

1994

Attorney Investment in Class Action Litigation: The Agent Orange Example

Paula Batt Wilson

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Paula Batt Wilson, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 Case W. Rsrv. L. Rev. 291 (1994)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol45/iss1/7>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

ATTORNEY INVESTMENT IN CLASS ACTION LITIGATION: THE *AGENT ORANGE* EXAMPLE

When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY
ETHICAL CONSIDERATION 9-2

I. INTRODUCTION

In recent years, the risk and expense involved in mounting class actions has spurred a search for funding sources beyond the standard contingency fee arrangement often used to finance civil cases. Complex class litigation, distinguished by complicated or novel issues and multiple litigants, arises often in the mass tort, environmental, antitrust, securities, and product liability areas. Attorneys and plaintiffs have been forced to search for new sources of capital to finance the high cost of these suits. One controversial funding source has been speculative investment in class action lawsuits by the class attorneys themselves. The *Agent Orange* case provides a model for the examination of this type of investment.¹

1. The *Agent Orange* case concerned the exposure of military personnel to phenoxy herbicides (collectively known as "Agent Orange") contained in defoliants sprayed over Vietnamese jungles. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 731 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). The veterans and their families, suffering unexplained illnesses which they believed to have been caused by exposure to Agent Orange, filed suit against various chemical manufacturers and the United States government. As Peter Schuck describes it:

The case is actually a consolidation into one class action of more than 600 separate actions originally filed by more than 15,000 named individuals throughout the United States, and almost 400 individual cases not included in the class action ("opt-out" cases). The parties in these consolidated actions consist of some 2.4 million Vietnam veterans, their wives, children born and unborn, and

In the *Agent Orange* class action,² "investor-attorneys" joined the Plaintiffs' Management Committee (PMC) and advanced money to bankroll the overextended plaintiffs' attorneys. In return, the members of the PMC agreed that the investors would receive three times their original contribution prior to distribution of any settlement or judgment. The unique roles of the attorneys in this situation as advocates, officers of the court, and investors suggest conflicts which are compounded by the nature of class action litigation.

Class actions, with their representative plaintiffs, court-appointed counsel, and supervisory judges, differ significantly from the ordinary lawsuit. The prerequisites to class actions found in the *Federal Rules of Civil Procedure*³ demand a showing that the class will be represented adequately by a typical plaintiff(s),⁴ and competent counsel, who will litigate common issues on behalf of all class members.⁵ The rules require active supervision by the court

soldiers from Australia and New Zealand; a small number of civilian plaintiffs; seven (originally twenty-four) corporate defendants; and the United States government The plaintiffs are represented by a network of law firms that numbered almost 1,500 by May, 1984 It has been estimated that the defendants spent roughly \$100 million merely to prepare for the trial, utilizing hundreds of lawyers and corporate staff in their Herculean effort.

PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* 4-5 (enlarged ed. 1987).

2. The district court actually certified two types of class actions in December 1983. A class was certified under Rule 23(b)(3) on the basis of common issues of general causation and the military contractor defense, 100 F.R.D. at 721-24, and a "limited fund" class was certified under Rule 23(b)(1)(B) for punitive damage claims. *Id.* at 732. The second class was comprised of all persons in the Rule 23(b)(3) class. *Id.* For the purposes of this Note, *Agent Orange* will be referred to as a single class action.

3. See FED. R. Civ. P. 23(a):

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

4. The prerequisite concerning representation has been described as follows:

This prerequisite embodies concerns which fall into two categories: that the representatives and their attorneys will competently, responsibly and vigorously prosecute the suit, and that the relationship of the representative parties' interests to those of the class are such that there is not likely to be divergence in viewpoint or goals in the conduct of the suit.

Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

5. Careful attention to the prerequisites of Rule 23 is "indispensable." East Texas Mo-

on behalf of the class, recognizing the potential prejudice to the interests of the absent class members which is inherent in the class action format.⁶ Many class actions involve contingency fee arrangements, which are often the only way plaintiffs with small claims can afford to pursue them.⁷

In the *Agent Orange* case, the potential weaknesses in the representative character of class litigation—multiple litigants bound by the decisions of their relatively autonomous attorneys—were exacerbated, or perhaps exploited, by the financial investments of those attorneys. The original cases were conceived and filed by attorneys inexperienced in class actions or complex litigation.⁸ Well-heeled investor-attorneys became interested in the case only after the defendants were seriously considering settlement, despite the profound difficulties in the plaintiffs' case.⁹ Eventually the case did settle,¹⁰ after taxing the resources of the court,¹¹ costing the defendants millions of dollars in legal fees¹² and incalculable negative publicity, and producing a paltry recovery for some of the original class members.¹³

In the view of the trial judge in the *Agent Orange* case, the net effect of attorney investment on the settlement was negligible.¹⁴ Arguably, however, attorney investment was the factor

tor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (vacating a decision imposing class-wide liability in an employment discrimination case).

6. See FED. R. CIV. P. 23(c) (Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions); (d) (Orders in Conduct of Actions); (e) (Dismissal or Compromise).

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1983) [hereinafter MODEL CODE].

8. See *infra* notes 130-31 and accompanying text (discussing litigators' backgrounds).

9. See *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994) (summarizing these weaknesses: obstacle of the military contractor defense, lack of epidemiological evidence of general causation, difficulty of proving individual exposure to Agent Orange, problem of proving individual causation).

10. The settlement arrived at in May, 1984 established a fund of \$180 million. SCHUCK, *supra* note 1, at 5.

11. See *id.* at 82 (discussing the appointment of Sol Schreiber as special master for discovery); *id.* at 122 (explaining that Schreiber was replaced by magistrate Shira Scheindlin); *id.* at 144-46 (noting the "highly unusual if not unprecedented" appointment of three masters for settlement: Kenneth Feinberg, David I. Shapiro, and Leonard Garment).

12. See *id.* at 5 (estimating defendants' pre-trial legal expenses at \$100 million).

13. See *infra* text accompanying notes 318-19 (discussing the inadequacy of the plaintiffs' recovery).

14. See *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452, 1461 (E.D.N.Y. 1985) (denying motion to set aside fee-sharing agreement of plaintiffs' counsel), *rev'd*,

which tipped the balance to allow an underfinanced, inadequately prepared case to determine the outcome of thousands of injured plaintiffs.¹⁵ In hindsight, the safeguards existing in Rule 23 to protect absent class members were insufficient to protect them from the serious conflict of interest created by their attorneys' speculative investment in the case.

This Note uses the *Agent Orange* scenario to explore the ethical and practical issues involved in financing class action litigation by speculative attorney investment. The background section defines traditional prohibitions on the financing of lawsuits by unrelated parties: champerty, maintenance, and barratry.¹⁶ After describing the rationale and costs associated with complex litigation in the class action format,¹⁷ the Note discusses traditional methods of calculating attorney fees in that context.¹⁸ Part II.F reviews the attorney investment in the *Agent Orange* case in some detail. The discussion incorporates relevant provisions of the *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct*. The Note concludes by endorsing disclosure of financial and compensation arrangements as part of the class certification process and suggesting that the plaintiffs' counsel be required to consult with a sampling of the class¹⁹ beyond the named representatives on major issues affecting the litigation. Further, when certifying a class, the court should appoint an independent guardian ad

818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

15. Two class actions were filed in Texas courts in 1989 and 1990 by plaintiffs whose injuries allegedly resulted from exposure to Agent Orange but did not become apparent until after the settlement of May, 1984. The plaintiffs claimed their right to due process was violated when future claims were prohibited by the 1984 settlement. *Attorneys General Join Agent Orange Appeal*, NAT'L L.J., Feb. 14, 1994, at 5. The cases were removed to federal court, but the claims of two civilian plaintiffs were remanded to state court, in part on the grounds that they were not part of the original *Agent Orange* class. *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992), *aff'd*, *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994). The claims of the remaining plaintiffs, veterans and family members, were dismissed as barred by the original settlement. *Ryan*, 781 F. Supp. at 918-20. (Benton Musslewhite appeared for the plaintiffs before the Second Circuit. Musslewhite was a member of the nine-man Plaintiffs' Management Committee which settled the original *Agent Orange* case. *See infra* note 136).

16. *See infra* part II.A-B.

17. *See infra* part II.C-D.

18. *See infra* part II.E.

19. *See* Michael D. Ricciuti, Note, *Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult*, 1 GEO. J. LEGAL ETHICS 817, 853 (1988) (proposing a "consultation unit" to act as the client in dealing with class counsel). *See infra* note 365 for further discussion of the consultation unit.

litem, compensated by the plaintiffs' attorneys at the direction of the court, to protect the interests of absent class members in situations analogous to *Agent Orange*.²⁰

II. BACKGROUND

A. *Historical Prohibitions on Maintenance, Champerty, and Barratry*

The common law developed several categories of offenses aimed at discouraging the involvement of third parties in legal disputes. Maintenance is "[a]n officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation."²¹ A companion offense to maintenance, barratry is "frequently exciting and stirring up quarrels and suits, either at law or otherwise."²² Champerty is a more specific form of maintenance: "[a] bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration for receiving part of any judgment proceeds."²³

In the medieval era, maintenance agreements primarily occurred in connection with actions to recover land.²⁴ Success meant that the investor became a joint owner of the land,²⁵ which allowed wealthy families to amass "little principalities" by maintaining the suits of their retainers.²⁶ In addition to popular resentment of such aggrandizement, the medieval Christian church objected to litigation on principle, especially in the secular courts.²⁷ According to Professor Max Radin, "[s]ubconsciously, [the] basis [of the offense of champerty] was the fundamental distrust of legal procedure and of

20. A guardian ad litem could be appointed by the court pursuant to its authority under Rule 23(d)(3) or the guardian mechanism could be instituted as a local rule under Rule 83. Sylvia R. Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 326 n.104 (1985).

21. BLACK'S LAW DICTIONARY 954 (6th ed. 1990).

22. *Id.* at 150.

23. *Id.* at 231.

24. See Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 60 (1935) (tracing the roots of champerty from the early Greeks and Romans through the Middle Ages and the modern era).

25. *Id.* at 60.

26. *Id.* at 66.

27. *Id.*

lawyers."²⁸

Ancient restrictions on maintenance and champerty have been preserved in modern codes of legal ethics, including the *Model Code of Professional Responsibility*²⁹ and the *Model Rules of Professional Conduct*.³⁰ The codes preserve the notion that allowing third parties to bring claims encourages needless litigation.³¹ Some critics contend that these restrictions, particularly those on champerty, are outdated in modern litigation settings.³² Others recommend that certain ethics rules be "jettisoned" in class action and derivative litigation, observing that "rules on solicitation, maintenance, fee-splitting and the appearance of impropriety have virtually no current force or rationale in the large-scale, small-claim setting and are routinely circumvented with only the thinnest veneer of compliance."³³

28. *Id.*

29. The Model Code provides as follows:

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

MODEL CODE, *supra* note 7, at DR 5-103. See also Daniel C. Cox, Comment, *Lawsuit Syndication: An Investment Opportunity in Legal Grievances*, 35 ST. LOUIS U. L.J. 153, 161 (1990) ("The core of the antichamperty rules exist [sic] today in the Code of Professional Responsibility." (footnote omitted)).

30. The Model Rules state:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e) (1992) [hereinafter MODEL RULES].

31. See Cox, *supra* note 29, at 162 (noting that both the *Model Rules* and the *Model Code* reflect a desire to avoid "excessive" or "unwarranted" litigation).

32. See *id.* at 153 & n.3 (endorsing lawsuit syndication, especially in antitrust, patent, and copyright infringement cases). See generally Susan L. Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485 (1992) (asserting that maintenance and champerty are outdated and that syndication actually improves access to the justice system).

33. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class*

B. Contingency Fees as an Accepted Form of Champerty

Critics of restrictions on champerty and related offenses point out that the typical contingency fee has obvious champertous implications.³⁴ Contingent fee arrangements, in which the attorney accepts the case in return for a percentage of any award or settlement, are permitted by current American codes of legal ethics.³⁵ Indeed, many members of the bar rely on contingent fees to make a living.³⁶ Contingency fees have been viewed as a way for plaintiffs with limited means to sidestep the "American rule" which, in the absence of a specific statute or common law exception to the contrary, requires each party to litigation to pay its own attorneys' fees.³⁷ The *Model Code* notes that contingent fees often "provide

Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. CHI. L. REV. 1, 5 (1991) (arguing that the theory of existing regulatory structures errs in treating entrepreneurial litigation according to a standard litigation model, and recommending rules to control agency costs which recognize that the attorney rather than the ostensible client controls the litigation).

34. See, e.g., Janet E. Findlater, *The Proposed Revision of DR 5-103(B): Champerty and Class Actions*, 36 BUS. LAW. 1667, 1669-70 (1981) (asserting that "illegal champerty is a necessity in representational suits").

35. See MODEL CODE, *supra* note 7, at EC 2-20 ("Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims."); MODEL RULES, *supra* note 30, at Rule 1.5(c):

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Contingent fees are banned in most foreign countries to avoid frivolous litigation and attorney-client conflicts of interest. See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 768 (1992).

36. Findlater, *supra* note 34, at 1669.

37. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (holding that only Congress has the authority to make exceptions to the American rule). Congress has adopted more than 150 fee-shifting statutes in specific areas, such as civil rights under 42 U.S.C. § 1988. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) (reiterating that, absent a statutory exception, each party pays its own fees). See Kenneth R. Feinberg & John S. Gomperts, *Attorneys' Fees in the Agent Orange Litigation: Modifying the Lodestar Analysis for Mass Tort Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 613, 615 & nn. 14-19 (1986) (listing various exceptions to the American rule).

the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim."³⁸ In the process of ensuring access to the courts, the successful attorney also conveniently produces a *res* from which his or her fee may be paid.³⁹

Apart from the contingency fee, courts have developed two exceptions to the "American rule:" the "bad faith exception" and the "common fund" doctrine. Under the first, bad faith or disobedience of a court order can subject a party to liability for the opponent's attorneys' fees.⁴⁰ Under common fund theory, the efforts of the attorney and plaintiff(s) produce a fund for the class.⁴¹ The attorney's fees, for which the named plaintiff normally would be individually responsible under the American rule, are paid out of the fund.⁴² The class members thus contribute to the costs of the litigation from their recovery, and are not unjustly enriched at the expense of the named plaintiff.⁴³

In contingency cases, the attorney becomes a "joint venturer"⁴⁴ with the client. In this capacity, the plaintiff's attorney has also

38. MODEL CODE, *supra* note 7, at EC 2-20.

39. *Id.*

40. Feinberg & Gomperts, *supra* note 37, at 615.

41. 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, 670 n.2 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*].

42. *See id.* at 669 n.1 (describing the plaintiffs' attorney as a "'bounty hunter' . . . a profit-motivated entrepreneur who is relatively unconstrained by the interests of any specific client").

43. *Id.* The common fund doctrine was articulated by the Supreme Court in *Boeing Co. v. Van Gemert*:

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

444 U.S. 472, 478 (1980) (citations omitted); *see also* Trustees of the Int'l Improv. Fund v. Greenough, 105 U.S. 527, 536-37 (1881) (approving equitable reimbursement of litigation expenses).

44. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 670 n.2.

been described as a "bounty hunter"⁴⁵ or, more grandly, as a "private attorney general."⁴⁶ The prospect of securing a significant portion of the plaintiff's recovery is designed to give attorneys an incentive to accept meritorious cases which plaintiffs otherwise would be unlikely to pursue on their own. Additionally, a contingent fee in a group situation can save clients money over traditional individual representation agreements, in which the attorney can charge the same percentage of recovery to all plaintiffs regardless of the common issues prepared.⁴⁷

Contingency fees translate into shared incentives and shared risks for attorney and client, but their interests are not identical.⁴⁸ For example, the attorney may want to settle early for a guaranteed fee rather than invest additional hours in the case. Those hours might result in a marginally greater recovery for the client or, alternatively, in the loss of the case altogether.⁴⁹ Use of the contingent fee in the context of class actions has also provoked much judicial criticism.⁵⁰ The Supreme Court has recognized nonetheless that the contingent fee remains a device of primary importance for less than wealthy plaintiffs to secure redress of claims in the courts.⁵¹

C. *Economic Rationale for Class Actions in Large-Scale Litigation with Small Individual Recoveries*

Class actions also provide a procedural vehicle to maintain lawsuits when individual plaintiffs cannot or will not risk litigation

45. *Cf. id.* at 669 n.1 (observing that the plaintiff's attorney first functioned as a "bounty hunter" in the context of derivative litigation).

46. *Id.* (discussing the increasing use of the term "private attorney general" to describe the role of the plaintiffs' attorney in derivative actions and mass tort cases).

47. See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 881 n.11 (1987) [hereinafter Coffee, *The Regulation of Entrepreneurial Litigation*] (discussing the "lodestar formula" which fixes attorney fees in class actions according to time actually spent on the case). See also *infra* notes 92-95 and accompanying text.

48. See, e.g., *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972) ("There can be no blinking at the fact that the interests of the plaintiff in a stockholder's derivative suit and of his attorney are by no means congruent.").

49. See Macey & Miller, *supra* note 33, at 17-18 (noting an attorney may determine his or her time investment based on the expected return).

50. See *infra* notes 322-26 and accompanying text.

51. See *Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 338 (1980) (noting the increase in litigation as a result of contingent fee agreements and the role played by those arrangements in vindicating the rights of individuals with small claims).

to secure recovery for their claims, usually because the anticipated individual recovery is too small to justify the projected costs.⁵² Litigation on behalf of a group neatly solves the "free rider" problem, in which a second plaintiff receives the benefit of an action initiated and financed by the first.⁵³ Without a class action, the aggregate costs of individual injuries to society would remain unredressed.⁵⁴

Class actions enable both plaintiffs and defendants to concentrate their resources to obtain higher-quality representation, reduce the burden on witnesses and courts, and level the playing field between plaintiffs and defendants.⁵⁵ In this way, class actions facilitate private enforcement of the law⁵⁶ and conserve judicial resources⁵⁷ where other alternatives, such as joinder⁵⁸ and intervention⁵⁹ of additional parties would be overwhelmingly cumbersome and costly.⁶⁰ In cases seeking the structural reform of an institution, class proceedings allow the action to focus on the practices of the institution as a whole rather than on individual issues requiring separate litigation.⁶¹ The certification of a class permits such suits to proceed and requires judicial approval of any settlement, even if individual claims become moot.⁶²

From the attorney's point of view, class actions gain more negotiating leverage, higher fees, and easier access to sources of

52. See Macey & Miller, *supra* note 33, at 8 (asserting that without a class action device plaintiffs would have no incentive to pursue claims for minor injuries).

53. See *id.* at 8 n.5 ("Freeriding, as the name implies, simply refers to a situation where a person can obtain a benefit (or avoid a cost) without paying for it.")

54. See Note, *Class Certification in Mass Accident Cases under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1144 n.3 (1983) (stating that while individual claims may be small there may be a significant loss to society which should be redressed).

55. See *id.* at 1144-46.

56. See *Deposit Guar. Natl. Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) (A class action is "an evolutionary response to the existence of injuries unremedied by the regulatory action of government.").

57. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." (quoting *Califano v. Yamasake*, 442 U.S. 682, 701 (1979))).

58. FED. R. CIV. P. 19 (joinder of persons needed for just adjudication); FED. R. CIV. P. 20(a) (permissive joinder of parties).

59. FED. R. CIV. P. 24.

60. Macey & Miller, *supra* note 33, at 8-9.

61. Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186 (1982).

62. *Id.*

financing.⁶³ These advantages have not gone unnoticed among defendants. Concern about "extortionate corporate litigation" surfaced in the 1930s⁶⁴ and is ongoing⁶⁵ in reference to derivative suits which could extort money in settlement regardless of their merits. With potential liability often exceeding the net worth of the defendants, critics note the tendency of corporate managers to seek insurance against adverse verdicts by settling with the plaintiffs' attorney.⁶⁶ Even the Supreme Court openly has acknowledged the leverage plaintiffs' attorneys gain over defendants in group litigation.⁶⁷

Rule 11 of the *Federal Rules of Civil Procedure* exists as one safeguard against frivolous actions.⁶⁸ However, the concern still

63. *Id.*

64. See Note, *Extortionate Corporate Litigation: The Strike Suit*, 34 COLUM. L. REV. 1308, 1308 (1934) ("A 'strike suit' is an action brought by a security holder, not in good faith, but, through the exploitation of its nuisance value, to force the payment of a sum disproportionate to the normal value of his interest as the price of discontinuance."). Congress amended § 11 of the Securities Act of 1933 in Title II of the Securities Exchange Act of 1934 with a provision to deter 'strike' or nuisance suits. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975); see also Lazos, *supra* note 20, at 324-25 n.94 (describing three forms of strike suits).

65. The Seventh Circuit reiterated this common concern:

Ensuring that the suit stems from real grievances of real persons is especially important in securities class actions. The costs of litigation are so great, the potential damages so high, and the sources of payment so likely to disappear in the event of victory after trial, that many cases settle for substantial sums, which one careful study has found to be unrelated to the strength of the claim.

Rand v. Monsanto Co., 926 F.2d 596, 599 (7th Cir. 1991) (citing JANET M. COOPER, *DO THE MERITS MATTER? A STUDY OF SETTLEMENTS IN SECURITIES CLASS ACTIONS* (Stanford Law School Working Paper No. 73, 1990)).

66. See Richard H. Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses*, 71 KY. L.J. 787, 818 (1982-83) (noting that plaintiffs with frivolous claims may coerce settlement); see also William C. O'Kelley, *Class Actions: Proposals for New Rules of Professional Responsibility*, LITIG., Winter 1979, at 25, 25 (District Judge from the Northern District of Georgia alleges: "Too often, boilerplate class allegations are used indiscriminately by lawyers for the purpose of intimidating defendants into settling with the named plaintiffs in the early stages of the litigation.").

67. See *Blue Chip Stamps*, 421 U.S. at 739-40 (noting the "widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit."); see also Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 670 n.3 (listing cases in which courts have criticized plaintiffs' attorneys). One study noted that almost 75% of shareholder derivative and class action lawsuits resulted in some type of settlement, although only 2 of 88 decided by the court resulted in plaintiffs' victories. See Thomas M. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U. L. REV. 542, 545 (1980).

68. The pertinent text of Rule 11 states:

exists in situations where plaintiffs' attorneys with private agreements guaranteeing their return (regardless of court allocation of fees) could be induced to file suits strictly for their settlement value. Judge Jack B. Weinstein noted the problem in his initial attorneys' fees opinion in the *Agent Orange* case.⁶⁹ While recognizing the need to provide incentives to attorneys to undertake complex and expensive class action litigation, Judge Weinstein observed: "Nevertheless, the potential for abuse of the class action device exists. Overly generous fee awards may encourage cases without merit to be brought and pressed beyond reasonable limits, forcing defendants to settle to avoid burdensome litigation expenses and adverse publicity."⁷⁰ Judge Weinstein also noted that Rule 11 sanctions provide small comfort for defendants. "The threshold of egregiousness required to make out a case under Rule 11 is so high, and the probability of successful motions for improper certification so low, that the Rule in general provides little protection for prospective defendants, the public and the courts."⁷¹

D. Costs Associated with Financing Class Actions

Regardless of the merits of the claim(s), complex litigation, especially class actions, can be extremely expensive. Expert witness fees, exhibits, filing and transcription charges, and discovery expenses are only some of the preliminary costs incurred before trial.⁷² Supreme Court decisions on class notification often mean

(A) SIGNATURE. Every . . . paper . . . shall be signed

(B) REPRESENTATIONS TO THE COURT. By presenting to the court . . . [the] paper, an attorney . . . is certifying that to the best of [his or her] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

- (1) it is not presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law

FED. R. CIV. P. 11. See also Underwood, *supra* note 66, at 818 (noting that attorneys have a professional obligation to determine if sufficient evidentiary support exists for class action allegations).

69. See *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985) (awarding reasonable attorneys' fees), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

70. *In re "Agent Orange,"* 611 F. Supp. at 1303.

71. *Id.* at 1304.

72. Vincent R. Johnson, *The Second Circuit Review—1986-87 Term: Ethics: Ethical*

that the initial steps of assembling and notifying the class can be among the most costly.⁷³ In class actions filed under Rule 23(b)(3) of the *Federal Rules*, the members of the class must receive "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."⁷⁴ In a large class action, such notice easily can cost more than half a million dollars.⁷⁵ In the *Agent Orange* case, the attorneys were faced with millions of dollars in costs to communicate with hundreds of thousands of potential plaintiffs in the United States, New Zealand, and Australia.⁷⁶

Notice costs and other expenses become particularly significant in the approximately 15 states which retain the *Model Code*.⁷⁷ In those states, attorneys must obtain the client's consent to pay the costs of losing litigation.⁷⁸ The *Model Rules* are somewhat more flexible in allocating responsibility for litigation expenses.⁷⁹ In jurisdictions where they have been adopted, the *Model Rules'* acceptance of contingent repayment of expenses abolishes what had been a "critical limitation upon a lawyer's ability to finance litiga-

Limitations on Creative Financing of Mass Tort Class Actions, 54 BROOK. L. REV. 539, 545 (1988); Cox, *supra* note 29, at 153 n.2.

73. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (requiring individual notice for all class members who can be identified with reasonable effort). The Supreme Court later ruled that constitutional due process requires that:

[t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

74. FED. R. CIV. P. 23(c)(2). However, notice is generally not required in a Rule 23(b)(2) class action requesting injunctive or declaratory relief, where defining the class precisely is not as important. See Macey & Miller, *supra* note 33, at 31 n.98 (noting that while notice generally is not required for 23(b)(2) class actions, notice may be mandatory at the judge's discretion).

75. Macey & Miller, *supra* note 33, at 27 & n.84.

76. Johnson, *supra* note 72, at 548.

77. See STEPHEN GILLERS & ROY D. SIMON, JR., *THE REGULATION OF LAWYERS: STATUTES AND STANDARDS* 319 (1993).

78. See MODEL CODE, *supra* note 7, at DR 5-103 (B) ("[A] lawyer may advance or guarantee the expenses of litigation . . . provided the client remains ultimately liable for such expenses.").

79. See MODEL RULES, *supra* note 30, at Rule 1.8(e) ((1) "[A] lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.").

tion.”⁸⁰ Despite its clear implications for the viability of litigation, the requirement that the client consent to pay costs frequently is considered a formality: attorneys almost always pay costs without expecting reimbursement.⁸¹ However, some courts strictly enforce the rule as written. In one case, the plaintiffs’ attorneys told the class representatives that their firm would not seek reimbursement of costs if the suit were unsuccessful.⁸² The court then denied class certification on the ground that the agreement was “tantamount to the unacceptable situation of the attorney being a member of the class of litigants while serving as class counsel.”⁸³

With this uncertainty looming, plaintiffs with small recoveries at stake rarely will agree to pay costs.⁸⁴ One commentator remarked, “[t]he named plaintiff in these suits commonly has such a small stake in the outcome of litigation that sanity alone prohibits him from accepting liability for expenses that will almost surely exceed any gain he might conceivably achieve.”⁸⁵ If he or she did accept such liability, the incentive to settle might be considered so strong that he or she could not fairly represent the class.⁸⁶ In addition, plaintiffs whose financial standing is sufficient to support costs may be attacked on that ground as atypical of the class,⁸⁷ violating one of the four prerequisites to class actions under Rule 23.

80. Findlater, *supra* note 34, at 1667.

81. See Macey & Miller, *supra* note 33, at 32 n.101, 71, 85-86; see also Findlater, *supra* note 34, at 1669 (explaining that the canon is frequently violated in individual suits); Mark Lynch, *Ethical Rules in Flux: Advancing Costs of Litigation*, LITIG., Winter 1981, at 19-21 (asserting that Model Code DR 5-103(B) seriously impedes litigation, supporting contingent cost agreements, and noting that DR 5-103(B) is “widely ignored”).

82. *In re Mid-Atlantic Toyota Antitrust Litig.*, 93 F.R.D. 485, 489 (D. Md. 1982).

83. *Id.* at 490. But see *Brame v. Ray Bills Fin. Corp.*, 85 F.R.D. 568 (N.D.N.Y. 1979) (finding that the fact that a legal aid organization advanced expenses does not establish inadequate representation); *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991) (vacating order denying class certification in securities class action when plaintiff refused to accept liability for costs of the suit).

84. *Rand*, 926 F.2d at 599 (asserting that “[o]nly a lunatic would do so”). See also Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 47, at 897-98 (noting that clients with small claims will not risk litigation if they remain ultimately liable for litigation costs).

85. Findlater, *supra* note 34, at 1669-70; see also Macey & Miller, *supra* note 33, at 19-20, 70 (Even where the aggregate number of claims is large, “the small size of the individual claims creates enormous free-rider effects: no rational plaintiff would take on the role of litigation monitor because she would incur all the costs of doing so but would realize only her pro rata share of the benefits.”).

86. Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 47, at 898.

87. Macey & Miller, *supra* note 33, at 87-88.

Financial issues are a major factor to be weighed by both plaintiff and attorney in the decision to undertake class litigation. The American rule on attorney fees places the burden of financing a lawsuit in most cases on a plaintiff and her attorney, rather than shifting fees to the losing side.⁸⁸ The cost of a lawsuit must be justified by the anticipated recovery, by the class as a whole, if not by any individual class member.⁸⁹ Concomitantly, a lawsuit which the parties think worthy of financing is presumed to merit the attention and resources of the judicial system.⁹⁰ Problems arise when other factors, such as attorney investment, distort the assessment of the costs of the lawsuit for the parties directly involved. When the defendants can be pressured to settle by significant risk exposure, and yet the plaintiffs can expect only small recoveries, the prime beneficiaries of the large-scale, small claim class action become the plaintiffs' attorneys.⁹¹

E. Fee Arrangements in Class Actions

Courts in the United States use two main methods of fee calculation. The predominant method is the "lodestar" which was developed in the Third Circuit in the 1970s.⁹² The lodestar method has been followed by most circuits which have developed standards for setting fees.⁹³ The court multiplies the reasonable hours devoted to

88. See *supra* note 37 and accompanying text (discussing the American rule).

89. See *supra* text accompanying notes 52-54 (explaining that aggregate recovery for a class encourages multiple parties with small individual claims to seek redress).

90. See *supra* text accompanying note 54 (observing that without class actions small individual injuries with large aggregate costs to society would go unredressed).

91. See *infra* note 238 (stating that the plaintiffs' attorneys are the beneficiaries and real parties in interest in class actions).

92. See *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp. (Lindy II)*, 540 F.2d 102, 118 (3d Cir. 1976); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp. (Lindy I)*, 487 F.2d 161, 168 (3d Cir. 1973) (adopting the "lodestar" approach). The Supreme Court followed the Third Circuit's lead by adopting the "lodestar" approach in civil rights cases in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

93. See *Court Awarded Attorney Fees*, 108 F.R.D. 237, 244 (1985) (Report of the Third Circuit Task Force). But see *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976) (following the decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)). The *Johnson* method uses twelve factors with which to assess the fee request:

- (1) The time and labor required.
- (2) The novelty and difficulty of the questions.
- (3) The skill requisite to perform the legal service properly.
- (4) The preclusion of other employment by the attorney due to acceptance of the case.

the case by the lawyer's reasonable hourly fee to create an objective "lodestar."⁹⁴ Courts then can use multipliers to adjust the fee subjectively for various situations, including high-risk litigation.⁹⁵

The main alternative to the lodestar approach is the "percentage of recovery" method. This was the most commonly used method until the lodestar approach superseded it in the 1970s,⁹⁶ although it is gaining popularity once again.⁹⁷ Under this formula, attorneys are awarded a fixed or sliding percentage of the plaintiff's recovery.⁹⁸ Although the fees awarded under either scheme may be approximately equal,⁹⁹ and the Supreme Court has approved of each in different contexts,¹⁰⁰ each method has its critics.

Major criticisms of the lodestar approach involve its asserted

- (5) The customary fee.
- (6) Whether the fee is fixed or contingent.
- (7) Time limitations imposed by the client or the circumstances.
- (8) The amount involved and the results obtained.
- (9) The experience, reputation, and ability of the attorneys.
- (10) The "undesirability" of the case.
- (11) The nature and length of the professional relationship with the client.
- (12) Awards in similar cases.

Johnson, 488 F.2d at 717-19. The Supreme Court noted that "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9; see also *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) ("The *Lindy* and [*Johnson*] approaches are not dissimilar. However, the latter method is more cumbersome and includes factors that are often inapplicable to a particular case.").

94. See *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (applying this method for determining fees); *Hensley*, 461 U.S. at 433 (same); *Blum v. Stenson*, 465 U.S. 886, 888 (1984) (same).

95. See *Feinberg & Gomperts*, *supra* note 37, at 617 (explaining that the fairly objective first step of multiplying the number of hours spent on the suit by an hourly fee is followed by a more subjective step of evaluating the services). This simplistic description belies what is in fact "an extremely difficult and imprecise process." *Id.*

96. See *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679, 687-88 (M.D. Ala. 1988) (explaining that the percentage method was used between 1885-1973 to calculate awards. As early as 1885, the Supreme Court accepted the attorney's claim to a portion of the common fund in *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885)).

97. *Macey & Miller*, *supra* note 33, at 23 n.66.

98. *Id.* at 4.

99. See *Coffee, Understanding the Plaintiff's Attorney*, *supra* note 41, at 678-79 n.26 (observing that studies show that in suits involving more than \$1,000,000, courts generally award the same amount under either formula). Fees in class and derivative actions are typically in the range of 20-30% of recovery, with the percentage declining as the total amount increases. See *id.* at 685-86.

100. See *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) ("[W]e have adopted the lodestar approach as the centerpiece of attorney's fee awards."); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class.")

incentives to pad billable hours,¹⁰¹ its burden on the parties¹⁰² and the court,¹⁰³ and the fact that its guarantee of fees in successful cases may cause attorneys to reject a favorable settlement for the class.¹⁰⁴ In 1985, the Third Circuit, which had pioneered the lodestar approach in the *Lindy I* and *Lindy II* cases,¹⁰⁵ formed a Task Force to address the "widespread belief that the deficiencies of the current system either offset or exceed its benefits."¹⁰⁶ Specifically, the Third Circuit Task Force "concluded that the lodestar formula increases the use of judicial resources, encourages attorneys to bill excessive hours, and discourages early settlements."¹⁰⁷

Several commentators have viewed the settlement problem from a different perspective. In some cases, plaintiffs' attorneys can be tempted to negotiate early with the defense counsel about settlement. The ensuing pre-litigation work becomes merely a "meaningless exercise" to bill additional hours after a settlement

101. See generally *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48 (E.D. Pa. 1983) (describing abuses by plaintiffs' counsel), *aff'd in part, rev'd in part*, 751 F.2d 562 (3rd Cir. 1984).

102. See *Court Awarded Attorney Fees*, 108 F.R.D. 237, 246 (1985) (Report of The Third Circuit Task Force) (increased paperwork required).

103. See *id.* at 246, 249 (recognizing the administrative problems associated with this approach including determination of the appropriate fee rate).

104. *Id.* at 248. The following is an abbreviated list of the major allegations identified, although not verified, by the Task Force:

- (1) *Lindy* increases the workload of an already overtaxed judicial system.
- (2) The elements of the *Lindy* process are insufficiently objective and produce results that are far from homogenous.
- (3) The *Lindy* process creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law.
- (4) *Lindy* is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount.
- (5) Although designed to curb certain abuses, *Lindy* has led to others. (e.g., padding bills, lack of incentive to settle)
- (6) *Lindy* creates a disincentive for the early settlement of cases.
- (7) *Lindy* does not provide the district court with enough flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered.
- (8) The *Lindy* process works to the particular disadvantage of the public interest bar.
- (9) Despite the apparent simplicity of the *Lindy* formulation, considerable confusion and lack of predictability remain in its administration.

Id. at 246-49.

105. See cases cited *supra* note 86 and accompanying text.

106. *Court Awarded Attorney Fees*, 108 F.R.D. at 246.

107. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 675 n.17.

has been agreed upon in actuality.¹⁰⁸ In this way, the lodestar approach can produce structural, de facto collusion between the plaintiff's attorney and defendants.¹⁰⁹ In this scenario, the defendant makes a low settlement offer and then cooperates with the plaintiff's attorney to allow the latter to accumulate hours, which are deducted from the class recovery at no additional cost to the defendant.¹¹⁰ "At no point must either side actually link the fee award and the settlement size in their negotiations—the law does this for them by tying fee awards to hours billed rather than settlement size."¹¹¹ The lodestar approach, therefore, can award a settling attorney the same fee award she would receive if she litigated a much higher recovery for the plaintiffs at trial.¹¹² Under this analysis, the lodestar approach is "too vulnerable to collusive settlements."¹¹³ "In effect, under the lodestar formula, a plaintiff's attorney shares his clients' downside risk, but not their upside gain, by rejecting a settlement and proceeding to trial."¹¹⁴ Without a premium to compensate for the risk an attorney takes in advancing funds, he or she has nothing to gain by rejecting a settlement which includes repayment of expenses.¹¹⁵ When the settlement figure soars into the millions of dollars, the incentive to settle increases, regardless of the fact that recovery after trial could be even greater.¹¹⁶

Advocates of the percentage-of-recovery method note that in most cases it is easier to compute,¹¹⁷ and increases the amount of

108. Macey & Miller, *supra* note 33, at 23, 45.

109. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 718.

110. *Id.*

111. *Id.* Professor Rosenberg disputes Coffee's analysis by pointing to court-sanctioned fee multipliers available to accommodate risk, success, and benefit factors. See David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 584 n.89 (1987) (contending that elements of bureaucratic justice present in class actions accomplish the goals of tort litigation more effectively than traditional individual litigation). *But see infra* note 288 and accompanying text (noting recent Supreme Court decisions which restrict fee multipliers).

112. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 717; see also Saylor v. Lindsley, 456 F.2d 896, 900 (2d Cir. 1972) ("A relatively small settlement may well produce [a fee] bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and an appeal.").

113. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 689 n.57.

114. *Id.* at 717-18.

115. See Findlater, *supra* note 34, at 1674 (noting that in the absence of a risk premium the attorney may accept a settlement in the amount of advanced expenses rather than risk no recovery by proceeding to trial).

116. Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 58 (1975).

117. See *supra* note 95 (noting difficulties of lodestar calculations). *But see In re Supe-*

certainty with which plaintiffs' counsel can calculate potential fee awards.¹¹⁸ Less risk may result in more litigation, which some regard as "additional private enforcement of the law."¹¹⁹ The percentage-of-recovery method has been termed a "deregulatory" approach which is "the only alternative to converting the courts into the equivalent of public utility commissions."¹²⁰ Nonetheless, at least one court has said that there is "no necessary logical connection" between the percentage system and reasonable compensation for attorneys.¹²¹ Attorneys can feel pressure to settle at the point when their percentage recovery is at its highest hourly rate, i.e. when they have expended enough hours to obtain settlement but not necessarily as many as a maximum settlement or trial victory would require.¹²² Thus, percentage fees can result in windfall profits for the class attorneys when their expenses are low relative to the proposed settlement.¹²³ Additionally, this method has a decreased deterrent effect on defendant's conduct: attorneys will not

rior Beverage/Glass Container Consol. Pretrial, 133 F.R.D. 119, 124 (N.D. Ill. 1990) (noting difficulty in establishing percentages of certain types of awards: "[W]hat is the present cash value of a class recovery that provides for certificates, redeemable over time, in an undetermined amount to range from 49 to 70 million?").

118. As noted above, the question of what percentage is appropriate is open to debate. See, e.g., *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1376 (N.D. Cal. 1989) (30 percent); *Mashburn v. National Healthcare Inc.*, 684 F. Supp. 679, 692 (M.D. Ala. 1988) (50 percent generally considered upper limit, with exceptions); *Greene v. Emersons Ltd.*, No. 76 Civ. 2178, 1987 WL 11558, at *2 (S.D.N.Y. 1987) (award of 46.2% of fund "reaches the outer limits"); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 750 (S.D.N.Y. 1985) (under 25 percent), *aff'd*, 798 F.2d 35 (2d Cir. 1986); see also *Macey & Miller*, *supra* note 33, at 59.

119. *Macey & Miller*, *supra* note 33, at 59. Alternatively, such a prospect could be viewed with alarm by prospective defendants. See *supra* notes 64-66 and accompanying text (discussing the possibility that defendants may be forced into extortionate settlements irrespective of a suit's merits).

120. *Coffee*, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 725. The Third Circuit Task Force insisted, however, that "[f]irm judicial control" was needed to prevent its recommended negotiated percentage approach from becoming "protracted, hypertechnical, and a battlefield for the participants." *Court Awarded Attorney Fees*, 108 F.R.D. 237, 258 (1985) (Report of the Third Circuit Task Force).

121. *Superior Beverage*, 133 F.R.D. at 125 ("The point is that 'percentage' is a relational concept. Percentage of *what*? Fifty percent is neither a lot nor a little, until one knows what the underlying whole is. Half of one cookie isn't much. Half of a full cookie jar may well be a lot.").

122. *Macey & Miller*, *supra* note 33, at 25, 44; see also *Superior Beverage*, 133 F.R.D. at 124 (describing a contingent fee "sell-out" settlement); *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 694 n.16 (N.D. Cal. 1990) (same); *Coffee*, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 687 n.55 (crediting Professors Schwartz and Mitchell with identifying the link between the percentage formula and incentives for premature settlements).

123. *Macey & Miller*, *supra* note 33, at 23.

accept cases where the attorney's fee award will not exceed his or her costs, even if the plaintiff still would receive a substantial recovery.¹²⁴

One proposal for resolving the seemingly intractable problems in fee awards in class actions is an auction theory.¹²⁵ Under this theory, the right to bring a claim and keep any recovery would be auctioned off, with the winning bidder free to prosecute the claim without the burden of class action prerequisites and the necessity of court supervision.¹²⁶ Modified auction theory would have attorneys competing for the lead counsel rights in a bidding process based on their proposed percentage of recovery.¹²⁷ Auction theory, of course, has its own problems, including defining the claim to be sold, investigating the financial status of bidders, negotiating with the claim owners, and resolving jurisdictional problems in consolidation.¹²⁸ More significantly, auction theory forces us to confront directly the question of who is the real party in interest.¹²⁹ The ethical issues raised by auction theory are beyond the scope of this Note, but the concept raises many of the same questions of professional ethics, economy, and efficiency.

124. *Id.* at 60-61.

125. *See* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 692-93 (discussing variations in the auction theory). *See generally* Jonathan R. Macey & Geoffrey P. Miller, *Auctioning Class & Derivative Suits: A Rejoinder*, 87 NW. U. L. REV. 458 (1993) (responding to Thomas & Hansen, *infra*); Macey & Miller, *supra* note 33, at 6 (proposing an auction theory); Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423 (1993) (evaluating and recommending experimentation with judicial auctions); Rosenberg, *supra* note 104, at 584 n.89 (suggesting investigation of auctions and outright purchases of claims by attorneys).

126. *See* Macey & Miller, *supra* note 33, at 109 (discussing the advantages of auction theory).

127. *See id.* at 6, 106-16 (providing a basic overview of the auction theory process); *see also In re Oracle Sec. Litig.*, 131 F.R.D. 688, 697 (N.D. Cal. 1990) (describing the bidding procedure); *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 548 (N.D. Cal. 1990) (awarding lead counsel rights to successful bidder); *In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716, 721 n.12 (N.D. Ill. 1990) (approving approach of *Oracle Securities*).

128. Macey & Miller, *supra* note 33, at 7.

129. *See* FED. R. CIV. P. 17(a) ("Every action shall be prosecuted in the name of the real party in interest."). In the context of an auction, Macey and Miller see no reason to reveal to the jury that a claim has been bought by, for example, a corporation: "a considerably less appealing plaintiff than thousands of innocent small individuals." Macey & Miller, *supra* note 33, at 116. *But see* *Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 353 & n.13 (1980) (Powell, J. dissenting) (rejecting "client-less" litigation in general and questioning whether the Constitution confers jurisdiction on the federal courts for cases which "will be litigated by lawyers whose only 'clients' are unidentified class members who have shown no desire to be represented by anyone.").

F. *The Agent Orange PMC Fee Agreement*

The private agreements concerning fees and expenses reached by the attorneys in the *Agent Orange* case were the result of tortuous attempts to finance adequately the massive, complicated litigation. In 1979, Victor J. Yannacone, Jr., a workmen's compensation lawyer, amended a complaint filed by Edward J. Gorman in 1978, which grew into the class action now referred to as the *Agent Orange* case.¹³⁰ Yannacone established a consortium known as Yannacone and Associates, consisting of attorneys from small Long Island, New York personal injury firms.¹³¹ The consortium quickly encountered internal dissent and escalating costs, spending over \$500,000 in the initial stages of preparing the case.¹³² As a result of these difficulties, the consortium withdrew as class counsel in September 1983 and was replaced by a three-member Plaintiffs' Management Committee (PMC).¹³³

When Judge Jack Weinstein took over the case from Judge George C. Pratt in 1983, he threw the plaintiffs' camp into a "near-panic" by setting a trial date which gave the parties less than seven months to complete pretrial investigation and preparation of the case.¹³⁴ Overwhelmed, the plaintiffs' attorneys sought help. Nine of the original attorneys eventually agreed to continue their work on the case under a reconstituted leadership group.¹³⁵ In December, 1983, nine members of a new Plaintiffs' Management Committee¹³⁶ executed an agreement requiring six members to

130. SCHUCK, *supra* note 1, at 42, 45.

131. *Id.* at 51. The members of the consortium were Victor Yannacone, Hy Herman, Albert J. Fiorella, Eugene O'Brien, William F. Levine, David J. Dean, Edward F. Hayes III, Edward J. Gorman, Milton Mokotoff, Jim Kelly, Irving Like, and Donald Russo. *See generally id.* (listing the attorneys' names informally).

132. *Id.* at 107-08.

133. The new PMC consisted of Stephen J. Schlegel, Benton Musslewhite, and Thomas W. Henderson. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452, 1454 (E.D.N.Y. 1985), *rev'd*, 818 F.2d 216, 218 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

134. *See* SCHUCK, *supra* note 1, at 110-11, 119-20. On October 21, 1983, Judge Weinstein established a firm trial date of May 7, 1984. *Id.* at 11-13. Until that point, the case had been in process for almost five years, in "a rather placid, predictable pattern largely dominated by the minutiae of discovery, a routine undisturbed by any prospect of imminent trial." *Id.* at 111.

135. *Id.* at 109.

136. The nine were David J. Dean, Stephen J. Schlegel, Benton Musslewhite, Newton B. Schwartz, John O'Quinn, Phillip E. Brown, Gene Locks, Stanley Chesley, and Thomas Henderson. *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 216, 221 (2d Cir.) (listing names and fee awards), *cert. denied*, 484 U.S. 926 (1987).

advance \$200,000 each for litigation expenses.¹³⁷ These investor-attorneys were to receive \$600,000 from the award of attorney's fees if the case were successful. Of the remaining fees, 50 percent were to be divided equally among the nine members, 30 percent would be divided according to the hours each member devoted to the case, and 20 percent would be divided by a majority vote on the basis of certain quality and risk factors.¹³⁸

When Judge Weinstein learned of this agreement four months after settlement,¹³⁹ he expressed "serious doubt about [its] legality and propriety."¹⁴⁰ The PMC members then executed a new agreement in December, 1984, which was retroactive to October 1, 1983.¹⁴¹ The new agreement left the percentage of return on investment unchanged at 300%, but increased the maximum allowable contribution of five of the six investors to a total of \$250,000 each.¹⁴² The percentage return on investment feature of the agreement was applied to the three non-investor attorneys¹⁴³ on the committee, allowing them to contribute up to the limit of \$50,000 each and receive the same threefold return as the others.¹⁴⁴ The new agreement eliminated the previous provisions for dividing fees remaining after the expenses and multiplier were deducted, and substituted division among all PMC members "in the proportion the individual's and/or firm's fee award bears to the total fees awarded."¹⁴⁵ The district court awarded over \$4.7 million in fees to the nine PMC members¹⁴⁶ out of the total of \$7.9 million in fees and \$1.4 million in expenses awarded.¹⁴⁷

The internal PMC agreement radically altered the district court's individual award to each attorney.¹⁴⁸ The six investor-at-

137. *Id.* at 218.

138. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452, 1454 (E.D.N.Y. 1985), *rev'd*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987). Additional expenses above the amounts contributed were to be reimbursed without a multiplier. *Id.*

139. *Id.*

140. *Id.*; see also SCHUCK, *supra* note 1, at 202-03.

141. *In re "Agent Orange,"* 611 F. Supp. at 1454.

142. Brown, Chesley, Locks, O'Quinn, and Schwartz increased their contributions. *Id.* Henderson remained at \$200,000. *Id.* at 1454-55.

143. David Dean, Steven Schlegel, and Benton Musslewhite. *Id.* As it turned out, these members did not advance money for general expenses, and were reimbursed separately for individual expenses incurred. *Id.* at 1455.

144. *Id.* at 1454.

145. *Id.*

146. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 219 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

147. SCHUCK, *supra* note 1, at 200.

148. See *In re "Agent Orange,"* 818 F.2d at 219-20 & n.2 (illustrating this change with

torneys were awarded a total of \$2,000,244 by the district court.¹⁴⁹ The three noninvestors were awarded \$2,713,388,¹⁵⁰ or slightly less than 58 percent of the fees awarded to the PMC. After the agreement was applied, the noninvestors' share dropped to \$1,142,613, with the investors' share increasing to \$3,621,164.¹⁵¹ The difference for individual members was striking: David Dean, the chief litigator for the PMC, was compensated at the rate of approximately \$55.62 per hour, while Newton Schwartz, "essentially a passive investor," collected more than \$1700 per hour.¹⁵²

III. ANALYSIS

Every lawyer owes a solemn duty to uphold the honor and integrity of his profession . . . to conduct himself as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY
ETHICAL CONSIDERATION 9-6

A. Potential Conflicts Created by Attorney Investment

In general, rules of legal ethics value client autonomy¹⁵³ and

a chart of the fees awarded to each attorney by the district court and the amount received after application of the PMC agreement, showing decreased fees for the three litigating attorneys and increased fees for the six investing attorneys); *see also* Johnson, *supra* note 72, at 550 n.37 (describing the PMC fee-sharing agreement).

149. *See In re "Agent Orange,"* 818 F.2d at 220 n.2 (listing the fees awarded to Schwartz, O'Quinn, Brown, Locks, Chesley and Henderson).

150. *See id.* (listing the fees awarded to Dean, Schlegel, and Musslewhite).

151. *Id.* The chart here contains an unexplained difference in the total fees awarded by the district court (\$4,713,632) and under the PMC agreement (\$4,763,777).

152. SCHUCK, *supra* note 1, at 203.

153. *See* MODEL CODE, *supra* note 7, at EC 7-7:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As [a] typical example[] in civil cases, it is for the client to decide whether he will accept a settlement offer"

See also MODEL RULES, *supra* note 30, at Rule 1.2(a): "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." In order to facili-

the right of the client to supervise his or her attorney.¹⁵⁴ "A fundamental premise of American adjudicative structures is that clients, not their counsel, define litigation objectives."¹⁵⁵ These guidelines, at least facially, apply equally to large-scale litigation.¹⁵⁶ However, some commentators note that code provisions on client autonomy and attorney responsibilities were designed with ordinary litigation in mind.¹⁵⁷ "[B]y presupposing an individual client with clearly identifiable views, [ethical] codes elide a fre-

tate the accomplishment of the client's objectives, the attorney must keep the client reasonably well informed. See MODEL CODE, *supra* note 7, at EC 7-8 ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so."); *id.* at EC 9-2 ("In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."); MODEL RULES, *supra* note 30, at Rule 1.4 ("(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

154. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 677 (noting the traditional view that the client and not the attorney should define the objections of the litigation).

155. Rhode, *supra* note 61, at 1183; see also *Pettway v. American Cast Iron Pipe Co.* (*Pettway IV*), 576 F.2d 1157, 1176 (5th Cir. 1978) (noting that the lawyer may make tactical choices while deferring to the client on "major litigation decisions"), *cert. denied*, 439 U.S. 1115 (1979).

156. See MODEL CODE, *supra* note 7, at DR 5-106 (A):

A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

See also MODEL RULES, *supra* note 30, at Rule 1.4 cmt. 1 ("Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter."); *id.* at Rule 2.2 cmt. 6 ("In a common representation, the lawyer is still required . . . to keep each client adequately informed . . ."); *id.* at Rule 1.8(g):

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

157. See Johnson, *supra* note 72, at 540 (noting that the attorney-client relationship was envisioned as a "simple, elegant paradigm"); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 481 (1994) ("Our current general code of ethics assumes a Lincolnesque lawyer strongly bonded to an individual client.").

quent and fundamental difficulty in class action proceedings,¹⁵⁸ in essence, the tenuous control of attorneys by their clients in the class. One court noted that "no clear allocation of decisionmaking responsibility has emerged between the attorney and class members."¹⁵⁹ Unlike most plaintiffs, members of the class are bound by the results of litigation they do not control.¹⁶⁰ Clients in ordinary litigation are entitled to fire their attorneys at will.¹⁶¹ In the class action context, however, the class must seek the approval of the court to dismiss its attorney.¹⁶² Difficulties in gaining access to information and exercising its collective will make the class more dependent than ordinary plaintiffs upon its attorney and less able to exercise the prerogatives of the average client.

Unfortunately, no one in the plaintiff class has any active interest in pursuing disciplinary action against a lawyer who violates ethical rules. Even a representative plaintiff may have so little at stake that bringing a disciplinary action would be pointless.¹⁶³ Judges lack plaintiffs' personal stake in ethical representation, and defense attorneys actually may benefit by ethical lapses of the plaintiffs' counsel.¹⁶⁴

As a practical matter, then, the deterrent function of "private attorneys general"¹⁶⁵ has led to a marginalized role for both the representative plaintiff and the class itself. "[A]lthough our law publicly expresses homage to individual clients, it privately recognizes their limited relevance in this context."¹⁶⁶ Class members have few options for receiving information and making informed decisions about the litigation, given the enormous costs of commu-

158. Rhode, *supra* note 61, at 1183.

159. *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 163 (1984) (Adams, J. concurring), *cert. denied*, 472 U.S. 1008 (1985).

160. Lazos, *supra* note 20, at 308 n.3.

161. See MODEL CODE, *supra* note 7, at DR 2-110(B)(4) ("A lawyer representing a client . . . shall withdraw from employment[] if . . . [h]e is discharged by his client."); MODEL RULES, *supra* note 30, at Rule 1.16(3) ("[A] lawyer shall . . . withdraw from the representation of a client if . . . the lawyer is discharged."); *id.* at Rule 1.16 cmt. 4 ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.")

162. Lazos, *supra* note 20, at 318 & n.58. Under the Model Rules, discharge of an appointed attorney may be subject to applicable law. MODEL RULES, *supra* note 30, at Rule 1.16 cmt. 5.

163. See generally *supra* text accompanying notes 52-54 (providing an overview of how class actions encourage small claims to be brought by solving the "free rider" problem).

164. Macey & Miller, *supra* note 33, at 21.

165. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 669 n.1.

166. *Id.* at 678-79.

nicating with the class.¹⁶⁷ Decisions requiring more than a “yes” or “no” answer would require unworkably cumbersome procedures.¹⁶⁸ In addition, large-scale communications could compromise confidentiality required for successful settlement strategy.¹⁶⁹ In sum, “[t]he profession’s customary mechanism for coping with counsel’s self-interest—disclosure and informed client consent—is simply not a workable approach in class adjudication.”¹⁷⁰

Class actions, thus, create a unique attorney-client relationship. “[C]lass and derivative attorneys function essentially as entrepreneurs who bear a substantial amount of the litigation risk and exercise nearly plenary control over all important decisions in the lawsuit.”¹⁷¹ Concomitantly with this high degree of control, the plaintiffs’ attorney has a fiduciary relationship with both the named representative and the absent class members.¹⁷² One court explicitly stated: “[B]y granting class status, the court places the attorney for the named parties in a position of public trust and responsibility, and in effect creates an attorney-client relationship between the absentee members and the attorney.”¹⁷³

In discounting the entrepreneurial attorney’s fiduciary role, Professor John C. Coffee rejects what he labels “the ‘noble myth’: namely that the client can and should control all litigation decisions.”¹⁷⁴ More succinctly, Coffee asserts that “[e]ven the most practical litigator or judge is often the slave of some defunct law

167. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 (1978) (stating that plaintiffs are responsible for the costs of identifying class members in most situations); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (holding that plaintiff must bear the cost of providing notice by mail to approximately six million class members); Rhode, *supra* note 61, at 1214 (discussing the lack of feasibility of obtaining informed consent from all class members).

168. Macey & Miller, *supra* note 33, at 20.

169. See Weinstein, *supra* note 157, at 511 (“Secrecy often has been, in fact, the price of settlement.”); Lazos, *supra* note 20, at 317 (explaining that communication to the class might weaken the class’s position if confidentiality is important to success).

170. Rhode, *supra* note 61, at 1212.

171. Macey & Miller, *supra* note 33, at 3; see also Dam, *supra* note 116, at 60 (“The attorney is an entrepreneur.”).

172. See *Pettway v. American Cast Iron Pipe Co. (Pettway IV)*, 576 F.2d 1157, 1176 (5th Cir. 1978) (stating that the plaintiffs’ counsel must turn to the court for assistance in cases of conflict between named representatives and the class), *cert. denied*, 439 U.S. 1115 (1979); see also *Greenfield v. Villager Indus.*, 483 F.2d 824, 832 (3d Cir. 1973) (asserting that both plaintiff’s attorney and the court have fiduciary obligations); Rhode, *supra* note 61, at 1203 (“[C]ounsel’s fiduciary obligations run to the class as a whole.”).

173. *Cullen v. New York State Civil Serv. Comm’n*, 435 F. Supp. 546, 560 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977).

174. Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 47, at 877.

professor who taught him to think of the lawyer as a fiduciary."¹⁷⁵ Coffee acknowledges that the entrepreneurial model of the plaintiffs' attorney "may seem offensive to those accustomed to viewing the relationship as a fiduciary one."¹⁷⁶ The more common view relies on the fiduciary role of the class attorney when faced with a situation in which "the litigation directives of nominal plaintiffs are not of controlling significance."¹⁷⁷ Without this fiduciary overlay, it is hard to justify giving attorneys the wide latitude they currently enjoy in representing the interests of absentee class members.

*B. Actual Conflicts Created by Attorney Investment
in the Agent Orange Example*

Fee agreements which guarantee specific returns on investment from either settlement or judgment automatically produce at least the potential for conflicts between the attorney and the class. Both the district court and the appellate court in *Agent Orange* recognized that the PMC agreement represented a potential conflict of interest for the investor-attorneys.¹⁷⁸ The Fifth Circuit had previously phrased the issue in broad terms: "[W]henver an attorney is confronted with a potential for choosing between actions which may benefit himself financially and an action which may benefit the class which he represents there is a reasonable possibility that some specifically identifiable impropriety will occur."¹⁷⁹ Chief Justice Burger concurred in a 1980 opinion, in which he noted the "obvious" potential for abuse in the class action format, where the

175. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 726-27; see also Lazos, *supra* note 20, at 314 n.35 (noting the distinction between the entrepreneurial and fiduciary models in literature on the class action plaintiff's attorney).

176. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 683.

177. Rhode, *supra* note 61, at 1203. Professor Coffee's analysis of attorney as entrepreneur largely ignores the other individual and social motivations for litigation, such as the vindication of a controversial and perhaps painful position or simply the desire experienced by the *Agent Orange* veterans for their "day in court."

For many . . . the central purpose of the *Agent Orange* case . . . had always been to publicize, palliate, and in some sense justify the veterans' sufferings by allowing them to tell their story, find an authoritative explanation for their conditions, and assign moral and legal responsibility. Compared to this goal, the prospect of monetary compensation, although important, was for these veterans decidedly subsidiary.

SCHUCK, *supra* note 1, at 171. Judge Weinstein later acknowledged the importance of the *Agent Orange* veterans' non-monetary goals. Weinstein, *supra* note 157, at 503.

178. Johnson, *supra* note 72, at 562.

179. *Zylestra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978).

class members have only a nominal stake and others are the main beneficiaries.¹⁸⁰ In *Agent Orange*, the Second Circuit zeroed in:

Given the size and complexity of the litigation, it seems apparent that the potential for abuse was real and should have been discouraged The conflict obviously lies in the incentive provided to an investor-attorney to settle early and thereby avoid work for which full payment may not be authorized by the district court. Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor-attorney will be disinclined to undertake the risks associated with continuing the litigation. The conflict was especially egregious here, since six of the nine PMC members were investing parties to the agreement.¹⁸¹

The district court and the court of appeals viewed the predicament of the plaintiffs' attorneys quite differently.¹⁸² The assumptions each court made about the necessity of alternative financing may well have determined its perspectives on the PMC agreement.¹⁸³ Judge Weinstein noted "the great difficulty of funding such a massive litigation" which confronted Yannacone and Associates (the initial consortium) in the summer of 1983.¹⁸⁴ The court of appeals was unpersuaded: "[W]hether this class action would have collapsed without an agreement calling for a threefold return is a matter of speculation. Any such collapse, however, would have been due to the pervasive weaknesses in the plaintiffs' case."¹⁸⁵

Aside from attorney-class conflicts, fee agreements which substantially alter court-awarded fees generate conflicts among the

180. *Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980).

181. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

182. *See Johnson*, *supra* note 72, at 564 (explaining that the district court and court of appeals judges assessed the importance of creating financing for class action suits differently).

183. *Id.*

184. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1302 (E.D.N.Y. 1985), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

185. *In re "Agent Orange"*, 818 F.2d at 225-26; *see also In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1437 (2d Cir. 1993) (summarizing weaknesses in the plaintiffs' case, the later Second Circuit panel noted the following flaws: the military contractor defense, lack of epidemiological evidence of general causation, difficulty of proving individual exposure to Agent Orange, problem of proving individual causation).

litigating and investing attorneys. In *Agent Orange*, “[t]he effect of the treble repayment of expenses agreement was to significantly skew the compensation of individual members of the PMC.”¹⁸⁶ The investors received a greater return from the litigation than they would have in the commercial markets.¹⁸⁷ In contrast, the litigators, who had spent years on the case, received a comparatively poor fee award.¹⁸⁸

*C. Resolution of the Conflicts of Interest
in the Agent Orange Case*

The district court approved the PMC fee agreement but established structural protections to avoid the negative consequences of such perceived conflicts of interest in the future. The court required disclosure of any fee agreement, so that the court and class representatives might have better opportunity to monitor the representation by counsel, saying, “(a) ‘sunshine’ rule is essential to protect the interests of the public, the class and the honor of the legal profession.”¹⁸⁹ Evidently, Judge Weinstein was not pleased to learn of the PMC agreement four months after the settlement.¹⁹⁰ He recognized that court approval of the settlement would not nec-

186. Johnson, *supra* note 72, at 550.

187. In his earlier opinion, Judge Weinstein evaluated the reasonableness of this rate of return against conventional investment opportunities available at the time of the agreement in December 1983.

Interest rates for conventional investments were then high. The length of time that the Agent Orange case would take to litigate and its outcome both were uncertain. The investing attorneys could have reasonably expected to receive a significant return on their capital through reasonably safe alternative investments—perhaps 50 to 100 percent—over the same time period that their money was to be invested in the Agent Orange litigation. Thus at the time that the attorneys committed themselves to making these advances, the expected extra “profit” was significantly less than the agreed upon total interest of 200 percent, being perhaps 100 to 150 percent above the interest they otherwise probably could have earned in less risky enterprises.

In re “Agent Orange” Prod. Liab. Litig., 611 F. Supp. 1452, 1462 (E.D.N.Y. 1985), *rev’d*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987); *see also* Johnson, *supra* note 72, at 550 (discussing treble repayment received by investors). *But see infra* text accompanying note 245 (noting Second Circuit’s observation that “a threefold return on one’s money is a rather generous return in any market over a short period of time”).

188. *See* Johnson, *supra* note 72, at 550 (noting that those who invested time and effort, rather than money, received less compensation); *supra* notes 149-152 and accompanying text (discussing the discrepancies in fee awards between investors and litigators).

189. *In re “Agent Orange,”* 611 F. Supp. at 1454.

190. *See* SCHUCK, *supra* note 1, at 203 (stating that Judge Weinstein was troubled by the agreement).

essarily "completely eliminate the more subtle effects of undue pressure on attorneys toward settlement."¹⁹¹ Despite his own ignorance of the PMC agreement during the litigation and settlement negotiations, Weinstein maintained that his direct observations of the counsel revealed no reason to believe the fee agreement had any "appreciable untoward effect" on the settlement decision.¹⁹² In this case, he felt that settlement incentives were balanced by the incentive to build up hours under the lodestar formula.¹⁹³ He also pointed out that three of the six investors spent a significant amount of time on the case.¹⁹⁴

In any event, Weinstein reasoned that the fee-sharing agreement did not increase the amount awarded to the attorneys out of the fund. Rather, it merely redistributed the fee award, so that "[t]he profit will be paid by those members of the PMC who did the work."¹⁹⁵ In refusing to revise the award to reflect his own assessment of proper fees,¹⁹⁶ he noted that "[b]usiness realities of law practice often require that those who bring clients and capital to a law firm be better compensated than those whose talents lie in the area of preparing legal papers and arguments."¹⁹⁷ Another commentator aptly summarized the situation: "The otherwise grotesque imbalance revealed by Dean's comparisons reflected the relative value that their money and his services had for the survival of the case at that point"¹⁹⁸ Weinstein, although "clearly troubled" by the agreement,¹⁹⁹ decided to approve it.

191. 611 F. Supp. at 1461.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*; see also Weinstein, *supra* note 157, at 526 (arguing that the fee-sharing agreement did not reduce the clients' benefits).

196. This in spite of his own feeling that "[t]he plaintiffs' attorneys had done little to establish their case and would have lost if traditional tort rules had been applied." Weinstein, *supra* note 157, at 535. Primarily Weinstein felt that the plaintiffs could not prove general causation. *Id.* at 550-51.

197. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452, 1458 (E.D.N.Y. 1985), *rev'd*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

198. SCHUCK, *supra* note 1, at 204. Another commentator, an Associate Reporter of the Restatement of the Law Governing Lawyers, pointedly disparaged Judge Weinstein's approval of the "bizarre" financing agreement in Agent Orange. Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 588 n.31 (1994).

199. SCHUCK, *supra* note 1, at 203; see also *In re "Agent Orange,"* 611 F. Supp. at 1462 (noting that the failure of the PMC to reveal the existence of the agreement until late in the litigation was particularly troubling). On the compensation of non-PMC attorneys, Judge Weinstein later wrote:

On appeal, the Second Circuit confronted the issue directly and rejected the district judge's assessment of the conflict of interest. The court acknowledged that attorneys may be more competent than the court to divide fees equitably among themselves.²⁰⁰ However, it asserted that the court's role as guardian of the class under Rule 23(e) prevented it from allowing attorneys complete discretion to divide fees among themselves.²⁰¹ While the Second Circuit recognized the general practice of permitting discretionary private fee divisions among attorneys, it noted that none of the authorities involved cases of investment-based returns.²⁰² The court did not require strict adherence to the lodestar formula, but insisted that "the distribution of fees must bear some relationship to the services rendered."²⁰³ "The test to be applied is whether, at the time a fee sharing agreement is reached, class counsel are placed in a position that might endanger the fair representation of their clients and whether they will be compensated on some basis other than for legal services performed."²⁰⁴

The Second Circuit also evaluated the implicit settlement pressures differently than did the lower court. Judge Weinstein discounted any special settlement pressure. He felt such pressures were inherent in any financing arrangement.²⁰⁵ The appellate court asserted that the incentive created by the lodestar analysis to build up hours does not fully counteract settlement pressure, because the judge has the often-exercised power to refuse compensation for hours spent in various tasks.²⁰⁶ The court concluded that the risk

I believe I gave too little attention to this subject in "Agent Orange" and did not fairly compensate the attorneys who represented individuals. All the fees went to members of the central committee who had almost no individual client contact. Many attorneys had spent time with individual clients and should have received compensation for this important personal relationship aspect of the litigation.

Weinstein, *supra* note 157, at 531.

200. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 224.

205. *See* Weinstein, *supra* note 157, at 526 (stating that the incentive to settle prematurely in order to recoup profits early exists with any type of financing).

206. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 225 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987); *see, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1320 (E.D.N.Y. 1985) ("No time was allowed for nonsubstantive meetings at which [management] committee members aired their disputes with one another and haggled over

of inappropriate settlement alone was sufficient grounds to reject the agreement "as being inconsistent with the interests of the class."²⁰⁷

The Second Circuit also differed with Judge Weinstein on the ability of the court to adequately supervise counsel's fee agreement. When confronted with a settlement agreement, "[t]he court's attention properly is directed toward the overall reasonableness of the offer and not necessarily to whether class counsel have placed themselves in a potentially conflicting position with the class."²⁰⁸ Finally, the appellate court injected a new consideration in asserting that public perceptions about the interests of class counsel are appropriate subjects of concern for the court on review.²⁰⁹ The court noted the perception among class members and the general public that the *Agent Orange* settlement was inadequate and argued that such public perception provided additional justification for voiding an agreement which gave one investor twelve times more than he was awarded by the district court.²¹⁰ The Second Circuit reversed Judge Weinstein and reinstated the fees as he had apportioned them originally among the PMC members.²¹¹

D. *Analysis of the Conflict of Interest Question*

Even assuming the good intentions of the lawyers involved in *Agent Orange*, the practice of allowing attorneys to finance a class action on the basis of an agreement guaranteeing a specific investment return creates an unacceptable level of conflict between the interests of attorney and class. A guaranteed investment return differs from a flat retainer fee both in the inability of the class to negotiate for services and supervise their attorneys' activities on their behalf, as well as in the inadequacy of the court as a substitute watchdog. In a class situation, breaking the link between results and compensation jeopardizes the interests of the class beyond

finances."), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987); *see also In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 126 (N.D. Ill. 1990) ("Class litigation is risky, and a lawyer as a rational maximizer will not compound his or her risks by logging long hours that might wind up unrewarded.").

207. *In re "Agent Orange,"* 818 F.2d at 224.

208. *Id.*

209. *Id.* at 225.

210. *Id.* The court presumably was referring to Newton Schwartz, who was awarded \$41,886 by the district court and received \$513,026 under the PMC agreement. *Id.* at 220 n.2.

211. *Id.* at 226.

any benefits gained from additional financing.

1. Monitoring of the Class Attorney by Class Members and Representatives

The prerogative of the court to appoint lead counsel leaves class action clients in a position of powerlessness.²¹² Lack of meaningful participation undermines client satisfaction even when the clients view the outcome as favorable, unlike that in *Agent Orange*.²¹³ Michael Ryan, one of the representative plaintiffs in the *Agent Orange* case, expressed his frustration in his bitter reaction to the news of settlement: "The next thing I know, a reporter calls me at 7 a.m. Monday morning and tells me the case has been settled. We had no say in the settlement. Is it a lawyers' case or the clients' case?"²¹⁴

The representative plaintiff, chosen by the attorney, perhaps from his or her retinue of "professional plaintiffs,"²¹⁵ may have the best opportunity but little incentive to act as a serious auditor.²¹⁶ Despite the fact that named representatives, unlike indigent defendants, are nominally expected to shoulder litigation costs, they are often not much more than a "ticket of admission"²¹⁷ to the

212. This feeling of powerlessness is analogous to the attitude of criminal defendants represented by public defenders. Indigent defendants often view their state-paid, court-appointed attorneys with suspicion, which is exacerbated if defendants feel they have no control over their cases. "[I]n games between attorneys and clients, clients perceive fairness if they trust their attorneys and believe they have a say or voice in the handling of their cases." Roy B. Flemming, *Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients*, 1986 AM. B. FOUND. RES. J. 253, 268.

213. See Weinstein, *supra* note 157, at 497 & nn.115-16, 498 & n.120 (noting perceived importance to litigants of procedural fairness).

214. SCHUCK, *supra* note 1, at 169.

215. See Macey & Miller, *supra* note 33, at 74 (using the derogatory term "professional plaintiff" to describe someone who serves as a representative plaintiff in multiple class or shareholder derivative actions); see also Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 682 (noting that "[i]n the securities and derivative suit areas, there are well-known individuals who possess broad (but thin) securities portfolios and have served as the lead plaintiff in numerous previous class actions").

216. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 682 & n.38 (describing the "near legendary" Harry Lewis, a prolific plaintiff); Rhode, *supra* note 61, at 1203 ("[A]s a practical matter, once a class is certified, named plaintiffs generally are neither highly motivated nor well situated to monitor the congruence between counsel's conduct and class preferences.").

217. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 683 ("When the client is neither a potentially valuable witness nor a co-investor in the action, his role may often be only that of a 'ticket of admission' by which the plaintiff's attorney can join the caucus of attorneys who gather to organize a class action."); see also Saylor v. Lindsley, 456 F.2d 896, 900 (2d Cir. 1972) (stating that courts should not "accept the

class action. Legitimate named representatives, such as Michael Ryan, often lack the knowledge necessary to supervise their attorneys effectively.²¹⁸ The costs of supervision are not normally balanced for the named representative by any bonus for the effort involved.²¹⁹ Even a committed plaintiff may accede to settlement because he or she has little to gain from the additional personal burdens of litigating to trial.²²⁰ There are some situations in which class members may have the incentive and/or opportunity to exercise greater control over their attorneys. The structural controls of the "public interest" firm may be potentially effective restraints on "attorney opportunism."²²¹ Also, significant financial harm to individual class members and/or "a subjective, nonmonetary component to the injury"²²² can produce closer monitoring.

The representative plaintiff who actively does monitor the class attorney may encounter difficulty. The attorney usually can overrule objections by the representative plaintiff by arguing that the attorney is obligated to use his or her judgment on behalf of the whole class.²²³ Courts have allowed attorneys to settle actions against

view that the attorney for the plaintiff is the *dominus litis* and the plaintiff only a key to the courthouse door dispensable once entry has been effected").

218. See Lazos, *supra* note 20, at 318 (stating that plaintiffs often lack the knowledge, interest, and ability to effectively supervise their attorneys).

219. See Dam, *supra* note 116, at 58 (stating that economic incentives for plaintiffs discourage close supervision of class attorneys); Lazos, *supra* note 20, at 319. *But see In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 357-58 (N.D. Ga. 1993) (granting "incentive attorney fee awards" of \$2,500 to each class representative who produced documents, and \$5,000 to each representative who also was deposed); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (approving incentive awards of \$50,000 earned by class members); *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525 (E.D. Pa. 1990) (granting representative of each plaintiff class in a securities fraud class action a special award of \$5,000 for his/her "public service"); *In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366 (S.D. Ohio 1990) (granting plaintiffs' representatives incentive awards ranging from \$35,000-\$55,000).

220. See Rhode, *supra* note 61, at 1203 ("Why should named representatives make special efforts to expose conflict that could result in delay, expense, or impairment of their own litigation objectives?"); Lazos, *supra* note 20, at 316 ("The risk-averse nature of class representatives may therefore induce them to settle when the class members would prefer to present their claims to a neutral party for decision."); see also Josef D. Cooper & Tracy Kirkham, *Class Action Conflicts*, LITIG., Winter 1981, at 35 ("It is a grave mistake for the lawyer to minimize the personal commitment required of the class plaintiff.").

221. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 680. Conducting a class action lawsuit on ideological as opposed to economic grounds, however, carries with it the potential for other types of conflict, for example, regarding appropriate remedies.

222. *Id.*

223. See *Pettway v. American Cast Iron Pipe Co. (Pettway IV)*, 576 F.2d 1157, 1176 (5th Cir. 1978) (stating that, in conflicts between named representatives and the class,

the wishes of the class representatives on that basis.²²⁴ Absentee members of the class, of course, have virtually no opportunity to monitor the class attorney. Class action clients are not physically present to review their attorneys' work and many lack the legal expertise to evaluate it effectively.²²⁵ Quality control options open to normal plaintiffs, e.g., investigating an attorney's reputation before hiring her and requesting second opinions, are unavailable as a practical matter to class action plaintiffs.²²⁶ The normal constraints which ordinarily apply when an attorney is concerned about his or her reputation are not necessarily applicable to the class action context. There, as noted above, the attorney chooses the plaintiffs, rather than vice versa.²²⁷ Plaintiffs' attorneys often are more con-

plaintiffs' attorneys should notify court so that it can protect the absentee class members), *cert. denied*, 439 U.S. 115 (1979); Macey & Miller, *supra* note 33, at 20 (noting that the attorney represents the class as a whole and need not follow the directions of any individual class member); Rhode, *supra* note 61, at 1203 & n.82 (arguing that, because the attorney's obligation is to the entire class, objections of nominal plaintiffs are not dispositive).

224. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 677-78 (discussing plaintiffs' attorneys' and their clients' relative degrees of control in the context of class and derivative actions); Dam, *supra* note 116, at 59 (providing examples of actions which courts have allowed to settle against the wishes of class representatives); see also Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir.) ("[N]amed plaintiffs should not be permitted to hold the absentee class hostage by refusing to assent to an otherwise fair and adequate settlement . . ."), *cert. denied*, 459 U.S. 828 (1982); Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501, 508 (5th Cir. 1981) (holding that five of six named plaintiffs could not prevent settlement in Title VII action); *Petway IV*, 576 F.2d at 1176 ("[T]he class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs."); Flinn v. FMC Corp., 528 F.2d 1169, 1174 (4th Cir. 1975) (holding that settlement approval over objections of the three original plaintiffs was not an abuse of discretion), *cert. denied* 424 U.S. 967 (1976). *But see* Saylor v. Lindsley, 456 F.2d 896 (2d Cir. 1972) (refusing to uphold settlement to which one plaintiff stockholder objected). The court in *Petway IV* observed:

The class itself often speaks in several voices. Where there is disagreement among the class members concerning an appropriate course of action, it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole [H]owever, at some point objections from the class may become so numerous that in a very real sense it can be said that "the class" has not agreed to the proposal.

576 F.2d at 1216.

225. See Macey & Miller, *supra* note 33, at 14 (describing a plaintiff's inability to effectively evaluate his or her attorney's work even in the context of a traditional lawsuit).

226. See *id.* (describing quality control options for plaintiffs in traditional lawsuits).

227. *Id.* at 41; see also Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 679 ("[B]ecause the attorney as private enforcer looks to the court, not the client, to award him a fee if successful, the attorney can find the legal violation first and the client second.").

cerned about their reputations among judges and members of the defense bar than with the opinions of their clients.²²⁸ The experience and ability of the plaintiffs' lawyer can affect a judge's decision on lead counsel appointments²²⁹ and fee awards, so the attorney necessarily wishes to impress the court. Moreover, the plaintiffs' attorney wishes to appear before defense attorneys as a hard-nosed opponent, but one willing to compromise in settlement negotiations.²³⁰ Indeed, either or both of the parties' attorneys may be "repeat players," anxious to create or maintain reputations for toughness which will benefit them in the current case and any future litigation.²³¹ Further, even if the attorney desired greater input from the class, communications on a broad scale could jeopardize the security of sensitive information.²³²

Appeals as well as settlements can raise conflict of interests between the attorney and the class. The attorney may want to "cash in" his or her fee award rather than spend additional time and effort on an appeal which may be in the interests of the class.²³³ The court in *Pettway IV* observed that neither the plaintiff's attorney nor the named representative has unilateral authority to decide upon an appeal.²³⁴ Yet, the court concluded, "at least as an initial matter, the decision to appeal a class action judgment must rest with the class plaintiffs."²³⁵

Given the American judicial system's allocation of decisions regarding basic objectives to the client,²³⁶ some effort should be

228. See Macey & Miller, *supra* note 33, at 21 (noting that, in the absence of client monitoring, only judges and defense counsel may be likely to refer plaintiffs' attorneys to a bar disciplinary board).

229. "[A] potentially valuable franchise." *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 693 n.12 (N.D. Cal. 1990).

230. Macey & Miller, *supra* note 33, at 21.

231. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 702 (noting that defendants or their insurance companies may want to resist "extortion" and thus may prefer trial over settlement); *id.* at 713 (arguing that plaintiff's attorney can gain future advantages from refusing reasonable settlement offers).

232. See Lazos, *supra* note 20, at 317 (discussing possibility that pre-trial communication with class could endanger class' bargaining power at settlement proceedings if confidentiality is compromised).

233. Macey & Miller, *supra* note 33, at 43.

234. *Pettway v. American Cast Iron Pipe Co.* (*Pettway IV*), 576 F.2d 1157, 1176-78 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

235. *Pettway IV*, 576 F.2d at 1177. The American Law Institute tentatively has approved the assignment to the client of the prerogative of deciding upon an appeal in a civil or criminal case. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 33 (Tentative Draft No. 5, 1992).

236. See *supra* note 155 and accompanying text.

made to consult the absent class members as well as the named representatives before conferring such an important prerogative upon the class attorney. Such efforts can be costly, repeating the notice dilemmas which often plague class actions.²³⁷ Since notice costs can easily exceed the small individual recoveries at stake in a class action, the legal community should be forced to consider whether the goals of a class action, namely deterrence of defendant misconduct and remuneration for the attorneys, justify the expenditure of court time and the potentially enormous expense involved. Attorneys stand to benefit most from the large-scale, small claim class action.²³⁸ Therefore, it is in their interests to control the settlement and appeals decisions for their own advantage. Arguably, the attorneys should be required to consult with at least a representative sampling of the class, beyond the named plaintiffs, before making important decisions affecting the case.²³⁹ Alternatively, or in addition, the attorneys could consult with a guardian ad litem appointed by the court. The guardian could give the court an additional perspective on the factors involved in the attorneys' decisions regarding the class, thus strengthening the supervisory powers of the court. Using a representative sampling of the class allows more input from class members without incurring ruinous notice costs, while the guardian can provide monitoring from a knowledgeable perspective normally unavailable to class members.

2. Monitoring by Investor-Attorneys

The idea of attorney-investors in an ad hoc law firm has some appeal as an efficient "market mimicking" strategy.²⁴⁰ The advantages of this approach include the spreading the litigation risk among attorneys' portfolios and enhancing the access of plaintiffs to sources of funding.²⁴¹ Attorney-investors are potentially better monitors than lay plaintiffs or investors because of their profes-

237. See *supra* notes 73-76 and accompanying text.

238. See Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits: The 23rd Annual Antitrust Review*, 71 COLUM. L. REV. 1, 10 (1971) ("[I]t is the attorneys, not the class members, who are the true beneficiaries and the real parties in interest.").

239. See Ricciuti, *supra* note 19, at 852-54 (proposing a "new ethical duty" for the class attorney to consult "with the consultation unit as if it were the sole client in the case").

240. Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 47, at 934-35.

241. *Id.* at 901, 934.

sional expertise.²⁴² Concomitantly, professional attorneys have an advantage over lay investors in their increased ability to influence the actual course of the litigation in a substantive way through their votes on plaintiffs' management committees. In the *Agent Orange* example, the PMC was stacked with twice the number of investors as non-investor litigators. Even if a PMC operated on some basis other than majority vote, the weight of the investors' interests surely would be felt in the decision-making process. Restrictions on the ability of attorney-investors to command a majority among plaintiffs' counsel could help mitigate their influence, unless of course the entire plaintiffs' counsel team were comprised of such investors.²⁴³ At that point, requiring the plaintiffs' counsel to consult with a selected group of plaintiffs and a guardian ad litem could provide oversight essential to protecting the interests of the class.

From an economic perspective, legal expertise theoretically should enable the attorney-investors to assess realistically the risks of litigation. Accurate projections would permit what is essentially lending to occur at a lower rate than lay investors would charge.²⁴⁴ The Second Circuit, of course, found otherwise when it looked askance at the 300% rate of return envisioned by the *Agent Orange* investor-attorneys.

[W]e find wholly unconvincing the district court's suggestion that the investors could have made a sizable return on their funds if they had invested them in other ventures. We take notice of the fact that a threefold return on one's money is a rather generous return in any market over a short period of time.²⁴⁵

Even Judge Weinstein, who approved the agreement, noted that the philosophy of compensation for attorneys in common fund cases was adequacy, not generosity.²⁴⁶

242. *Id.* at 934-35.

243. One commentator who supports lawsuit syndication in general flatly rejects the notion of allowing investors a voice in controlling the lawsuit. Cox, *supra* note 29, at 165 & nn.116-19.

244. See Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 47, at 901 (arguing that both attorney investors and attorney debtors could benefit from this relationship because investors could monitor debtors more effectively and at less cost).

245. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 226 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

246. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1303-04 (E.D.N.Y.

The usury argument of the Second Circuit could be attacked on the basis that, if anything, investors had incentive to delay settlement in order to accumulate more expenses and thus increase their return.²⁴⁷ This argument is unconvincing because the limited, albeit large, resources of each investor could be swallowed up quickly by the expenses of complex litigation. The main point, however, is not whether the incentives lead attorneys to settle earlier for a quick return, or later for a higher return, but rather that the incentive is to settle as opposed to taking a potentially winning case to trial. "Ultimately, the most persuasive account of why class actions frequently produce unsatisfactory results is the hypothesis that such actions are uniquely vulnerable to collusive settlements that benefit plaintiff's attorneys rather than their clients."²⁴⁸ Given the less intensive scrutiny devoted to fee awards presented as part of a settlement package,²⁴⁹ it seems more realistic to assume investors would take a quick threefold profit rather than risk losing everything at trial. Even commentators who advocate the elimination of ethical rules on champerty, maintenance, and fee-splitting in large class actions,²⁵⁰ concede:

[T]he inherent conflict of interest between attorney and client over the matter of settlement is conceptually more acute when costs, rather than fees, are at issue The attorney who has advanced costs subject to a risk of non-success would much prefer to settle out at a low sum in order to assure that the costs will be repaid.²⁵¹

The acute conflict of interest described above would be even more significant when the settlement assures the investor-attorney of three times his or her cost incurred, free of any risks associated with trial.

1985) ("[A] reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.'" (quoting *Blum v. Stenson*, 465 U.S. 886, 897 (1984))), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

247. *Coffee, The Regulation of Entrepreneurial Litigation*, *supra* note 47, at 902.

248. *Coffee, Understanding the Plaintiff's Attorney*, *supra* note 41, at 677.

249. *See infra* part III.D.5.b.

250. *See supra* note 33 and accompanying text.

251. *Macey & Miller, supra* note 33, at 86-87. The term "costs" in this context refers to the myriad expenses incurred by the attorneys in preparing the case. The lump sums advanced by the *Agent Orange* attorneys were expended to cover items such as travel, expert witness fees, depositions, assembly and review of medical records, administrative overhead, and legal research. *SCHUCK, supra* note 1, at 50.

3. Conflicts Between Litigating and Investing Attorneys

Conflicts between investors and litigators can compromise the representation of the class,²⁵² especially when the conflicts are concealed from the court. Victor Yannacone's partners in the original consortium struggled to control his activities while preventing him from making good on his threat to report the consortium's internal conflicts to the court.²⁵³ A challenge in early 1981 by outside lawyers to the original plaintiffs' consortium's handling of documents and information was unsuccessful, in part because Judge George C. Pratt fortuitously was "oblivious" to the consortium's internal disarray.²⁵⁴ As one of Yannacone's associates described the situation: "Victor . . . was totally unpredictable, an unguided missile. To destroy the enemy he would willingly risk blowing his own side up."²⁵⁵ Such a damaging report could lead to the removal of the consortium as lead counsel, destroy its claim to the lion's share of any fee award,²⁵⁶ and relegate it to the sidelines of the litigation. Thus, intractable conflict within the plaintiffs' camp can reduce the effectiveness of representation and make settlement more attractive than continued litigation.²⁵⁷

The incentives which motivate investors and litigators also differ according to the stage of the litigation. Pretrial settlement is more attractive to investors paying expenses, when costs are front-loaded before trial, than to litigators, whose time will add up during a lengthy trial.²⁵⁸ Investors who are guaranteed a substantial return regardless of whether the settlement comes later rather than earlier, might be content to wait. However, it is more likely that they would prefer to take their compounded return and invest it once again elsewhere.²⁵⁹

It is possible that any bias toward settlement on the part of the

252. SCHUCK, *supra* note 1, at 202.

253. *Id.* at 54.

254. *Id.* at 74-75.

255. *Id.* at 54.

256. See *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 693 n.12 (N.D. Cal. 1990) (noting the potentially valuable franchise interest inherent in a lead counsel appointment); *infra* notes 283-86 and accompanying text.

257. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 690 n.58 (citing instances of premature settlement due to instability within the plaintiff's camp).

258. SCHUCK, *supra* note 1, at 121.

259. See *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452, 1461 (E.D.N.Y. 1985), *rev'd*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987) (discussing incentives to settle early versus incentives to prolong litigation).

Agent Orange investors was counterbalanced by the reduced incentive for settlement among the litigators.²⁶⁰ However, a litigator who has assigned part of his or her recovery to an investor may lack the incentive to proceed with litigation and risk an already reduced award on the chance of a greater recovery.²⁶¹ As a practical matter, the investors in the *Agent Orange* case outnumbered the litigators by six to three. The investors had final authority in key decisions, especially regarding expenses and settlement, despite their relative lack of familiarity with the case and the inconsequential number of actual clients they represented.²⁶²

4. Prohibitions on Fee-Splitting

The basic objection to fee-splitting codified in ethical rules²⁶³ is the unwarranted increase in legal costs caused by the payment of referral fees.²⁶⁴ In contrast, lawyers are entitled to divide fees

260. See Macey & Miller, *supra* note 33, at 55 (discussing the competing incentives for both litigators and investors in the fee allocation arrangement).

261. Johnson, *supra* note 72, at 563. In the *Agent Orange* case, Benton Musslewhite recruited two Houston attorneys, Newton Schwartz and John O'Quinn, by selling them a share in Musslewhite's interest in any fee awarded. SCHUCK, *supra* note 1, at 121. Referring to a character in the Mel Brooks movie, *THE PRODUCERS*, David Dean, the plaintiffs' chief litigator, joked that financial pressures had turned Musslewhite into "the Max Bialystok of the legal profession; he sold 10,000 percent of his case." *Id.*

262. See SCHUCK, *supra* note 1, at 124 (noting that only Musslewhite and Schlegel represented a significant number of veterans); Weinstein, *supra* note 157, at 531 (discussing the lack of client contact among the members of the PMC).

263. See MODEL CODE, *supra* note 7, at DR 2-107(A):

A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

- (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
- (2) The division is made in proportion to the services performed and responsibility assumed by each.
- (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

See also MODEL RULES, *supra* note 30, at Rule 1.5(e):

A division of fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- (2) the client is advised of and does not object to the participation of all the lawyers involved; and
- (3) the total fee is reasonable.

The comments to Rule 1.5 add: "[Paragraph (e)] does not require disclosure to the client of the share that each lawyer is to receive." *Id.* at Rule 1.5 cmt. 4.

264. See Johnson, *supra* note 72, at 553 n.55 (describing other rationales for the prohi-

within a firm as they see fit, in part on the theory that their competing interests will assure a rational division of fees.²⁶⁵ Further, monitoring of in-house fee splitting would be impracticable.²⁶⁶ Fee-splitting prohibitions, then, address “the most egregious cases: those involving no more than straight referral or perfunctory participation in a client’s representation by a forwarding attorney.”²⁶⁷ The PMC fee agreement did not violate these ethical prohibitions on fee-splitting from a public policy perspective because the investor-attorneys were appointed by the court and enjoyed a “constructive attorney-client relationship with absent class members.”²⁶⁸ All members of the PMC freely assented to its terms and some would argue that the 300% return was justifiable in view of the risk of the litigation.²⁶⁹ However, the actual level of risk at the time of the agreement is dubious in view of the fact that only ten percent of all civil cases actually come to trial²⁷⁰ and in this case there was a substantial possibility of settlement.

Functionally, if not technically, the PMC more closely resembled a traditional law firm than a referral relationship.²⁷¹ Judge Weinstein ruled that the PMC constituted an ad hoc law firm, “formed for the purpose of prosecuting the *Agent Orange* multidistrict litigation,”²⁷² thus giving the PMC a legitimate basis upon which to divide its fees. Judge Weinstein did not distinguish sharply between the roles of partners in a law firm, whose shares in firm profits are related only indirectly to individual cases, and the members of the PMC, who could increase their remuneration

bition against fee-splitting and concluding that they do not apply to the *Agent Orange* PMC agreement).

265. *Id.* at 557.

266. *Id.*

267. *Id.*

268. *Id.* at 558.

269. Macey & Miller, *supra* note 33, at 55.

270. See RHODE & LUBAN, *supra* note 35, at 772 (stating that only about 2.5 percent of cases are lost at trial, although the investors’ level of risk aversion would naturally increase if settlement gave way to trial).

271. Johnson, *supra* note 72, at 558-59.

272. *In re* “Agent Orange” Prod. Liab. Litig., 611 F. Supp. 1452, 1458 (E.D.N.Y. 1985), *rev’d*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987); see Weinstein, *supra* note 157, at 525-26 (“Law firms make internal arrangements giving greater financial rewards to rainmakers and partner-investors. I saw no reason to prevent a similar arrangement for the committee charged with conducting the litigation.”). Such an ad hoc law firm can be created by direction from the Judicial Panel on Multi-District Litigation or by voluntary association as in the *Agent Orange* case. Coffee, *Understanding the Plaintiff’s Attorney*, *supra* note 41, at 708-09 & n.111.

directly by voting to settle a single case. The Second Circuit, in a key part of its opinion, rejected Judge Weinstein's characterization of the PMC. "We do not find class counsel to have formed an ad hoc partnership. They merely are a group of individual lawyers and law firms associated in the prosecution of a single lawsuit, and they lack the ongoing relationship that is the essential element of attorneys practicing as partners."²⁷³

In point of fact, the fee-splitting rules do not mandate any type of on-going relationship: attorneys may split fees among those who are in their firm on the day the fee is divided.²⁷⁴ A PMC-type of association did not exist when the ethical rules were devised, and the Second Circuit's application of those rules to the *Agent Orange* fee-sharing arrangement has been labeled as "wooden."²⁷⁵ The district court, in contrast, implicitly applied the *Model Rules*, which permit a division of fees with the consent of the client and assumption of joint responsibility for representation.²⁷⁶

In the *Agent Orange* case, the district court's assessment was more realistic for a class action situation. Court approval satisfied the client consent and joint responsibility requirements,²⁷⁷ given that client notification, much less consent, is impractical in a class action.²⁷⁸ The plaintiffs' attorneys clearly were not members of a traditional law firm, and in fact most of them maintained their practices elsewhere during the litigation. There was, however, a division of responsibility for the case which represented a certain amount of teamwork.²⁷⁹ Leaving aside the investment aspects of the fee agreement, the fact that plaintiffs' attorneys from across the country chose to work together on a massive litigation should not

273. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 226 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

274. Johnson, *supra* note 72, at 559.

275. *Id.* at 560.

276. MODEL RULES, *supra* note 30, at Rule 1.5(e)(1); see *In re "Agent Orange,"* 611 F. Supp. at 1459 (stating that the PMC agreement clearly reflects the *Model Rules*); Johnson, *supra* note 72, at 561 (describing the manner in which the court implicitly approved the *Model Rules*).

277. *In re "Agent Orange,"* 611 F. Supp. at 1459. See Johnson, *supra* note 72, at 561 (describing the district court's assessment of the PMC's fee arrangement as realistic for a class action situation).

278. See Macey & Miller, *supra* note 33, at 102 (discussing the impracticality of gaining consent of all class members to a class action suit); see also Rhode, *supra* note 61, at 1235 (describing some humorous responses to class notifications).

279. See, e.g., SCHUCK, *supra* note 1, at 109 (describing the division of responsibilities among the plaintiffs' lawyers under the three-man PMC of Schlegel, Musslewhite, and Henderson).

in itself have constituted a basis for invalidating their fee agreement. The PMC did not violate the spirit of ethical prohibitions on fee-splitting because of its office arrangements. Far more important was the fact that some members of the PMC were little more than "passive investor[s],"²⁸⁰ creating a situation in which "those who advanced money [were] advantaged to an extraordinary degree over those who gave their time and skill to the enterprise."²⁸¹ Fee-splitting was merely a straw man in the debate over the propriety of a secret agreement which contravened both the letter and the spirit of the fee arrangements sanctioned by the district court.

5. The Attorney's Relationship with the Court under Rule 23
of the *Federal Rules of Civil Procedure*

a. Appointment of lead counsel

As part of its supervisory responsibilities, the court appoints lead counsel in class actions and consolidations.²⁸² Power, prestige, and money accompany such appointments.²⁸³ In most cases an attorney on the plaintiff's management committee will be able to command a higher fee award than one who bills the same number of hours as a staff attorney on the plaintiff's side.²⁸⁴ Maintaining a high level of visibility before the court also can be crucial to winning various multipliers under the lodestar approach.²⁸⁵ Referring to the *In re Fine Paper Antitrust Litigation*, one commentator noted: "Titles were a valued commodity, since lawyers in 'leadership' roles can more easily petition the court for fee 'multipliers,' allowing them to double or triple their normal hourly billings."²⁸⁶ Perhaps reflecting a dislike for the notion of litigation as an entrepreneurial activity,²⁸⁷ recent Supreme Court decisions have

280. *Id.* at 203.

281. *Id.* at 202.

282. See MANUAL FOR COMPLEX LITIGATION SECOND § 20.224 (1985).

283. See Weinstein, *supra* note 157, at 532 ("The monetary awards, the power, and the prestige associated with control of mass cases are enormous.")

284. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 713.

285. See Weinstein, *supra* note 157, at 532-33 ("Given the relatively small national bar capable of managing a large *masstort* [sic] action, the amount of handwashing and backbiting can be substantial.")

286. *Reading Moody's at \$682 an Hour*, AM. LAW., Jan. 1982, at 31, *quoted in* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 713 n.117.

287. See Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 47, at 897 (arguing that the courts' unwillingness to oversee contingency fees in class action litigation

restricted the use of fee multipliers.²⁸⁸ Nonetheless, plaintiffs' attorneys jockey for position to gain the lion's share of any fee the court decides to award.²⁸⁹ Notwithstanding such maneuvering,²⁹⁰ an agreement among attorneys which uses their cost outlay as a base figure upon which to calculate a multiple reimbursement is one way of evading the supervisory role of the court in reviewing appropriate fee allocation. Clearly the client class members in the *Agent Orange* case had no input into the allocation of fees among their attorneys, leaving the court as the only avenue of review. In their case, that avenue was foreclosed by the district judge's ignorance of counsel fee arrangements, and opened by the appellate court only after the case effectively ended with settlement.

b. Court monitoring of conflicts of interest in settlement

A more acute problem in the litigation investment context is the court's ability and incentive to monitor conflicts of interest in the settlement process. Some commentators are fairly sanguine about the efficacy of court supervision: "Presumably the necessity for obtaining court approval before class claims are aborted will deter counsel from acting contrary to the interests of absent class members."²⁹¹ However, one experienced lawyer shrewdly observed that "the fundamental assumption underlying the finding of manageability in the certification of large user class actions is the court's belief that the case will be settled prior to trial."²⁹²

Most courts take seriously their responsibilities under Rule

tion stems in part from their reluctance to view the attorney as an entrepreneur).

288. See *City of Burlington v. Dague*, 112 S. Ct. 2638, 2643 (1992) (rejecting contingency enhancement for prevailing party in fee-shifting case); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U.S. 711, 723-27 (1987) (limiting, by a 4-1-4 decision, multipliers for risk of non-payment to exceptional cases); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)*, 478 U.S. 546, 565 (1986) (restricting merit or skill multipliers in fee-shifting case); *Blum v. Stenson*, 465 U.S. 886, 898-99 (1984) (stating that the lodestar approach reflects the novelty or difficulty of the issues in the hours expended, and the quality of representation in the hourly rate).

289. See *Court Awarded Attorney Fees*, 108 F.R.D. 237, 257 (1985) (Report of the Third Circuit Task Force) ("[G]reat care must be taken to avoid patronage and discrimination . . . in the selection of litigation counsel when there is a competition for that position."); Weinstein, *supra* note 157, at 532-33 (noting that jockeying among potential representatives becomes "fierce").

290. Such maneuvering can include fee-sharing deals and vote buying. Weinstein, *supra* note 157, at 533 & nn.259-60.

291. Underwood, *supra* note 66, at 825.

292. *Id.* at 817-18.

23(e), recognizing that “[i]n such circumstances, the role of the attorneys is drastically altered; they then stand in essentially an adversarial relation to their clients who face a reduced award to the extent that counsel fees are maximized.”²⁹³ Courts tend to look more closely at fee awards in common fund cases where any award reduces the recovery of the plaintiff class, while in common benefit²⁹⁴ and fee-shifting cases,²⁹⁵ the defendant may object to the fee request and give the judge reasons to trim the fee award.²⁹⁶ Without a defendant, the lack of opposition to settlement puts judges, normally impartial arbitrators, at a disadvantage.²⁹⁷ Without a guardian or other assistance, a judge is faced with the prospect of watching “the attorneys for the plaintiff . . . link arms with their former adversaries to defend the joint handiwork All the dynamics conduce to judicial approval of such settlements.”²⁹⁸ In defense of conscientious jurists, the problem may be one of “institutional rather than individual insensitivity.”²⁹⁹ Court supervision is necessary as long as the attorneys’

293. *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1109 (3d Cir. 1979).

294. In common benefit cases, the attorney’s efforts result in a non-monetary benefit to the client, usually a corporation in a shareholder derivative suit. *Macey & Miller, supra* note 33, at 25.

295. In fee-shifting cases, the plaintiff’s attorneys’ fee is shifted to the losing defendant. *Id.*

296. *See id.* at 49 (noting that in common benefit and fee-shifting cases the defendant may appear at the fee hearing to contest the fee award).

297. In explaining its rationale for appointing a guardian ad litem to represent the class in determining attorney fees, one court explained:

The initial difficulty in setting counsel fees when a guardian is not appointed revolves around the defendants’ total indifference to the proceedings. Having agreed to contribute a fixed sum of money in settlement of the suit, the proportion of the fund allocated to counsel fees is of no moment to the defendants The dilemma thereby created for the Court finds the judge playing “devil’s advocate” on behalf of the disinterested defendants, while at the same time attempting to exercise his impartiality in making a just determination of reasonable fees. To require the judge to occupy an adversary position during the fee proceedings is highly inconsistent with his acknowledged duty to act as an impartial arbitrator. The appointment of a guardian for the class obviates this considerable problem of judicial schizophrenia.

Haas v. Pittsburgh Nat’l Bank, 77 F.R.D. 382, 383 (W.D. Pa. 1977); *see also Rhode, supra* note 61, at 1219 (stating that judges who oversee the fee aspects of settlement, where neither defense counsel nor class members object, find themselves in an unpopular position).

298. *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting), *aff’d en banc by an equally divided Court*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966).

299. *Rhode, supra* note 61, at 1220.

interests diverge from those of the class, but too often such supervision of settlements and fee applications is "haphazard, unreliable, and lacking in administrable standards."³⁰⁰

Courts under pressure to keep litigation moving are unlikely to be alert to ethical violations such as conflicts of interest, which may lead to inappropriate settlements.³⁰¹ The *Federal Rules* themselves encourage judges to promote settlement through procedural mechanisms such as the pre-trial conference.³⁰² The Advisory Committee notes state: "Since [settlement] obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible."³⁰³ Similarly, the *Federal Rules of Evidence* limit the adverse use of information gained from settlement negotiations on the "consistently impressive ground . . . of the public policy favoring the compromise and settlement of disputes."³⁰⁴ One court frankly proclaimed the common attitude towards settlement: "In deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial."³⁰⁵

Thus predisposed, courts are particularly willing to see class actions settled.³⁰⁶ Judges easily can approve fee awards presented as part of a settlement package, even if they suspect some degree of untoward cooperation between the two sides on the fee issue.³⁰⁷ Judges might be tempted to ignore any such suspicion to

300. Macey & Miller, *supra* note 33, at 4. See also Lazos, *supra* note 20, at 310 ("[I]n practice, the current judicial scrutiny of class action settlements neither prevents abuse nor effectively protects the interests of the absentee class.")

301. Some members of the Third Circuit Task Force were concerned that judges would favor early settlement irrespective of the merits of an action, in order to clear their dockets. Court Awarded Attorney Fees, 108 F.R.D. 237, 262 n.79 (1985) (Report of The Third Circuit Task Force); see also Macey & Miller, *supra* note 33, at 21 & nn.57, 45 (noting the incentives that judges have to approve settlements in order to clear their dockets); Rhode, *supra* note 61, at 1219 (arguing that trial courts faced with heavy caseloads and the pressure to clear dockets may be reluctant to "smok[e] out conflict" in a settlement agreement).

302. See FED. R. CIV. P. 16(a)(5) (giving judges the discretion to hold conferences to facilitate settlement); see also Macey & Miller, *supra* note 33, at 46 & n.134 (noting that settlement is one of the objectives of the pre-trial conference).

303. FED. R. CIV. P. 16(c) advisory committee's note.

304. FED. R. EVID. 408 advisory committee's note.

305. *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); see also Lazos, *supra* note 20, at 308 n.2 (citing cases which refer to the benefits of settling class actions).

306. See *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) (noting that the scarcity of judicial resources creates an "overriding public interest" in settling class actions).

307. See Macey & Miller, *supra* note 33, at 49 (describing judges' authority to grant

avoid the chore of scrutinizing the details of an attorney's fee request, which has been described as a "cumbersome, enervating, and often surrealistic process."³⁰⁸ Such scrutiny "essentially places the court in the position of a public utility commission that regulates the 'fair' return the attorney receives."³⁰⁹ Understandably, courts are less than enthusiastic about assuming such burdens in light of their already heavy responsibilities.³¹⁰ The court might also have in mind that approving a settlement advanced by both parties to a suit carries very little chance of appeal, while rejecting a settlement can lead to appeal and reversal.³¹¹ As Rule 23 does not confer authority clearly on judges to modify settlements, but refers only to approval authority,³¹² judges have an additional incentive to approve proposed settlements.

Certain obstacles confront judges who do seek to scrutinize fee requests made in conjunction with settlement. Judges may be forced to make a decision on settlement with an inadequate documentary record.³¹³ An objector to the settlement may provide more information, but without an objector, the court has little with which to evaluate the fairness of the settlement.³¹⁴ In complex litigation with many participating attorneys, the court may be unable to evaluate the efficacy of coordination time and effort required to run the PMC.³¹⁵ In the *Agent Orange* case, Judge Weinstein refused to compensate the PMC for time spent in coordination and financing activities³¹⁶ despite the necessity of that

fee requests).

308. Court Awarded Attorney Fees, 108 F.R.D. 237, 258 (1985) (Report of the Third Circuit Task Force) (referring to both preparing and evaluating fee requests); see also Macey & Miller, *supra* note 33, at 48 (describing judges' reluctance to set attorneys' fees).

309. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 691.

310. *Id.* at 691 n.62 ("When the fee petition hearing consumes nearly as much judicial time as the litigation of the substantive merits, it appears that the tail has begun to wag the dog.").

311. Macey & Miller, *supra* note 33, at 46.

312. See FED. R. CIV. P. 23(e) advisory committee's note; see also Lazos, *supra* note 20, at 322 n.82 (noting that it is unclear whether courts have the power to reformulate defective settlements).

313. See Macey & Miller, *supra* note 33, at 46 & nn.135-36 (describing difficulty judges face in obtaining information on settlement agreements); see also Lazos, *supra* note 20, at 329 n.110 (explaining that, in ruling on settlement agreements, courts may be hindered by lack of information).

314. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 714 n.121.

315. See Macey & Miller, *supra* note 33, at 51 (explaining the difficulties courts face in calculating fees in class actions when many attorneys are involved).

316. SCHUCK, *supra* note 1, at 198 (detailing the attorneys' fees and costs which were

type of activity in directing the litigation. Without substantial resources to effectively review each settlement proposal and fee request, many courts find their wrists shackled when they prepare to wind up a complex case.

6. Public Perceptions

The Second Circuit opinion invalidating the PMC fee agreement stressed the significance of public perceptions of the role of the attorneys in the case. “[P]otential conflicts of interest in class contexts are not examined solely for the actual abuse they may cause, but also for potential public misunderstandings they may cultivate in regard to the interests of class counsel.”³¹⁷ The court noted the feeling shared by many class members and the general public that the settlement, which produced an individual death benefit of \$3400 and a disability benefit of \$12,800,³¹⁸ represented inadequate compensation for the perceived harms of Agent Orange.³¹⁹ Many veterans felt that the PMC had betrayed them and sold out their cause, which had been motivated by a desire to bring their story before the public.³²⁰ In that context, the court found the potentially negative public reaction to the enormous dichotomy between the fees awarded by the district judge and the fees actually collected by the individual attorneys to be additional justification for overriding the PMC agreement in favor of the lodestar approach.³²¹

In this opinion, the Second Circuit reflected frequent judicial skepticism about attorneys’ fees in class actions.³²² One court characterized class action complaints as a “port from which to embark on a large scale fishing expedition.”³²³ An earlier Second Circuit panel concurred, decrying a class action which “has result-

awarded in the *Agent Orange* case); see *id.* at 121 (quoting Stephen Schlegel’s description of the management of the *Agent Orange* case as an “administrative nightmare”).

317. *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 216, 225 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

318. SCHUCK, *supra* note 1, at 220.

319. *In re “Agent Orange,”* 818 F.2d at 225. See also SCHUCK, *supra* note 1, at 174 (noting that almost every witness at the fairness hearings thought the settlement was very inadequate).

320. SCHUCK, *supra* note 1, at 175.

321. *In re “Agent Orange,”* 818 F.2d at 225.

322. *Id.* See also Lazos, *supra* note 20, at 310 n.10 (discussing in detail various cases of abuse in economically-motivated class actions).

323. *Peak v. Topeka Hous. Auth.*, 78 F.R.D. 78, 84 (D. Kan. 1978) (quoting defendant’s brief).

ed in minuscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees."³²⁴ Some commentators note in particular the resentment of profiteering by attorneys who file private suits on the heels of government actions, e.g., securities, bankruptcy, or antitrust actions.³²⁵ Professor Milton Handler went so far as to call antitrust class actions "legalized blackmail."³²⁶

On the other hand, public perception that class actions lead to negative results and serve only to line attorneys' pockets may be a necessary evil: "[T]here is really little choice but to permit lawyers, self-seeking though they may be, to dignify themselves with the label of private attorney general, finance the litigation as necessity demands, and do battle with those whose wrongs have taken a small amount from each of a multitude."³²⁷ The key issue is that of "financ[ing] the litigation as necessity demands."³²⁸ The Second Circuit crafted an opinion discarding that utilitarian perspective in favor of an approach consistent with the profession's history and ethical codes, rejecting even "the appearance of impropriety."³²⁹ The tension between beneficial private enforcement of the law by the plaintiffs' bar and the conflicts of interest which accompany creative attorney financing could be resolved at least in part by requiring those attorneys to pay for the additional supervision necessitated by the entrepreneurial aspects of their legal ventures.

IV. RECOMMENDATIONS

The conflict of interest problem in the *Agent Orange* case clearly troubled everyone who considered it.³³⁰ The fundamental

324. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974) (quoting *Free World Foreign Cars, Inc. v. Alfa Romeo* 55 F.R.D. 26, 30 (S.D.N.Y. 1972)).

325. See *Macey & Miller*, *supra* note 33, at 115 n.341 ("[T]he available empirical evidence suggests that [derivative] actions regularly follow in the wake of prior proceedings by the SEC or other governmental agency.").

326. Handler, *supra* note 238, at 9 ("Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail.").

327. Findlater, *supra* note 34, at 1677. In a similar vein, Professor Dam suggests that the deterrent function of the class action assumes primary importance when compensation is unrealistic, such as when the individual claims are so small that class members will not bother to claim them. Dam, *supra* note 116, at 60.

328. Findlater, *supra* note 34, at 1677.

329. MODEL CODE, *supra* note 7, at EC 9-6.

330. See, e.g., SCHUCK, *supra* note 1, at 303-04 (recounting an exchange between Judge Winter of the Second Circuit and Leon Friedman, David Dean's attorney in Dean's appeal

problem was money; complex cases, especially class actions, require a lot of it³³¹ and the *Agent Orange* case was a prime example. One step toward reform would clarify the role of the named representative in shouldering the expenses of the suit. One commentator has suggested that a corporation or other formal association comprised of class members could function as the named representative, providing a "sturdier financial base"³³² for the litigation. Such a proposal might work in a shareholder derivative context, where the names and addresses of the putative owners are accessible, but seems unlikely to succeed in a typical amorphous, consumer-based class action with little at stake for unidentified individual plaintiffs. At bottom, most commentators seem to agree on the wisdom of ending the charade that the class representatives will bear the costs of litigation.³³³ Once the onus of that liability is removed, their attorney may have a wider choice of parties qualified and willing to become the representative plaintiffs.

The class counsel should be required to make a good faith effort to select representative plaintiffs who not only meet the criteria of Rule 23, but exhibit the best potential for understanding and contributing to the development of the case.³³⁴ The court should exercise its discretion, perhaps in private interviews with the

of the PMC fee agreement).

331. See Geoffrey C. Hazard, Jr., *Reflections on Judge Weinstein's Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 569, 572 (1994) ("Money is thus both the compelling object of this kind of litigation [mass torts] and the means by which it has taken its distinctive form."); Weinstein, *supra* note 157, at 524 & n.238 (noting that expenses in mass cases are "astronomical" and discussing tobacco litigation as an example of expensive class action litigation).

332. Paul Bergman, *Class Action Lawyers: Fools for Clients?*, 4 AM. J. TRIAL ADVOC. 243, 274 (1980).

333. See *Rand v. Monsanto Co.*, 926 F.2d 596, 600 (7th Cir. 1991) (stating that the *Model Code* is "long in the tooth and being replaced [by the *Model Rules*]"); Weinstein, *supra* note 157, at 524 (arguing that compensatory function of mass tort cases is so important to society that clients should not be required to finance them).

334. See Underwood, *supra* note 66, at 788 (noting that at least one court has required the representative plaintiff to have a "keen interest in the progress and outcome of the litigation"); *In re Goldchip Funding Co.*, 61 F.R.D. 592, 595 (M.D. Pa. 1974) (noting, however, that "[e]ven unknowledgeable and inexperienced Plaintiffs might meet the requirements of Rule 23 by demonstrating a keen interest in the . . . litigation"). *But cf.* Piel v. National Semiconductor Corp., 86 F.R.D. 357, 366 (E.D. Pa. 1980), *cert. denied*, 474 U.S. 903 (1985) (rejecting the *Goldchip* view and requiring only that a class representative proceed with the "requisite vigor and in the interests of the class"); *Chevalier v. Baird Sav. Assoc.*, 72 F.R.D. 140, 146 (E.D. Pa. 1976) (requiring plaintiff to have sophisticated knowledge of a complex case would reduce the class action to "an impotent tool").

representative plaintiffs, to determine whether a guardian should be appointed as an additional safeguard. Where novel or complex issues are involved, the court should assume a guardian will be needed and appoint one at the expense of the class counsel.³³⁵

Once the burden of financing is removed from the representative plaintiffs and placed squarely upon the plaintiffs' attorney, the court can insist upon clear funding arrangements as part of its decisions on appointing lead counsel. Judge Weinstein's "sunshine" rule³³⁶ would prevent back room dealings which effectively evade the court's scrutiny. Full disclosure of financing and compensation issues early in the proceedings will allow the court to evaluate whether the plaintiffs' case may be compromised by inadequate financing, something the plaintiffs' attorney has every incentive to conceal.³³⁷

In searching for funds, plaintiffs' attorneys typically have been limited to bank financing³³⁸ because of ethical limitations on the division of fees³³⁹ and the formation of partnerships with lay persons.³⁴⁰ The tremendous amount of money required to finance

335. See *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1437 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994) (stating that "we ordinarily would anticipate the appointment of a guardian to represent the interests of absent claimants, particularly those with questionable injuries" but holding nonetheless that the interests of claimants whose injuries were not manifest at the time of the earlier settlement were represented adequately by class counsel).

336. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452, 1454 (E.D.N.Y. 1985), rev'd, 818 F.2d 216 (2d Cir.), cert. denied, 484 U.S. 926 (1987). Judge Weinstein emphasized the importance of making information available through the court in cases where the attorneys lack any personal relationship with class members. *Id.* at 1462.

337. See *id.* at 1463 (describing advantages of early disclosure). The Third Circuit Task Force recommended a negotiated percentage fee arrangement for traditional common fund cases and those statutory fee cases likely to create a *res* from which attorneys' fees could be paid. The Task Force retained a modified *Lindy* method for "the typical statutory fee case involving the declaration or enforcement of rights or relatively modest sums of money." Court Awarded Attorney Fees, 108 F.R.D. 237, 255 (1985) (Report of the Third Circuit Task Force). The Task Force specified that the court should act on its own initiative, if necessary, to establish a negotiated percentage agreement "at the earliest practicable moment," *id.* at 255, which it defined as "immediately after the pleadings are closed and before discovery is fully underway." *Id.* at 255 n.62.

338. See *Coffee, Understanding the Plaintiff's Attorney*, *supra* note 41, at 706-07 n.104 (explaining the limitations placed on plaintiffs' attorneys in securing financing).

339. See MODEL CODE, *supra* note 7, at DR 3-102(A) ("A lawyer or law firm shall not share legal fees with a non-lawyer . . ."); MODEL RULES, *supra* note 30, at Rule 5.4(a) ("A lawyer or law firm shall not share legal fees with a non-lawyer . . .").

340. See MODEL CODE, *supra* note 7, at DR 3-103(A) ("A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law."); MODEL RULES, *supra* note 30, at 5.4(b) ("A lawyer shall not form a

large-scale litigation is beyond the borrowing capacity of most individual attorneys,³⁴¹ such as those who comprised the initial consortium of *Agent Orange* plaintiffs' counsel. In an effort to limit costs, the size of the class could be restricted to minimize the amount of money the counsel advances.³⁴² That approach has drawbacks in an action for damages, where the cases of many injured persons would benefit from class treatment. The size of the class has an obvious effect on the size of the award and thus the counsel fees which may be approved, so limiting the class size may defeat some of the advantages of the class action format.³⁴³ Amending the notice requirements in class actions to permit less expensive forms of notification to class members would cut many of the initial expenses of the suit. This action might be appropriate in consumer litigation where the individual class members have nothing of significant value at stake and the main purpose of the action is the curb the defendant's behavior.

One commentator has advocated, in effect, institutionalizing the PMC fee agreement by creating a risk multiplier for expenses.³⁴⁴ Giving attorneys a risk premium for expenses advanced, as well as for fees, would increase the attorney's recovery and theoretically minimize the effect of champerty in inducing settlement.³⁴⁵ This approach assumes that the risk factor and opportunity cost of advancing expenses is not built into the attorney's decision to undertake the case. It also places an additional burden upon the fund

partnership with a non lawyer if any of the activities of the partnership consist of the practice of law.").

341. In dealing with traditional law firms, banks rely on retainer agreements and other indicia of credit-worthiness. Plaintiffs' firms operating on contingency fees have difficulty in securing credit based on future earnings, so for the most part their borrowing is restricted to the collateral value of their personal assets. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 41, at 707 n.104.

342. See, e.g., *Rode v. Emery Air Freight*, 80 F.R.D. 314, 317 (W.D. Pa. 1978) (reducing class size from nationwide to judicial district to minimize conflicts caused by plaintiff's attorney's advancement of funds); *P.D.Q. Inc. of Miami v. Nissan Motor Corp.*, 61 F.R.D. 372, 381 (S.D. Fla. 1973), *aff'd sub nom. In re Nissan Antitrust Litig.*, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (restricting nationwide class action to purchasers of autos within a two-county area when plaintiffs were unwilling to pay costs of notice).

343. Limiting the size of the class could also have implications for the numerosity prerequisite in Rule 23(a)(1). See *supra* note 3.

344. See Findlater, *supra* note 34, at 1674-75 (arguing that allowing a risk premium on both the hourly fee award and expenses advanced would minimize the effect of champerty in inducing settlements).

345. *Id.*

recovered for the class. These concerns are reflected in recent Supreme Court decisions restricting contingency enhancements in fee-shifting cases.³⁴⁶ Presumably the Court would have the same negative reaction to risk multipliers for expenses.

Private contractual arrangements among attorneys to divide fees on an agreed-upon basis should not be invalidated automatically by the courts. There is precedent in the intra-firm example for allowing attorneys to decide the value of their various contributions to the common scheme.³⁴⁷ Wealthy attorneys may be the most accessible source of funds for plaintiffs' counsel, and in some cases their expertise may be as valuable as their cash. There remains, however, the insistence of the profession's codes of ethics³⁴⁸ and the courts³⁴⁹ that the attorneys' remuneration have some relationship to the legal services performed for the client. In that sense attorneys involved in the case cannot simply assign themselves the role of banker and vote for the highest possible return on their investments. In class actions, the courts evaluate the benefit to the class of every charge assessed against the common fund, with the result that the attorneys' private assessment of their own contributions must yield to the court's judgment on those contributions.

Instituting a review of financing arrangements as part of the class certification process will clarify the expectations of all concerned: the attorneys, the class members, and the court. In most complex cases, however, the court could benefit from additional support in the oversight process. The court could appoint a guardian ad litem to a limited role of representing the class in settlement discussions.³⁵⁰ Alternatively, the court might appoint an attorney

346. See cases cited *supra* note 288 and accompanying text.

347. See Weinstein, *supra* note 157, at 525-26 ("Law firms make internal arrangements giving greater financial rewards to rainmakers and partner-investors. I saw no reason to prevent a similar arrangement for the committee charged with conducting the litigation."); see also *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452, 1456 (E.D.N.Y. 1985), *rev'd*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987) (citing cases in which courts have allowed counsel to allocate fees among themselves, but reiterating court's authority to review such agreements).

348. See MODEL CODE, *supra* note 7, at DR 2-106(B)(1) (listing factors to be considered in determining the reasonableness of a fee); MODEL RULES, *supra* note 30, at Rule 1.5(a)(1) (same).

349. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987) (requiring distribution of attorneys' fees to bear some relation to services rendered).

350. See Macey & Miller, *supra* note 33, at 4, 47 & n.139 (discussing the benefits of appointing a guardian ad litem to represent the class). See generally Lazos, *supra* note 20 (arguing that a guardian ad litem is needed to protect the interests of the class in pre-trial

to oppose the settlement in order to assist class members to organize opposition.³⁵¹ The use of either type of figure might reduce the "rubber stamp" quality of judicial review of settlement proposals.³⁵² Some courts already use guardians ad litem or special masters to review fee requests.³⁵³ The Third Circuit Task Force on attorneys' fees recommended the appointment of a "non-judicial representative" of the class to negotiate a fee agreement with counsel early in the case.³⁵⁴ The guardian should be selected on the basis of his or her skills and experience rather than through a rotation of local attorneys or a patronage system.³⁵⁵ Appointing a guardian for the class early in the proceedings would provide the most effective supervision of the attorneys before the case snowballed toward resolution through settlement or trial.

However, the guardian's functions should not be limited to negotiating a fee agreement. Critical decisions are made throughout the lawsuit, beginning with the class certification process, which could be more effectively evaluated by the court with the aid of a guardian. Contrary to some suggestions, the guardian would not be a neutral observer³⁵⁶ but rather a partisan observer with distinct fiduciary obligations to the class. The guardian could work with the representative plaintiffs and class attorney to ensure that the interests of the class as a whole, and the absent class members in

settlement negotiations).

351. See Rosenberg, *supra* note 111, at 585 & n.93 (stating that, without effectively organized opposition, courts will lack the impetus to conduct thorough reviews of proposed class settlements).

352. Macey & Miller, *supra* note 33, at 48. See also Rhode, *supra* note 61, at 1220 (noting the "myopic" appellate level oversight of class conflicts).

353. See Macey & Miller, *supra* note 33, at 57 & nn.172-73 (discussing courts' justifications for appointing guardians and special masters); see, e.g., Kronfeld v. Transworld Airlines, Inc., 129 F.R.D. 598, 599 (S.D.N.Y. 1990) (adopting report of Special Master on attorneys' fee requests); Haas v. Pittsburgh Nat'l Bank, 77 F.R.D. 382 (W.D. Pa. 1977) (appointing guardian ad litem for fee determination); Miller v. Mackey Int'l, Inc., 70 F.R.D. 533, 535 (D. Fla. 1976) (upholding appointment of guardian ad litem for fee determination).

354. In common fund and statutory fee cases likely to produce a settlement fund, the Task Force recommended that courts appoint "a non-judicial representative—who typically will be an attorney—for the then putative fund beneficiaries, who will negotiate [a percentage fee agreement] in the usual marketplace manner and submit the proposal for the court's approval." Court Awarded Attorney Fees, 108 F.R.D. 237, 256 (1985) (Report of the Third Circuit Task Force).

355. *Id.* at 257 ("[G]reat care must be taken to avoid patronage and discrimination . . . in the selection of negotiating representatives.").

356. See Ricciuti, *supra* note 19, at 846 (arguing that guardian should function as a neutral observer).

particular, are fully considered. A cooperative approach to the litigation should not obscure the guardian's role as an adjunct of the court. The guardian would not supervise the plaintiffs' attorneys *per se*. Rather, he or she would act as the eyes and ears of the judge and, as appropriate, a voice for the class, throughout the course of the litigation.

To eliminate incentives for the guardian to justify his or her fee by obstructing settlement unnecessarily, the court should award the guardian's fee without direct reference to the amount that the settlement may be reduced or increased as a result of the guardian's recommendations. One commentator suggested that a fixed salary would reduce the guardian's incentive to prolong settlement negotiations.³⁵⁷ On the other hand, an hourly fee could enhance the guardian's willingness to object to an inadequate settlement.³⁵⁸ As a general rule, selecting a means of payment would seem to be something best left to the sound discretion of the court in the circumstances of the individual case.³⁵⁹

Regardless of the means, the court should be wary of the fact that ordinarily, the guardian's fee will increase the burden on the common fund, most clearly if the guardian does not succeed in reducing the class attorney's fee award.³⁶⁰ Various alternative funding mechanisms are available. The actual cost of a guardian could be financed by assessing a small charge against all settlement funds secured in class actions.³⁶¹ Monetary sanctions on attorneys for filing frivolous lawsuits would be another possible source of funds.³⁶² The most likely candidates to pay, however, would be the individuals with the most at stake: the plaintiffs' attorneys.

357. Lazos, *supra* note 20, at 331.

358. See Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1564 (1976) (arguing that a guardian should receive hourly wages to protect against inadequate settlements).

359. In the case of its judicially-appointed fee negotiator, the Third Circuit Task Force left the exact means of compensation up to the court. *Court Awarded Attorney Fees*, 108 F.R.D. 237, 257 (1985) (Report of The Third Circuit Task Force).

360. Cooper & Kirkham, *supra* note 220, at 60. See also *Haas v. Pittsburgh Nat'l Bank*, 77 F.R.D. 382 (W.D. Pa. 1977) (allowing guardian's fee to be assessed against fund). Judge Weinstein decided against the appointment of a guardian ad litem for proposed subgroups in the *Agent Orange* fairness hearings, on the grounds that any such appointment would reduce the recovery available for the veterans. *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1436 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994).

361. Lazos, *supra* note 20, at 331.

362. *Id.*

Forcing the plaintiff's attorneys to pay the guardian's fee can be viewed as imposing on them an additional cost of doing business as entrepreneurs, if not fiduciaries.³⁶³ Leaving the amount of the fee in the court's hands would eliminate the specter of additional conflicts of interest between the guardian and attorney. If the activities of the guardian were supervisory rather than participatory in nature, his or her fee would not be onerous in light of the attorney's overall recovery.³⁶⁴

In addition to financing a check on their entrepreneurial activities, the court should consider requiring the plaintiffs' counsel to assemble and consult with a sample group of clients³⁶⁵ regarding important litigation objectives, such as settlement and appeal possibilities.³⁶⁶ The costs of communication with a relatively small sample would be a worthwhile tradeoff for the opportunity to achieve some actual client input into the litigation process.³⁶⁷ The

363. The Third Circuit Task Force did not reach a consensus on the method of payment for its proposed negotiating representative "but it generally was agreed that the representative's fee and expenses should be paid by those seeking to represent the fund claimants." *Court Awarded Attorney Fees*, 108 F.R.D. at 257 n.65. One commentator would require the plaintiff or his attorney to post a security bond to ensure payments regardless of whether a settlement is reached. If a settlement has been reached, the party can be reimbursed from the common fund. Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1564 (1976). This requirement would prove particularly burdensome for plaintiffs' attorneys working on a contingency basis.

364. The Third Circuit Task Force recommended that the court fix limits on the compensation of the negotiator. *Court Awarded Attorney Fees*, 108 F.R.D. at 257.

365. Cf. Ricciuti, *supra* note 19, at 853, 856 (suggesting that the attorney be required to consult with the consultation unit as the "sole client" with the court determining the weight to be assigned to class preferences). Ricciuti's approach requires the attorney to make a preliminary survey of the class to assemble a representative consultation unit to serve as the client in the case. *Id.* at 852-53. One advantage of the proposal, the requirement that the attorney identify any structural divisions of interest among class members, *id.* at 852, arguably is covered by the option of subclasses or separate actions where differing interests are irreconcilable. Ricciuti argues that his mechanism would be "simpler and more efficient" than subclasses with separate representation. *Id.* at 853 n.196. However, the question of when a subgroup is sufficiently distinct to become a subclass remains open. Nor is it clear how subgroup representatives can escape the problems encountered by representative plaintiffs, *see supra* part III.D.1, even if more stringent consultation requirements are imposed on the class attorney. *See Ricciuti, supra* note 19, at 852 (describing proposed requirements on the class attorney).

366. *See Ricciuti, supra* note 19, at 862 (promoting the consultation unit concept, but allowing that in some instances a guardian might be a more realistic choice for protecting the interests of the class).

367. In a hypothetical application of his concept to the *Agent Orange* case, Ricciuti suggests five subgroup representatives corresponding to the five major types of alleged injuries: dermatological, systemic, neurological, oncological, and genetic, in addition to the named representatives. *Id.* at 860.

hazards of revealing confidential information could be evaluated on a case-by-case basis by the plaintiffs' counsel, the guardian, and the court. The sample group would not undertake the responsibilities of the named representatives, and their suggestions would not be binding upon the attorneys. However, their sentiments would be taken into account by the guardian in evaluating the development of the lawsuit for the court.

V. CONCLUSION

Investment by attorneys in complex litigation such as class actions creates serious ethical and practical conflicts of interest in management of a complex case. Many authorities believe such conflicts are necessary evils in bringing meritorious cases to court and trust that judicial supervision is the key to avoiding harm. The *Agent Orange* case provides evidence that their confidence may be misplaced.

In the *Agent Orange* litigation, a Plaintiffs' Management Committee dominated by investor-attorneys voted to accept a settlement which many members of the class and the public felt was grossly inadequate and yet which provided those attorneys with a windfall return on money contributed for litigation expenses. The astute and experienced district judge, knowledgeable about the plaintiffs' financial exigencies and heavily involved in the settlement, was unaware of this agreement during the pendency of the case and for four months after the settlement was concluded. Nonetheless, the district judge approved the attorneys' fee arrangements.

The Second Circuit's opinion reversing the district court demonstrated strong and appropriate aversion to private investment contracts by which attorneys can ensure a substantial profit merely by voting for settlement. Such contracts present a clear conflict of interest with the attorneys' clients in the class. Equally important, this type of agreement undermines the efforts of the trial court to apportion fees fairly and impairs the integrity of the legal profession in the eyes of the client and the public.

The practical case for allowing limited experimentation with such contracts in future cases rests on the analogy to the relatively unfettered division of fees within a law firm. Permitting attorneys to reallocate fees among themselves, provided such reallocation does not further drain the class recovery, would be acceptable if judicial supervision were enhanced to protect the members of the class from potential conflicts of interest. The court should require

disclosure of all financing and compensation agreements as part of the class certification process. Encouraging consultation of a sample group of class members by the attorneys regarding significant decisions throughout the case is one way to enhance input and monitoring by the class itself. A professional backstop in the form of an independent guardian ad litem appointed by the court and funded by the plaintiffs' attorneys would be a further step toward ensuring responsible representation by attorney-investors while protecting the funds generated for the class. These measures will allow the courts to experiment with financing alternatives while fulfilling their own obligations to protect the interests of the class.

PAULA BATT WILSON

