an antitrust claimant to base a claim on the restriction of entry, therefore, would inevitably interfere with the state's regulatory interest.

The restriction of free entry was also the very point of the regulatory scheme in \textit{New Motor}, which required a car manufacturer to seek agency approval before opening a retail dealership in the territory of an existing franchisee if the existing franchisee protested to the agency. \textit{New Motor Vehicle v. Orrin W. Fox Co.}, 439 U.S. 98, 98-100 (1978). Like the state supreme court in \textit{Hoover}, the agency had the authority to restrict the number of dealers in an area. Such authority is inconsistent with a regime of competition in which free entry is a prerequisite.

\footnote{472} In addition to price-setting and free entry, a third aspect of competition is that other than offering a superior product, acts that exclude a competitor are impermissible. Antitrust law has long included the notion that a monopolist may not refuse to deal if its purpose is solely to perpetuate its monopoly. In \textit{Town of Hallie v. City of Eau Claire}, 471 U.S. 34, 42 (1985), the Court held that a statute authorizing a city to provide sewage services within a self-defined district and to refuse to provide sewage services outside this district clearly articulated an intent to allow the city to engage in anticompetitive conduct, namely a refusal to deal. It is not hard to see why the statute at issue in \textit{Hallie} is inconsistent with this third premise of competition.

To the extent that \textit{Hallie}—with its focus on the "foreseeability" of the anticompetitive results, id. at 42-43—and \textit{Omni}—with its broad notion of authorization, see supra notes 449-450 and accompanying text—imply a greater scope for state action protection than does \textit{Southern Motor Carriers}, it may derive from the fact that the Court has given special treatment to municipalities under the state action doctrine. The Court in \textit{Hallie} stressed that it can presume that "[a] municipality acts in the public interest," 471 U.S. at 45, because "municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct." Id. at 45 n.9. By comparison, trial courts in class actions often do not operate under the same degree of public scrutiny in approving class counsel fees and settlements as do municipalities in enacting ordinances. See supra notes 233-235 and accompanying text.
able rates according to specified criteria, and then apply these rates to all counsel within some group over a range of cases, which would be the equivalent of the regulatory scheme in *Southern Motor Carriers*. Rather, the most the rules do is to require the court to approve class counsel in the case before it as adequate and class counsel's fee in that case as reasonable; that is, the rules contemplate that the court is, in effect, buying services on behalf of the class.

But as the court recognized in *In re Oracle Securities Litigation*, lawyers could compete for the right to be class counsel by offering bids undercutting the bids of the other lawyers. More to the point, not only do the state statutes that require courts to approve class counsel fees as reasonable not preclude such competition, nothing in those statutes precludes a judge from requiring such competition. If he did, then the fee chosen by the court would, unlike the fees in *Southern Motor Carriers*, bear a "discernible relationship to the prices that would be set by a perfectly efficient and unregulated market." In short, nothing in the need for a class to have counsel or the requirement that a court approve of that counsel and counsel fees is inherently inconsistent with competition to be that counsel or more to the point here, with the idea that lawyers would compete on the basis of price to be chosen as class counsel.

*Southern Motor Carriers* and *Omni* provide even less support for finding a clearly articulated state policy to displace competition among lawyers for claimants who seek to recover under the

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474 See supra notes 148-52 and accompanying text.
475 *Southern Motor Carriers*, 471 U.S. at 65 n.25. In fact, this type of competition is similar to what the Court was trying to preserve in *Federal Trade Comm'n v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990), in which the Court held that a boycott by a group of trial lawyers against a local government in hopes of forcing the government to increase the lawyers' hourly compensation was a per se violation of the antitrust laws. If anything, the potential for competition in situations like *Oracle* is greater than the potential in *Trial Lawyers* because in *Trial Lawyers* the lawyers could not negotiate prices individually; they could only decide individually whether or not to accept employment at the rate offered by the city.

476 According to Professor Hovenkamp, "[i]f the statute is neutral on the question and there appear to be both competitive and non-competitive ways of operating under the statute, the court may insist on the former." Hovenkamp, supra note 136, § 20.4, at 681. This is nothing more than the common antitrust technique of condemning a questionable restraint when a less restrictive alternative is available.
private administrative system established by class action settlements like Georgine v. Amchem Products and other mass tort cases. When such a system is set up as part of a class action settlement, counsel representing individual claimants in the private system are not class counsel within the meaning of the state's class action rules. State class action statutes say absolutely nothing about lawyer fees other than fees for class counsel. In fact, these statutes do not even contemplate private administrative systems that might require counsel, let alone foresee the anticompetitive effects of such systems. Nor is there anything inherent in the structure of class action regulation, or even in statutes setting maximum contingency fees in certain classes of cases, that precludes price competition by lawyers representing individual claimants outside of the court system, or that precludes new lawyers from freely entering the market for representing these individual claimants, and thereby displacing class counsel or other lawyers who may have previously represented those claimants. The most that can be said is that these private administrative systems are consistent with the class action rules and maximum fee statutes, and that lawyer anticompetitive agreements concerning these administrative systems may be consistent with state policy, which is insufficient to establish the state's clear intent to displace competition under Southern Motor Carriers and Omni.

It is true that in some sense a class action is like a regulated monopoly. Class actions can be said to displace competition among lawyers for individual litigants by consolidating individual cases into the class monopoly. Under Southern Motor Carriers,

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477 See supra note 459.
478 Whether or not the administrative systems violate state law is irrelevant for purposes of determining whether the state action doctrine applies. See supra notes 449-453 and accompanying text. If the state has a clearly articulated policy to displace competition, the fact that a particular agent of the state violated the policy in acting anticompetitively does not remove the immunity. See Hovenkamp, supra note 136, § 20.4, at 680-81. On the other hand, if the state has no clearly articulated policy, the fact that a particular agent of the state complied with state law does not create immunity.
479 See Oracle, 131 F.R.D at 693 n.12. (asserting that "the need to prosecute the claims of the class collectively rather than individually may create a so-called 'natural monopoly,'" but that this should not preclude use of market mechanisms in choosing class counsel).
it could be argued that once the state displaces this competition by creating class actions and by authorizing judicial review of settlements and class counsel fees, it demonstrates a clear intent to regulate all aspects of lawyer behavior concerning class actions. Trial courts must be given great leeway, under this view, "because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature."\(^{480}\)

The Court, however, rejected exactly this argument in \textit{Cantor v. Detroit Edison Co.}\(^{481}\) In \textit{Cantor}, the Court held that a regulated utility that provided "free" light bulbs to its paying electricity consumers was not immune from the antitrust laws under the state action doctrine, even though the utility submitted tariffs including the light bulbs to a state agency. The Court found that the mere fact that the state pervasively regulates a monopoly does not mean that federal antitrust policy cannot reach anything concerning that monopoly.\(^{482}\) In support of its position, the Court advanced several arguments relevant here.

First, the Court found that although the state had demonstrated an intent to displace competition in the market for electricity, it did not demonstrate a similar intent with respect to the market for light bulbs.\(^{483}\) Because the Court found that the state

\(^{480}\) \textit{Southern Motor Carriers}, 471 U.S. at 64.

\(^{481}\) 428 U.S. 579 (1976).  

\(^{482}\) This finding is consistent with the Court's approach with respect to patents. The mere fact that a patent confers a licensed monopoly on the patent holder does not immunize that party from the antitrust laws. See Hovenkamp, supra note 136, § 7.11 at 290 (noting that the "power to exclude [conferred by a patent] is not unlimited, and courts have often found patentees guilty of exclusionary practices"). The Court has also reached essentially the same conclusion with respect to professionals. Although they are regulated with respect to some of their activities, when they act to restrain markets in which the state has no regulatory interest, the antitrust laws sometimes reach their conduct. See, e.g., \textit{National Soc'y of Prof. Eng'rs v. United States}, 435 U.S. 679 (1978) (canon of ethics prohibiting competitive bidding for the purpose of minimizing risk of inferior work held unlawful under the Sherman Act); \textit{Arizona v. Maricopa County Medical Soc'y}, 457 U.S. 332 (1982) (maximum fee arrangement among competing physicians violated Sherman Act); \textit{Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n}, 493 U.S. 411 (1990) (collective boycott by lawyers targeted at forcing local government to increase pay to lawyers violated Sherman Act).

\(^{483}\) Specifically, the Court found that:

\textit{The distribution of electricity in Michigan is pervasively regulated . . . . [But t]he distribution of electric light bulbs in Michigan is unregulated. The statute creating the [regulatory] Commission contains no direct reference to light bulbs. Nor, as far as we have been advised, does any other Michigan statute authorize}
did not intend to displace competition in the light bulb market, the Court saw no reason to prevent antitrust law from regulating that market. Cantor thus mandates that in deciding whether to apply the state action doctrine to a regulated firm, a court must identify the market in which the state has displaced competition and determine whether that market is the same as or separable from the markets in which the alleged restraint of trade is occurring.

In our context, the fact that a class action is a single “case” does not mean that there is a single market any more than a single tariff filing in Cantor meant that there was a single market that included both electricity and lightbulbs. The only possible market in which the states, by permitting class actions, displace competition is the market for lawyer services in bringing claims against the class action defendants in the state court system. After the court’s approval of the class action, lawyers can no longer compete to represent clients in the state court system by offering better terms to these clients because the class action precludes private suits arising out of the same transaction as the class action by class members who have not opted out.

Contrast this market with the markets in which we suggest plaintiffs’ lawyers may have restrained competition in Oracle and Georgine. The market in which the lawyers might have restrained competition in Oracle is the market for the right to represent the class action monopoly. The market in which the

the regulation of that business. Neither the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp-exchange program or of its possible effect on competition in the light-bulb market. Other utilities regulated by the Michigan Public Service Commission do not follow the practice of providing bulbs to their customers at no additional charge. The Commission’s approval of respondent’s decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs. We infer that the State’s policy is neutral on the question whether the utility should, or should not, have such a program. Cantor, 428 U.S. at 584-85; see also id. at 594 (finding that “the option to have, or not to have, such a program is primarily [the utility’s], not the Commission’s”). 484 See id. at 596 (“There is no logical inconsistency between requiring [the utility] to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy.”).

485 Cf. Fishman v. Estate of Wirtz, 807 F.2d 520, 533-35 (7th Cir. 1986) (holding that restriction on “competition to acquire a natural monopoly” is an antitrust injury).
lawyers might have restrained competition in *Georgine* is the market for lawyer services in representing individual claimants in the private administrative system. Although the buyers (claimants) and sellers (plaintiffs' lawyers) in these markets are the same as in the "regulated" market, and the "product" bought and sold in each market is lawyer services, the markets involved are very different in the sense that matters for antitrust purposes under *Cantor*—namely that elimination of competition in the first market does not necessarily affect competition in the other two markets.486 Nothing in the class action rules suggests the states are interested in regulating these markets simply because they want to eliminate individual claims in the court system.487

Of course, the mere fact that a separate market can be identified does not answer the question of whether a court should consider the two (or more) markets separately for antitrust purposes. The Court's second argument in *Cantor* was that whatever the state's regulatory goals were in the electricity market, they were not inconsistent with antitrust enforcement in the light-bulb market.488 The Court reasoned that if the light-bulb exchange program were held to violate the antitrust laws, "there [would be] no reason to believe that Michigan's regulation of its electric utilities [would] no longer be able to function effect-

486 The tying doctrine in antitrust law requires a similar determination that there are two separate products being tied together. Whether or not there are two products does not depend on the physical characteristics of the products but on whether the products could be offered separately at reasonable cost and in a way that consumers might demand. See generally Jefferson Parish Hosp. No. 2 v. Hyde, 466 U.S. 2 (1984) (discussing the requirement of two products in tying analysis). The *Georgine* restraints could be viewed as tying arrangements in that class counsel could be trying to tie the sale of their services as class counsel to the sale of their services as lawyers for individual claimants in the private administrative system.

487 See sources cited supra notes 452 and 459. Lawyer competition in fees is generally unregulated. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Furthermore, class action rules make no direct reference to lawyer competition. With the possible exception of state maximum fee statutes, neither state legislatures nor state courts have ever investigated the desirability of regulating lawyer competition. And not all class actions involve settlements that establish private administrative systems that require claimants to secure a lawyer's services. The choices made seem to be the lawyers' choices, not the court's.

488 *Cantor*, 428 U.S. at 596 ("[The state's] regulation of respondent's distribution of electricity poses no necessary conflict with a federal requirement that respondent's activities in competitive markets satisfy antitrust standards.").
ively."\(^{489}\) In fact, if anything, the light-bulb program might have hindered the state's regulatory efforts by artificially increasing the rate base on which the state calculated the utility's rates, and by distorting consumer choices for electricity as compared to substitute energy sources.\(^{490}\) Thus, just as an overly narrow state action immunity might unduly interfere with state regulatory efforts, there is a danger that "[f]or States [seeking] to benefit their citizens through regulation, a broad doctrine of state-action immunity may serve as nothing more than an attractive nuisance in the economic sphere."\(^{491}\)

In the class action context, too broad a view of the state action immunity could interfere with the state's regulatory goal—namely, fair resolution of claims at the lowest cost. Competition in the market for the right to be class counsel and in the market

\(^{489}\) Cantor, 428 U.S. at 598. The Court reached the same conclusion 30 years earlier, in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), which held that the antitrust laws could apply to the business of insurance. The Court in South-Eastern Underwriters stated:

The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. Cf. Parker v. Brown, 317 U.S. 341, 350-52. No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged . . . .

South-Eastern Underwriters, 322 U.S. at 562.


\(^{490}\) The Cantor Court noted:

In 1972 [the utility] provided its residential customers with 18,564,381 bulbs at a cost of $2,835,000. In its accounting to the Michigan Public Service Commission, [the utility] included this amount as a portion of its cost of providing service to its customers. [The utility's] accounting records reflect no direct profit as a result of the distribution of bulbs. 428 U.S. at 583-84. In an accompanying footnote, the Court added that of the total cost reported, "$2,363,328 was paid to the three principal manufacturers of bulbs from whom [the utility] made its purchases; the other $471,672 represented costs incurred in the use of [the utility's] personnel and facilities in carrying out the program." Id. at 583 n.8. A 20% markup might lead one to suspect that the utility had engaged in some creative accounting. If so, the light-bulb program might have allowed the utility to evade the state's regulatory goals and unduly increase prices to consumers.

for representing claimants in the private administrative system would arguably further that goal.492

The Court's third argument in Cantor was that the state's regulation of the market for electricity did not conflict with antitrust policy because the state's policy itself was not anticompetitive.493 Unlike regulation whose "very purpose . . . is to avoid the consequences of unrestrained competition," state regulation of natural monopolies "does not necessarily suppress competition" because there might not have been competition to begin with.494 Thus, by regulating natural monopolies, states demonstrate no intent to displace competition.495

In the class action context, the Court's argument makes sense. Class actions that aggregate small claims, by grouping cases together, create economic incentives to bring cases that would be uneconomical if filed individually. These class actions do not necessarily displace competition that would otherwise exist; rather, they make possible claims that would otherwise not be brought. There is no competition for bringing uneconomical cases.496

Even when class actions consolidate cases that could otherwise be brought individually, as is often the case in the mass tort context, class actions are not necessarily inconsistent with the competition policy of the federal antitrust laws. A class action

492 One might argue that improving imperfect state regulation is no business of the federal antitrust laws. But that argument misses the point. The antitrust laws do not apply because they further the state's regulatory goal (though that is an incidental benefit). They apply because in the class action context, the states have not committed to a regime of regulation that displaces competition, and thus, there is no state action immunity.

493 Cantor, 428 U.S. at 595-96 (noting that "public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation.").

494 Cantor, 428 U.S. at 595. See also id. at 596 n.33 (stating that "the 'very reason for the regulation of private utility rates . . . is the inevitability of a monopoly that requires price control to take the place of price competition.'") (quoting Otter Tail Power Co. v. United States, 410 U.S. 366, 389 (1973) (Stewart, J., dissenting)).

495 The Court's assertion that regulation of natural monopolies does not necessarily suppress competition may be wrong as a factual matter in the case of utilities. The fact that a utility is a natural monopoly simply means that one utility can serve the entire market at lower cost than if several utilities compete in the market. That may make competition undesirable, but it does not make it impossible or even unlikely. Generally, the antitrust laws preclude the argument that competition is undesirable.

496 In this sense, class actions that aggregate small claims are somewhat like natural monopolies.
may be more like a joint venture than a natural monopoly. The antitrust laws have long recognized that not all cost-saving joint ventures are antitrust violations, even if some competitors cannot effectively compete against the joint venture. The joint venture view of class actions is supported by the fact that class action statutes and rules often protect lawyer competition for clients through opt out procedures. In these cases, lawyers have every incentive to compete by trying to entice class members to opt out by offering them a better deal than they would get if they stayed in the class. Even if opting out is almost meaningless as a practical matter, the mere fact that an option for individual competition is available makes class actions generally consistent with federal antitrust policy.

In short, if class actions are not necessarily anticompetitive monopolies, it is hard to see why the regulation of class actions necessarily displaces competition. And if there is no necessary displacement of lawyer competition—if, in the Omni Court’s language, displacement of competition is not the “very purpose”

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497 See, e.g., Broadcast Music v. Columbia Broadcasting Sys., 441 U.S. 1 (1979) (holding that blanket licensing arrangements were not per se unlawful). As for the inability of competitors to compete against a joint venture, it is useful to recall that one of the most repeated phrases in antitrust jurisprudence is that the antitrust laws protect competition, not competitors. See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (“Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors.”).

498 See, e.g., Tex. R. Civ. P. 42(c)(2).

499 Though the purpose of these opt-out provisions may be to protect due process for litigants rather than to promote competition among lawyers, the effect these provisions have on competition seems to preclude the state (or lawyers) from arguing that the state intends to displace competition by regulating class actions. The same could be said of provisions allowing objectors to appear at a fairness hearing. As we have already discussed, objectors are rarely represented by counsel. See supra notes 180-187 and accompanying text. When counsel appear on behalf of objectors, it is fair to assume that those counsel have a financial stake in overturning the settlement. This financial stake could come from the potential to act as class counsel in a new class action or to represent substantial numbers of individual clients if no class action settlement occurs, both of which would be to the economic detriment of the lawyer proposing the settlement. Thus, we would expect to see represented objectors only when their counsel have a competitive interest in the rejection of the settlement. See supra note 184.

500 In Broadcast Music, the Court relied in part on the fact that individual bargaining was available to purchasers of music (although individual bargaining rarely occurred) to find that blanket licenses offered by joint ventures of composers were not per se illegal. 441 U.S. at 11, 12, 23.
of class action regulation—it is hard to see what could possibly make the state's intent to displace competition "clear" within the meaning of *Southern Motor Carriers* and *Omni*.

3. **Active Supervision**

Even if class action lawyers could successfully show that procedural rules governing class actions represent a clearly articulated policy to displace competition among lawyers, they would still have to satisfy the second *Midcal* prong—that of "active supervi-
Class action lawyers would have a tough time showing that the courts actively supervise the restraints.

The active supervision doctrine requires the state to do more than leave private parties to their discretion in carrying out state regulatory policy; the state must have some oversight or supervisory role in monitoring and ensuring compliance with its clearly articulated regulatory policy. In *Midcal*, the Court held that although a state statute clearly authorized resale price maintenance in the wine industry, it violated the Sherman Act because

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501 See, e.g., *Patrick v. Burget*, 486 U.S. 94, 100 (1988) ("Only if an anticompetitive act of a private party meets both [the clear articulation and active supervision] requirements is [the conduct deemed state action]."); *Southern Motor Carriers*, 471 U.S. at 62 ("A private party may claim state action immunity only if both prongs of the *Midcal* test are satisfied."). Thus, a state cannot declare that its regulatory policy favors competition and at the same time argue that it actively supervises those carrying out its regulatory policy to make sure that they adequately protect competition. Were this allowed, it would stand the Supremacy Clause on its head by allowing states to preempt the enforcement of the federal antitrust laws by enacting antitrust laws and other procompetition statutes at the state level.

On the other hand, if a state does not have a clear regulatory policy specifically promoting or displacing competition, but actively enforces the regulatory policy that it has adopted, the question arises whether the active supervision alone can effectively satisfy the clear articulation requirement. The Supreme Court position on this issue is unclear because in its cases involving disputes over the scope of the active supervision requirement since *Midcal*, the existence of a clearly articulated policy to displace competition was either found or not discussed. Federal Trade Comm'n v. *Ticor Title Ins. Co.*, 504 U.S. at 631 (noting that because the FTC had conceded that the clear articulation prong was satisfied, the immunity question turned only upon the proper interpretation and application of the active supervision requirement); *Patrick*, 486 U.S. at 100 ("In this case, we need not consider the 'clear articulation' prong of the *Midcal* test, because the 'active supervision' requirement is not satisfied."); 324 Liquor Corp. v. *Duffy*, 479 U.S. 335, 344 (1987) (holding that state statute imposing mandatory resale price maintenance in liquor industry meets the clear articulation requirement). The case that comes closest to active supervision of a regulatory policy without a clearly articulated policy on the facts is the pre-*Midcal* case of *Cantor*. Recall that in *Cantor*, the state regulatory agency repeatedly approved the utility's light bulb sales as part of its tariff approval, but the Court found that approval did not suggest that the state's policy was to displace competition in the market for light bulbs. See *Cantor*, 428 U.S. at 584 ("Neither the . . . Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp-exchange program or of its possible effect on competition in the light-bulb market."). Perhaps *Cantor* suggests that active supervision could sometimes establish a clearly articulated policy. But to the extent the clear articulation requirement is about fair notice to both regulated parties and citizens, allowing aggressive agency regulation in the face of state inaction to constitute a clearly articulated regulatory policy for state action doctrine purposes is troubling.
there was no active supervision by the state. The Court reasoned:

The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing agreement.

In *Patrick v. Burget*, the Court interpreted this active supervision test as laid out in *Midcal* to mean that "state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." In both of these cases, the Court found that there was no state procedure to review the reasonableness of prices or the anticompetitive nature of the restraint.

In the class action context, trial courts must approve class action settlements. In doing so, they must consider whether the settlements are in the interest of the class. As part of this determination, they may take into account the reasonableness of fees

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502 *Midcal*, 445 U.S. at 105-06.
503 Id. at 105-06 (footnote omitted). The Court reached essentially the same conclusion in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). The basic difference was that *Schwegmann* arose during the reign of the Miller-Tydings Act, ch. 690, Title VIII, 50 Stat. 693 (1937) (repealed in 1975), which allowed states to permit resale price-maintenance contracts. The Court held in *Schwegmann* that the Miller-Tydings Act did not exempt from antitrust scrutiny a state-supported resale price maintenance program in which retailers who did not want to contract with distributors to maintain minimum resale prices were compelled to do so. *Schwegmann*, 341 U.S. at 388-89.

On the other hand, in *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), the Court upheld a municipal rent control ordinance against antitrust challenge because:

>[It] places complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board. Not just the controls themselves but also the rent ceilings they mandate have been unilaterally imposed on the landlords by the city.... Adopted by popular initiative, the Ordinance can hardly be viewed as a cloak for any conspiracy among landlords...."

Id. at 269. Our argument, of course, is that judicial approval of class action settlements can and should be viewed as a potential cloak for conspiracies among lawyers.

505 Id. at 101.
charged by class counsel as well as the reasonableness of attorney's fees permitted to be charged in any private administrative system set up by the settlement. It is the fixing of these fees that constitutes an anticompetitive restraint. Because the court has the authority to review the reasonableness of prices, and to disapprove of any settlement that contains fees failing to accord with state policy, the court's supervision over class action settlements does not suffer from the same defects that led the Court to deny state action immunity to the restraints in *Midcal* and *Patrick*.

But the trial court's authority to engage in a substantive review of lawyer fees may not be sufficient to satisfy the active supervision requirement. The Court in *Patrick* left open the question "whether judicial review of private conduct ever can constitute active supervision." If the court were to hold that only administrative agencies can provide adequate (for state action purposes) review, that would not, however, mean that court review of class settlements was inadequate under the state action doctrine. The "judicial review of private conduct" that the Court had in mind in *Patrick* was ordinary litigation to review the merits of a peer-review decision by a group of doctors to terminate a competing doctor's hospital privileges. But, as we argued above, trial courts in class actions could be viewed as more akin to administrative agencies than courts, which normally "review" private conduct through ordinary litigation. Moreover, the fact that the restraint in the class action context

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505 Id. at 104. On the facts of the case, the Court found that even if judicial review could constitute active supervision, it did not here because:

"[I]f [judicial] review exists at all, [it] falls far short of satisfying the active supervision requirement. . . . [I]t is not clear that Oregon law affords any direct judicial review of private peer-review decisions. . . . Moreover, the Oregon courts have indicated that even if they were to provide judicial review . . . the review would be of a very limited nature.

506 Id.

507 At least one commentator argues that the Court will say judicial review is sufficient under certain circumstances. Michal Dlouhy, Note, Judicial Review as *Midcal* Active Supervision: Immunizing Private Parties from Antitrust Liability, 57 Fordham L. Rev. 403, 416-23 (1988). See also Bolt v. Halifax Hosp. Medical Center, 851 F.2d 1273, 1282 (11th Cir. 1988), vacated en banc and per curiam, 874 F.2d 755 (11th Cir. 1989), cert. denied, 110 S. Ct. 1960 (1990) (holding that judicial review may constitute "active supervision").

508 *Patrick*, 486 U.S. at 96-97.
does not occur until the trial court approves a settlement could further support interpreting court approval of class action settlements as "active supervision." Thus, whatever the Court eventually decides about judicial review in the Patrick context, court supervision in the class action context presents a different case.

Even if judicial review can at least in some cases satisfy Midcal's active supervision prong, the question of whether a trial judge is authorized to engage in the necessary review remains. In reviewing a class action settlement, a trial judge faces a situation unlike that faced by the typical administrative agency in one crucial respect: The judge is not predominantly regulating lawyer conduct, but is supposedly approving a settlement in a way that protects the rights of the litigants. The judge cannot consider agreements concerning lawyer fees, such as those in Georgine, separately from the rest of the settlement; the judge must evaluate the settlement as a whole. Thus, one could argue that the judge lacks the authority to actively supervise in the way that Midcal contemplates.

Moreover, if active supervision means continuous supervision, the argument that class action judges actively supervise a regulatory system is significantly weakened. Midcal is unclear on the question of whether active supervision requires continuous supervision so long as there is at least one review of the reasonableness of price schedules. A later and similar case, 324 Liquor Corp. v. Duffy, sent mixed signals on this question in the

509 Professor Elhauge considers the timing of judicial review as a crucial factor in deciding whether judicial review can satisfy the active supervision requirement: "The key question . . . is not whether a court or agency provides the disinterested state process for controlling the terms of restraints, but whether that process occurs before or after the market injury." Elhauge, supra note 429, at 716. Thus, he argues that judicial review should satisfy the active supervision requirement only when the review is "disinterested, substantive, and provided before the restraint becomes effective." Id. at 716-17 (emphasis added). He continues: "Because pre-injury review is typically more common for agencies than courts, agency review will provide active supervision more often than will judicial review. But that does not mean that judicial review never provides active supervision or that agency review always does." Id.

510 Courts can and do review class counsel fees separately from the rest of the agreement, but the actions we are discussing here do not directly challenge the class counsel fee award. It is less clear whether courts can review the fee caps for the private administrative systems separately from the rest of the agreement.

footnotes. The Court held invalid a state regulatory system that required retailers to charge at least 112% of the “posted” wholesale price for liquor, but allowed wholesalers to sell at less than the “posted” price.\textsuperscript{512} The Court stated that a “simple ‘minimum markup’ statute requiring retailers to charge 112 percent of their actual wholesale cost may satisfy the ‘active supervision’ requirement.”\textsuperscript{513} But, in the very next footnote, the Court rejected the argument that “periodic reexaminations by the state legislature” and the potential for the regulating agency to allow individual wholesalers and retailers to depart from the regulated prices constituted active supervision.\textsuperscript{514} The Court found that neither of the above “exerts any significant control over retail liquor prices.”\textsuperscript{515}

At the very least, the Court’s opinion suggests that if continual monitoring is required, it must be comprehensive monitoring of prices by the agency that regulated in the first place. But requiring continual monitoring would not always make sense. In particular, recall the situation in Oracle, where the antitrust allegation would be that the lawyers colluded in choosing class counsel and proposing class counsel fees. It is not apparent what monitoring the court could do other than examining the bid submitted and deciding if the proposed fee was reasonable. If the lawyers are engaging in bid rotation,\textsuperscript{516} only monitoring from one class action to the next would catch it. There is no assurance that any one judge will have every (for example) securities class action in a particular state. Of course, this is not so much a question of the authority to monitor as the likely effectiveness of monitoring.

When, however, antitrust allegations concern the fees to be charged in the private administrative system established under a class action settlement, it makes a big difference if active supervision requires continuous supervision. Although courts retain continuing jurisdiction to adjudicate disputes that arise from the implementation of the settlement,\textsuperscript{517} it is not clear that

\textsuperscript{512} Id. at 352.
\textsuperscript{513} Id. at 344 n.6 (emphasis added).
\textsuperscript{514} Id. at 345 n.7.
\textsuperscript{515} Id.
\textsuperscript{516} See supra note 154.
\textsuperscript{517} See, e.g., Ivy v. Diamond Shamrock Chem. Co. (In re “Agent Orange” Prod.
that jurisdiction would qualify as continuing supervision over the fees paid to lawyers within the administrative system. First, continuing jurisdiction does not normally empower courts sua sponte to "engage in any 'pointed reexamination' of the [system's operation]." Parties or aggrieved others must bring disputes to the court for adjudication and there is obviously no guarantee that any party would do so. Thus, there is no assurance that continuing jurisdiction would amount to continuing supervision or even sporadic supervision. Second, although in theory it is conceivable that the settlement itself could include terms that try to confer on a court the responsibility to conduct periodic pointed reexamination on its own initiative, it is questionable whether by contract (which is what a class settlement is) private parties could effectively confer such new responsibilities on state judges, or any state actor for that matter,\(^{518}\) or how

\[^{518}\] If A and B wrote a contract that provided that a state judge would come check every six months to see that building construction was proceeding in accordance with the contract terms, it is inconceivable that a state would accept that the judge had thus effectively been given some new power of office. The responsibilities of state judges are defined by the state's laws and its constitution, not the private agreement of parties. It is generally accepted that court approval of a settlement does not change that agreement into "public law." See, e.g., Derrickson v. City of Danville, 845 F.2d at 718 (stating that "a consent decree is fundamentally a contract and therefore does not bind a governmental body to any greater degree than a contract"); Air Line Stewards & Stewardesses Ass’n, Local 550 v. Trans World Airlines, 713 F.2d 319, 321 (7th Cir. 1983) ("A settlement agreement is a contract and as such, 'the construction and enforcement of settlement agreements are governed by principles of local law applicable to contracts generally.'") (quoting Florida Educ. Ass’n v. Atkinson, 481 F.2d 662, 663 (5th Cir. 1973)). In any case, it is not clear that class action settlements attempt to expand the court's role beyond the traditional one. Compare Price v. Ciba-Geigy Corp., No. 94-0647-B-S, Exhibit A ¶ III.B (Stipulation of Settlement) (S.D. Ala. 1995) ("The COURT shall retain jurisdiction over this case and the DCA and MMT FUNDS and shall use its equitable powers to enforce this STIPULATION and to protect its jurisdiction over this case and all parties and SETTLEMENT CLASS MEMBERS. THE COURT shall have jurisdiction over all phases of this STIPULATION.") with id. ¶ XXIII.E ("No modification of this STIPULATION may be made except by written agreement of CLASS COUNSEL and CIBA-GEIGY CORPORATION approved by the COURT.")
a court could as a practical matter carry out such responsibilities assuming they could legally be conferred on state judges. In addition to the question of whether the court has the authority to supervise, *Ticor Title* directs that the State must have also "played a substantial role in determining the specifics of the economic policy."\(^{519}\) In particular, [w]here prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State.\(^{520}\) The Court stressed that especially where price fixing is involved, active supervision should not be casually inferred.\(^{521}\) Although the involvement of courts in approving class action settlements is greater than the involvement of the agencies in *Ticor Title*, the features the Court found crucial point toward an absence of active supervision. The lawyers set fee terms as an initial matter subject only to a potential veto by the court. The court may not be at all aware of potential price fixing. And even if it is, though the court may examine the specifics of the scheme, it does not "determine" these specifics in any meaningful way, given its obligation to consider the settlement as a whole.

It appears, therefore, that class action lawyers cannot demonstrate that the courts actively supervise their anticompetitive restraints. Thus, they cannot satisfy the second *Midcal* prong, and state action immunity does not exempt anticompetitive lawyer conduct from the federal antitrust laws.

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\(^{519}\) 504 U.S. at 635.

\(^{520}\) Id. at 638.

\(^{521}\) Id.
4. Summary of State Action

We can summarize the preceding discussion in a straightforward way. The anticompetitive conduct that lawyers involved in class actions may engage in would not, under current doctrine, and should not, in light of the serious potential for abuse, enjoy the cloak of state action immunity. Neither of *Midcal's* two prongs would be satisfied. No authorized state actor has clearly articulated any state policy to displace competition in the markets where we claim the potential for anticompetitive behavior exists. These markets are the market to be class counsel in any pending and future class action, and the market to represent claimants in a private administrative system established by a class action settlement. *Cantor* teaches that even if class actions themselves represent state regulation that the antitrust laws cannot reach, state action immunity does not attach to collateral markets that the state does not intend to regulate. The market to be class counsel and the market to represent claimants in a subsequent non-court system are such collateral markets.

Even if there were a clearly articulated state policy to displace competition in these markets, there is no active supervision of such a policy. Courts approving class action settlements must evaluate the settlement as a whole; therefore, they cannot effectively monitor anticompetitive behavior occurring in and around class actions. Certainly monitoring is impractical when anticompetitive behavior can occur over the course of several class actions, such as in the bid rotation scenario. And in the private administrative system cases, monitoring is either not in fact done or is beyond the court's competence or authority to do. The court in such a system cannot serve as a roving regulator that continuously reevaluates the specific terms of the settlement, but merely as an arbiter of disputes that may arise. If the court tries to do more, on its own initiative or at the behest of the parties, the court risks straying beyond its constitutional function. For these reasons, a state action immunity defense to an antitrust suit brought against class action lawyers charged with the types of anticompetitive conduct we have discussed would likely fail.
C. Class Actions as Federal Regulation

1. Reasonable Does Not Mean Right

The Supreme Court has developed a strong presumption in favor of the antitrust laws when they conflict with other federal regulatory statutes. Congress must demonstrate a "clear intent" to displace the antitrust laws, just as state legislatures must clearly articulate a policy inconsistent with competition. Unlike state legislatures, Congress may demonstrate its clear intent by providing express antitrust immunity. Yet even when Congress provides for express immunity, the Court strictly construes these exemptions.

When no applicable federal statute contains an express antitrust immunity, the Court has been quite reluctant to imply immunity. Immunity from the antitrust laws by implication has been found only "in cases of plain repugnancy between the antitrust and regulatory provisions." Further, the Court has found

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523 Congress has often provided just such express antitrust immunity, and several Supreme Court cases address the scope of such immunity. See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350 n.27 (1963) (citing various statutes in which Congress provided express antitrust exemption); see also Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973) (construing express grant of antitrust immunity under the Federal Aviation Act of 1958); Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 220-22 (1966) (discussing previous application of express grant of immunity under the Shipping Act of 1916); Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960) (applying antitrust exemption under the Capper-Volstead Act of 1922); see generally E.H. Schopler, Annotation, Applicability of Federal Antitrust Laws as Affected by Other Federal Statutes or by Federal Constitution—Supreme Court Cases, 45 L. Ed. 2d 841 (1976) (collects and discusses Supreme Court cases applying individual statutes).

524 Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726, 733 (1973) (citing the Court's "frequently expressed view that exemptions from antitrust laws are strictly construed"). In following its policy of strict construction, the Court has not hesitated to find that some restraint exceeded the scope of the express antitrust immunity. See, e.g., Pacific Westbound Conference, 383 U.S. at 217-20; Maryland & Virginia Milk Producers, 362 U.S. at 469-70; United States v. Borden Co., 308 U.S. 188, 204-05 (1939).

525 Philadelphia Nat'l Bank, 374 U.S. at 350-51 ("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.") (footnote omitted). For other cases similarly indicating reluctance to imply immunity, see National Gerimedical Hospital, 452 U.S. at 388; Gordon, 422 U.S. at
such repeals by implication "only if necessary to make the [regulatory law] work, and even then only to the minimum extent necessary." 526

In National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City, 527 the most recent Supreme Court case discussing implied federal regulatory immunity, the Court reaffirmed its reluctance to imply antitrust immunity. The Court also offered additional guidelines to its federal regulation immunity jurisprudence. First, although Congress may displace the antitrust laws if it demonstrates a clear intent to do so, pervasive regulation alone is not sufficient to establish the requisite clear intent. 528 Second, "antitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a governmental entity." 529 On the other hand, if Congress empowers a regulatory agency "to authorize or require the type of conduct under antitrust challenge," it expresses a "much clearer" intent to repeal the antitrust laws. 530

528 National Gerimedical Hospital, 452 U.S. at 389 ("Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry.") (citing Otter Tail Power, 410 U.S. at 372-75; United States v. Radio Corp. of America, 358 U.S. 334, 346 (1959)). In National Gerimedical Hospital, the Court held that the National Health Planning and Resources Development Act of 1974 did not "create a 'pervasive' repeal of the antitrust laws as applied to every action taken in response to the health-care planning process." National Gerimedical Hospital, 452 U.S. at 393. The idea that pervasive regulation does not create immunity with respect to all aspects of the industry parallels the Supreme Court's decision in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), in the state action context. See supra notes 481-484 and accompanying text.
529 National Gerimedical Hospital, 452 U.S. at 390. The Court compared this statement with Otter Tail Power, 410 U.S. at 374 ("When ... relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws."). This notion parallels the Court's active supervision requirement in the state action context. See supra Section IV.B.3.
530 National Gerimedical Hospital, 452 U.S. at 389. Professor Hovenkamp offers the following summary:

[T]he less the regulatory regime interferes with the workings of the market, the more room for antitrust. Intervention under the antitrust laws is generally appropriate with respect to market decisions that (a) are actually or potentially anticompetitive; and (b) are made according to the discretion of private firms without effective agency supervision.
National Gerimedical Hospital suggests that lawyers involved in class actions have little hope of prevailing in antitrust suits on federal regulatory immunity grounds. Congress has not expressed a clear intent to exempt lawyers from the antitrust laws. Neither the Federal Rules of Civil Procedure, nor the Rules Enabling Act, nor any other federal statute expressly immunizes lawyer conduct in and around class action suits from the antitrust laws. Whatever “pervasive regulation” means, it would not seem to include the regulation of class actions. Federal Rule of Civil Procedure 23, which governs class actions, gives very little direction and very broad discretion to federal judges overseeing class actions. In particular, neither the text of Rule 23, nor of the other Federal Rules, nor of the Rules Enabling Act purports to regulate competition among lawyers—whether for the position of class counsel or in the private administrative systems set up as part of class action settlements (themselves not contemplated by the regulatory regime). Not surprisingly, then, federal district judges who approve class counsel and class action settlements almost never consider the antitrust implications of business decisions made by the lawyers. That means, under National Gerimedical Hospital, that antitrust immunity would be denied. While at least two federal judges have tried to mandate competitive bidding for the position of class counsel and have reminded the lawyers that they are subject to the antitrust laws, as we have noted, even those judges did not consider all the possible antitrust implications of the conduct before them. 531

Thus, the only possible argument for lawyers in class actions that might entitle them to federal regulatory immunity is that Congress and the Supreme Court, by giving district courts broad discretion to oversee class actions, have “empowered” them to “authorize” anticompetitive conduct by lawyers.

As we shall see, however, a close examination of these Supreme Court cases reveals that the authority of and discretion

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531 See supra note 152-153 and accompanying text.
given to district courts to choose class counsel and approve class action settlements would not suffice to confer federal regulatory immunity. Moreover, this would probably remain true even if the courts, when approving class settlements, began to consider explicitly—as they should—the possible antitrust implications of lawyer conduct. We consider three groups of cases: (1) railroad rate cases, in which railroad cartels submitted joint rate proposals to a federal agency, and the Court declined to find implied immunity; (2) contract approval cases, in which regulated firms negotiated a potentially anticompetitive deal which required and received agency approval, and the Court declined to find implied immunity; and (3) authorized restraint cases, in which the Court found implied immunity. If the cases in the first two groups make one central point, it is this: A federal agency’s approval of private anticompetitive conduct does not by itself immunize that conduct from a later antitrust suit. This conclusion holds even if the agency can and does take antitrust considerations into account in making its decision, and even if the antitrust suit would completely undermine the agency’s decision.\textsuperscript{332} Federal agency approval of private anticompetitive conduct may immunize conduct only if Congress either grants the agency specific antitrust enforcement powers or specifically approves of anticompetitive conduct; instances in which Congress has done so are found in the cases in the third group. Class actions do not fall into that category.

\textsuperscript{332} Justice White, in his dissent in NASD (a case granting immunity) summarized the cases rejecting immunity as follows: “Absent express immunization or its equivalent, private business arrangements are not exempt from the antitrust laws merely because Congress has empowered an agency to authorize the very conduct which is later challenged in court under the antitrust laws.” NASD, 422 U.S. at 737-38 (White, J., dissenting).
a. I've Been Colluding on the Railroad

The idea that agency approval does not by itself create immunity is implicit in the very first antitrust cases that the Court decided on the merits, United States v. Trans-Missouri Freight Association and United States v. Joint Traffic Association. In both cases, railroad cartels had filed rate schedules with the Interstate Commerce Commission ("ICC"). The Interstate Commerce Act required railroads to make such filings (though it did not require joint filings) and also required that the ICC approve the rates as "reasonable," which the ICC apparently did. The railroads argued that because their rates were "reasonable" within the meaning of the Interstate Commerce Act, their price fixing agreements to establish and maintain these rates did not and could not violate the Sherman Act, as, they argued, Section 1 of the Sherman Act prohibited only unreasonable restraints of trade.

The Court flatly rejected this argument. In Joint Traffic, the Court stated that railroads could not "combine as one consolidated and powerful association for the purpose of stifling competition . . . even though the rates provided for in the agreement may for the time be not more than are reasonable." This holding was grounded in the Court's reasoning in Trans-Missouri Freight that the Interstate Commerce Act neither expressly prohibited nor permitted price-fixing agreements, nor did it

533 The Court made the implicit explicit in Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156, 162 (1922) ("The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government."); id. at 161-62 (interpreting Trans-Missouri Freight and Joint Traffic to hold that even though the ICC had established that the rates "were reasonable and non-discriminatory," nevertheless, "under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings . . . by injunction . . . and by forfeiture").

534 166 U.S. 290 (1897).

535 171 U.S. 505 (1898).

536 Trans-Missouri Freight, 166 U.S. at 303; Joint Traffic, 171 U.S. at 562.


538 Id. at 379 (1887) ("All charges made for any service rendered or to be rendered . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.").

539 Joint Traffic, 171 U.S. at 571.

540 Trans-Missouri Freight, 166 U.S. at 314-15, 335. In particular, the Court noted that the Interstate Commerce Act "was not directed to the securing of uniformity of
“furnish[ ] a complete and perfect set of rules and regulations which . . . cover all cases concerning transportation by railroad and all contracts relating thereto.”541 These cases thus led to the establishment of a bedrock principle of antitrust: A price fixing claim may not be defended on the grounds that a cartel’s prices are reasonable.542

Both Trans-Missouri Freight and Joint Traffic were suits brought by the federal Government, so the Court could have limited their holdings—that antitrust suits can be brought despite agency approval—to suits brought by the Government and not to suits by private parties.543 But in Georgia v. Pennsylvania Railroad Co.,544 the Court allowed a suit by the state of Georgia, as parens patriae, seeking injunctive relief545 against a railroad cartel for fixing rates that the ICC had approved.546 The Court found that “[t]he fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial

rates to be charged by competing companies, nor was there any provision therein as to a maximum or minimum of rates.” Id. at 315.

541 Id. at 316. This concept—that an incomplete and imperfect set of rules and regulations establish implied antitrust immunity—is the source of the suggestion made in some of the later cases that “pervasive regulation” might sometimes be enough to establish implied antitrust immunity.

542 See, e.g., Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 353-54 (1990) (“If any proposition is firmly settled in the law of antitrust, it is the rule that the reasonableness of the particular price agreed upon by defendants does not constitute a defense to a price-fixing charge.”). Perhaps the most often quoted rationale for this rule is found in United States v. Trenton Potteries Co., 273 U.S. 392 (1927), in which the Court stated that “[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.” Id. at 397.

543 The Court’s statement in Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156 (1922) that “[t]he fact that the[ ] rates had been approved by the Commission would not . . . bar proceedings by the Government” could have supported such an interpretation. Id. at 162.

544 324 U.S. 439 (1945).

545 Id. at 446-47. Georgia also sought damages, but the Court rejected the state’s claim on the authority of Keogh. Pennsylvania R.R., 324 U.S. at 453. We discuss the Keogh doctrine and its applicability to damage suits against class action lawyers infra Section IV.C.2.

546 In so deciding, the Court found it necessary to distinguish a line of previous cases holding that § 16 of the Clayton Act barred injunction suits against private carriers subject to the Interstate Commerce Act and regulated by the ICC. Pennsylvania R.R., 324 U.S. at 454. The Court found § 16 inapplicable because “the relief which Georgia [sought was] not a matter subject to the jurisdiction of the Commission[.]” Id. at 455.
to the issue before us," and stressed that the ICC's finding that the potentially fixed rates fell within a "zone of reasonableness" did not mean that the conduct leading to those rates could escape antitrust scrutiny. Moreover, because the ICC neither had the authority to grant the injunctive relief sought by the state—namely dissolving the combination or confining it within legitimate boundaries to remove the cartel's influence in the field of rate-making—nor supervisory authority over the cartel as such, the Court deemed ICC approval of rates irrelevant to the antitrust question. The Court concluded that Congress did not intend the regulatory scheme to "eliminate the emphasis on competition and individual freedom of action in rate-making," and that to hold otherwise would permit "monopoly power [to be] created under the aegis of private parties without Congressional sanction and without governmental supervision or control."

Taken together, the railroad rate-fixing cases support our claim that lawyers in class actions would not be successful in asserting federal regulatory immunity from the antitrust laws.

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547 Id. at 460.
548 Id. at 460-61. The Court added that "[d]amage must be presumed to flow from a conspiracy to manipulate rates within that zone." Id. at 461.
549 Id. at 456, 459-62. On the question of the ICC's authority to grant injunctive relief, the Court stated that Congress has not given the Commission ... authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities.

Id. at 456.
550 In discussing the injunctive relief sought by the state of Georgia, the Court also found that: The aim [of the injunction] is to make it possible for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs which are free from the restrictive, discriminatory, and coercive influences of the combination. That is not to undercut or impair the primary jurisdiction of the Commission over rates. It is to free the rate-making function of the influences of a conspiracy over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted.

Id. at 460.
551 Id. at 458-59.
552 Id. at 459.
These cases emphasize that an agency determination that rates fall within the "zone of reasonableness" under some statutory framework does not preclude competition from producing rates that are even more "reasonable."[^553] There is no conflict between the regulatory policy in the railroad cases and the antitrust policy of competition.[^554] Similarly, the fact that district court judges may oversee and cap lawyer fees—both for class counsel and for lawyers in private administrative systems set up by class action settlements—does not obviate or conflict with the antitrust policy that competition ought to influence these fees.[^555]

[^553]: This is essentially the same point courts have made in allowing malpractice actions against lawyers who mishandle a settlement negotiation even though a court approves the settlement as reasonable. See, e.g., Ziegelheim v. Apollo, 607 A.2d 1298, 1305 (N.J. 1992) ("The fact that a party received a settlement that was 'fair and equitable' does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent.") (quoted in Durkin v. Shea & Gould, Nos. 95-55432 & 95-55434, 1996 U.S. App. LEXIS 20695 at *18-*19 (9th Cir. Aug. 19, 1996).

[^554]: But cf. Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48 (1985), which reaches a result—in the state action, as opposed to federal exemption, context—that seems inconsistent with the regulatory policy and the antitrust policy of competition. The only rationale the Court offers for its differing view in the state action context is that Congress can easily correct a federal court that erroneously rejects an exception to the antitrust laws, while state legislatures cannot "overrule" a holding by a federal court that the state action doctrine does not apply. Southern Motor Carriers, 471 U.S. at 57-58, n.21. This rationale is weak: A state can almost always "overrule" a court rejection of state action immunity by regulating more clearly. See Hovenkamp, supra note 136, § 19.1, at 648-49. For example, had Southern Motor Carriers rejected the state action immunity argument on the ground that a statute simply requiring an agency to approve "reasonable" rates does not clearly articulate a policy to displace competition, the state could have passed a statute explicitly permitting collective ratemaking (as several of the states in Southern Motor Carriers did). It is true that states lack Congress's ability to simply draft statutes evidencing an intent to have the federal antitrust laws not apply and have it be so merely by virtue of that legislative statement. But nothing seems to be stopping the states from writing into their statutes that it is their intent to have their regulations qualify for state action immunity, although they do not seem to do so. Thus, although we have offered a rationale for the approach taken in Southern Motor Carriers, see supra notes 466-467 and accompanying text, on the assumption that the Court was correct in concluding that a "reasonable rate" statute clearly articulates a state policy favoring collective ratemaking, and although we have argued that even the standard adopted by that case does not help lawyers involved in class actions, see supra notes 473-478 and accompanying text, we think the case was wrongly decided on this issue and that the Court's approach in the federal regulatory immunity cases is superior.

[^555]: Indeed, the recent federal statute revising securities class actions uses language similar to the Interstate Commerce Act when discussing attorney's fees. 15 U.S.C.
Moreover, the Court’s concern that the ICC did not have sufficient authority to remedy antitrust violations in *Pennsylvania Railroad* is, if anything, magnified in the class action context. The ICC was a single agency charged with continuous supervision over rates. By contrast, federal district court judges are independent and do not form a coordinated agency. Lawyers may file class actions in many different districts before many different judges, subject to jurisdictional and other constraints.\(^5\)

It would seem impossible for a single judge even to begin to control bid rotation behavior by lawyers of the type that may have been going on in *Oracle*. And as for class action settlements, the court’s role is even more limited than the ICC’s role was: The district court has the authority only to approve or disapprove the settlement. It cannot, while serving as class action overseer, issue injunctions extending beyond the class action before it, impose criminal sanctions\(^5\) or award damages in response to anticompetitive conduct.

**b. Let’s Make a Deal—And Get the Agency to Approve**

Just as the Court had concluded that federal agency approval of “reasonable rates” did not establish antitrust immunity in the trilogy of railroad cases, in another trilogy of cases, the Court held that agency approval of private contracts under a “public interest” standard—essentially the standard applicable to class action settlements—was also not enough to displace the antitrust laws. The Court reached this conclusion even though in each of the three cases the agency involved had considered the potential anticompetitive effects of the conduct in question in making its determination.

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\(^5\) The Judicial Panel on Multidistrict Litigation can transfer to a single jurisdiction cases involving “one or more common questions of fact.” 28 U.S.C. § 1407(a) (1994) (emphasis added). Thus, the statute does not confer the authority to transfer all securities (or other) cases involving common questions of law to a single jurisdiction.

\(^5\) *Derrickson*, discussed supra notes 291-306, 346-352, 373-414 and accompanying text (judicial approval of class action settlement in voting rights case does not preclude subsequent criminal prosecution of agents for city who negotiated the settlement for violating state conflict of interest laws).
In the first case of this trilogy, *United States v. Radio Corporation of America*, the Government attacked a contract between NBC and Westinghouse under which NBC was to acquire a Westinghouse-owned television station in Philadelphia in exchange for an NBC-owned station in Cleveland and three million dollars in cash. The Government alleged that NBC had conspired with RCA, then NBC's parent company, to force Westinghouse to agree to the contract by threatening to end the NBC network affiliation of Westinghouse's Boston and Philadelphia stations and to withhold NBC affiliation from Westinghouse's Pittsburgh station. The Communications Act required the Federal Communications Commission (FCC) to review such transactions under a "public interest, convenience, and necessity" standard. The FCC did not hold a hearing, but "decided all issues relative to the antitrust laws that were before it," and approved the contract of sale. Although the Justice Department had a right to request a hearing by the FCC and to seek judicial review of the FCC's decision, it instead opted to file an antitrust suit.

The Court unanimously held that FCC approval did not bar the Government's antitrust suit. It relied primarily on the fact that the language of the Communications Act as well as the legislative history specifically recognized the continuing validity of the antitrust laws and court enforcement of those laws. But the Court went on to explain why agency approval of a private

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559 Id. 358 U.S. at 335-36.
560 Id. at 336. Because NBC was a wholly-owned subsidiary of RCA, the § 1 suit would today be barred under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), which rejected the "intraenterprise conspiracy" doctrine in such cases. Id. at 759-66.
562 RCA, 358 U.S. at 337 (quoting 47 U.S.C. § 310(b) as it was codified in 1959).
563 Id. at 338.
564 Id. at 338.
565 Id. at 352-53.
566 The Court held that the "[legislative] history compels the conclusion that the FCC was not intended to have any authority to pass on antitrust violations" and that "it is equally clear that courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action." Id. at 343-44.
contract does not necessarily create a "pervasive regulatory scheme" to which antitrust immunity may attach:

[Defendants RCA and NBC], like unregulated business concerns, made a business judgment as to the desirability of the exchange. Like unregulated concerns, they had to make this judgment with knowledge that the exchange might run afoul of the antitrust laws. Their decision varied from that of an unregulated concern only in that they also had to obtain the approval of a federal agency. But scope of that approval in the case of the FCC was limited to the statutory standard, "public interest, convenience, and necessity." The monetary terms of the exchange were set by the parties, and were of concern to the Commission only as they might have affected the ability of the parties to serve the public. Even after approval, the parties were free to complete or not to complete the exchange as their sound business judgment dictated. In every sense, the question faced by the parties was solely one of business judgment (as opposed to regulatory coercion), save only that the Commission must have found that the "public interest" would be served by their decision to make the exchange. No pervasive regulatory scheme was involved.\(^{567}\)

In two subsequent merger cases, the Supreme Court reaffirmed and expanded the RCA approach towards agency ap-

\(^{567}\) Id. at 350-51 (citations omitted). The Court's discussion from the quoted paragraph is clouded by the fact that it comes in a section of the opinion in which the Court purported to decide whether "the over-all regulatory scheme of the Act requires invocation of a primary jurisdiction doctrine." Id. at 346. But as the "primary jurisdiction doctrine" is a doctrine of temporary abstention by a court until an agency decides issues within its expertise, and not a doctrine of immunity, the placement seems somewhat odd. See Hovenkamp, supra note 136, § 19.4, at 655 ("The 'primary jurisdiction' doctrine, as its name implies, is not an antitrust exemption but a jurisdictional mechanism for proceeding with a case that may involve an antitrust claim."). As Justice Harlan seemed to think, the fact that the FCC had already approved the transaction would seem to make any discussion of "primary jurisdiction" pure dictum. See RCA, 358 U.S. at 353 (Harlan, J., concurring in the judgment) (The Court's holding that a "Commission determination of 'public interest, convenience, and necessity' cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee \textit{pro tanto} from the antitrust laws" alone is "dispositive of this appeal."). Perhaps the Court simply meant to suggest that a comprehensive regulatory scheme could create some limited form of immunity. In any event, whatever the Court meant by the primary jurisdiction doctrine, if agency approval of a private anticompetitive agreement does not even call this limited immunity into play, then a fortiori it cannot give rise to full regulatory immunity.
proval of private transactions. In California v. Federal Power Commission, the Federal Power Commission ("FPC") approved a merger between a natural gas company and a pipeline company under the Natural Gas Act's "public convenience and necessity" standard. The case arose after the state of California intervened in the FPC hearing and sought review by the federal court of appeals, which affirmed the FPC's approval of the merger. It was from this judgment that the petition for certiorari was filed and granted. Although the FPC had invited the Justice Department to participate in its hearings, the Justice Department declined, and instead proceeded with an antitrust suit to block the merger. Thus, in Federal Power Commission, unlike RCA, not only was there a hearing held by the agency but there was also judicial review of the agency's approval. Still, the Court found no antitrust immunity. The Court found that the Natural Gas Act provided no express exemption; that the FPC had not been given the power to enforce the antitrust laws; and, as in RCA, that "there [was] no 'pervasive regulatory scheme' including the antitrust laws that has been entrusted to the Commission."
In the second merger case, *United States v. Philadelphia National Bank*, the Comptroller of the Currency approved a merger between two banks pursuant to the requirements of the Bank Merger Act. The Court followed essentially the same analysis as in *Federal Power Commission*, but went further because the suit in *Philadelphia National Bank* arguably undermined not only the agency's decision, but the Bank Merger Act itself. The Court found that the Bank Merger Act did not give banking agencies the authority to enforce the antitrust laws or to grant immunity from those laws. The Court also noted that "[a]lthough the Comptroller was required to consider [the] effect upon competition in passing upon [the banks'] merger application, he was not required to give this factor any particular weight." Finally, the Court again found that the regulatory

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577 Id. at 332. The Court noted that the statute required the Comptroller to "take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and . . . not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest." Id. at 333 n.8 (quoting Bank Merger Act, 74 Stat. 129 (1960) (current version at 12 U.S.C. § 1828) (1994)).
578 See id. at 384-85 (Harlan, J., dissenting) (arguing that as a result of the majority opinion, "the Bank Merger Act is almost completely nullified," the "only vestige" remaining being "that the banking agencies will have an initial veto"). Of course, the Bank Merger Act would not be completely nullified in the sense that the Government might simply decline to challenge a merger which the Comptroller had approved on antitrust grounds. Moreover, the only issue in *Philadelphia Nat'l Bank* was whether a suit could be brought under the Clayton Act; there was no dispute that the Bank Merger Act did not immunize an antitrust challenge under the Sherman Act. Id. at 354.
579 Id. at 351. The Court reached its conclusion despite the fact that at the time the Bank Merger Act was passed, at least some members of Congress as well as the Justice Department assumed that § 7 of the Clayton Act did not apply to bank mergers. Id. at 348. The Court found that because "the applicability of § 7 to bank mergers" was a "subject of speculation" this assumption was largely irrelevant in determining Congressional intent in passing Section 7, see id. at 348-49, and therefore, irrelevant to the immunity question.

Justice Harlan's dissent, on the other hand, emphasized the importance of the fact that this assumption was held by members of Congress and the Justice Department. See id. at 373-74, 377-79, 381, 384 (Harlan, J., dissenting). Justice Harlan also relied on statements in the legislative history to the effect that competition was not supposed to be the controlling factor in merger approvals by the Comptroller. Id. at 382-83 (Harlan, J., dissenting).
580 Id. at 351. The Court went on to state that the Comptroller "was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision." Id. at 351. But given the
regime established under the statute did not amount to "pervasive regulation" of the banking industry, as banking regulation, though extensive, did not for the most part cover the type of conduct most likely to conflict with the antitrust laws: There was no rate regulation, no prohibition on discrimination, and no restriction on where banks could make loans and solicit deposits.581

The trilogy of cases reviewed in this section stand for the proposition that agency review of private transactions under a public interest standard does not confer antitrust immunity. Such review does not amount to "pervasive regulation," even if the agency considers the antitrust implications of the challenged conduct, even if the antitrust plaintiff can make its case before the agency at hearings, and even if appellate courts review the agency decision. Although the Court has never fully articulated why the antitrust laws take priority over agency approval of private conduct, we think this approach makes sense from both a political and pragmatic perspective. Politically, the Court's decisions recognize that absent some clear indication from Congress, agencies lack the authority to determine the scope of possibly conflicting statutes. Pragmatically, the decisions implicitly recognize that the dangers of capture, corruption, and collusion—however great they are at the legislative level—may be even greater at the agency level.

What implications do these three cases have in the context of anticompetitive lawyer conduct in class actions? Each of the three cases involved statutory schemes with far stronger claims to creating antitrust immunity than has Federal Rule of Civil Procedure 23. Rule 23 does not even contemplate the possibility of anticompetitive lawyer conduct, let alone direct the court to consider the effects of class action settlements on competition

581 Id. at 352.

fact that in Federal Power Comm'n, there had been both a hearing and judicial review, it is hard to see why these facts mattered. Federal Power Comm'n, 369 U.S. at 484. In any case, the Court elsewhere in the opinion suggests that the existence of judicial review is not critical to the immunity question. See Philadelphia Nat'l Bank, 374 U.S. at 351 n.30 (suggesting that judicial review of the Comptroller's decision might be possible, but intimating no view on the question); see also id. at 354 ("But here there may be no power of judicial review of the administrative decision approving the merger, and such approval does not in any event confer immunity from the antitrust laws.") (emphasis added).
policy. Further, with regard to the pragmatic perspective that these cases implicitly endorse, courts in class actions seem to be exposed to the same capture, corruption, and collusion influences as federal agencies. Those who think courts immune have not paid sufficient attention to court behavior in class actions. Judges have a strong self-interest in settling these lawsuits—docket clearance being perhaps the strongest—even if those settlements have various troubling features.  

c. Has the Court Retreated?  
Since it decided RCA, the Court has found implied federal regulatory immunity from the antitrust laws in three cases. One of the three cases involved airline regulation under the Federal Aviation Act; the two other cases involved securities regulation under several different statutes. These cases do not signal a retreat from the position that agency approval of private conduct alone is insufficient to create antitrust immunity; instead, they represent fairly narrow exceptions to the general presumption against finding implied immunity. In each of these cases there was explicit language in the statute that either endorsed specific, potentially anticompetitive conduct that the agency had the authority to approve, or empowered the agency with antitrust enforcement authority. No similar features exist in any statute governing class actions.  
The first case, Pan American World Airways, Inc. v. United States, involved allegations of anticompetitive activity by Pan Am in connection with Panagra, a joint venture between Pan Am and W.R. Grace. The lawsuit, which the Civil Aeronautics

582 See supra Section II.C.  
583 In another case, Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973), the Court found antitrust immunity based on an express provision in the statute immunizing agency approval of certain private transactions from antitrust liability. Id. at 384-85. Hughes Tool held that because the agency involved had engaged in continuous supervision and approval, the statute’s express immunity applied although in approving the transactions the agency did not specifically consider and approve the anticompetitive aspects of the conduct. Id. at 389. Lawyers involved in class actions have no plausible claim of express immunity; therefore, we find Hughes Tool inapplicable to our discussion of antitrust suits controlling lawyer conduct in class actions and do not discuss this case further (although it can be distinguished on other grounds as well).  
Board ("CAB") had asked the Government to file, alleged that
Pan Am had formed Panagra pursuant to a market division
agreement in which Pan Am had agreed not to compete in cer-
tain locations and Panagra had agreed not to compete in others,
and further alleged that Pan Am had used its control over Pan-
agra to prevent Panagra from seeking the CAB's approval to
extend its routes into the United States.\textsuperscript{585}

The Court found that Section 411 of the Federal Aviation
Act,\textsuperscript{586} which gave the CAB authority to determine whether any
air carrier had been or was engaged in unfair methods of com-
petition, and which further empowered the CAB to issue a
cease and desist order to respond to unfair methods, created an
implied antitrust immunity.\textsuperscript{587} The Court reasoned that the anti-
trust challenge involved division of territories, the limitation of
routes and the relations of common carriers to "air carriers," each "precise ingredients of the Board's authority."\textsuperscript{588} Also, the
Government sought only injunctive relief and divestiture, and
the Court found that the CAB had the power under the statute
to grant both of those remedies against the specific conduct
alleged.\textsuperscript{589} Most important to its holding, the Court found that
the "unfair methods of competition" language of Section 411 of

\textsuperscript{585} Id. at 298.

\textsuperscript{586} Federal Aviation Act of 1958, Pub. L. 85-726, § 411, 72 Stat. 731, 769 (1958)
(similar contemporary provision at 49 U.S.C. § 41712 (1994)).

\textsuperscript{587} See \textit{Pan Am}, 371 U.S. at 309-310. Section 414 of the Federal Aviation Act of
1958 contain[ed] an express immunity provision for certain transactions approved by
the Civil Aeronautics Board. 49 U.S.C. § 1384 (1958) (similar contemporary provision
at 49 U.S.C. § 41308 (1994)). In \textit{Pan Am}, express immunity did not apply both
because the CAB had not issued an "order" approving the conduct, id. at 298 (noting
that CAB had asked the government to file the antitrust suit), and because even if it
had, the alleged conduct was not specifically covered by the statutory exemption
because it originated before the enactment of the statute, id. at 309 (noting that § 414
would apply to prospective application of the statute, but § 411 applies even to
conduct predating the statute); id. at 320 (Brennan, J., dissenting) (noting that the
Court conceded that the Board could not have issued an order that would qualify for
express immunity). In \textit{Hughes Tool}, the Court relied on § 414's express immunity

\textsuperscript{588} \textit{Pan Am}, 371 U.S. at 305.

\textsuperscript{589} The Court contrasted \textit{Pan Am} with Georgia v. Pennsylvania R.R. Co., 324 U.S.
439, 455-56 (1945), describing the two cases as "quite unlike" one another due to the
fact that in \textit{Pennsylvania R.R.} the agency involved (the Interstate Commerce Commission)
lacked the authority to issue an injunction against the conduct in
question. See \textit{Pan Am}, 371 U.S. at 305-06 & 306 n.11.
the Federal Aviation Act derived from Section 5 of the Federal Trade Commission Act,590 and that Section 411 was therefore "designed to bolster and strengthen antitrust enforcement."591 The Court concluded that "the Act leaves to the Board under Section 411 all questions of injunctive relief" against the anti-competitive conduct alleged by the Government.592

_Pan Am_ creates a fairly narrow exception to the presumption against implying immunity. It merely holds that if a statute specifically grants an agency the equivalent of antitrust enforcement powers, conduct within the agency's normal regulatory authority is immune from antitrust suits when those antitrust suits seek a remedy that the agency could grant.593

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590 Id. at 303 ("[S]ection [411] was patterned after § 5 of the Federal Trade Commission Act."). See also id. at 306-307 (discussing the relevance of the Federal Trade Commission Act in determining the scope of the language "unfair methods of competition" in the Federal Aviation Act).

591 Id. at 307. As the dissent points out, however, § 5 of the Federal Trade Commission Act was not intended to displace antitrust enforcement, either by the Justice Department or by private parties. See id. at 324 (Brennan, J., dissenting) (asserting that "§ 5 has uniformly been construed to provide for dual enforcement by courts and agency of the antitrust laws, not exclusive enforcement by the agency").

It is not clear from the Court's opinion whether private antitrust suits seeking injunctive relief would be barred, though the Court does note that the unfair methods of competition language as used in § 411 of the Federal Aviation Act "do[es] not embrace a remedy for private wrongs but only a means of vindicating the public interest." Id. at 306.

592 Id. at 310. The Court further noted that "[i]f it were clear that there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C.A.B.," there would be no immunity, but the antitrust court would have to give primary jurisdiction to the CAB to make factual findings. Id. at 313 n.19. As Justice Brennan points out in his dissent, the Court's approach suggests that a suit for damages might still have been available. Id. at 321, 326 (Brennan, J., dissenting).

593 The fact that _Pan Am_ predates _United States v. Philadelphia Nat'l Bank_, 374 U.S. 321 (1963), in which the Court rejected a claim of immunity in the absence of such a statutory provision, supports this narrow interpretation of _Pan Am_. _Ricci v. Chicago Mercantile Exch._, 409 U.S. 289 (1973), further supports this interpretation of _Pan Am_. In _Ricci_, the Court declined to find that the Commodity Exchange Act conferred general antitrust immunity on exclusionary conduct by commodity exchanges. The Court's rationale, in part, was that the area of administrative authority created by the statute did not appear to be particularly focused on competitive considerations, as the statute contained no express provision directing administrative officials to consider the antitrust law policies in carrying out their duties nor any other indication "that Congress intended the adjudicative authority given the Commission and the Secretary to be a complete substitute for judicial enforcement." _Ricci_, 409 U.S. at 302-03 n.13. However, in _Ricci_, the Court applied the primary jurisdiction doctrine to require that the antitrust court stay its hand until the agency had ruled on whether the challenged
The two securities cases create equally narrow exceptions to the presumption against immunity. In *Gordon v. New York Stock Exchange*, the Court unanimously found that the NYSE's rule fixing broker commissions was immune from antitrust challenge. The Court relied primarily on language in Section 19(b) of the Securities Exchange Act, which it found gave the SEC direct regulatory power over exchange rules and practices with respect to "the fixing of reasonable rates of commission." Not only was the SEC authorized to disapprove rules and practices concerning commission rates, but the agency also was permitted to require alteration or supplementation of the rules and practices . . . .

Because the SEC could not merely approve or disapprove of the price fixing but could also require alteration or supplementation of private rules and practices, the Court found a direct conflict between the regulatory regime and the antitrust laws not present in the *RCA* group of cases denying immunity. The conflict was that "the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC." But the Court did not seem to rely solely on the stat-

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595 Id. at 685.
596 See supra Section IV.C.1.b.
597 *Gordon*, 422 U.S. at 689 (emphasis added). In a nearby footnote, the Court distinguished *Philadelphia Nat'l Bank*, in part, on the "lack of conflict between the Bank Merger Act and Clayton Act standards." Id. at 689-90 n.14. But because the standards of the Bank Merger Act and Clayton Act did in fact conflict in *Philadelphia Nat'l Bank*, what the Court must have meant was that because the Comptroller could not mandate mergers (the anticompetitive conduct), but could merely approve them, banks would never face conflicting mandates from the Comptroller and an antitrust court. The same was true in *California v. Federal Power Commission*, 369 U.S. 482 (1962).

A harder case is presented if a party asks the agency not to approve but to stop anticompetitive conduct. This was the situation in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). In that case, Otter Tail Power refused to sell wholesale power to municipalities. Some of the municipalities asked the Federal Power Commission (FPC) to compel the utility to provide the power. The Court held that the FPC's authority to compel "procompetitive" conduct did not provide antitrust immunity. *Otter Tail Power*, 410 U.S. at 375-76 ("[T]here is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations."). The Court explicitly reserved the question of what would happen if the FPC had issued an order refusing
ute's explicit grant to the SEC of the power to alter exchange rules and practices;\(^5\) in addition, it emphasized active regulatory oversight by the SEC\(^6\) as well as repeated congressional approval of exchange commission rate practices\(^7\) in reaching its holding.

The other securities law case finding implied antitrust immunity, *United States v. National Association of Securities Dealers*,\(^8\) goes beyond *Gordon* and seems to present a more expansive approach to federal regulatory immunity than the Court has taken in its other cases.\(^9\) In *NASD*, the Government alleged that mutual fund underwriters and broker-dealers entered into agreements "to restrict the sale and fix the resale prices of mutual-fund shares in secondary market transactions between dealers, from an investor to a dealer, and between investors through brokered transactions."\(^10\) The Court held the NASD's activities to compel interconnection. *Otter Tail Power*, 410 U.S. at 375-77.

\(^{598}\) See *Gordon*, 422 U.S. at 685 (noting that "this case involves explicit statutory authorization for SEC review of all exchange rules and practices dealing with rates of commission and resultant SEC continuing activity."); see also id. at 691 (resting immunity on "the statutory provision authorizing regulation, § 19(b)(9), the long regulatory practice, and the continued congressional approval" together).

\(^{599}\) See id. at 685 (noting the SEC's "active role in review of proposed rate changes during the last 15 years"); see also *Gordon*, 422 U.S. at 689 ("[T]he commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC."); id. at 690 ("[T]he SEC has been engaged in deep and serious study of the commission rate practices of the exchanges and of their members, and has required major changes in those practices.").

It is also interesting to note that the Court distinguished *Philadelphia Nat'l Bank*, in part, on the basis of "an absence of continuing regulatory oversight." Id. at 690 n.14. Because *Philadelphia Nat'l Bank* involved a merger, it is not clear what "continuing oversight" would accomplish. Perhaps the Court is suggesting that when an agency approves a transaction that has continuous anticompetitive effects, the Court will almost never find immunity because "continuous oversight" by the agency is infeasible. In the class action context, courts do not exercise "continuous oversight." See supra notes 516-518 and accompanying text.

\(^{600}\) See *Gordon*, 422 U.S. at 690 (stating that "Congress has indicated its continued approval of SEC review of the commission rate structure").

\(^{601}\) 422 U.S. 694 (1975) [hereinafter *NASD*].


\(^{603}\) *NASD*, 422 U.S. at 700. The Government also alleged that the NASD had conspired with its member dealers to prevent the growth of a secondary market in mutual fund shares. Id. at 701-02.
immune from antitrust liability in light of the regulatory scheme created by the Investment Company Act of 1940.04

The Investment Company Act had been "designed to restrict most of secondary market trading" in mutual fund shares, and thereby curb the perceived abuses in that market.05 One section of the Act eliminated price competition in certain secondary market sales, and arguably created an implicit antitrust immunity, but that section was inapplicable in NASD.06 The section that did apply, Section 22(f),07 did not explicitly eliminate price competition, but merely authorized funds "to impose restrictions on the negotiability and transferability of their shares," provided they "do not contravene any rules and regulations the [SEC] may prescribe."08 The SEC had not prescribed any such rules and regulations, but had left it up to the underwriters and broker-dealers to develop the restrictions themselves.

Without bothering to distinguish its prior cases refusing to find immunity in the face of agency approval of private conduct, the Court stated simply: "Congress has made a judgment that these

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04 Id. at 729-30 (construing § 22 of the Investment Company Act of 1940, codified at 15 U.S.C. § 22 (1970)).
05 See id. at 700. The problem addressed by the Act was the "two-price system" problem. The price of mutual fund shares was typically set daily, based on the prior day's prices of the securities in the fund's portfolio. After the close of the stock exchange, there was a divergence between the existing mutual fund price, based on the prior day's stock prices, and the next day's mutual fund price, based on the closing stock prices. Insider dealers and others were able to take advantage of this spread in prices by engaging in arbitrage trading in the secondary market. See id. at 706-07. See also Hastings Comment, supra note 602, at 417-18.
06 Section 22(d) of the Act eliminated price competition in dealer sales of mutual fund shares by prohibiting dealers from selling these shares "to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus." NASD, 422 U.S. at 711 (quoting 15 U.S.C. § 80a-22(d) (1970)). By its terms, § 22(d) excepts sales between dealers, and the Court held that § 22(d) also does not cover sales made by a broker-dealer acting as a broker, that is, selling as an agent for an investor rather than for the broker's own account. Id. at 711-20.
07 This section provides:
No registered open-end company shall restrict the transferability or negotiability of any security of which it is the issuer except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the Commission may prescribe in the interests of the holders of all of the outstanding securities of such investment company.

08 NASD, 422 U.S. at 720-21.
restrictions on competition might be necessitated by the unique problems of the mutual-fund industry, and has vested in the SEC final authority to determine whether and to what extent they should be tolerated . . . .”\textsuperscript{609} Having divined congressional intent to immunize private conduct from antitrust liability, the Court noted that the fact that the SEC had merely acquiesced in fund-initiated restrictions for over thirty years did not mean the SEC was asleep at the wheel, but rather that it had made “an informed administrative judgment that the contractual restrictions employed by the funds to protect their shareholders were appropriate means for combating the problems of the industry.”\textsuperscript{610} Ultimately, the Court held that the Act’s encouragement of restrictions in the secondary market by NASD and its members immunized their conduct from antitrust attack, because the “close relationship”\textsuperscript{611} between the challenged activity and “the restriction that the SEC consistently has approved pursuant to § 22(f)”\textsuperscript{612} made “the SEC’s exercise of regulatory authority . . . sufficiently pervasive to confer an implied immunity.”\textsuperscript{613}

\textit{NASD} lends the strongest support to a claim of federal regulatory immunity for lawyers in federal class actions. It is the only case in which the Court has found antitrust immunity arising out of no more than an agency’s approval of private conduct and the pervasiveness of the regulatory regime.\textsuperscript{614} It involved a stat-

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\textsuperscript{609} Id. at 729.
\textsuperscript{610} Id. at 728. See also id. at 734 (noting that “the history of [SEC] regulations suggests no laxity in the exercise of [its] authority.”).
\textsuperscript{611} Id. at 733.
\textsuperscript{612} Id. at 733.
\textsuperscript{613} Id. at 730. The Court summarized its holding as follows:

In this instance, maintenance of an antitrust action for activities so directly related to the SEC’s responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly a result that Congress would have mandated. We therefore hold that with respect to the activities [of NASD and its members] challenged in Count I of the complaint, the Sherman Act has been displaced by the pervasive regulatory scheme established by the Maloney and Investment Company Acts.

Id. at 735.

\textsuperscript{614} The Court had suggested in a prior securities case, Silver v. New York Stock Exchange, 373 U.S. 341 (1963), that because the Securities Exchange Act expressly contemplated a degree of self-regulation and mandated a duty of self-policing by stock exchanges, there might be antitrust immunity for anticompetitive acts by exchanges. \textit{Silver}, 373 U.S. at 360-61. In reaching this conclusion, the Court considered § 6(b) of
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ute that does not grant antitrust enforcement powers to the SEC, as the Federal Aviation Act granted the CAB in Pan Am.\textsuperscript{615} Nor was there active agency and congressional oversight, as there was in Gordon.\textsuperscript{616} Moreover, the Court did not focus on the possibility that the SEC might require anticompetitive

the Securities Exchange Act, codified at 15 U.S.C. § 78f(b)(6), which requires exchanges that register with the SEC to maintain rules providing for the expulsion of a member for conduct “inconsistent with just and equitable principles of trade.” Silver, 373 U.S. at 353.

In Silver, however, the Court held that NYSE’s termination of a nonmember’s wire connections with NYSE members was not immune from the antitrust laws because NYSE had not provided any procedural safeguards against abuse. Silver, 373 U.S. at 364 (“Our decision today ... holds that [the Securities Exchange Act] affords no justification for anticompetitive collective action taken without according fair procedures.”). Invoking Pennsylvania R.R., Silver, 373 U.S. at 357, the Court held that the statute was “not sufficiently pervasive to create a total exemption [for exchange self-regulatory acts] from the antitrust laws,” Silver, 373 U.S. at 360-61, because the SEC lacked “jurisdiction over particular applications of exchange rules.” Id. at 358. And although the Court suggested that if the exchange provided procedural safeguards there might be partial immunity for “particular instances of exchange self-regulation,” id. at 358-60, 361, the Court found “no need ... to define further whether the interposing of a substantive justification in an antitrust suit brought to challenge a particular enforcement of the rules on its merits is to be governed by a standard of arbitrariness, good faith, reasonableness, or some other measure.” Id. at 365-66.

In Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973), the Court took a slight step beyond Silver, rejecting a total exemption from the antitrust laws but suggesting that a limited immunity might apply where a member of the Chicago Mercantile Exchange claimed the Exchange had wrongfully transferred his membership. Id. at 303. The Court suggested limited immunity might apply because the Commodity Exchange Act required that all dealers in commodity futures be “a member of a board of trade,” id. at 303, and therefore, it “clearly contemplate[d] a membership organization and hence the existence of criteria for the acquisition, transfer, and loss of membership.” Id. at 303. But because the Commodity Exchange Commission had jurisdiction over the Exchange’s conduct (unlike the SEC in Silver), the Court held that under the primary jurisdiction doctrine, the antitrust court should wait until the agency decided whether the conduct was lawful under the Commodity Exchange Act before deciding the antitrust immunity question. Id. at 304-06. The Court did not, therefore, hold that agency approval of the conduct would result in antitrust immunity.

\textsuperscript{615} See supra notes 590-591 and accompanying text; see also Hastings Comment, supra note 602, at 424-25.

\textsuperscript{616} See supra notes 598-600 and accompanying text; see also Hastings Comment, supra note 602, at 423-24. In this sense, NASD suggests that federal regulatory immunity can sometimes be stronger (more likely to be applied) than state action immunity, in that federal statutes can give more leeway to private conduct with less active supervision. However, comparing Pennsylvania R.R. with Southern Motor Carriers suggests that federal regulatory immunity is generally weaker than state action immunity.
conduct and therefore subject regulated firms to inconsistent mandates, a point the Court had emphasized in *Gordon*. Rather, the Court in *NASD* suggested that the mere fact that the statute permits private parties to enter anticompetitive agreements is alone sufficient to establish "clear repugnancy" with the antitrust laws.\(^\text{617}\)

Was the Court in *NASD* trying to undermine its prior jurisprudence on federal regulatory immunity?\(^\text{618}\) We think the answer is no.\(^\text{619}\) *NASD* is unique because the regulatory regime involved in the case is unique. Congress had essentially decided in the Investment Company Act that competition in the secondary market for mutual funds should be restricted to promote competition in the primary market. Congress sought to restrict competition in the secondary market directly through Section 22.\(^\text{620}\) Congress thereby reversed the ordinary presumption in

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\(^{617}\) See *NASD*, 422 U.S. at 729 ("There can be no reconciliation of [the SEC's] authority under § 22(f) to permit these and similar restrictive agreements with the Sherman Act's declaration that they are illegal *per se*."").

\(^{618}\) The dissenting Justices thought so. See id. at 735-48 (White, J., dissenting, joined by Justices Douglas, Brennan, and Marshall). A case can be made that *NASD* represents an example of the new Burger Court majority trying to undo Warren Court precedents with which it disagreed. (The same could be said of *Southern Motor Carriers* in the state action context). We prefer the explanation that follows in the text, however.

\(^{619}\) Several courts trying to interpret the *NASD* decision agree. See North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274, 284 n.10 (4th Cir. 1984) (en banc), cert. denied, 471 U.S. 1003 (1985) (recognizing that *NASD" represents something of an aberration" from the line of prior implied regulatory immunity cases, but finding that "[m]ore recent cases," such as *Cantor* reaffirmed the prior "plain repugnancy test"); Oahu Gas Serv. v. Pacific Resources, 460 F. Supp. 1359, 1373 (D. Haw. 1978) ("NASD's rationale is quite puzzling and the import of the decision is unclear," but "NASD cannot be given so expansive a reading as to discard three decades of well-established and consistent antitrust immunity precedent, for the pre-*NASD* axioms were reaffirmed in *Cantor* ... "); cf. Hastings Comment, supra note 602, at 429 ("Having failed either expressly to discard traditional immunity criteria on the one hand, or to unambiguously promulgate new ones on the other, the *NASD* holding is little more than a legal conundrum, and simply cannot be said to be the stuff of which judicial revolutions are made. It would not appear unreasonable to predict that the lower courts and the antitrust bar will agree... "). But see Finnegan v. Campeau Corp., 915 F.2d 824, 828-29 (2d Cir. 1990), cert. denied, 499 U.S. 976 (1991) (relying on *NASD*, *Gordon*, and *Silver* to find implied antitrust immunity and ignoring all prior cases).

\(^{620}\) See *NASD*, 422 U.S. at 724-25 (explaining how § 22(d) and § 22(f) work together to restrict secondary market sales). Not all agree that the purpose of § 22 was anticompetitive. Recall that the specific purpose of § 22 was to end the arbitrage
favor of competition policy,\textsuperscript{621} which makes this statutory scheme unlike those in \textit{RCA}, \textit{Federal Power Commission} and \textit{Philadelphia National Bank}. This difference may explain why the \textit{NASD} Court never attempted to distinguish those cases and why it relied on reasoning that those cases had seemed to reject.\textsuperscript{622} None of the regulatory schemes involved in those cases had as their primary purpose the restriction of competition trading opportunities arising out of the mutual fund two-price system. See supra note 605. According to one critic of \textit{NASD}, although § 22 "could arguably be interpreted as having an anticompetitive regulatory objective"—to curb those abuses in the secondary market—"it does not follow that the underlying regulatory objective was to eliminate competition categorically in the market for mutual funds." Hastings Comment, supra note 602, at 418. This criticism misses the Court's point. It is evident that § 22 cuts more broadly than simply restricting arbitrage trading to eliminate the two-price system problem in the secondary market. It is also evident that Congress could have, see id. at 421 (noting prior version of bill that would have granted the SEC power to eliminate "backward pricing"), and later did, see id. at 419, n.196 (discussing "forward pricing system" established in 1968), regulate more narrowly to eliminate that problem.

The Court's point is that Congress, in enacting § 22(f), deliberately chose an overbroad regulatory scheme, a scheme that expressly allowed the SEC to approve private agreements restricting competition in the secondary market. Once Congress enacted a statute that permitted private anticompetitive restraints, it did not matter that some competition in the secondary market would be consistent with both the purpose of § 22 and the antitrust laws. Cf. id. at 419 (arguing that if § 22's "main function was simply to insure a generally orderly distributive system, it is still not apparent from the rather superficial economic analysis in \textit{NASD} that such an orderly system could not in fact accommodate secondary market transactions").

\textsuperscript{621} For the sake of clarity in doctrine, it would have been helpful if the Court had made this point more explicitly.

\textsuperscript{622} The reasoning rejected includes: (1) the idea that an agency's authority to disapprove of private conduct, which authority has not been exercised, is sufficient to create immunity, see \textit{RCA}, 358 U.S. at 352-53 (no immunity even though agency approved contract); \textit{Federal Power Comm'n}, 369 U.S. at 485-86 (no immunity even though agency approved merger); \textit{Philadelphia Nat'l Bank}, 374 U.S. at 351 (no immunity even though agency approved merger); (2) the idea that whether an agency weighs competitive concerns in the absence of a statutory mandate is relevant to whether the Court should find implied immunity, see \textit{RCA}, 358 U.S. at 338 (no immunity even though agency "decided all issues relative to the antitrust laws that were before it"); \textit{Federal Power Comm'n}, 369 U.S. at 484-86 (no immunity even though agency invited Justice Department to participate in hearings because agency did not have the power to enforce the antitrust laws); \textit{Philadelphia Nat'l Bank}, 374 U.S. at 351 ("Although the Comptroller was required to consider [the] effect upon competition in passing upon [the banks'] merger application, he was not required to give this factor any particular weight; . . ."); and (3) the idea that there is a danger that regulated firms will face inconsistent standards simply because an antitrust court might disapprove of conduct that an agency had previously approved, see supra note 597.
in some market.\textsuperscript{623} Even in the railroad rate regulation cases, although the Interstate Commerce Act arguably did seek to restrict competition in rates, the reasonableness standard of that statute did not declare all price competition in the market suspect.\textsuperscript{624} By contrast, the statute attempting to eliminate unwanted arbitrage at issue in NASD cannot tolerate a zone of reasonableness; any undercutting of the set market price is undesirable. Viewed this way, NASD squares with the rest of the Court's federal regulatory immunity jurisprudence. If Congress adopts a policy against competition in some market and expressly permits private anticompetitive conduct subject to agency oversight, it creates an immunity from the antitrust laws.\textsuperscript{625}

\textsuperscript{623} For further evidence that this factor was important to the Court's decision, see Otter Tail Power v. United States, 410 U.S. 366, 374 (1973) (refusing to find a "pervasive regulatory scheme" creating antitrust immunity where the regulatory statute evidences "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest").

\textsuperscript{624} Recall that in the state action context, however, the Court in Southern Motor Carriers concluded that rate regulation—at least where accompanied by a requirement that the regulatory agency set rates based on noncompetitive factors—was inconsistent with competition policy.

\textsuperscript{625} This reading of NASD would arguably lead to a different result in Finnegan v. Campeau Corp., 915 F.2d 824 (2d Cir. 1990), cert. denied, 499 U.S. 976 (1991). In that case, the Second Circuit held that bidding agreements in corporate takeovers—including agreements to refrain from such bidding—enjoy antitrust immunity because the Williams Act implicitly repealed the Sherman Act with respect to the regulation of such agreements. Finnegan, 915 F.2d at 828. The court reasoned that the Williams Act and accompanying regulations explicitly contemplate joint bidding arrangements, which Congress and the SEC have chosen to regulate only by requiring their disclosure. Finnegan, 915 F.2d at 830. The court then concluded: "We cannot presume that Congress has allowed competing bidders to make a joint bid under the Williams Act and the SEC's regulations and taken that right away by authorizing suit against such joint bidders under the antitrust laws." Id. In our view, the mere fact that the Williams Act contemplates joint bidding does not express a policy against competition any more than a partnership statute does. Not all joint bids to achieve a corporate takeover would restrain competition or violate the antitrust laws. See Edward B. Rock, Antitrust and the Market for Corporate Control, 77 Calif. L. Rev. 1365, 1393 (1989) ("Allowing individuals to band together to make tender offers may be procompetitive: It may permit some bidders to enter the bidding, or create new bidders for larger targets, thereby increasing the competition in the market for corporate control."). Most important for present purposes, there is no indication in the text or legislative history of the Williams Act that Congress intended to allow restraints of trade in the market for corporate control; if anything, Congress' intention seems to be to promote competition in this market. See id. at 1393-94. Thus, Congress in the Williams Act did not reverse the general presumption in favor of
Most important for our purposes, in the class action context, NASD can have no application. Congress has adopted no policy against competition in class actions in Rule 23 or any federal statute. Even if class actions themselves could be viewed as anticompetitive, as we argued in the state action section, the fact that Congress permits class actions does not mean that Congress intends to displace competition in either the market for class counsel or the market for lawyer services in a private administrative system created by a class action settlement. NASD is perfectly consistent with the theme of Cantor—that in deciding questions of antitrust immunity, courts must focus on the relevant market. It does not adopt a “pervasive regulation” approach to immunity. Rather, NASD adopts a particularistic regulation approach: The market at issue must be examined to see whether Congress has adopted a policy against competition in that market. There is no such policy as to the markets on which we have focused. NASD, therefore, does not support a claim of antitrust immunity for lawyers in cases involving conduct like that in Oracle and Georgine.

Furthermore, if NASD does not apply, the ordinary presumptions of the federal regulatory immunity cases kick in. That is, the fact that an agency approves a rate as reasonable or a private transaction as consistent with the public interest is not sufficient to displace the antitrust laws. Courts appointing class counsel, approving class action settlements and retaining jurisdiction over subsequent private administrative systems do no more than the federal agencies whose actions the Court has held

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626 See supra notes 479-487 and accompanying text.

627 The relevant market for immunity purposes is the market in which the legislature intends to displace competition. See supra notes 484-487 and accompanying text.
insufficient to create immunity. Once again, we conclude that class action lawyers do not have the cloak they imagine.

2. The Keogh Doctrine and Damage Suits

Even if private conduct is not fully immune from the antitrust laws as a result of federal regulation, it might enjoy a limited immunity: immunity from private treble damage actions. In *Keogh v. Chicago & Northwestern Railway Company*, the Court held that a shipper could not sue a cartel of railroad carriers for damages resulting from fixing a rate "higher than that which would otherwise have prevailed," when this rate had been properly filed with, and after a formal hearing approved by, the Interstate Commerce Commission. The Court reaffirmed *Keogh* in *Square D Company v. Niagara Frontier Travel Bureau, Inc.*, and extended it to situations in which the ICC had not held formal hearings before allowing the tariffs filed with the agency to take effect. If lawyer fees in class actions are like tariffs in ICC regulation, then *Keogh* would prevent private treble damage actions by class members.

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628 260 U.S. 156 (1922).
629 Id. at 163.
630 Id. at 162.
632 Id. at 417.
633 We note at the outset that even if courts decided to apply the *Keogh* doctrine to bar antitrust damage suits by class action members, *Keogh* would not bar injunctive suits or criminal actions by the government. *Keogh*, 260 U.S. at 161-62. Nor would it likely bar damage suits by competitor law firms harmed by the anticompetitive activity. See Barnes v. Arden Mayfair, 759 F.2d 676, 679 (9th Cir. 1985) ("*Keogh* did not . . . hold that carriers are immune from all antitrust actions, only those for which relief may be sought readily from the regulatory agency. . . . Because [the alleged] activities would be beyond the scope of the ICC's jurisdiction, the antitrust action was not subject to [summary judgment] dismissal."); City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1179 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) (allowing plaintiff's claim of antitrust injury caused by an alleged "price squeeze" applied by competitors and holding that neither "an award of antitrust damages nor the granting of properly conditioned injunctive relief" would be barred); Essential Communications Systems v. American Telephone & Telegraph Co., 610 F.2d 1114, 1122 (3d Cir. 1979) (holding that damages and injunctive relief were not barred despite FCC oversight and state tariff regulatory schemes). But see Pinney Dock & Transp. Co. v. Penn Central Corp., 838 F.2d 1445, 1457 (6th Cir.), cert. denied, 488 U.S. 880 (1988) (holding *Keogh* doctrine applicable to competitor suits); Lifschultz Fast Freight v. Consolidated Freightways Corp., 805 F. Supp. 1277, 1295-96 (D.S.C. 1992) (holding filed rate
But the *Square D* Court's reaffirmation of *Keogh* was lukewarm at best. Acknowledging criticisms of the doctrine, the Court decided to preserve *Keogh* merely for stare decisis reasons. It noted that "the *Keogh* rule has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6 1/2 decades."\(^{634}\) Moreover, the Court was reluctant to overrule established doctrine "in an area that has seen careful, intense, and sustained congressional attention."\(^{635}\) Given the Court's dim view of *Keogh*, lower courts would probably be reluctant to expand the doctrine into a new area not traditionally viewed as one of the "interstate commerce statutory regimes," such as the class action area.\(^{636}\)

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\(^{634}\) *Square D*, 476 U.S. at 423.

\(^{635}\) *Id.* at 424. In particular, Congress had passed the Reed-Bulwinkle Act, Pub. L. No. 80-662, ch. 491, 62 Stat. 472 (1948) (codified as amended at 49 U.S.C. § 10706 (1994)), which immunized from the antitrust laws approved collective ratemaking activities, 49 U.S.C. § 10706(b)(2), and the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in scattered sections of 49 U.S.C.), but had left *Keogh* undisturbed. The Reed-Bulwinkle Act was at least in part a response to *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), which had allowed private antitrust suits to enjoin collective ratemaking procedures used by railroads. See *Southern Motor Carriers*, 471 U.S. at 70 (Stevens, J., dissenting). The exemption created by the Reed-Bulwinkle Act did not bar the antitrust suit in *Square D* because the plaintiff's allegation was that the defendants had engaged in conduct that was not authorized by the terms of the agreement approved by the ICC. *Square D*, 476 U.S. at 413-14.

\(^{636}\) It is true that outside of the antitrust arena, the Court has applied the *Keogh* limitation to public utilities as the "filed rate doctrine." See *Maislin Inds. v. Primary Steel*, 497 U.S. 116 (1990); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571 (1981); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951). Moreover, lower courts after *Square D* have strengthened and expanded the filed rate doctrine to cover RICO claims, to cover state regulation as well as federal regulation, and to reject a "fraud on the agency" exception. See, e.g., *Sun City Taxpayers' Ass'n v. Citizens Utils. Co.*, 45 F.3d 58, 62 (2d Cir.), cert denied, 115 S. Ct. 1693 (1995) (RICO suit for submitting false information to state agency; no fraud exception); *Wegoland, Ltd. v. Nynex Corp.*, 27 F.3d 17, 22 (2d Cir. 1994) (RICO class action; no fraud exception); *Taffet v. Southern Co.*, 967 F.2d 1483, 1494-95 (11th Cir.) (en banc), cert denied, 506 U.S. 1021 (1992) (RICO suit against state-regulated utility; no fraud exception); *H.J., Inc v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 488-92, 494 (8th Cir.), cert. denied, 504 U.S. 957 (1992) (RICO class action against state-regulated utility alleging that regulated utility bribed state agency; court holds no fraud exception to filed rate doctrine and that filed rate doctrine applies to state agencies). We do not focus on the recent lower court "filed rate doctrine" cases for several reasons. One reason is that these cases do not involve antitrust claims. Thus, to the extent they establish broader standards of immunity than *Keogh* and *Square D*, these
A close examination of the reasoning in *Keogh* supports the conclusion that courts would be unlikely to extend it to the class action settlement context. First, the *Keogh* Court noted that the Commerce Act already provided a damage remedy for the charging of "illegal" rates, so if the ICC had found the rates to be "unreasonably high" the shipper would have been able to recover any damages in an action either before the ICC or in federal court. The Court then asked rhetorically whether Congress should be presumed to have intended an "additional remedy" under the antitrust laws. In the class action context, the Court would not reach its rhetorical question: There is no comparable damage remedy under Rule 23 available to a class member charged an "unreasonably high or discriminatory" fee by class counsel or individual counsel in the administrative proceeding. The only possible remedy would be a motion under Rule 60(b), which, if available in this context, is a far cry from an equivalent damage remedy. Moreover, since *Keogh* the standards may not apply to the antitrust laws, which enjoy a privileged position among federal statutes. Moreover, there is no reason to think that courts would extend these cases beyond public utilities to class actions, because the rationale used in the utility cases just does not fit. For example, in *Taffet* the court pointed out that allowing consumer suits against public utilities would inevitably raise the prices that those same consumers would have to pay, as the utilities would add legal expenses to their rate base. *Taffet*, 967 F.2d at 1492. In contrast, allowing suits against class lawyers would have no such necessary effect because offending firms would still have to compete with other firms in future class actions. See also supra notes 556-557 and accompanying text (discussing other differences between ICC rate regulation and class actions).

Judge Friendly's opinion for the court of appeals in *Square D* argues that the rationales in *Keogh* no longer support the Court's holding in that case due to subsequent developments. *Square D*, 760 F.2d at 1352-56. Professor Hovenkamp suggests that at the very least, the problems with the Court's reasoning in *Keogh* supports narrowly construing the case. Hovenkamp, supra note 136, § 19.6, at 660 (asserting that "a doctrine as indefensible as *Keogh* should be narrowly construed"). Our argument is that even if the rationales are accepted on the terms laid out by *Keogh*, they do not apply to the class action context.

*Keogh*, 260 U.S. at 162.

Id. at 162 ("Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act?") (emphasis added).

See supra Section II.B (discussing the difference between disgorgement remedies and remedies that provide damages, particularly punitive or treble damages). Rule 60(b) operates to vacate an earlier judgment, reversing whatever relief the first court ordered. It does not provide damages to the party who succeeds in getting a judgment reversed. Moreover, it is not clear that an antitrust violation by class lawyers constitutes "fraud . . . or other misconduct of an adverse party" or a "fraud upon the
Court has disavowed the notion that an alternative remedy is alone enough to justify antitrust immunity, which suggests that the duplicative remedy rationale of *Keogh* is not that important.\(^{641}\)

The remaining rationales in *Keogh* derived from the Court's view that once the Commission approved the rate, it was "for all practical purposes, the legal rate,"\(^ {642}\) and "[t]o be legal a rate must be non-discriminatory."\(^ {643}\) The Court reasoned that allowing an individual shipper to recover damages would violate the non-discrimination (or uniform rate) principle, because it would "operate to give him a preference over his trade competitors."\(^ {644}\) The Court further reasoned that any allegation that the Commission would have accepted a lower rate would be extremely difficult to prove, because "it is possible that no lower rate . . . could have been legally maintained without reconstituting the whole rate structure for many articles moving in an important section of the country."\(^ {645}\) Finally, the Court stressed that if the

court," grounds upon which relief might be granted. Fed. R. Civ. P. 60(b) (emphasis added).

\(^{641}\) Otter Tail Power Co. v. United States, 410 U.S. 366, 373-75 (1973) (holding that the availability of a remedy for the alleged anticompetitive conduct before an administrative agency is not sufficient to create antitrust immunity). This holding suggests that the Court would not rely too heavily on the duplicative remedy rationale in deciding whether to extend *Keogh*.

\(^{642}\) *Keogh*, 260 U.S. at 163.

\(^{643}\) Id. at 164. What the Court meant by "non-discriminatory" is not clear from the opinion, but at the very least it seems to mean that it is important to the regulatory scheme that all railroad customers pay the "same" rate in some sense; that is, there must be some form of price uniformity in the system.

\(^{644}\) Id. at 163 ("If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors."). As Judge Friendly pointed out in his opinion in *Square D*, 760 F.2d 1347, 1352 (2d Cir. 1985), the Supreme Court has since rejected the nondiscrimination rationale in *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 219 n.3 ("There is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others."). Judge Friendly also pointed out—interestingly in light of our topic—that class actions, unavailable at the time *Keogh* was decided, would alleviate the *Keogh* Court's concerns. 760 F.2d at 1352 ("Furthermore, the argument is scarcely applicable to class actions . . ., a means of avoiding Justice Brandeis' concerns that was unavailable in actions at law in 1922."). But cf. *Wegoland Ltd. v. Nynex Corp.*, 27 F.3d 17, 22 (2d Cir. 1994) (finding class action challenge by utility ratepayers insufficient to overcome filed rate doctrine).

\(^{645}\) *Keogh*, 260 U.S. at 164. Judge Friendly's response to this concern was that the
Commission had in fact approved a lower, noncollusive rate for all shippers, the shipper would have gained no advantage over its competitors because it would have been forced to pass on any cost savings to its customers.\footnote{Keogh, 260 U.S. at 165. Judge Friendly's response to this rationale was that the Court had subsequently held that a plaintiff can recover damages even if it is able to pass on these damages to its customers. Square D, 760 F.2d at 1353 (citing, inter alia, Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 487-94 (1968)).}

By contrast, when courts in class actions approve lawyer fees, they do not establish "for all purposes, the legal rate"\footnote{Id. at 164. Note the same would be true for the rate regulation by the states in Southern Motor Carriers. Thus, under our interpretation of Keogh, if Southern Motor Carriers had come out the other way then private damage suits against the cartels would have been allowed.} between lawyers and clients in the sense intended by the Court in Keogh. Class actions do not regulate lawyer fees in the Keogh sense because they do not impose any requirement of nondiscrimination (uniform rate setting) on courts when they approve class counsels' fees for representing the class. As for a court that approves a settlement that sets caps on the fees lawyers may charge in the administrative system created by the settlement, unlike the ICC, that court is not obliged to approve any rates at all for this market. And because it has no mandate to regulate this market, the court has no more reason to approve uniform fees than it does to regulate lawyer fees generally. In fact, the courts do not typically approve uniform fees; they approve maximum fees. There would be no disruption to the regulatory system—no need for "reconstitution of the whole rate structure"\footnote{Keogh, 260 U.S. at 163.}—if injured class members proved that the maximum rate approved by the court resulted from collusion and resulted in excessive fees. Moreover, because the lawyers' services are sold to the ultimate consumer (the claimants), none of the Court's concerns about unfair competitive advantage or pass-on is relevant.
This interpretation of *Keogh* is consistent with the Court’s reading of the case in *Square D*. The plaintiffs in *Square D* had argued that *Carnation Company v. Pacific Westbound Conference*649 supported overruling *Keogh*. *Carnation* allowed a shipper to bring a treble-damage action against a group of shipping companies that had engaged in collective ratemaking. The governing regulatory statute was the Shipping Act,650 which created an exemption from antitrust liability for collective ratemaking pursuant to agreements that the Federal Maritime Commission ("FMC") had approved.651 The defendants had not obtained this approval, but argued nevertheless that the antitrust laws could not reach their conduct.652 The Court rejected this argument.653 The *Square D* Court distinguished *Carnation* from *Keogh* in part on the ground that in *Carnation* the FMC had not approved the challenged ratemaking agreements.654 But the Court went on to note that "the Shipping Act gives the Federal Maritime Commission far more limited authority over rates than the Interstate Commerce Act gives the ICC."655 The import of this statement seems to be that the scope of the *Keogh* doctrine is narrower when the agency merely approves agreements rather than regulates rates.656 The role of the FMC under the Shipping

650 Id. at 215 (stating the issue as whether "the Shipping Act, 1916, 39 Stat. 728, as amended, 75 Stat. 762, 46 U.S.C. §§ 801-842 (1964 ed.), precludes the application of the antitrust laws to the shipping industry").
651 Id. at 216 (citing § 15 of the Shipping Act, codified at 46 U.S.C. § 814).
652 Id. at 217.
653 Id. at 217.
654 *Square D*, 476 U.S. at 420-21.
655 Id. at 422 n.29. The Court also quotes approvingly from Judge Friendly’s opinion in the court of appeals below: “Although the [Federal Maritime Commission] can and does take effect on competition into account in approving conference agreements under 46 U.S.C. § 814, ... the Shipping Act does not give the Commission any mandate to regulate rate competition and, indeed, the statutory scheme was designed to minimize the role of the FMC in this regard.” Id. at 422-23 n.29 (quoting *Square D*, 760 F.2d at 1363).
656 Thus, the *Carnation* Court explicitly rejected the application of the *Keogh* "nondiscrimination" rationale in the context of the Shipping Act. *Carnation*, 383 U.S. at 219 n.3 (“There is no reason to believe that Congress would want to deprive all shippers of their rights to treble damages merely to assure that some shippers do not obtain more generous awards than others.”) See also United States v. Radio Corp. of America, 358 U.S. 334 (1959). In *RCA*, the Court distinguished contract approval cases from common carrier rate regulation cases. Whereas common carrier regulatory
Act is closer to the role of a district court under Rule 23. The court can approve private agreements, but it has no mandate to regulate lawyer fee competition. This suggests that Keogh would not apply to Rule 23.657

This interpretation of Keogh is also consistent with the Court's later decision in the state action immunity case of Cantor v. Detroit Edison Company.658 Cantor, by rejecting the utility's state action immunity defense, implicitly held that private damage actions would be available against a regulated utility for anticompetitive conduct in an unregulated market (the dissent made much of this point).659 As we argued in the state action schemes were based on some notion of uniformity of rates, with which antitrust enforcement might interfere, in contract approval cases like RCA, there were "no rate structures to throw out of balance," and therefore "sporadic action by federal courts can work no mischief." RCA, 358 U.S. at 350.

657 Carnation did restrict the damages that could be recovered: The plaintiff could recover only damages resulting from agreements that were not approved by the FMC. Carnation, 383 U.S. at 216 (holding that "the implementation of rate-making agreements which have not been approved by the Federal Maritime Commission is subject to the antitrust laws"). But the Shipping Act explicitly exempted from antitrust liability agreements that the FMC had approved. The Court ordered the antitrust action stayed until proceedings were held to determine whether the conduct was covered by prior agreements that the FMC had approved. Id. at 223-24. It is a plausible reading of Square D, however, that absent a statute explicitly immunizing conduct approved by an agency from antitrust liability, Keogh would not bar damage suits when an agency had approved of certain conduct, if that agency had limited regulatory authority. This argument is important because RCA and the other contract approval cases in which the Court denied immunity all involved suits by the Government, rather than private treble damages suits. Thus, the Court has not definitively resolved the question of whether Keogh would bar damage suits when an agency approves a contract, though we think Carnation points in the direction of allowing such suits.


659 Id. at 598-99 (plurality opinion) (responding to criticism of availability of treble damages as a result of Court's opinion), id. at 603 (plurality opinion) (rejecting dissent's proposed rule that "no matter how peripheral or casual the State's interests may be in permitting [a private proposal] to go into effect, the state act would confer immunity from treble-damage liability"). One could argue that Cantor is irrelevant because it involves the state action doctrine rather than federal regulatory immunity. It is true that none of the Cantor opinions cited Keogh. But significantly, the Court in Cantor viewed the scope of state action immunity as identical to the scope of federal regulatory immunity. Id. at 596-97 ("Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws. Therefore, . . . the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation."); id. at 596-97 nn. 33-37 (relying on
section, neither the market to represent the class nor the market to represent individual claimants in a subsequent administrative procedure should be viewed as the relevant regulated market.\textsuperscript{660} Even if consumers would be barred from seeking damages, competitor law firms might not be, assuming they show injury. Competitors might have a hard time proving "antitrust injury" in cases alleging maximum price fixing, because as the Court recognized in \textit{Atlantic Richfield Company v. USA Petroleum Company},\textsuperscript{661} maximum price fixing should induce firms either to undercut the cartel if the maximum in fact is a minimum, or to provide superior service at higher prices if the maximum forces the cartel members to cut back on service.\textsuperscript{662} A firm that refuses to take these actions has not suffered an antitrust injury. The exception is if predatory pricing is alleged. Some lower courts have held that \textit{Keogh} does not apply when competitors allege predatory pricing.\textsuperscript{663} The settlement agreement in \textit{Georgine} does not involve classic predatory pricing, but it raises many of the same concerns.\textsuperscript{664} Recall that the settlement provided that certain law firms would automatically be offered higher recoveries for their clients. In this regime, a disfavored law firm would have to lower its rate because a plaintiff coming

\textsuperscript{660} See supra notes 483-487 and accompanying text. \textit{Cantor} also provides another reason why we find the recent filed rate cases inapplicable here. Those cases all involve attempts to challenge rates set by an administrative agency in the market the government sought to regulate.\textsuperscript{661} 495 U.S. 328 (1990) (holding that independent gasoline dealers could not sue other dealers subject to an alleged maximum retail price maintenance scheme because, absent predatory pricing, the independent dealers had been harmed by competition, and so had not suffered an antitrust injury) [hereinafter \textit{ARCO}].\textsuperscript{662} Id. at 337. The Court's holding was that a competitor distributor does not suffer an antitrust injury, and therefore may not recover damages, when it complains that a rival manufacturer has imposed a maximum resale price maintenance scheme on its distributors, unless the maximum price is a predatory price.\textsuperscript{663} See supra note 633.\textsuperscript{664} Of the three possible antitrust problems we have raised, the \textit{Georgine} scheme of allowing designated law firms to get higher recovery for their clients would seem to be the best candidate for a competitor law firm antitrust suit. This scheme involves a type of predation in that the disfavored law firms, because a plaintiff coming to them will get a lower recovery, must lower their rates to perhaps below-cost levels. We leave a full discussion of this problem for another day.
to it would get a lower recovery, but it might be unprofitable to charge the lower rate.

3. The Relevance of the Rules Enabling Act

Putting aside all the arguments we have already made, there is another reason why federal regulatory immunity from the antitrust laws should not apply to lawyer conduct in class actions. The federal "regulatory" scheme is Rule 23 and the case law interpreting that Rule. The scope of Rule 23, like all the Federal Rules of Civil Procedure, is governed by the Rules Enabling Act. The Rules Enabling Act provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right." Rights under the antitrust laws are certainly substantive rights. To bar a plaintiff from bringing an antitrust suit on the ground that a court's approval of a class action settlement under Rule 23 created an immunity from the antitrust laws would be to interpret a Federal Rule so as to "abridge" a substantive right.

A recent case supports that reading of the Rules Enabling Act: McCoy v. Massachusetts Institute of Technology. In McCoy, the First Circuit held that a union's trust fund administrator could not rely on Rule to justify asserting a lien under a state mechanic's lien law, which would otherwise be preempted by the Employee Retirement Income Security Act of

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668 Rule 64 provides that during the course of an action in federal court, subject to certain exceptions:
- all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought

   . . . .

   The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.
Fed. R. Civ. P. 64.
669 The Massachusetts statute "allow[ed] the trustee of an employee benefit plan to assert a lien against property improved through the labor of plan participants in order to collect overdue benefit contributions." McCoy, 950 F.2d at 15.