## THE SIGNIFICANCE OF SILENCE: COLLECTIVE ACTION PROBLEMS AND CLASS ACTION SETTLEMENTS

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I. INTRODUCTION

When the Federal Rules of Civil Procedure first provided for a class action vehicle, hopes were high that individuals would be able to act collectively to hold corporations liable for small injuries imposed upon large numbers of victims. But after almost forty years of operation, hope has transformed into suspicion and cynicism. Class action litigation often seems to be a mechanism for greedy class counsel and shrewd defendants to negotiate settlements that undermine the interests of the class. Anticipating the risk of such shady deals, the Federal Rules of Civil Procedure required that any settlement of a class action be approved by the district court judge in charge of the case. However, any optimism about this safety valve has waned, as judges routinely approve class action settlements that often make the class worse off than no settlement at all. No rational class members would want a settlement that eliminated their right to sue while giving them little or nothing of value in exchange. But judges approve such settlements with disheartening regularity. This Article argues that one of the primary reasons judges approve fundamentally flawed settlements in class action litigation is because judges consistently misread the response of the class to the proposed settlement. In particular, judges misinterpret the significance of silence.

Part II details the nature of the collective action problem in litigation and how the class action vehicle solves the problem. Collective action problems exist whenever it is in individuals’ self-interest not to contribute to a group activity even though all of the individuals would be better off
if everyone were to contribute. In a resulting irony, each individual is made worse off by pursuing her own self-interest. Litigation can represent a collective action problem when numerous individuals each suffer a small harm. Given the costs of litigation, each potential plaintiff may conclude that the game is not worth the candle, and rationally decide not to sue. When each wronged individual pursues her own self-interest, nobody brings suit and the wrongdoer is not held accountable. This may encourage more wrongdoing. The class action process facilitates the aggregation of numerous small claims in order to solve the collective action problem. By acting together, the class members can reduce their average costs and receive individual compensation that exceeds their litigation expenses.

Part III explains the agency problem inherent in class action litigation. Class counsel may collude with the defendants to contrive a settlement that rewards the class counsel for selling out the class by negotiating an inadequate settlement. For the same reason that class members may not find it worth their time to bring individual suits in the first place, they may also rationally decide not to monitor the class counsel’s activities or the terms of any proposed settlement. Congress attempted to solve this problem by requiring that the trial judge approve any settlement of a federal class action lawsuit. Part III notes the factors that federal judges apply in order to determine whether a proposed class action settlement is fair and adequate. One of the most important factors, according to many judges, is the reaction of the class to the proposed settlement.

After presenting the basic process by which courts solicit class member responses, Part IV shows how courts often focus on the absence of objectors when approving proposed settlements. In many cases, the courts interpret this silence as an endorsement of the proposed settlement. Part IV explains how silence is not acceptance. Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low. Indeed, objecting is unlikely to confer any benefit on class members because judges routinely approve proposed settlements over the objections of class members. In many cases, judges focus on the percentage of objectors instead of on the absolute number willing to bear the costs of objecting. When a small percentage of the class objects and the majority is silent, courts interpret this as majority support for the settlement, which outweighs the views of a minority of objectors. This attitude reduces an individual class member’s incentive to object because she knows that her objection (which is costly to her) will be ignored unless a majority of the class objects as well, which is unlikely given that objection is generally not cost-beneficial. This creates a negative feedback loop: Futility makes
objection even less cost-beneficial. This reduces the number of objections, and then courts (incorrectly) treat the low number of objections as evidence that class members endorse the proposed settlement.

Finally, Part V considers several potential ways to address the silent objector problem. First, because coordination problems exacerbate most collective action problems (including the monitoring of class counsel and review of proposed settlements), judges should devise mechanisms to increase communication among class members and to create genuine two-way communication between the court and the class. In particular, courts can use the Internet more effectively during both the notice and settlement stages of class action litigation. Second, courts should make a concerted effort to read the reaction of class members more accurately. Part V advocates the creation of a one-way presumption as to class silence, whereby objections raise a red flag that should require greater investigation by the reviewing judge, but class member silence is not taken as evidence of the class’s support of the proposed settlement.

II. THE COLLECTIVE ACTION PROBLEM AND THE CLASS ACTION SOLUTION

Collective action problems exist whenever individual members of a group, by pursuing their own short-term self-interest, act in a manner that makes every member worse off in the long run. There are many circumstances where the group benefits from a particular course of action exceed the aggregate costs to the individual members of the group, making action socially desirable. But because benefits are dispersed among the group, an individual may be unwilling to incur the cost of action because her individual costs would exceed her individual benefits. She would be willing to split the costs with other members of the group so that her share of the costs would be less than her anticipated benefit, but she may have no mechanism to convince or coerce other members to share the costs. When a community of individuals is unable to coordinate and enforce agreements to undertake group action, this represents a collective action problem.1

Corporate wrongs often create collective action problems. When an entity engages in conduct that injures people in a way that creates potential liability, we expect the wrongdoer to be named a defendant in subsequent litigation. However, when the harm is spread across a sufficiently large
number of victims, no individual victim may find it worthwhile to bother filing suit even in the presence of easily demonstrable liability. The individual losses may be so low that lawyers would be unwilling to represent potential plaintiffs who approached them. Or, the harm to each victim may be so small that he does not even know he has been wronged. While the harm to each individual victim may be small, the wrongdoer may secure significant ill-gotten gains. Indeed, knowing that individuals are unlikely to mobilize, the rational, albeit highly unethical, firm may knowingly engage in illegal conduct that causes dispersed injury, confident that it will not be held accountable.

The collective action problem distorts corporate incentives to do right by their customers, shareholders, and society. For an entity that is confident that victims of illegal overcharges, shoddy products, or other violations of tort or regulatory law will not seek compensatory damages, the law loses its teeth. Firms are not deterred from wrongdoing and the victims of wrongdoing are not compensated for their injuries. All individuals affected by such misdeeds would be better off if each individual victim brought suit to hold firms accountable, but given the costs of litigation, individual lawsuits are not cost-beneficial.

Rule 23 of the Federal Rules of Civil Procedure allows multiple individual victims of wrongdoing to aggregate their claims in a manner that makes litigation cost-beneficial. Whereas each individual claim may be too small to justify the litigation costs, the class action vehicle

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2. See, e.g., Roger C. Cramton, Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction, 80 CORNELL L. REV. 811, 824 (1995) (“When a million consumers have a ten dollar claim against a common defendant for an illegal business practice, no single claimant has a legal right that is worth individual pursuit.”).


4. See id.

5. See id. at 68.

6. Id. at 421.

7. See id.

8. Id.

allows consumers to aggregate small claims and bring them on behalf of the class when the amount at stake for an individual consumer would not warrant filing suit and when they might not be able to do so on an individual basis. That is, it permits consumers to pursue their claims in the aggregate—consumers who, standing alone, would lack both the incentive and the ability to act with such curative effect.  

Empirical research shows that many of the class actions brought pursuant to Rule 23 produce “recoveries by individual class members . . . in amounts that could not be expected to support individual actions.”  

Class action litigation converts uneconomical individual suits into realistic collective actions. Also, because it reduces the litigation costs of each victim—particularly the attorneys’ fees—the aggregation of claims within the class action vehicle allows victims “to purchase higher quality [legal] services, to litigate more intensively, to offer global peace when settling, and to make more credible threats of going to trial.” Finally, the class action helps solve the coordination problem by having the litigation managed by a relatively small group of named representative plaintiffs and class counsel.  

Class actions can also deter misconduct by defendants. Absent the class action device, wrongdoers would be able to profit significantly by imposing small costs across a wide number of people, none of whom have enough at stake to hold the wrongdoer accountable. When misconduct is cost-beneficial, it thrives. By aggregating individual claims, the class action process makes litigation economical and facilitates the

10. Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 952 (E.D. Tex. 2000); see also Eisen, 417 U.S. at 186 (Douglas, J., dissenting in part) (“The class action is one of the few legal remedies the small claimant has against those who command the status quo.”); Cosgrove, 68 F.R.D. at 560 (“It is well established that Rule 23 was intended to open up the federal courts to the plaintiffs with small but valid claims.”).


12. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (“Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.”).


disgorgement of ill-gotten gains.\textsuperscript{17} Done properly, this can render misconduct not cost-beneficial and reduce its occurrence.\textsuperscript{18}

In sum, absent the class action device, collective action problems could preclude recovery for small damages shared by numerous victims of a defendant’s misdeeds. Class actions both aggregate individual claims and help coordinate litigation efforts that otherwise would be unmanageable. Class action litigation thus has the potential of securing compensation for individual victims while providing a meaningful deterrent to wrongdoers by forcing disgorgement of ill-gotten gains and in some instances, notably antitrust with its treble damages, imposing damage awards that actually punish wrongdoers.\textsuperscript{19} When it works as intended, a class action lawsuit can compensate, deter and punish, and insure that underlying statutory schemes from securities laws to consumer protection regimes function properly. Unfortunately, however, the class action vehicle often gets derailed, as Part III illustrates.

\textbf{III. The Class Action Problem and the Judicial Approval Solution}

The class action vehicle does not simply solve a collective action problem; it also creates new collective action dilemmas. In the same way that individual class members do not have sufficient incentives to initiate independent litigation, they similarly have insufficient incentives to object to inadequate proposed settlements of class action litigation.\textsuperscript{20} Indeed, class members cannot even realistically keep tabs on their own lawyers.\textsuperscript{21} The class members and their counsel are in a principal-agent relationship, with the attorneys acting as the agents of their putative employers—the hundreds, thousands, or millions of individuals that comprise the class.\textsuperscript{22} Unfortunately, as is common with many principal-agent relationships, there is a divergence of interests between the principals and their agents.\textsuperscript{23} Courts recognize that “the relationship between a plaintiff class and its attorney may suffer from a structural flaw, a divergence of economic interests of the class and its counsel.”\textsuperscript{24} This creates a serious risk that the

\begin{itemize}
\item \textsuperscript{17.} Id.
\item \textsuperscript{18.} See id.
\item \textsuperscript{19.} See Robert H. Lande, \textit{Are Antitrust “Treble” Damages Really Single Damages?}, 54 OHIO ST. L.J. 115, 115 (1993). \textit{But see id.} at 117-18 (arguing that courts may undermine the effect of treble damages by being reluctant to apply them).
\item \textsuperscript{21.} See id. at 359.
\item \textsuperscript{22.} See id.
\item \textsuperscript{23.} See id.
\item \textsuperscript{24.} \textit{In re} Auction Houses Antitrust Litig., 197 F.R.D. 71, 72 (S.D.N.Y. 2000).
\end{itemize}
class counsel may be an unreliable agent. While principal-agent problems may exist in traditional litigation, they exist on a much grander scale in class action litigation, where even the identity of the clients (to each other and to their counsel) is often unknown.

When working on a contingent fee basis, class counsel often have a strong preference for settling class action litigation instead of going to trial. Although a jury verdict in a class action lawsuit can be the equivalent of winning the lawyer lottery, trials are expensive for the class counsel and the lawyers risk receiving nothing, not even reimbursement for their costs. These costs can be extensive as class counsel must pay court costs, research and discovery costs (which may include paying for depositions of experts), as well as opportunity costs as the attorneys devote time to preparing this class litigation for trial instead of working for other clients who would pay an hourly rate. Perhaps more importantly, in the event that the class action is dismissed or the defendant prevails at trial, the class counsel working on a contingent fee basis earns nothing and is out the entire investment in the litigation, measured in both time and costs. Settlement is therefore a much more attractive alternative for class counsel who may be risk averse and want to recover their costs.

Not only do class counsel have a strong incentive to settle claims, but they also have incentives to settle them sooner rather than later. As class action litigation drags on, the costs mount. If the class counsel can terminate the litigation earlier in the process, before high litigation costs

25. Mars Steel Corp. v. Cont’l Ill. Nat’l Bank & Trust Co., 834 F.2d 677, 681 (7th Cir. 1987) (“The problem in the class-action setting, and the reason that judicial approval of the settlement of such an action is required, see Fed. R. Civ. P. 23(e), is that the negotiator on the plaintiffs’ side, that is, the lawyer for the class, is potentially an unreliable agent of his principals.” (citing Kenneth W. Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. LEGAL STUD. 47 (1975); Andrew Rosenfield, An Empirical Test of Class-Action Settlement, 5 J. LEGAL STUD. 113 (1976) (examination of class action settlements)); see also Plummer v. Chem. Bank, 668 F.2d 654, 658 (2d Cir. 1982).

26. See In re Auction Houses, 197 F.R.D. at 77-78 (“These problems of mismatched incentives are present not only in class actions . . . . However, they often are far more severe in the class action context, primarily because classes tend to be large, dispersed and disorganized and therefore suffer from a collective action dilemma not faced by individual litigants.”).


28. See id.


30. See Alexander, supra note 27, at 358.

31. See id.


33. See Alexander, supra note 27, at 358.
are incurred, the rate of return on their investment increases.\textsuperscript{34} For attorneys with high-volume practices, profits are maximized by settling cases quickly, even if that means settling before discovery is completed and the relevant information is fully analyzed.\textsuperscript{35} Class members are hurt when a settlement is negotiated before adequate discovery. Without sufficient discovery, the true value of the class claims cannot be determined and the class may abandon valuable legal claims for a negligible recovery.\textsuperscript{36} This seems to happen, in particular, in those cases where the class counsel and defendants agree to a coupon-based settlement, in which the class members receive coupons instead of cash.\textsuperscript{37} The optimal strategy for the class counsel is to have a larger volume of cases with fast settlements and consistent income. Thus, despite the fact that the class members may maximize their payoffs with a full-blown trial conducted after extensive discovery, the class counsel may be tempted to negotiate an early settlement.

Whereas the interests of the class and its attorneys may diverge, class counsel and defendants may have goals that can be aligned, even if they are seemingly at odds. Defendants, too, generally have a strong incentive to settle early and cheaply, with as little discovery as possible.\textsuperscript{38} The defendant wants to minimize outflow of expenditures and the class counsel wants to increase inflow of attorneys’ fees.\textsuperscript{39} Both can achieve their goals if they collude to sacrifice the interests of the class.\textsuperscript{40} Either the defendant may attempt to bribe the class counsel to sell out the class\textsuperscript{41} or an unethical class counsel may approach the defendant with an indecent proposal: In exchange for a payment of high attorneys’ fees, the class counsel will champion a low-ball settlement for the class.\textsuperscript{42} The defendant is indifferent

\begin{itemize}
\item[34.] See id. at 358-59.
\item[35.] Id. at 358 (“The higher profitability of a high-volume practice . . . also provides an incentive to settle cases rather than to try them. Indeed, . . . the earlier cases are resolved, the more profitable they are for contingent fee lawyers, providing a strong incentive to settle cases early, perhaps before relevant information is obtained and analyzed during discovery.” (citing Herbert M. Kritzer, \textit{The Wages of Risk: The Returns of Contingency Fee Legal Practice}, 47 DePaul L. Rev. 267 (1998))).
\item[36.] See HENSLE \textsc{et al.}, supra note 3, at 120; Samuel Issacharoff, \textit{Class Action Conflicts}, 30 U.C. Davis L. Rev. 805, 832 (1997).
\item[38.] See HENSLE \textsc{et al.}, supra note 3, at 119-20.
\item[40.] See id.
\item[42.] See Richard A. Nagareda, \textit{Turning From Tort to Administration}, 94 Mich. L. Rev. 899, 933 (1996) (“When negotiating a settlement in a class action, counsel for the plaintiff class are in a position to entice defendants to reduce their total payments by providing counsel with generous fees but affording inadequate compensation to the class.”).
\end{itemize}
as to the distribution of settlement funds,\textsuperscript{43} either as among class members or between the class and its counsel. The defendant merely wants to eliminate liability while minimizing its overall payout, however distributed.\textsuperscript{44} In extreme situations, the defendant who anticipates class action litigation will shop for class counsel to initiate litigation and then negotiate a sweetheart settlement with those plaintiffs’ attorneys.\textsuperscript{45} Even in an ongoing class lawsuit, the class counsel may fear standing up to a defendant who offers a sweetheart deal, lest that defendant solicit another class counsel to file a competing class action in another jurisdiction, settle the latter case immediately, and wipe out the first class action altogether, leaving the original class counsel on the hook for its costs and without any recovery at all.\textsuperscript{46}

The general risk of plaintiffs’ attorneys pursuing their own interests is magnified in class action litigation by the fact that, in reality, the lawyer is the decisionmaker, not the class member clients. There is no “real client”\textsuperscript{47} in the traditional sense of a plaintiff who can watch the attorney’s performance and fire her if she is doing an inadequate job.\textsuperscript{48} The group of class members is too large and amorphous to engage in any meaningful collective decision-making.\textsuperscript{49} Moreover, the named representatives do little to intrude upon the attorneys’ ability to pursue their own agenda.\textsuperscript{50} Professor Edward Brunet notes that the roles in the relationship are effectively switched and “the attorney becomes the principal and the unsophisticated client becomes the agent, with minimal ability to monitor

\begin{itemize}
\item \textsuperscript{43} See John C. Coffee, Jr., \textit{Class Wars: The Dilemma of the Mass Tort Class Action}, 95 COLUM. L. REV. 1343, 1376 (1995) [hereinafter Coffee, \textit{Class Wars}].
\item \textsuperscript{44} See id.
\item \textsuperscript{45} See id. at 1354; see also John C. Coffee, Jr., \textit{The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action}, 54 U. CHI. L. REV. 877, 885-86 (1987) [hereinafter Coffee, \textit{Entrepreneurial Litigation}] (describing a phenomenon where the agent, an attorney, shops for the principal, the client).
\item \textsuperscript{46} See Coffee, \textit{Class Action, supra} note 32, at 392 (“Finally, class counsel is aware that if they press defendants 'too hard,' defendants may actually solicit a rival team of plaintiffs' attorneys to file an action elsewhere and then may enter an immediate settlement with these new entrants. So long as this rival action is filed in a different state court, the court hearing the original class action—whether a state court or a federal court—will be essentially powerless to stop this potential reverse auction.”).
\item \textsuperscript{47} Posner, \textit{supra} note 41, at 586 (“[T]he absence of a real client impairs the incentive of the lawyer for the class to press the suit to a successful conclusion. His earnings from the suit are determined by the legal fee he receives rather than by the size of the judgment.”).
\item \textsuperscript{48} See, e.g., Alexander, \textit{supra} note 20, at 359 (proposing a solution where the client is present to monitor the lawyer’s performance).
\item \textsuperscript{49} See Mary Kaye Kane, \textit{Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer}, 66 TEX. L. REV. 385, 389 (1987).
\item \textsuperscript{50} See Hensler et al., \textit{supra} note 3, at 450 (“[R]epresentative plaintiffs . . . are often mere figureheads.”); Kane, \textit{supra} note 49, at 394.
\end{itemize}
the behavior of the class action counsel.”

In the case of class action litigation, the same collective action problem that made individual litigation impractical replicates itself in the class action process and makes it unlikely that class members will monitor their agent, the class counsel. First, because some class action litigation is premised on the need to aggregate claims that are too small to litigate individually, no class member may have enough at stake to expend personal resources on monitoring the class counsel. Also, there are too many members to coordinate monitoring efforts. Second, each individual class member has little, if any, ability to effectively monitor the class counsel. Because class action litigation is often terribly complex, with respect to both legal and factual questions, ordinary consumers (and some larger entities) generally are unable to comprehend the litigation in any meaningful way, let alone second-guess the multiple decisions made by class counsel (assuming they even know the decisions are being made).

The attorneys control access to critical information “about the merits of the claim, the amount of work done by the lawyers for the class, the likely damages if the case goes to trial,” and the amount of compensation that the average class member actually will receive—critical information to determine the reasonableness of any proposed settlement. Partly because the balance of power—in the form of information, expertise, and decision-making authority—favors the class counsel, class members have little incentive to attempt to monitor the class counsel.

Thus, although the class action vehicle was developed to solve the collective action problem of many victims with small injuries unable to

52. See Alexander, supra note 27, at 359. An exception may exist in securities class actions: Large institutional investors may have a sufficient stake to monitor. See id. at 360. Also, the Private Securities Litigation Reform Act of 1995 contained lead plaintiff provisions that sought to give large investors a greater incentive to monitor class action litigation. Id. at 359-60.
53. See Judith Resnik, Litigating and Settling Class Actions: The Prerequisites of Entry and Exit, 30 U.C. DAVIS L. REV. 835, 854 (1997) (“Further, we know that it is meaningless to speak of the discipline of clients monitoring attorneys when ‘the clients’ number in the thousands.”).
55. See Kane, supra note 49, at 394.
56. Posner, supra note 41, at 586; see also Coffee, Entrepreneurial Litigation, supra note 45, at 884.
57. See William C. Baskin III, Note, Using Rule 9(b) to Reduce Nuisance Securities Litigation, 99 YALE L.J. 1591, 1595 (1999) (“Conflicts of interest and the balance of power . . . leave members of the plaintiff class with little incentive or ability to monitor class counsel’s actions. Plaintiff’s counsel thus controls all major strategic decisions and effectively assumes the role of plaintiff. As a result, plaintiff’s counsel is able to act opportunistically in her own best interests.”).
seek relief and hold wrongdoers accountable, the class action mechanism actually creates another collective action problem. As a result of this second collective action problem, several issues arise. First, the members of the class may receive little—and sometimes nothing—of value in exchange for giving up their claims against the defendant. This risk is particularly high in coupon settlements. In many settlements, class members receive nothing more than discount coupons good towards future purchases of the defendant’s products. These settlement coupons are laden with restrictions, such as short expiration periods, transferability restrictions, prohibitions on coupon aggregation, product restrictions, and complex administrative requirements. All of these restrictions combine to render most settlement coupons unredeemed, leaving the class members uncompensated.

Second, defendants may pay little by way of damages and, thus, their initial wrongdoing remains cost-beneficial. In such instances, defendants are purchasing repose at a bargain-basement price. In some cases, the settlement provisions do not even preclude the defendant from repeating the precise misconduct that prompted the class action litigation in the first

58. See Hensler ET AL., supra note 3, at 94. Hensler and her co-authors noted one such example:

One such case—brought in federal district court in northern California—was settled with an agreement that an auto manufacturer would replace a faulty part and mount an advertising campaign concerning the replacement; the defendant also agreed to pay up to $5 million in fees to the class counsel. Public Citizen charged that the defendant had already promised the National Highway and Traffic Safety Administration (NHTSA) to replace the part and fund the advertising in response to a regulatory investigation. Moreover, Public Citizen said, at the time of settlement, the retrofit had not yet been designed. Hence, “class counsel apparently agreed to something it could not have properly assessed and which the government had already obtained.” Public Citizen lawyers said that the judge approved the settlement on the grounds that it was enforceable in court, whereas the manufacturers’ agreement with NHTSA was not, and approved the fees on the grounds that they were negotiated with the help of a retired-judge mediator. On appeal, the Ninth Circuit upheld the settlement and fee award.

Id. at 95 (citation omitted).

59. See Leslie, supra note 37, at 955.

60. See id. at 995-96.

61. See id. at 1015-28.

62. See id. at 1037. Even when class members redeem their settlement coupons, the defendant may be better off as the coupons may have induced a purchase that would not have otherwise occurred. See id. at 1039. In these cases, the settlement coupon operates as a traditional promotional coupon. See id. at 1036.

place. Some settlements eschew monetary relief for the class in favor of structural remedies that are often largely meaningless. In other instances, class counsel consent to settlements in which any remaining money in a common fund reverts to the defendants after a set period. This reversion mechanism may be coupled with a claims process geared for minimal compensation (due to a short turnaround time) and maximum reversion of moneys to the defendant. In the case of coupon settlements, every unused coupon operates as a de facto reversion to the defendant.

Third, class counsel receive inordinately high awards of attorneys’ fees. As one court has noted, “[Class] lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.” To convince judges to award significant attorneys’ fees, the lawyers who negotiated the settlement may attempt to make the settlement seem more significant than it is. For example, in the context of coupon settlements, the defense and class counsel tout the aggregate face value of the proposed coupons as the true value of the settlement to the class. However, coupon restrictions reduce the actual value of the settlement to a small fraction of coupon face value. Nevertheless, class counsel permit defendants to impose these restrictions in exchange for higher attorneys’ fees. Because most courts have difficulty divining the true worth of coupon settlements, judges generally approve them despite the presence of value-reducing restrictions, and both defendants and class counsel are benefitted.

In sum, the agency cost problem can result in the class action failing to achieve any of its goals: compensation, disgorgement, or deterrence. Instead, we are left with the above three effects, which are interdependent—class counsel agree to inadequate settlements if defendants agree to proposed settlements that provide generous attorneys’ fees. Everybody wins, except the class.

64. See, e.g., Hensler et al., supra note 3, at 162. In a class action involving Bausch & Lomb contact lenses, Bausch & Lomb, in the settlement agreement, was not expressly prohibited from repeating the practices that had sparked the litigation. See id. (discussing Roberts v. Bausch & Lomb Inc., No. CV-94-C-1144-W (N.D. Ala. Nov. 26, 1996)).
65. See, e.g., Coffee, Class Wars, supra note 43, at 1367.
66. See, e.g., Hensler et al., supra note 3, at 197.
67. See id. at 199.
69. See Leslie, supra note 37, at 1059.
70. See id. at 1056-57.
71. See id. at 1059.
72. See id.
IV. THE JUDICIAL APPROVAL SOLUTION AND THE SILENT OBJECTOR PROBLEM

Cognizant of the risk of self-interested class counsel, the Federal Rules of Civil Procedure attempt to solve the agency cost problem in class action litigation through judicial supervision. Rule 23(e) requires that any proposed settlement of class action litigation be approved by the federal judge overseeing the litigation.74 The district court judge is supposed to “conduct a careful inquiry into the fairness of a settlement to the class members before allowing it to go into effect and extinguish, by the operation of res judicata, the claims of the class members who do not opt out of the settlement.”75 Judges are to require notice to the class members and to provide opportunities for members to object to the proposed settlement at fairness hearings.76 These procedures are designed to get all necessary information to the judge so that she may insure that the settlement is fair, that the class counsel has operated as a faithful agent, and that the defendants are not buying peace at too low a price.77 However, these provisions fall short of the mark, largely because of yet another collective action problem within the class action apparatus.

Class members generally do not participate in class action litigation until the judge has made a preliminary determination that a proposed settlement is fair. The trial judge reviews the proposed settlement to insure that it is not the product of collusion.78 If the proposed settlement appears reasonable, the judge will hold a fairness hearing and afford class members the chance to comment on the proposed settlement.79 Before that hearing, the judge will have directed that proper notice be sent to the class members so that they are aware of both the pending settlement and their opportunity to object at an upcoming fairness hearing.80 The notice should inform the class members about the time and place of the fairness hearing, the details of the proposed settlement, and any requirements that a class member must fulfill if she wants to object to the proposed settlement as written.81

The fairness hearing generally is the final step before the judge’s

74. FED. R. CIV. P. 23(e); see, e.g., Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991).
77. See id.
78. See id.
79. See id.
80. See HENSLER ET AL., supra note 3, at 450.
preliminary determination of the proposed settlement’s fairness becomes a formal and final determination. As such, the fairness hearing often represents the only opportunity for class members to participate directly in the class action litigation. The class members who so choose can attend the hearing and raise specific objections to the proposed settlement. Class members who cannot appear in person at the fairness hearing generally can submit written objections to the proposed settlements.

A. The Class Reaction to the Proposed Settlement

After the fairness hearing, the trial judge decides whether to approve or reject the proposed settlement. Rule 23(e) provides that approval is contingent on the judge finding that the proposed settlement “is fair, reasonable, and adequate.” But the rule lays out neither meaningful criteria nor specific factors to guide judges who must apply this standard. Instead the common law has developed a list of factors that courts consider when determining whether a proposed settlement is fair, reasonable, and adequate.

Although the specific list of factors differs from court to court, almost

82. See Hensler et al., supra note 3, at 118.
83. See Stuart T. Rossman & Daniel A. Edelman, Consumer Class Actions: A Practical Litigation Guide 167 (5th ed. 2002) (“The judge will allow class members who are present, but did not file written objections, to raise questions.”).
84. Thomas A. Dickerson, Class Actions: The Law of 50 States § 9.03[4], at 9-66 (1998) (“[C]ounsel for the class should collect all written objections and submit them to the court prior to the settlement hearing.”).
86. See id. Initially this touchstone was developed by the courts, but this standard became codified in the Federal Rules of Civil Procedure effective December 2003. See id.
88. There is no one accepted list of factors, but the most common factors include:

1. likelihood of recovery, or likelihood of success;
2. amount and nature of discovery or evidence;
3. settlement terms and conditions;
4. recommendation and experience of counsel;
5. future expense and likely duration of litigation;
6. recommendation of neutral parties, if any;
7. number of objectors and nature of objections; and
8. the presence of good faith and the absence of collusion.

all federal courts consider “the reaction of the class to the settlement” as one of the factors determining the fairness of a proposed class action settlement. State courts have followed suit. In both judicial systems, this factor has also been articulated as “the strength of the opposition to the settlement from the class members.” Any “class member who formally challenges a proposed class action settlement” as inadequate is generally considered an objector.

While most courts simply list the absence of objectors as one factor among many in evaluating the fairness of a proposed settlement, in some instances this consideration is the single most important factor. As one district court explained, “[i]t is well settled that ‘the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.’” Judges should afford considerable weight to the opinions of the class members. First, the class members are the actual plaintiffs, the ones whose rights are being extinguished in exchange for the negotiated settlement. Second, the class members are an important source of objective information about the proposed settlement. By the time of the fairness hearing, opposing counsel have joined forces to advocate approval of the proposed settlement and “have little or no incentive to present negative information about the settlement, so objections from class members and others may be a crucial source of information about defects in the settlement.”

In the absence of objectors, every person before the judge—the defendants, the class counsel, and often the class representatives—supports the settlement and, thus, the judicial process of evaluating facts through an adversarial contest is thwarted. In our adversarial system, judges are ill-

89. City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).
93. Robert B. Gerard & Scott A. Johnson, The Role of the Objector in Class Action Settlements—A Case Study of the General Motors Truck “Side Saddle” Fuel Tank Litigation, 31 Loy. L.A. L. Rev. 409, 409 (1998). This Article uses the term “objector” to mean class members who object to a proposed settlement. Class members can also object to class certification and other issues. This Article does not address such objections.
95. WILLING ET AL., supra note 11, at 58.
equipped to investigate and discover evidence against a proposed settlement on their own initiative. Professor Brunet notes that “a district judge lacks the incentive, information, and practical ability to effectively monitor class counsel. Under these conditions, the trial court alone cannot be an effective check on the potential abuse that can arise in the class action settlement process.” This makes objectors important because class members can potentially provide critical objective viewpoints on the adequacy of a proposed settlement.

Objections to a proposed settlement can take several forms. Some class members may object to the procedures relating to the fairness hearing, such as the adequacy of the notice, the time allowed to file written objections, discovery rulings, and the inadequacy of any evidentiary hearings. However, most objections seem to go to the substance of the proposed settlement. The objection most frequently made is to the amount of attorneys’ fees; the second most frequent objection is to the settlement amount. Independent of the size of the settlement fund, class members in some cases object to the formula for distribution of the fund as well as “the scope of releases which will bind class members.” In other cases, “members object[] to having to . . . do[] business with [the defendant] in order to receive any benefits of the settlement”; this is most common in coupon settlements, in which the class members receive coupons for discounts on future purchases of the defendant’s products. Sometimes a government official may oppose a proposed settlement. However, objections generally come from class members themselves.

B. Courts Interpret Silence as Endorsement of the Proposed Settlement

In weighing the reaction of the class as part of the fairness determination, courts focus on the number and intensity of these objections. Thus, courts often cite an absence of objections from class members as a major reason to conclude that a proposed settlement is fair,

97. Brunet, supra note 51, at 406 (footnotes omitted).
98. Dickerson, supra note 84, § 9.03[4][b][iii], at 9-71 to -73.
99. See id.; Willging et al., supra note 11, at 57.
100. See Willging et al., supra note 11, at 57; see also In re Airline Ticket Comm’n Antitrust Litig., 953 F. Supp. 280 (D. Minn. 1997) (finding that “some class members . . . [sought] to limit the award of attorney’s fees to [class] counsel”). Class members’ objections often focus on the dollar figure. See, e.g., In re Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 179 (S.D.N.Y. 2000).
101. Dickerson, supra note 84, § 9.03[4][b][iv], at 9-74 to -75.
103. See generally Leslie, supra note 37.
reasonable, and adequate. This is particularly true when no class members object. Some judges treat the presence of only one or two objectors as tantamount to uniform class endorsement of the proposed settlement. Whenever the number of objectors is less than ten, courts seem to read this as presumptive evidence that the proposed settlement is fair. However, there is no magic number; so long as the number of objectors is small, courts may consider the relative silence as evidence that the class is satisfied with the proposed settlement. Indeed, some judges have held that there is no need to even hold a fairness hearing if the court receives no written objections to the proposed settlement following the distribution of notice to the class. In sum, courts find an absence or a small number of objectors to be powerful evidence that the proposed settlement is fair.

While the courts no doubt are correct that the views of the class members are an important indicator of the overall fairness of a proposed settlement, courts are far too eager to read ambiguous evidence (or non-evidence) as class endorsement of the proposed settlement. In particular, courts interpret class member silence as overwhelming support for

105. See, e.g., In re Am. Bank Note Holographics, Inc., 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (“[M]ore than 5,000 notices were sent to potential members of the Classes or their nominees . . . [and] not a single objection . . . had been received. In addition, only five stockholders have sought exclusion from the proposed Settlement.”); In re SmithKline Beckman Corp. Sec. Litig., 751 F. Supp. 525, 530 (E.D. Pa. 1990); In re Chicken Antitrust Litig., 560 F. Supp. 957, 959 (N.D. Ga. 1980) (“Of special significance in this regard was the absence of any objections to the terms of these agreements, which would seem to indicate that the settlements were satisfactory to all those affected.”).

106. See, e.g., Am. Employers’ Ins. Co. v. King Res. Co., 556 F.2d 471, 478 (10th Cir. 1977) (noting that the presence of only one objector was “of striking significance and import”); In re Warner Commc’ns Sec. Litig., 618 F. Supp. 735, 746 (S.D.N.Y. 1985) (characterizing as “rather incredible that only two objections” to proposed settlement in securities class action settlement were filed even though more than 104,000 notices were sent to class members).

107. See, e.g., Laskey v. UAW, 638 F.2d 954 (6th Cir. 1981) (noting that only 7 out of 109 class members objected to the settlement proposal).

108. See, e.g., Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 961 (E.D. Tex. 2000) (“[T]his Court takes judicial notice that, despite a potential class of thousands—if not millions—of owners of roughly five million (5,000,000) Toshiba laptop computers, fewer than thirty (30) objections were filed in response to the well-publicized announcement of this proposed Settlement Agreement.”).


110. See, e.g., In re Beef Indus. Antitrust Litig., 607 F.2d 167, 180 (5th Cir. 1979), cert. denied, 452 U.S. 905 (1981); Hammon v. Barry, 752 F. Supp. 1087, 1092-93 (D.D.C. 1990); 4 CONTE & NEWBERG, supra note 88, § 11:48 (“Courts have taken the position that one indication of the fairness of a settlement is the lack of or small number of objections.”). But see Hammon, 752 F. Supp. at 1092-93 (“A relatively small percentage of [objections] . . . is not dispositive.”).

111. See supra notes 105-10 and accompanying text.
proposed settlements.\textsuperscript{112} The reasoning appears to be based on the proposition that silence means acceptance. For example, the Third Circuit has observed that in an effort to measure directly the class’s own reaction to the settlement’s terms, courts look to the number of objectors.\textsuperscript{113} Courts have generally assumed that “silence can be considered tacit consent to the settlement.”\textsuperscript{114} As a result, judges routinely have assumed that the complete silence of most class members is strong evidence of a “majority of class members who apparently favor this settlement.”\textsuperscript{115} Even when a non-negligible minority of the class files written objections to a proposed settlement, courts interpret the silence of most class members to mean that the class reaction is “overwhelmingly favorable”\textsuperscript{116} and that “the vast majority of class members do not oppose the proposal.”\textsuperscript{117} Getting to the merits of the proposed settlement, some judges assert that a dearth of objectors is evidence that the proposed settlement “provide[s] a significant benefit to class members.”\textsuperscript{118} In sum, if the class members are largely

\begin{itemize}
  \item \textsuperscript{112} See supra note 110.
  \item \textsuperscript{113} See Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993).
  \item \textsuperscript{114} Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1301 (D.N.J. 1995) (citing Bolger, 2 F.3d at 1313 n.15).
  \item \textsuperscript{115} Tornabene v. Gen. Dev. Corp., 88 F.R.D. 53, 61 (E.D.N.Y. 1980); see also Ohio Pub. Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1, 11 (N.D. Ohio 1982) (“Even more significant is the fact that not one of the 1.1 million class members filed an objection to the proposed settlement which complied with the requirements of this Court’s order. There can be no question but that the proposed settlement has been well received by the class members.”); In re Cuisinart Food Processor Antitrust Litig., M.D.L. 447, 1983 WL 153, at *6 (D. Conn. Oct. 24, 1983) (“The reaction of the class to the proposed settlement appears to be overwhelmingly favorable. In response to the mailed and published notice, a mere 45 persons objected to the settlement; 89 requested to be excluded expressly for the purpose of avoiding the settlement’s res judicata effect; and 825 others opted out for other reasons (111 because they were satisfied with their Cuisinart products and did not wish to pursue a cause of action against Cuisinarts). In a putative class numbering in excess of one and one-half million members, these objections and requests for exclusion represent a miniscule percentage of the class membership.”) (emphasis added).
  \item \textsuperscript{116} In re Cuisinart Food Processor Antitrust Litig., M.D.L. 447, 1983 WL 153, at *6 (D. Conn. Oct. 24, 1983) (“The reaction of the class to the proposed settlement appears to be overwhelmingly favorable. In response to the mailed and published notice, a mere 45 persons objected to the settlement; 89 requested to be excluded expressly for the purpose of avoiding the settlement’s res judicata effect; and 825 others opted out for other reasons (111 because they were satisfied with their Cuisinart products and did not wish to pursue a cause of action against Cuisinarts). In a putative class numbering in excess of one and one-half million members, these objections and requests for exclusion represent a miniscule percentage of the class membership.”) (emphasis added).
  \item \textsuperscript{117} In re Montgomery County Real Estate Antitrust Litig., 83 F.R.D. 305, 317 (D. Md. 1979) (“Of the approximately 1875 class members who received notice . . . some 125, or approximately 6%, objected to the proposed settlement. While this is by no means an insignificant percentage, it does appear that the vast majority of class members do not oppose the proposal.”).
  \item \textsuperscript{118} Phemister v. Harcourt Brace Jovanovich, Inc., No. 77-C-39, 1984 WL 21981, at *8 (N.D.
silent, courts take this to mean that the vast majority of the class has "deemed the [proposed settlement] unobjectionable."\textsuperscript{119}

Of course, not all courts read silence as acceptance. Some courts already realize that "a low level of vociferous objection is not necessarily synonymous with jubilant support."\textsuperscript{120} Indeed, the Seventh Circuit recognized that "[a]cquiescence to a bad deal is something quite different than affirmative support."\textsuperscript{121} Judge Friendly alluded to the collective action problem when he opined that "[l]ack of objection by the great majority of claimants means little when the point of objection is limited to a few whose interests are being sacrificed for the benefit of the majority."\textsuperscript{122} Perhaps even more importantly, some courts have refused to bootstrap the lack of response from the class into proof that the settlement is reasonable. For example, the district judge in one class action correctly observed that "'fairness' is not demonstrated by the silence of class members in response to the proposed settlement."\textsuperscript{123} But these judges represent a minority in the reported decisions that interpret the silence of class members in response to a proposed settlement.

C. Silence Is Not Endorsement

Courts have been far too quick to treat class member silence as universal support for a proposed settlement. This section argues that courts have systematically misinterpreted the silence of the class by ignoring more plausible explanations for class members’ failure to object to a proposed settlement. First, many class members are unaware of the class

\textsuperscript{119} Id. at *13 ("The response of the class to the settlement notice is a relevant factor to consider in judging the fairness and adequacy of the settlement. Forty-nine class members have filed timely objections. In this case, approximately 150,000 persons received notice by mail or publication. The number of claimants, when finally tallied, will be about 90,000. Only 49 filed objections. It appears that the settlement was deemed unobjectionable by more than 99 percent of those in the class and those filing claims." (citing \textit{In re Corrugated Container Antitrust Litig.}, M.D.L. 310, 1981 WL 2093, at *14 (S.D. Tex. June 4, 1981))).

\textsuperscript{120} \textit{In re Corrugated Container Antitrust Litig.}, 643 F.2d 195, 217-18 (5th Cir. 1981); \textit{In re Ford Motor Co. Bronco II Prods. Liab. Litig.}, Civ. A. MDL-991, 1995 WL 222177, at *6 (E.D. La. Apr. 12, 1995) ("The fact that a . . . small number of objections were lodged [should not be used] to rebut the conclusion that the terms of the settlement [were] inadequate."); see also Grove v. Principal Mut. Life Ins. Co., 200 F.R.D. 434, 447 (S.D. Iowa 2001) ("The Court . . . is unwilling to bootstrap a low response rate into class-wide enthusiasm for the settlement."); cf. Petruzzi’s, Inc. v. Darling-Delaware Co., 880 F. Supp. 292, 297 (M.D. Pa. 1995) ("The silence of the overwhelming majority does not necessarily indicate that the class as a whole supports the proposed settlement . . . ." (quoting County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1428, 1437 (E.D.N.Y. 1989), aff’d in part, rev’d in part, 907 F.2d 1295 (2d Cir. 1990))).

\textsuperscript{121} \textit{In re Gen. Motors Corp. Engine Interchange Litig.}, 594 F.2d 1106, 1137 (7th Cir. 1979).

\textsuperscript{122} Nat’l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660 F.2d 9, 16 (2d Cir. 1981).

\textsuperscript{123} \textit{Petruzzi’s}, 880 F. Supp. at 299.
action litigation and any proposals to settle the lawsuit. Second, those aware of the suit and settlement may not have sufficient information or time to form an informed opinion as to the proposal’s adequacy. Finally, and most importantly, even those class members who believe that the proposed settlement is inadequate may remain silent because they (correctly) calculate that the costs of objecting exceed the expected benefits of doing so.

1. Silence as Ignorance

Some judges treat the silence of class members as a conscious, informed decision to express their approval of the proposed settlement by remaining silent. It is far more likely that the silence of class members reflects their ignorance of the proposed settlement and perhaps the underlying class action litigation altogether. Rule 23(e) provides that “notice of the proposed dismissal or compromise shall be given to all members of the class.” But that does not mean that class members necessarily receive meaningful notice.

There are several reasons why class members may lack sufficient information to object to a proposed settlement. As an initial matter, many class members do not receive notice of the proposed settlement at all. Notice is critical. Without adequate notice, it is impossible to gauge the reaction of the class to the proposed settlement. In some cases, no individual notice is given to class members. Instead, courts use notice by publication in many cases, despite an absence of indication as to what percentage of the class will actually read the published notice. Finally, in some instances, courts have held that notice of the proposed settlement to the class is not necessary at all. Despite the fact that Rule 23(e) requires

124. See supra Part IV.B.
125. FED. R. CIV. P. 23(e).
126. See, e.g., WILLGING ET AL., supra note 11, at 62-64.
127. See id. at 63 ("Without notice to the class and the reaction of class members to the settlement, the judge might not have sufficient information to assess whether the settlement is fair and reasonably responsive to the interests of the class.").
128. See, e.g., In re Cuisinart Food Processor Antitrust Litig., M.D.L. 447, 1983 WL 153, at *3 (D. Conn. Oct. 24, 1983) (discussing how class members probably heard about the proposed settlement through publishing in the mainstream media). If the proposed settlement is presented to the court prior to the certification of the class, then class members are even less likely to know about the proposed settlement.
129. See, e.g., HENSLER ET AL., supra note 3, at 155 (describing how the court in the Bausch & Lomb case “found that there was no practical means of identifying individual class members and ordered that notice be primarily achieved by publication.”).

[N]otice may not be necessary . . . (1) when the terms of the settlement provide
notice of proposed settlements in all cases, the Federal Judicial Center’s study of class action litigation found several instances in which no notice had been given to the class.\textsuperscript{131} Because class action litigation is designed to create a remedy for a large number of individual victims, who often are widely dispersed, even under the best of circumstances many class members might not receive actual notice of the class action litigation.\textsuperscript{132} Thus, some potential objectors may not even know that they are part of a class action and that their rights are being adjudicated.\textsuperscript{133} Given this probability, it is wrong for courts to interpret every silent class member as a supporter of the proposed settlement. Often it is equally or more likely that a class member does not even know that the litigation exists, let alone that she belongs in the class.

Even for those class members who do receive the notice, the contents of the notice often fail to provide sufficient information to allow the class members to make informed decisions about whether to challenge the proposed settlement.\textsuperscript{134} Although a notice of proposed settlement under Rule 23(e) should advise class members of their right to object and the logistics of the fairness hearing,\textsuperscript{135} such information is largely useless absent comprehensible information about the terms of the settlement itself. Yet Rule 23(e) does not indicate or dictate the content of the required notices.\textsuperscript{136} As a result, the thoroughness and intelligibility of class notices regarding proposed settlements varies considerably.\textsuperscript{137}

Several problems, though, appear endemic. First, in deciding whether to object to a proposed settlement, the single most important fact that the

\textit{Id.; see also} In re Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429, 441 (D.N.J. 2000); Patrick Woolley, \textit{Rethinking the Adequacy of Adequate Representation}, 75 \textit{Tex. L. Rev.} 571, 600 (1997) (“Rule 23 does not require notice in structural reform suits . . . ”).

\textsuperscript{131}. \textit{See} \textit{WILGING ET AL.}, \textit{supra} note 11, at 46, 63.


\textsuperscript{133}. \textit{See, e.g.}, Issacharoff, \textit{supra} note 36, at 814-15; Susan P. Koniak, \textit{Through the Looking Glass of Ethics and the Wrong With Rights We Find There}, 9 \textit{Geo. J. Legal Ethics} 1, 12-13 (1995).

\textsuperscript{134}. \textit{See} Koniak, \textit{supra} note 133, at 12-13.

\textsuperscript{135}. \textit{See ROSSMAN & EDELMAN}, \textit{supra} note 83, at 167.


\textsuperscript{137}. \textit{See} HENSLER ET AL., \textit{supra} note 3, at 454.
average class member needs to know is how much she will receive under
the settlement plan. Yet, despite Rule 23(e)’s requirement of notice to
the class, courts generally do not interpret the rule to require that the notice
inform the class members what their individual recovery will be. With
many proposed settlements, all that the class member knows is how much
the class as a group will receive. However, notices do not estimate the
size of the class and, thus, class members are unable to calculate their own
individual recoveries. As a result, class members do not have sufficient
bases for objecting to the proposed settlement.

Second, settlement notices often do not contain sufficient information
for class members to evaluate the merits of the legal claims that they are
giving up. In some cases, the intelligent class member reading the notice
of the proposed settlement may be unable “to discern what exactly the
defendant is alleged to have done.” If the class member cannot
understand the allegations, she cannot determine what claims she is
foregoing; without knowing what claims she is foregoing, she cannot
possibly judge whether the proposed settlement amount is fair, adequate,
and reasonable. In extreme cases, the notice to the class members does not
inform them of the nature of claims, the fees to be received by class
counsel, or even the right to participate in the fairness hearing.

Third, many settlement notices do not identify the award of attorneys’
fees to class counsel. Nor do most notices contain information relating
to the costs of administering the settlement and other expenses. Even

138. See Carter, supra note 9, at 1151.
139. See id. (citing In re Corrugated Container Antitrust Litig., 643 F.2d 195, 224 (5th Cir.
1981); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1177-78 (9th Cir. 1977)); see also Hensler
et al., supra note 3, at 453 (“But in some cases, class members were not told what individual class
members would get as a result of the settlement.”).
140. See supra note 139. Of course, in many cases, the court and attorneys may not know the
individual payments at the time of the proposed settlement.
141. See WIlbring et al., supra note 11, at 9; Confe & Newberg, supra note 88, § 11:53,
at 164. Indeed, even after the settlement has been executed, the actual distribution of funds to the
class and their counsel is not available, in some cases, because the defendants and class counsel
agree “not to discuss or divulge matters related to the settlement negotiations or the actual
distribution to the class.” Hensler et al., supra note 3, at 163-64; see also id. at 165 (“How many
people were actually members of this class, how many of these class members actually submitted
a claim form, and how much they were actually paid appear to be closely held secrets between the
class counsel and the defendant.”).
142. See WIlbring et al., supra note 11, at 50.
143. Hensler et al., supra note 3, at 454 (discussing the notice in Inman v. Heilig-Meyers
Furniture, No. CV 94-047 (Ala. Cir. Ct. filed May 12, 1994)).
144. See, e.g., Hensler et al., supra note 3, at 453 (summarizing Pinney v. Great Western
Bank, No. CV 95-2110 (C.D. Cal. filed Mar. 31, 1995)).
145. See WIlbring et al., supra note 11, at 9.
146. See id. at 9.
when notices provide some indication of the defendant’s total payment under the proposed settlement, these notices often do not mention either the class counsel’s fees or administrative costs to be deducted from the settlement fund before disbursement to the class.\(^{147}\) Professor Resnik notes that “in some of the current settlements, class members know nothing or little of the terms—of recovery or costs and fees—to which they are asked either to assent or to object.”\(^{148}\) As a result, class members generally will have little basis for evaluating the reasonableness of attorneys’ fees under a proposed settlement, as the individual will have little idea of the merits of the claims or the amount of work undertaken by the class counsel. Unaware of the value of their own claims or of the class action litigation overall, the notice will give most class members no reason to suspect that their class counsel have struck a backroom deal that sacrifices the members’ claims in exchange for higher attorneys’ fees.\(^{149}\)

Fourth, even when settlement notices theoretically include the relevant information, they often do so in a manner unintelligible to the class members. Many settlement notices are written in legal jargon incomprehensible to class members.\(^{150}\) The notice has been so complicated in some cases that a reader may have been unable to readily determine even whether she was a class member.\(^{151}\) Nevertheless, courts preemptively wave off any attempt by class members to better understand the notice by including in the notice “an instruction to class members that they should not contact the court if they have any questions. Thus, directly and indirectly, courts convey to class members that they are not very concerned about what individual class members understand about the litigation and what they might want from it.”\(^{152}\) Yet class members often cannot understand the notice of the proposed settlement.\(^{153}\) At their worst, notices may create more confusion than elucidation.\(^{154}\) For example, in

\(^{147}\) See id. at 50.

\(^{148}\) Resnik, supra note 53, at 860.

\(^{149}\) See Kane, supra note 49, at 395.

\(^{150}\) See Willging et al., supra note 11, at 51 (“Many, perhaps most, of the notices present technical information in legal jargon. Our impression is that most notices are not comprehensible to the lay reader.”); Hensler et al., supra note 3, at 496 (“[Class members] may not be told the details of the proposed settlement, or may be told the details in some fashion that is intelligible only to lawyers.”). Compounding the problem of notices written in legalese is the fact that notice is often delivered only in English when some class members may not read English. See, e.g., In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503, 516 (E.D.N.Y. 2003).

\(^{151}\) See, e.g., Hensler et al., supra note 3, at 454 (“A reader who invested sufficient time in the detailed Bausch & Lomb notice could determine for herself whether or not she was a class member, but a less dedicated reader might not be able to pick her way through the various conditions.”).

\(^{152}\) Id. at 454.

\(^{153}\) See id. at 496.

\(^{154}\) See id. at 120 (“Notices may obscure more than they reveal to class members whose
response to the notice in one class action, "the Court received a significant number of letters and telephone calls from class members who thought the notice meant that they were being sued by [the defendant]." If the notice does not adequately inform class members of what they are either giving up or receiving, while simultaneously discouraging questions, it can hardly be surprising that a confused class member would not bother to participate in the proceedings.

Fifth, even when an inadequate notice sparks class members to seek additional information, their requests may be denied. When objectors do complain, it is often about the inadequacy of the notice of proposed settlement. Although appellate courts sometimes hold notices of proposed settlements to be inadequate, issues of notice adequacy rarely wind up on appeal. Moreover, even when objectors do incur the expense of challenging the sufficiency of the class notice, appellate courts often defer to the trial judge and uphold the notice as adequate.

In sum, because notice is often inadequate, silence can evidence that class members did not understand the notice rather than reflect affirmative support for the proposed settlement. Courts do not require that the notice include "[p]rojections on recovery percentages, circumstances surrounding the settlement negotiation process and the results of discovery," all information the conscientious class member would want in deciding whether to object. Professor Brunet has noted that "[t]here is simply no reason to think that the small stakes class member will possess either the immediate gain or loss from a proposed settlement is modest."); cf. Coffee, Entrepreneurial Litigation, supra note 45, at 920 ("In general, class action plaintiffs do not respond to attempts to ascertain their views, and it is doubtful that those who do respond would understand the issues or questions presented to them.").


156. Anecdotal evidence suggests the drafting of the notice can significantly affect the class response. "In one case regarding court-ordered relief in a public benefits class action, for example, the plaintiffs presented evidence that the response rate from class members in cases in which the notices were drafted by the plaintiffs was far higher than when the notices were drafted by the government defendant." Nancy Morawetz, Bargaining, Class Representation, and Fairness, 54 OHIO ST. L.J. 1, 23 (1993).

157. See WILGING ET AL., supra note 11, at 49.

158. See, e.g., State v. Chadwick, 956 S.W.2d 369, 386 (Mo. Ct. App. 1997) (finding that the notice of proposed settlement was inadequate because it failed to disclose individual class recoveries and payments to class representatives); Bloyed v. Gen. Motors Corp., 881 S.W.2d 422, 435 (Tex. App. 1994) (finding the settlement notice inadequate because it failed to disclose class counsels’ anticipated fees), aff’d on other grounds & remanded, 916 S.W.2d 949 (Tex. 1996).

159. The reason is given in Part IV: It is simply not rational (i.e., cost-beneficial) for the individual class member to litigate such peripheral issues when the expected gain from their efforts hovers between negligible and non-existent.


161. Carter, supra note 9, at 1137.

162. See id.
information or the incentive needed to evaluate the performance of class counsel or, more specifically, the adequacy of a proposed settlement.”

In the absence of adequate information, class members decline to engage.

2. Silence as Time Crunch

Even if class members do receive comprehensible notice, they may not have sufficient time to evaluate the material and satisfy the objection procedures. Although the period to object is generally measured in weeks, the time to decide whether to object can be as short as three days. While a few weeks may seem to be sufficient time for attorneys to process the information because they are used to making decisions about litigation, “two months or less might not be enough time for a layperson to decide whether to pursue an objection and to figure out how to go about doing so, particularly if the notice is the first time he or she hears of the litigation.” In many instances, the class members are not even aware of the class action litigation until they receive notice of the proposed settlement. In such situations, the proposed settlement can seem like a fait accompli: If they hear simultaneously about the class action litigation and the proposed settlement, class members are unlikely to affect the settlement in any way. The notice to the class generally does not defend the settlement figure or clearly explain why it is reasonable. In order to have a credible basis for objecting, the “class member must therefore secure evidence through independent discovery and presentation of witnesses at the fairness hearing. Since the period from receipt of notice to the actual settlement hearing is often 30 days or less, the objector has little opportunity to develop a challenge adequately.”

163. Brunet, supra note 51, at 428 (citing Leslie, supra note 37, at 1046-47).
164. See, e.g., Hensler et al., supra note 3, at 451 (six weeks to object in Pinney v. Great Western Bank).
165. See McAllen Med. Ctr., Inc. v. Cortez, 66 S.W.3d 227, 231 (Tex. 2001) (acknowledging objector who claimed three days was inadequate time to file objections and prepare for hearing); see also Rossman & Edelman, supra note 83, at 168-69 (“Because most class members first become aware of the settlement when the notice is received in the mail, the time that members actually have to object to the settlement is typically very short.”).
166. Hensler et al., supra note 3, at 451.
168. See Hensler et al., supra note 3, at 479 (“If class members first hear about a case when a settlement has already been reached, critics say, they have little likelihood of influencing the outcome.”).
169. See Willging et al., supra note 11, at 50-51 (discussing what was provided in the notice).
evaluating the merits of the proposed settlement.\textsuperscript{171} Some evidence suggests that the negotiating parties may delay the notice of proposed settlements, reducing the decision-and-response time for the class members considerably.\textsuperscript{172} Additionally, class members not only have to process a significant amount of information in a short time but also have to jump through several administrative hoops if they are to register their objections in a timely manner.\textsuperscript{173} A dearth of information coupled with administrative hurdles and a short response period can combine to make any meaningful objection impractical. In sum, the decision not to object in some cases may result, not from satisfaction with the proposed settlement but from an inability to make a decision in the time allotted.

3. Silence as a Collective Action Problem

Collective action problems generally arise when three characteristics are present. First, the expected costs of individual action are relatively high. Second, the expected benefits to the acting individual are low, less than the expected costs. These two factors make individual action not cost-beneficial. Third, if the affected persons are unable to easily coordinate their efforts in order to share costs in a manner that would render individual costs less than individual benefits, then a collective action problem results. Class members face all three of these factors when confronted with a proposed settlement, making it a classic recipe for a collective action problem.

a. Objection Is Costly

Although courts that treat the silence of class members as endorsement of the proposed settlement seem to think that a class member could easily object, objecting to any proposed settlement, in fact, entails significant costs for the would-be objector. Simply determining whether to object entails costs. For example, many class members will be unable to interpret the notice or evaluate the merits of the claims being settled without consulting an independent attorney.\textsuperscript{174} But it can be prohibitively expensive for class members, particularly in garden variety consumer class actions, to consult an attorney simply to determine the appropriate

\textsuperscript{171} This Article does not advocate greater discovery for class members. Neither does it conclude that class members should not receive discovery. It is agnostic on the point.

\textsuperscript{172} See Willging et al., supra note 11, at 45, 62.

\textsuperscript{173} See infra notes 175-78 and accompanying text; Brunet, supra note 51, at 447-48 (“Objectors often surface following receipt of class action notice and have little time to collect their own information, formulate a coherent position, and formally object to the court.”).

\textsuperscript{174} See Rossman & Edelman, supra note 83, at 169; Gerard & Johnson, supra note 93, at 417.
response to the notice of the proposed settlement.

If a class member does decide that the proposed settlement is inadequate or somehow unfair, she must undertake the expense of deciphering and following the rules for written objections. The writing requirements can approach those appropriate for a formal legal brief. Yet, it is important to get this right because often only those members that properly file the necessary paperwork are allowed to present their objections at the fairness hearing. In order to object in person, most judges require the objector to have properly filed a written objection with the clerk of the court.

In order to have her objections taken seriously, an “objector should appear at the final approval hearing and be prepared to explain the objections.” But explaining one’s objections to a judge in front of a courtroom is often too daunting a task for class members who do not pay for separate legal representation. Absent an independent attorney, requiring that objectors present their complaints in person at the settlement hearing could effectively deter even class members opposed to the proposed settlement from objecting.

The objector would have to go into an adversarial contest against attorneys and claim that the defendant and the class counsel (which is, in theory, his own attorney) are proposing an unreasonable settlement. She would be the target of attack by both the drafters and supporters of the proposed settlement. Objectors are sometimes described by class counsel as “warts on the class action process,” “pond scum,” and “bottom feeders.” While that can be

175. See ROSSMAN & EDELMAN, supra note 83, at 169. For example, there may be local procedures for objecting. See id. (“Immediately contact the appropriate court to determine any local procedures necessary for filing objections.”). While at least one court has tried to streamline the process of objecting, see, e.g., State v. Levi Strauss & Co., 715 P.2d 564, 578 (Cal. 1986) (allowing the objectors to simply send written objections to one address), others have not, as this section illustrates.

176. See, e.g., Northrup v. Sw. Bell Tel. Co., 72 S.W.3d 1, 4 (Tex. App. 2001) (“The objection was required to include a written statement of the objector’s position and grounds therefore and copies of any supporting papers, briefs or other documents.”).

177. See 4 CONTE & NEWBERG, supra note 88, § 11:30. This allows the attorneys who negotiated the proposed settlement the opportunity to defend it in writing before the hearing.

178. ROSSMAN & EDELMAN, supra note 83, at 169. This, in turn, sometimes requires the class member to file a Notice of Intention to Appear. See, e.g., Northrup, 72 S.W.3d at 4. Making such legal filings are not activities that most ordinary consumers would feel comfortable doing.

179. See WILLING ET AL., supra note 11, at 10 (noting strong class member preference for written objections over in-court testimonial objections).

180. See Gerard & Johnson, supra note 93, at 417 (“And the objector can be subject to vigorous attack by the proponents of the settlement, who often have a strong financial interest in seeing the settlement approved.”).

181. Brunet, supra note 51, at 411; see also Lawrence W. Schonbrun, The Class Action Con Game, 20 REGULATION 53 (1997) (“Objectors are as welcome in the courtroom as is the guest at
stressful enough for the unrepresented class member, it is not unheard of for the trial judge, who is deciding whether the proposed settlement is fair and reasonable, to “lambaste anyone rash enough to object to the settlement.” Fear operates as both a cost and a deterrent.

There also may be costs associated with discovery. Settlements are sometimes negotiated and proposed by defendants and class counsel before proper discovery has taken place. The objector in such cases may need to conduct discovery before proceeding, because without adequate discovery, a class member may not be able to intelligently evaluate the proposed settlement. This will require the objector to file a discovery motion with the court, laying out what information is missing, what discovery the objector would like to take, what the class member hopes to discover, and why that discovery might affect the reasonableness of the proposed settlement. If the class member is permitted the opportunity to conduct additional discovery, the objector (or her attorney) must bear that cost.

The expense of hiring a lawyer can be significant and objectors generally do not get awarded attorneys’ fees. While “[o]bjectors may petition the court for [attorneys’] fees separate from the fees paid to class counsel,” in general “an objector in a class action settlement proceeding is not entitled to a fee award.” Courts sometimes will award objectors their attorneys’ fees when the objector has meaningfully improved the

a wedding ceremony who responds affirmatively to the minister’s question, ‘Is there anyone here who opposes this marriage?’

Objectors may also be condemned by other class members. See Brian Wolfman & Alan B. Morrison, Problems of Representation in Class Action: Representing the Unrepresented in Class Actions Seeking Monetary Relief, 71 N.Y.U. L. REV. 439, 494 (1996) (“[T]hose who oppose the settlement on principle, often because of internal allocation questions, can be subject to severe criticism from other victims—as can their lawyers—because they are ‘holding up’ the settlement and ‘costing’ the class hundreds or perhaps thousands of dollars a day, if not more.”).


183. See HENSLER ET AL., supra note 3, at 196.

184. See Brunet, supra note 51, at 448 (“It is reasonable to predict that a legitimate objector may need some discovery relating to the merits of the case in order to assess the real value of a proposed settlement.”); ROSSMAN & EDELMAN, supra note 83, at 168-69; see also Edward H. Cooper, The (Cloudy) Future of Class Actions, 40 ARIZ. L. REV. 923, 950 (1998) (“Objectors should be supported by full (and guided) access to discovery materials, if the litigation (or earlier individual litigation) has generated adequate discovery, or by a realistic opportunity to engage in discovery on the merits.”).

185. ROSSMAN & EDELMAN, supra note 83, at 170.

186. HENSLER ET AL., supra note 3, at 89.

settlement. Yet, even if the objector succeeds in convincing a reviewing judge to reject an inadequate settlement, she still may not recover her attorneys’ fees. Professor John Coffee explained that

the dissident objector is a poor champion of class action accountability. Primarily, this is because the objector’s attorney can receive a fee award only when the objector’s efforts ‘improve’ the settlement, but not when the objector’s efforts cause the court to reject the settlement or decline to certify the class.

In any case, it is unlikely that the objector will affect the settlement and hence unlikely that she will be reimbursed for her attorneys’ fees. Thus, we have situations in which the court ignores the objections and then denies attorneys’ fees to objectors for failure to change the proposed settlement. Even in cases in which the objectors did improve the settlement, their fees sometimes are denied. For example, in one case, even though the court did in fact convince the parties to modify the proposed settlement after 1,000 class members objected to the initial proposal, the judge denied that the objectors had any effect on the outcome. Of course, there is no way of knowing before objecting whether one will get attorneys’ fees and this creates a huge risk that the class member will incur large upfront costs without any recovery. Most class members are probably unwilling to assume the risk and bear this cost.

Finally, attending the fairness hearing is rarely cost-free. Hearings are held during regular court hours, which is when most employed class members are at work. Class members are often geographically dispersed and may have to travel relatively long distances to present their objections in court. One major study by the RAND Corporation noted one fairness hearing “scheduled for the morning of a workday in the county courthouse in downtown Los Angeles—not easily accessible to many in far-flung Los Angeles County, much less to residents of other parts of California.”

The cost of parking alone is likely to exceed the individual class members’

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190. Adams v. Robertson, 676 So. 2d 1265, 1302 (Ala. 1995).

191. HENSLER ET AL., supra note 3, at 86.
recovery under the settlement. Professor Hensler and her colleagues aptly summarized the situation:

[Class members] are told that they may object to a settlement, but sometimes they are not told much about how to go about doing that, and often what they are expected to do—e.g., appear in some place miles away or secure a lawyer to appear on their behalf—is infeasible. Whatever the notices say, the real message to class members is ‘stay away.’\(^{192}\)

This is particularly true for nationwide class actions that are litigated in remote venues.\(^{193}\)

The aggregate effect of all of these individual costs can make the expected overall costs of objecting quite high. As Professor Owen Fiss has observed, “The forces that discourage most members of the group from stepping forward to initiate suits will also discourage them from responding to whatever notice may reach them.”\(^{194}\) These costs must be weighed against the benefits of objecting.

b. The Expected Benefits (and Perceived Futility) of Objection

The next step in determining whether class members considering objecting to a proposed settlement as inadequate should bother to do so is to estimate the expected benefits from objection. Rational individuals should be willing to incur significant costs if they believe the return on their investment will exceed the costs. However, it would be irrational to spend even a small amount of one’s own money if the expected benefits remain below these costs. The evidence suggests that the benefits of objecting to a proposed settlement often are minimal or negligible.

(1) Low Stakes for Individual Class Members

Even if an objector could convince the court to reject a proposed settlement—leading to the negotiation and approval of a better settlement—the objector would probably benefit very little because the individual stakes in class action litigation are sometimes low. Courts and scholars have long recognized that “ordinarily the unnamed class members have individually too little at stake to spend time monitoring the lawyer.”\(^{195}\) One purpose of class action litigation is to address situations

\(^{192}\) Id. at 496.
\(^{193}\) See Gerard & Johnson, supra note 93, at 417.
\(^{195}\) Mars Steel Corp. v. Cont’l Ill. Nat’l Bank & Trust Co., 834 F.2d 677, 681 (7th Cir. 1987); accord Alexander, supra note 20, at 359 (“The problem is that although class actions empower
in which a large number of victims have suffered injuries that are too small to warrant individual lawsuits, but which in the aggregate add up to a significant collective injury. If an individual victim did not have a sufficient interest to hold the defendant accountable before the filing of the class action, then that same individual will not have sufficient individual interest to hold the defendant accountable at the settlement stage of the class action. In short, even if the objector were to prevail upon the court to reject the proposed settlement, her share of any increased settlement would likely be negligible.

(2) Systemic Factors That Reduce Benefits of Objecting

Not only does the successful objector gain little by improving the overall settlement, systemic factors reduce the likelihood that objectors will actually affect the ultimate settlement. For example, although the lack of damming information may reduce the expected benefits of objecting, potential objectors often suffer from a dearth of information about the settlement, its negotiation, or the merits of the underlying litigation. Although some settlements occur before any formal discovery takes place, courts generally refuse to permit objectors to conduct necessary discovery. Without additional information, the would-be objector is unlikely to mount a successful challenge to a proposed settlement. Judges have broad latitude to permit or deny objectors’ requests to conduct any discovery relating to the proposed settlement. While limited discovery is sometimes permitted, courts routinely reject any attempt by objectors to perform any discovery related to the proposed settlement. Moreover, some courts have created a Catch-22 whereby the would-be objector is denied discovery about the settlement negotiation process unless he has “additional independent evidence of collusion” in that process. But how is the average class member to obtain such evidence

people to bring such claims, there is nobody with a stake big enough to justify monitoring the lawyers’ performance.”).

196. See supra Part II.
197. See Lamberth, supra note 81, at 168.
198. See, e.g., Hensler et al., supra note 3, at 196.
199. See Lamberth, supra note 81, at 168.
201. See, e.g., id. (“The objectors were also allowed to depose the actuarial expert for the class and were allowed to participate in depositions concerning Liberty National’s parent company, Torchmark Corporation.”).
202. See Resnik, supra note 53, at 859 (noting that “[i]n some instances, objectors to settlements have not been permitted to depose settlement proponents.”).
when she is denied any discovery? In many instances, neither the notice
nor any record in the public documents indicate how a particular
settlement figure was reached. 204 Of course, reviewing judges do not want
to allow objectors to conduct full-blown discovery that will delay the
litigation and perhaps threaten a reasonable settlement, 205 but courts have
denied objectors’ request for discovery relating to such simple issues as
the retainer agreement between class counsel and class representatives. 206
Yet even when objectors challenge high attorneys’ fees for class counsel,
courts have condemned them for not offering their own evidence. 207
Judges sometimes fail to recognize that it is not practical to offer new evidence
without the ability to conduct discovery. After all, the same collective
action problem that necessitated the class action in the first place generally
precludes independent investigation. 208 In short, without additional
discovery the class objector seems unlikely to affect the terms of
settlement, yet requests to conduct limited discovery routinely are denied,
thus reducing the anticipated benefits of objecting.

The expected benefits of objecting are significantly diminished even
further when courts engage in burden shifting against the objectors. Courts
have reasoned that once the proponents of the negotiated settlement have
satisfied their initial burden that settlement was negotiated after sufficient
discovery by experienced counsel, the “burden of proof shifts to the

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204. See, e.g., HENSLER ET AL., supra note 3, at 197 (“The defendants agreed to create a
common fund of $6.7 million from which all payments would be made. The basis for this figure
was not indicated in the public documents.” (discussing Graham v. Sec. Pac. Housing Servs., Inc.,
No. 2-96-CV-132 (S.D. Miss. Apr. 1, 1996)))).

205. Adams, 676 So. 2d at 1273 (citing City of Detroit v. Grinnell Corp., 495 F.2d 448, 463-64
(2d Cir. 1974)).

206. See, e.g., In re Intelligent Elecs., Inc. Sec. Litig., No. 92-CV-1905, 1997 WL 786984, at

(N.D. Ill. Sept. 14, 1984) (“[N]one of the objecting class members has challenged counsel’s
evidentiary materials or offered his or her own evidence.”).

The evidentiary burden that courts sometimes put on objectors is too high. In a case involving
settlement coupons, the court rejected the objectors’ arguments and essentially required the
objectors to prove that the coupon redemption rates from another case would properly estimate the
redemption rate in the case at hand. See Dunk v. Ford Motor Co., 56 Cal. Rptr. 2d 483, 490 (Cal.
Ct. App. 1996) (“[The objector] urges us to take judicial notice of that testimony, but the objectors
submitted no proof the estimates in the General Motors case apply to this case. This is not the type
of rebuttal that would merit an appellate court overturning the trial court’s finding. Nothing is
added by Geer’s distinguishing similar cases where settlements were upheld. (See, e.g., In re
air travel].”)”. This imposed an unrealistic burden on the objectors. What objector would
commission this study to predict the redemption rate of proposed settlement coupons? That would
be irrational waste of money.

208. See Carter, supra note 9, at 1139.
objecting class members.” Thus, courts sometimes create a presumption in favor of the proposed settlement. Even in the absence of such a presumption, the benefits of objecting are low because once the court gives preliminary approval to a proposed settlement, the settlement assumes a momentum that class members may believe they cannot overcome. As Judge Posner has noted, “[W]here notice of the class action is . . . sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a fait accompli.” Class members are not invited to participate until relatively late in the process, by which time the contours of the settlement seem set in stone.

The appeals process is unlikely to correct the problem. Even if the objecting class member has standing to appeal, she will have to show that the district court abused its discretion in approving the settlement. Under this standard, appellate courts give “[g]reat weight . . . to the trial court’s views, because that court has been ‘exposed to the litigants, and their strategies, positions, and proofs.’” Although appellants have overcome this high burden and successfully challenged settlements in some appeals, this standard is difficult to meet and appellate courts have deferred to trial court approval of class action settlements even when a


210. See Wellman v. Dickinson, 497 F. Supp. 824, 830 (S.D.N.Y. 1980), aff’d, 682 F.2d 355 (2d Cir. 1982) (listing the relevant factors for the presumption) (citations omitted). Similarly, with respect to the payments made to the class counsel, appellate courts in California have shifted the burden of proof onto class members who object to the attorneys’ fees planned under a proposed class settlement. See Dunk, 56 Cal. Rptr. 2d at 493 (“Nevertheless, the fees approved by the trial court are presumed to be reasonable, and the objectors must show error in the award.” (citing Rebney v. Wells Fargo Bank, 269 Cal. Rptr. 844, 859 (Cal. Ct. App. 1990))).

211. See Nagareda, supra note 42, at 933 (“The very existence of a multimillion-dollar settlement . . . may give rise to its own momentum, which individual class members may feel they cannot resist effectively.”).


213. See Hensler et al., supra note 3, at 496. “Typically, class members are brought into the litigation late in the process, when the deal has already been done.” Id.


215. See, e.g., County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1325 (2d Cir. 1990); Adams v. Robertson, 676 So. 2d 1265, 1272-73 (Ala. 1995).

216. Adams, 676 So. 2d at 1272-73 (quoting Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971)).

This is sometimes the last loop in a deference chain that operates against class interests: Trial courts defer to counsel and the appellate courts, in turn, defer to the trial court. As a result, there often is insufficient protection of the class members who have lost both their advocates (the class counsel) and their guardians (the reviewing judges).

(3) Empirically, Objecting is Futile

The most important reason that the expected benefits of objecting are low is that it is empirically a futile exercise. If objections are ignored and have no effect on the form or amount of settlement, then there is no benefit achieved by objecting. Yet history shows that courts consistently approve proposed settlements over the objections of class members. For example, judges routinely ignore objections that the monetary benefits of a proposed settlement are too low or that any non-monetary payments, such as coupons or in-kind transfers, are effectively worthless. Courts discount objections that proposed settlements are low-ball agreements that class counsel arranged after forum shopping. Courts have approved proposed settlements in over 90% of the cases in which class members filed objections. When changes are made, they are usually cosmetic, not substantive.

Courts generally justify the decision to ignore objections by noting that too few class members filed formal objections. If only a small number of class members object, judges seem to have little trouble dismissing the objections and approving the proposed settlement. Courts have asserted that a proposed “settlement is not unfair or inadequate simply because a number of class members oppose it.” Not surprisingly then, when only

218. See, e.g., TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 462-64 (2d Cir. 1982) (affirming district court’s approval of settlement over the objections of a majority of the class); County of Suffolk, 907 F.2d at 1325 (affirming district court’s approval of settlement over the objections of an assumed majority of class representatives); see also Reed v. Gen. Motors Corp., 703 F.2d 170 (5th Cir. 1983) (affirming district court’s approval of settlement over the objections of 600 of the 1,469 class members).
219. See, e.g., Gautreaux v. Pierce, 690 F.2d 616, 638 (7th Cir. 1982).
220. See Leslie, supra note 37, at 1063.

But courts even ignore significant numbers of objectors. Some courts have opined that significant opposition among class members does not prove that a proposed settlement is either unfair or inadequate.\footnote{See Flinn v. FMC Corp., 528 F.2d 1169, 1173 & n.16 (4th Cir. 1975) (quoting Bryan, 494 F.2d at 803).} Judges have approved settlements over the objections of a large number of class members.\footnote{See Bennett v. Behring Corp., 737 F.2d 982, 988 & n.10 (11th Cir. 1984) (noting that the district court properly considered the “numerous objectors”). But see Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157, 1217-18 (5th Cir. 1978) (holding that the district court abused its discretion in approving the settlement where 70% of the subclass opposed it).} Influential commentators have suggested that large numbers of objectors can be ignored if they constitute a small percentage of class members overall.\footnote{See Conte & Newberg, supra note 88, § 11:27.} Courts tend to agree, often rejecting objections from multiple class members when they comprise a small percentage of the total class.\footnote{Dunk v. Ford Motor Co., 56 Cal. Rptr. 2d 483, 489 (Cal. Ct. App. 1996) (“Although several people objected, their numbers were small in comparison to the entire class of over 65,000.”); Phemister, 1984 WL 21981, at *4 (“In response to the Notice, approximately 90,000 class members filed claims. Forty-nine class members have filed objections (about three one-hundredths of one per cent). None appeared at the hearing. Less than fifty class members in the expanded class opted out of the class in response to the Notice of Settlement [sic].”); In re Cuisinart Food Processor Antitrust Litig., M.D.L. 447, 1983 WL 153, at *6 (D. Conn. Oct. 24, 1983) (“In a putative class numbering in excess of one and one-half million members, these objections and requests for exclusion represent a miniscule percentage of the class membership.”); Adams v. Robertson, 676 So. 2d 1265, 1273 (Ala. 1995) (“In reviewing the trial court’s findings and order, we find particularly interesting the fact that less than 1,000 class members, out of 400,000 (less than 1%) objected to the settlement.”).} But courts have even approved settlements when 15, 20, and over 40% of the class has objected.\footnote{See Huguley v. Gen. Motors Corp., 999 F.2d 142, 145 (6th Cir. 1993) (approving settlement despite objections by 15% of the class); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 23 (2d Cir. 1987) (approving class settlement over objections from more than one-third of the class); Reed v. Gen. Motors Corp., 703 F.2d 170, 171, 175 (5th Cir. 1983) (approving settlement with over 40% (600 of 1469) of class members objecting); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir. 1974), cert. denied, 419 U.S. 900 (1974), reh'g denied, 420 U.S. 913 (1975) (affirming district court decision to approve settlement over opposition of more than 20% of class members); In re Montgomery County Real Estate Antitrust Litig., 83 F.R.D. 305, 318 (D. Md. 1979) (approving settlement where 6% objected) (citing Bryan, 494 F.2d at 803).} Indeed, courts have approved proposed settlements even though a majority of class members objected to them.\footnote{See, e.g., TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 462 (2d Cir. 1982) (approving settlement over objections of a majority of the class).}

These courts reason that “majority opposition to a settlement cannot serve
as an automatic bar to a settlement that a district judge, after weighing all the strengths and weaknesses of a case and the risks of litigation, determines to be manifestly reasonable.” In these situations, the court is not merely misinterpreting silence; it is ignoring the voices of the class members. While the presence of objections does not necessarily mean that a proposed settlement is in fact unfair, any sophisticated class member aware of judicial treatment of objections would know that the expected value of objection is minimal and perhaps nil.

(4) Courts Communicate the Futility of Objections to Class Members

Determined to ignore objections in any event, some judges communicate the message to class members not to object in the first place. For those class members who bother to attend the fairness hearings, the message of judicial apathy toward class member input is reflected in myriad ways. Objectors often are given insufficient time to state their objections. In some cases, the class members are simply never informed that they can speak, and they sit quietly through the fairness hearing, bewildered when it adjourns without the judge ever addressing them. The former Chief Justice of the California Supreme Court noted the unfairness of such treatment of class objectors: “Courts should not rely on untrained and unrepresented litigants to interrupt court proceedings and insist upon their rights.” Furthermore, the trial court in that case did not even read the written objections but instead relied upon one-line summaries of the objections prepared by other parties. In other extreme cases, judges have been known to scold the objectors for daring to question the proposed settlement.

Would-be objectors are given the message that their concerns cannot and will not change the proposed settlement. For example, judges sometimes treat the fairness hearing not as an information-gathering

232. Id. at 462; see also County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1325 (2d Cir. 1990) (quoting TBK Partners, 675 F.2d at 462).

233. See HENSLER ET AL., supra note 3, at 89. For example, in a class action against Ford Motor Corp. alleging faulty Mustang design, objectors showed up at the fairness hearing to protest a coupon settlement. Id. According to an attorney for the objectors, “[The judge was not hospitable to our objections at the fairness hearing, which lasted less than 30 minutes.]” Id.

234. State v. Levi Strauss & Co., 715 P.2d 564, 579 (Cal. 1986) (Bird, C.J., concurring) (“Here, the court could simply have announced the appropriate time and procedure for making objections.”).

235. Id. at 579 (“The trial court’s reliance on summarized objections makes a mockery of objectors’ due process rights. Class members have a due process interest in expressing their own views to the courts, not in having those views reduced to one-line summaries and expressed by other parties.”).

236. See Macey & Miller, supra note 182, at 47.
process, but as merely an opportunity for emotional closure for those class members who are particularly distraught. Professor Hensler and colleagues noted:

In the Agent Orange class action, Judge Weinstein held fairness hearings in five cities to provide opportunities to Vietnam veterans residing in different parts of the country to express their views. By the time of a fairness hearing, however, the shape of the settlement is set. Judge Weinstein apparently viewed the role of the fairness hearings as catharsis—an opportunity for individuals to have at least a vestige of their “day in court”—rather than a real opportunity to learn from class members what they wanted from the litigation.237

For the class member who truly objects to the proposed settlement, but does not feel the need to use an adjudicatory procedure solely as a means of group therapy, attending the fairness hearing is foolish.

Courts reject objections for a wide variety of reasons, including the substance of the specific objections and the identity of the objectors, but also for more systemic reasons. Many judges begin with an apparent presumption against objections, rejecting class member objections by reasoning that the “settlement is virtually always a compromise,” implying that some class members are simply unwilling to compromise and would object to any settlement. Courts also seem generally unpersuaded by objections relating to settlement provisions for payments to class counsel. The Federal Judiciary Center study found that in nineteen of twenty-one cases in which class members objected to the attorneys’ fees provision in a proposed settlement, the court awarded the full requested attorneys’ fees to the class counsel.239 Courts similarly reject efforts by class members who object to the settlement to have the class counsel disqualified.240

Some courts discount the concerns of objecting class members, reasoning that the objects could opt out if they do not like the settlement. For example, in Marshall v. Holiday Magic, Inc.,241 the Ninth Circuit upheld the approval of a disputed settlement in a securities and antitrust class action, reasoning that because the objectors could have opted out, they “should not now be allowed to play the role of spoilers for a class of more than 31,000 people when they could have chosen not to be bound by

237. HENSLER ET AL., supra note 3, at 118.
239. See WILGING ET AL., supra note 11, at 58.
240. See, e.g., Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 590-91 (3d Cir. 1999).
241. 550 F.2d 1173 (9th Cir. 1977).
the settlement." But this ignores the diseconomies of opting out. Almost by definition, most class members have too little at stake to warrant opting out of the class litigation and filing an individual lawsuit. Thus, opting out is probably not a viable option even though a proposed settlement is unfair or inadequate. Moreover, there may be no opportunity to opt out, or that opportunity may have expired before the terms of the proposed settlement were known.

Courts sometimes employ tortured reasoning to dispose of objections. For example, in one case when some non-objecting class members misinterpreted the notice to mean that the class members were being sued, the district court asserted that this confusion “strongly suggests that class members may not have fully understood the terms of the proposed settlement. Therefore, the Court discounts the significance of the small number of objectors.” This shows the utter futility of objecting. The Court dismissed the objections of some class members because other non-objecting class members were confused. This should have been evidence that the notice was inadequate, but instead the class counsel achieved a huge victory by drafting an apparently incomprehensible notice. Because the notice confused some class members, the judge ignored the objections of those other class members who understood the import of the document that they received. Finally, when confronted with a broad array of objections, courts are willing to reject them en masse.

(5) The Futility of Class Representatives’ Objections

While one might think that a court would afford appropriate weight to objections from the class representatives, the representatives often fare no better than ordinary class members. Courts routinely ignore objections when the class representatives oppose the proposed settlement. Even when a majority of class representatives oppose a proposed settlement,
courts have been known to approve the settlement over their objections.\textsuperscript{246} Courts have approved settlements when even a majority of class representatives have opposed the proposed settlement and sought to have the class counsel disqualified.\textsuperscript{247} Sometimes when the class representative opposes the proposed settlement, courts allow class counsel to substitute a more pliable class member as class representative in order to get the proposed settlement past the class. For example, in one prisoner class action alleging prison authority misconduct in disciplinary hearings, when the class representative opposed the proposed settlement, the court declared that a new class representative should be named for the purposes of getting the settlement through.\textsuperscript{248}

The rationale appears to be fear of the faithless representative. For example, the \textit{Manual for Complex Litigation} concluded that, unlike a party in an individual lawsuit, “a class representative cannot alone veto a settlement” that is found by the court to be in the best interests of the class as a whole.\textsuperscript{249} Courts, too, have reasoned that allowing the class representative to block a settlement “would put too much power in a wishful thinker or a spite monger to thwart a result that is in the best interests of the [class members].”\textsuperscript{250} Such reasoning seems odd given that one purpose of the class representative requirement is to address the collective action problem that would result in a lack of monitoring of the class counsel. Courts vet the proposed class representative “to ensure that the named representative is independent and can supervise the attorney’s decisions.”\textsuperscript{251} But when judges ignore the objections of class representatives, the monitoring function of named plaintiffs may be undermined. A monitor who is listened to only when she agrees with the person she is supposed to be monitoring is no monitor at all.

(6) Summary

Rational class members who are considering whether to make an objection should consider what they would get in exchange for incurring the costs of objection. Because the stakes are generally low and systemic obstacles to effectively objecting abound, it is not surprising that the

\textsuperscript{246} See County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1325 (2d Cir. 1990) (affirming district court’s approval of settlement over the objections of a majority of the class representatives).

\textsuperscript{247} See \textit{Lazy Oil Co. v. Witco Corp.}, 166 F.3d 581, 588-90 (3d Cir. 1999); \textit{see also} Coffee, \textit{Class Action}, supra note 32, at 407-08 (discussing \textit{Lazy Oil}).


\textsuperscript{249} \textit{MANUAL OF COMPLEX LITIGATION (FOURTH)} § 21.642 (2004).

\textsuperscript{250} \textit{Saylor v. Lindsley}, 456 F.2d 896, 899-900 (2d Cir. 1972).

\textsuperscript{251} Kane, \textit{supra} note 49, at 400-01.
empirical evidence shows negligible, if any, benefits from objecting. While not all class members will necessarily be aware of the historic futility of objecting, sophisticated class members—and those who contact a qualified attorney to assist with their objection—would likely realize that the expected benefits of objecting are low.

c. Coordination Problems

Collective action problems can be solved when parties have the ability to coordinate their efforts. However, as the size of the group increases, coordination becomes more difficult. A greater number of people increases the difficulty of identifying and locating the relevant parties and convincing them to contribute to the cause. Depending on the size of the group, the costs of finding the group members could even exceed the expected benefits of the project, rendering the entire effort not cost-beneficial. Once the affected parties are identified, large group size makes it more difficult for group members to efficiently communicate with each other. Thus, even with all parties present, a greater number of players increases the bargaining costs. It also increases the risk of

252. See supra Part IV.C.3.b.(3). None of this is to suggest that court approval of a proposed class action settlement is always perfunctory. Judges sometimes reject proposed settlements. In doing so, some have relied on the objections of class members. See, e.g., Clement v. Am. Honda Fin. Corp., 176 F.R.D. 15, 21-32 (D. Conn. 1997); see also Hensler et al., supra note 3, at 461 (noting examples). Courts appear more likely to seriously consider objections when the proposed settlement is facially suspect. See 4 Conter & Newberg, supra note 88, § 11:48. Persistent, well-articulated opposition can fundamentally improve a settlement for class members. See Hensler et al., supra note 3, at 204 (noting that as a result of objectors in one case, the common fund grew to $10.5 million—50% more than the originally negotiated amount). In very rare cases, in front of a receptive judge, one objector can derail a proposed settlement. See, e.g., Petruzzi’s, Inc. v. Darling-Delaware Co., 880 F. Supp. 292, 294 (M.D. Pa. 1995). Appellate courts, too, have sometimes taken the side of objectors who challenge proposed class action settlements approved by the trial court. See, e.g., Powers v. Eichen, 229 F.3d 1249, 1251, 1258 (9th Cir. 2000) (finding that the district court abused its discretion in calculating the attorney’ fees); Telecommunications Pacing Sys., Inc. v. TPLC Holdings, Inc., 221 F.3d 870, 880 (6th Cir. 2000); In re Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1135-36 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1979). For example, the Eleventh Circuit reversed the district court’s approval of a settlement when half of the monetary award went to eight class representatives. Holmes v. Cont’l Can Co., 706 F.2d 1144, 1148, 1160-61 (11th Cir. 1983). Although some judges claim to take objections seriously, see, e.g., Shaw v. Toshiba Am. Info. Sys. Inc., 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000), most settlements are approved without changes, see Willging et al., supra note 11, at 58.

253. See supra Part IV.C.


256. See id.

257. See id. at 831-33.
holdouts: individuals who threaten not to contribute their fair share, believing that others will take up the slack in order to secure the overall benefit for the group. Finally, knowing how difficult it is to coordinate a large number of dispersed individuals and get them to agree to contribute to solve a collective problem, most rational individuals will not attempt to undertake such a group project. In short, as the number of people that must agree in order to solve a collective action problem increases, the less likely it becomes that any given individual will expend the energy to cooperate, especially since the benefits of her coordination efforts will be dispensed among the group.

All of the coordination problems that make a collective action problem intractable appear in the class action context. First, the size of the affected group is large. By definition, there must be a significant number of class members. Rule 23(a) of the Federal Rules of Civil Procedure requires that the class be so numerous that joinder of all members is impracticable. The court thus should not certify the lawsuit as a class action unless the number of class members is sufficiently high. Second, it may be difficult to identify the class members. This makes it hard to coordinate with other class members. In particular, it is typically extremely difficult to ascertain which other class members are considering objecting to a proposed settlement. Third, even if all group members were known, the cost of communicating and bargaining with them may be prohibitively high. Although cooperative efforts may be more efficient when the players have cooperated in the past, in most class action litigation the members have not had previous interactions with one another and, therefore, would find it difficult to coordinate and cooperate.

Because of these factors, it is unlikely that any class member will undertake a meaningful effort to organize class members to object to an inadequate settlement. In sum, class members considering a proposed settlement have a classic collective action problem.

258. See id. at 833-34.
259. See id. at 813. Philip Heymann argues that “the benefits of coordination often escape individual actors.” Id. If so, then this creates an even greater disincentive to take a lead in coordinating any group action.
261. See id.
263. See supra notes 256-57 and accompanying text.
d. Summary of Collective Action Problem

The same collective action problem that may necessitate a class action (small gains spread across many people) applies to objecting to an inadequate proposed settlement of a class action suit. Each class member can expect to gain an insufficient amount to make it worth her while to object to a bad settlement. As a result, each individual class member rationally declines to object.

The collective action problem is significant at the objection stage for several reasons. Most importantly, it takes a large number of class members to object to a proposed settlement before the court will pay sufficient attention to the objections. Thus, even if one benevolent class member undertook the cost of objecting, she would probably receive no benefit for her action, nor would the class. Because the economics of objection creates a collective action problem, it is difficult for the class to monitor the class counsel. The silence that some judges interpret as endorsement of the proposed settlement is, in reality, a reflection of the collective action problem.

In sum, while the costs of objecting are great, the benefit to the individual objector is relatively small, certainly less than the costs of objecting. This means that the rational class member who understands this dynamic will remain silent, even in the face of a patently inadequate settlement proposal. Because of the collective action problem, judges are denied valuable information about the class members’ true attitudes towards proposed settlements. As a result, judges are more apt to approve class action settlements that are, in fact, inadequate.


The monitoring of a proposed settlement represents a public-good scenario. Every class member benefits from any class member’s efforts that improve the ultimate settlement. Add to this the fact that the costs of objecting are high and the expected individual benefits are low. No

265. See supra Part IV.C.3.b.
266. See Sylvia R. Lazos, Note, Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations, 84 Mich. L. Rev. 308, 319 (1985) (“Because the individual class member’s settlement award tends to be small, no member is financially motivated to expend the time and effort required to supervise the attorney closely. Moreover, any increase in the settlement award derived from close supervision of the attorney must be shared with all other class members, making it unlikely that the benefits of supervision will outweigh the costs.”) (footnotes omitted).
267. See id.
268. Of course, a class member could object as a matter of principle, even if the expected costs outweighed the expected benefits.
269. See Lazos, supra note 266, at 313-14.
class member has enough at stake to make his own gain from an improved settlement sufficiently high to justify the cost of objecting. The expected returns from objecting may be so negligible that the game is not worth the candle. Indeed, the benefits are likely to be zero because courts rarely reject proposed settlements in response to objections. If the expected benefit of objecting is close to zero, then even a minimal cost should deter the rational class member from objecting to an inadequate proposed settlement. The individual’s cost-benefit analysis means that it is rational to ignore any notice received about a pending class action settlement.

Instead of monitoring their class counsel and the proposed settlements themselves, class members are more likely to free ride on the monitoring efforts of others. An improved class action settlement is a form of a public good in that objectors who make the settlement better generally make it better for all class members. Any public good lends itself to free riding. Thus, rational class members may free ride on others’ objections. When members of a group free ride on the efforts of others in that group, the result is underinvestment—and sometimes complete non-production—of public goods.

The free rider problem magnifies the collective action problem in the proposed settlement context because courts are unlikely to take objectors seriously unless there is a critical mass of class members who oppose the proposed settlement. Knowing this, rational class members who

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270. See id. at 313-14 & n.32.
271. See WILLGING ET AL., supra note 11, at 58.
272. See Brunet, supra note 51, at 428.
273. See Lazos, supra note 266, at 324.
274. See id. at 314 n.32 (discussing the passive class member).
275. See id. at 313-14. It is difficult to limit the gains to one objector alone (unless that objector opts out and strikes a side deal). Although, it is possible that the objector could make the settlement better for a sub-class, but not the entire class.
276. See Toshio Yamagishi, The Structural Goal/Expectation Theory of Cooperation in Social Dilemmas, 3 ADVANCES IN GROUP PROCESSES 51, 56 (1986) (“Free riding constitutes rational action when a public good is involved.”).
277. Cf. Leslie, supra note 37, at 1047 (discussing the “free-rider problem” in monitoring class counsel); Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1309 n.9 (3rd Cir. 1993) (“Monitoring is fraught with ‘free-rider’ problems. Generally, the costs of monitoring will exceed the pro rata benefit to any single shareholder, even though they may be lower than the benefits to all.”).
278. See supra Part B.
279. While certainly not all class members are going to appreciate the costs, benefits, and general futility of objecting, many objectors are repeat players who would eventually understand these dynamics.
oppose the settlement, yet are unable to coordinate their efforts with other class members, will not bother to object. This creates yet another reason for class members who believe the proposed settlement is unreasonable to nevertheless keep quiet, because even for those individuals who are willing to let other class members free ride on their efforts (to increase the value to the group), objection is still not rational.\(^{280}\) Each class member knows that objection is not cost-beneficial for the other class members, yet no objection is likely to affect the outcome unless a critical mass of class members makes the sacrifice of objecting.\(^{281}\) Knowing that most class members are either unaware of the proposed settlement, apathetic, or planning to free ride,\(^{282}\) the rational class member will not bother to object to an inadequate settlement.

The problem is compounded by the opportunity to opt out of the litigation. Under Rule 23(c)(2), class members in certain class actions\(^{284}\) must be given an opportunity to opt out of the class litigation. The class members with the most at stake will sometimes have sufficient incentive

\(^{280}\) Although the high costs, low stakes, and probable futility of objecting makes silence a rational response to any proposed settlement, class members sometimes do step forward. Objections regularly come from public interest groups, such as Public Citizen, which seem to exist to overcome collective action problems. See Hensler et al., supra note 3, at 89. But more often than not, the objectors are individuals who (apparently) sincerely believe that a proposed settlement is inadequate, though in some cases the objector may just be ill-informed or foolish. Almost inexplicably, some class members have even objected to or opted out of proposed settlements because they thought that the underlying suit was frivolous and that the defendants should not have to pay anything. See, e.g., Polar Int’l Brokerage Corp. v. Reeve, 187 F.R.D. 108, 113 (S.D.N.Y. 1999); Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1301 (D.N.J. 1995); cf. In re Cuisinart Food Processor Antitrust Litig., M.D.L. 447, 1983 WL 153, at *6 (D. Conn. Oct. 24, 1983) (noting that some customers opted out because they were satisfied with their Cuisinart products). This would appear to be an irrational expenditure of time and money since opting out merely preserves the individual’s right to bring an individual cause of action against the defendant. See generally Shutts, 472 U.S. at 813 (1985) (describing opt-out). If the class member has no desire to sue the defendant, it makes more sense to ignore the class action altogether and not file a claim against the settlement fund. The objection appears irrational.

\(^{281}\) Free riding is more likely to occur in groups that are relatively large because individuals in large groups believe that their efforts cannot affect the end result. See Yamagishi, supra note 276, at 59 (“In small groups members can feel that their own actions have some tangible effects upon the collective consequence or upon other members’ decisions, but in large groups members usually feel that their own actions have practically no such effects.”).

\(^{282}\) Critical mass might not be achieved because class members may believe that if their objection is being made by another class member, it is unnecessary for them to make that same argument to the court. Increasing the number of objectors making the same arguments is arguably inefficient, but without a sufficient number of objectors making the same objections, courts are more likely to approve an unreasonable or inadequate settlement.

\(^{283}\) Rational class members will not become involved at all until the case settles. Then, after the settlement is approved, they can decide whether it is cost-beneficial to file a claim.

\(^{284}\) Notably, those brought pursuant to Federal Rule of Civil Procedure 23(b)(3).
to monitor the class counsel and object to an inadequate settlement. However, the class member with the highest stake has the highest incentive to opt out of the class action altogether. These individuals and institutions often can efficiently pursue individual litigation. Thus, the class is in a bind because those with little at stake will do nothing and those with much at stake will exit. In either case, monitoring does not occur. Finally, courts particularly fail to comprehend the cost-benefit analysis undertaken by wealthier or more intelligent class members. Courts read even more into silence when the class is comprised of relatively educated and sophisticated members. For example, in a class action whose members resided “in an affluent suburb of Washington, D.C.,” the district court reasoned that the silent response from 94% of the class “is helpful in this case because, for the most part, the affected individuals would appear to be educated, knowledgeable people . . . . [the suburb] harbors a high percentage of professionals and civil servants: people whose education and background prepare them to act in their own self-interest.” The court conjectured, without any real evidence, “that the notice of the proposed settlement was widely understood and intelligently considered by the class.” But this is an incorrect reading. Educated professionals are more likely to place a high dollar value on their time and therefore are even less likely to take the time to object to a proposed settlement. Indeed, they are more likely to appreciate the collective action problem. Thus, economically sophisticated class members are more likely to free ride. This leaves less sophisticated class members to object, but these are the class members judges appear more likely to ignore. In sum, because sophisticated class members generally have higher opportunity costs for their time, they should be even less likely than unsophisticated class

285. See Coffee, Entrepreneurial Litigation, supra note 45, at 894.
286. See id. at 895, 904 (discussing this opt-out incentive as a function of adverse selection and the common pool problem).
287. Opt-outs are an important signal, made all the more important because when these class members exit the litigation, the judge loses the input of the people most likely to object. See infra Part IV.G.
289. Id.
290. Similarly, uneducated, rich people (rock stars and models come to mind) would be less likely to object because of higher value to their time.
292. See Geoffrey P. Miller, Some Agency Problems in Settlement, 16 J. LEGAL STUD. 189, 214 n.73 (1987) (“Often the only ones opposing the settlement are private individuals whose arguments may be unsophisticated or frivolous. Moreover, the trial judge knows that if he or she approves the settlement there is little likelihood that the decision will be appealed, whereas if he or she rejects it there is certain to be an appeal.”).
members to invest their time in objecting to an inadequate proposed settlement.

E. Negative Feedback Loop

In most cases, the perceived futility of objecting makes objection not cost-beneficial. For people who are aware of judges approving inadequate settlements over class member objections in previous class actions, there is little reason to object to a proposed settlement in a class action in which they are members. This creates a negative feedback loop: (1) Because courts often ignore objections, fewer class members object; (2) As fewer class members object, courts interpret this as the class members’ endorsement of the proposed settlement. This is analytically unsound. It fails to take into account the individual class member’s payoffs and why even class members who perceive a proposed settlement as weak may rationally withhold their objections. Class members see the following:

(1) Their notice often does not adequately explain:
   - the membership of the class,
   - the claims being released,
   - the actual recovery for each class member,
   - the attorneys’ fees to the class counsel, and
   - other costs and administrative fees that will be deducted from the settlement amount.

(2) When they want additional information:
   - the notice tells them not to contact the court,
   - the court may well deny them discovery, and
   - the class counsel does not have to share any information with them.

(3) When they show up to the fairness hearing to object, the court may:
   - ignore them,
   - berate them,
   - chastise them for being uninformed, even though the notice is unintelligible and nobody will answer their questions or provide them access to necessary information, and
   - dismiss their objections as irrelevant or unpersuasive.

Courts have increased the costs and diminished the expected value of objecting. Is it any wonder that the vast majority of class members, with little at stake, simply do not get involved? Yet, when class members perceive the futility of objection, and rationally decide not to put themselves through this Kafkaesque process, courts are likely to
mischaracterize the lack of objections as evidence of enthusiastic, well-informed support for the proposed settlement. Class members are caught in a vicious cycle: Few objectors come forward, so courts ignore the objections; because courts ignore objectors, few class members bother to come forward to object.

F. Additional Arguments That Silence Is Not Endorsement

In addition to the above arguments for why non-responsive class members do not necessarily support a proposed settlement, analogies to other areas of law and evidence of class members’ post-settlement behavior also suggest that courts are misreading class member silence.

1. Silence, Assent, and an Analogy to Contract Law

It is particularly surprising that trial judges interpret silence as endorsement in the context of proposed settlements to class action litigation when silence carries no such significance in other areas of law. Although contract law does not govern the relationships at issue in the settlement stage of class action litigation, contract law nevertheless provides a useful analogy for how courts treat silence in other contexts. The general rule in contract law is that silence is not acceptance of an offer to form a contract.293 People should not become bound to contractual obligations unless they actually manifest assent.

Contract law does permit silence to constitute acceptance when the offeree has a duty to speak but nevertheless remains silent.294 The Second Restatement of Contracts establishes three scenarios in which the offeree has a duty to speak.295 First, silence can form a contract if the offeree receives the benefits of services performed by the offeror when the offeree had an opportunity to reject the services and knew the offeror was expecting compensation.296 Second, if the offeror communicates that silence can mean acceptance and the offeree subjectively intends to accept by remaining silent.297 Third, previous dealings between the parties can impose a duty upon the offeree to notify the offeror if the offeree does not want to enter into a contractual relationship.298

Although contract law provides exceptions to the general rule that silence is not acceptance, none of them apply to silent class members. First, class members at the settlement evaluation stage of the proceedings

\[293. \text{See Restatement (Second) of Contracts § 69 (1981).} \]
\[294. \text{See id.} \]
\[295. \text{See id.} \]
\[296. \text{See id. § 69(1)(a).} \]
\[297. \text{See id. § 69(1)(b).} \]
\[298. \text{See id. § 69(1)(c).} \]
have not idly stood by receiving benefits, while now refusing to pay for them. Second, most class members do not subjectively intend to endorse the proposed settlement by remaining silent. Third, class members have not had previous dealings that warrant imposing upon them a duty to speak. In short, there is no reason to infer that silence constitutes endorsement in the context of a proposed class action settlement by analogy to the situations in contract law when silence signals acceptance.

As in contract law, silence among class members is consistent with various states of mind. Silence may be evidence of ignorance or rational non-response, as well as of approval. There is no greater reason to believe that silence signifies approval than there is to interpret that same silence as ignorance, rejection, or simple belief that one’s opinion does not matter to the decisionmaker.

Of course, the analogy to contract law is just that, an analogy. Contract law and class actions have important differences. Most notably, where the Federal Rules of Civil Procedure rely on an opt-out structure, silent class members are deemed to have consented to participate in the process and result of the class action litigation. Thus, class actions begin by reading significance into inaction. But this has more to do with protecting the efficiency of the class action vehicle than actually viewing silence as informed participation by every class member. In any case, the contract law comparison counsels caution about reading too much into a party’s silence.

2. Empirical Evidence That Silence Is Not Endorsement

Class member conduct after a settlement is finally approved provides strong circumstantial evidence that class members have not intended to communicate through silence their support for the proposed settlement. If silence were acceptance, then we would expect the silent class members to actually participate in the settlement after it is approved. We do not see this. In many cases, the vast majority of class members neglect to collect the money due them under the settlement. It is not unusual for only 10 or 15% of the class members to bother filing claims. When settlements

299. See supra Part IV.D.
300. See Hensler et al., supra note 3, at 14.
301. See, e.g., Zimmer Paper Prods. Inc. v. Berger & Montague, P.C., 758 F.2d 86, 92 (3d Cir. 1985) (noting that only 12% of the class responded to the notice by filing a claim to share in the settlement); see Hensler et al., supra note 3, at 81 (“It was estimated that somewhere between 14 and 33 percent of all eligible consumers filed claims in the Levi Strauss suit.”); see also Hensler & Rowe, supra note 63, at 148 (discussing the RAND study, which found that in one case with a settlement fund valued at $67 million (half cash, half coupons), only an estimated $9.2 million was distributed); William Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F.R.D. 375, 379 (1973) (“Even after a settlement, where class members are notified that they can share in the
require class members to file statements or proofs of claim in order to receive their share of the common fund, “response rates are often very small, and rarely exceed 50%.”

There are so many examples of shockingly low participation rates that what used to be extreme is becoming ordinary. In one suit against Wells Fargo, less than 5% of the eligible class members bothered to claim their cash refunds under the settlement plan. In extreme cases, the rate has been less than one percent. In one class action with forty million members, only 228 individuals actually filed claims against the settlement fund. It bears noting that these percentages are considerably lower than the percentage of class members objecting in some cases in which trial courts nonetheless approved the proposed settlement. Response rates are particularly low in coupon-based settlements, where settlement coupon redemption rates are as low as 0.002%. In most coupon settlements, the vast majority of class members received absolutely nothing from the class action settlement. It would simply be irrational to infer that these class members embraced the settlement.

These examples suggest that silence does not indicate endorsement of the proposed settlement. Although part of the reason for the low response rates may be the requirement that “class members . . . request and complete a fairly complex form[,]” if the class members cannot understand the claim form, what is the likelihood that they understood the notice, the merits of their underlying claims, and the adequacy of the proposed settlement? Again, the silence of this cohort of class members does not indicate their support for the proposed settlement. The low response rates, accompanied by silence, are evidence that class members are out of the loop, that they are not following the class action at all. If people do not take advantage of the class action settlement at all—for example, by not filing a claim—then it is extremely unlikely that these non-responding class members intended to endorse the settlement by being silent.

recovery merely by filing a simple proof of claim, only 10% to 15% bother to do so.

303. See Hensler et al., supra note 3, at 81.
304. See id. at 283.
306. See supra notes 226-32 and accompanying text.
307. See Wolfman & Morrison, supra note 181, at 474. But see Leslie, supra note 37, at 1035 (discussing studies showing higher redemption rates).
308. See Leslie, supra note 37, at 1035.
309. Hensler & Rowe, supra note 63, at 148.
310. While it is possible that a settlement could be reasonable despite a low claims rate, it is
G. Courts Misinterpret Significance of Opt-Outs

Interpreting class member silence as endorsement of a proposed settlement is not the only way that courts misread the actions of the class. Sometimes a request to opt out is the most common reaction of the class members to class litigation.311 So it is often particularly important to read this cue correctly.312 Yet judges often compound the mistake of treating silence as approval by misinterpreting the significance of opt-outs. First, judges do not interpret opt-outs as objections. Indeed, some courts have actually held that a large number of opt-outs by class members supports the reasonableness of a proposed settlement.313 One court asserted, “By approving this settlement the majority who never objected and the very significant number who opted-out are satisfied; fewer than six objectors are still members of the class.”314 But approving the settlement does not make the opt-outs “satisfied.” They could have felt forced to pursue alternative (or no) litigation because the proposed settlement was inadequate. Approval did not serve their interests. Furthermore, to the extent that these class members are more likely to have read the proposed settlement than the average class member who did not opt out, the remaining class members may discover a rude surprise too late when they unlikely that those class members who declined to file a claim affirmatively supported the proposed settlement.

311. See, e.g., Simon, supra note 301, 55 F.R.D. at 379 & n.18 (“[During] one phase of the Antibiotics litigation, notice was given to 2,000,000 class members, and only 12,000 responded, 90% of whom requested exclusion.” (citing AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1972))). However, in general, the percentage of class members who opt out of class actions at the settlement stage is empirically extremely low, usually less than one-half of one-half percent of the class. See WILLGING ET AL., supra note 11, at 10 (finding the median opt-out rate in four case studies to be “either 0.1% or 0.2%”).

312. Courts have also relied on the fact that class members can opt-out of damages class actions to justify the denial of full participation to those class members who decline to opt out. See Woolley, supra note 130, at 579; see also Kornhauser, supra note 90, at 1565 (arguing that opt-out rights under rules for (b)(1) and (b)(2) classes are unclear).

Although class members may generally opt out of class action litigation at its inception, this opt-out right does not necessarily survive to the point of the proposed settlement, such as when the class has been certified only for settlement purposes. See Mark C. Weber, A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor, 59 OHIO ST. L.J. 1155, 1167 (1998).

313. See Tornabene v. Gen. Dev. Corp., 88 F.R.D. 53, 61 (E.D.N.Y. 1980) (“Perhaps the strongest factor supporting approval here is the extended period given to request exclusion and the relatively large number (2,179) who in fact did so. The Court is convinced that both those class members who seek the fruits of the settlement and those who prefer to pursue other remedies should be allowed the choice.”).

314. Id.
find that they are bound by an unreasonable settlement.\textsuperscript{315} In short, an opt-out is an objection. A class member would not opt out of a proposed settlement that she perceived as fair, reasonable, and adequate. When a significant number of class members opt out of a proposed settlement, judges should interpret the action as a vote of no confidence in the settlement.

Second, courts may treat a low number of opt-outs as demonstrating class support of the proposed settlement.\textsuperscript{316} Courts also point to a limited number of opt-outs as evidence of a proposed settlement’s reasonableness.\textsuperscript{317} Especially when only single-digit numbers of class members choose to opt out of a class action following announcement of the proposed settlement, courts likely will find this to be persuasive evidence that the settlement is fair, adequate, and reasonable.\textsuperscript{318} But a failure to opt out proves neither knowledge nor endorsement of the proposed settlement. Class members might not have enough information to know whether to opt out by the time that the deadline expires.\textsuperscript{319} The same inadequate notice that may make the decision of whether to object difficult\textsuperscript{320} may similarly render an informed decision about opting out impossible. Even if class members understand the underlying litigation, they may not fully understand their opt-out rights.\textsuperscript{321} Most often a dearth of opt-outs simply demonstrates either ignorance or indifference about the class action litigation and its resolution.\textsuperscript{322} Yet some courts treat those

\textsuperscript{315.} See Nagareda, supra note 42, at 932 (“The persistence of judicial review under Rule 23(e) stands as a tacit recognition that the opt-out mechanism is an imperfect check upon class counsel.”).

\textsuperscript{316.} See, e.g., Ohio Pub. Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1, 11 (N.D. Ohio 1982) (“The reaction of the class members of the proposed settlement has been extraordinarily supportive. Out of the 1,122,422 class members who received the First Notice by mail (approximately 1,040,000 households and 82,000 businesses), only 3,060 Requests for Exclusion were returned, representing only 0.27%.”).


\textsuperscript{318.} See, e.g., De Angelis v. Salton/Maxim Housewares, Inc, 641 A.2d 834, 839-40 (Del. Ch. 1993) (finding the proposed settlement in shareholder class action fair when, among other factors, only eight shareholders opted out of the class action).

\textsuperscript{319.} See HENSLER ET AL., supra note 3, at 77 (“[C]lass members may not know precisely how the settlement would affect them”); Bruce L. Hay, Asymmetric Rewards: Why Class Actions (May) Settle for Too Little, 48 HASTINGS L.J. 479, 492 n.32 (1997).

\textsuperscript{320.} See supra Part IV.E.

\textsuperscript{321.} See Berman v. L.A. Gear, Inc., No. 91 Civ. 2653 (LBS), 1993 WL 437733, at *5 (S.D.N.Y. Oct. 26, 1993) (holding that class members need to be advised of their opt-out rights only once); see also Hay, supra note 319, at 492 n.32.

\textsuperscript{322.} For example, when settlements require class members to file claim forms to receive their share of the proceeds, many do not. See supra notes 302-09 and accompanying text.
class members who did not opt out as favoring settlement. In reality, the failure to opt out probably represented rational non-involvement in the suit.

Finally, the opt-out right is not particularly meaningful when the class action vehicle is used to aggregate individual claims that are too small to be litigated individually. If one’s claim is so small that the claimholder would not litigate after opting out, then it makes no sense to incur the transaction costs of opting out merely to let one’s claim lie fallow. It would be rational to simply accept the fruits of an inadequate settlement, even if one recovers nothing from that settlement. In sum, a rational consumer may not opt out even though the proposed settlement is inadequate, or perhaps even worthless to that class member.

In conclusion, the absence of opt-outs does not indicate fairness of a proposed settlement. Neither does the presence of opt-outs counsel in favor of settlement approval for the class members who remain. Courts do not treat opt-outs as objections. They should. If a class member opts out, this reflects her determination that the proposed settlement is inadequate. No class member would opt out if she felt that the proposed settlement was fair, adequate, and reasonable. Of course, opt-outs should not be read as objections if the class members somehow indicate that they are opting out for reasons unrelated to the adequacy of the proposed settlement, but in the vast majority of cases they do not so indicate.

H. Why Courts Misinterpret Silence as Endorsement

While some judges might honestly think that silence is a manifestation
of assent to a proposed settlement, this seems unlikely because silence does not generally constitute assent in other areas of law. On the other hand, there is significant systemic pressure for judges to approve settlements. Most notably, judges have limited information. In addition, evidence suggests that courts often do not invest sufficient time and resources into monitoring class action settlements. One study found that while judges invest an average of 34.5 hours for each certified class action, only 2.8 hours (less than 10% of the total time) is spent evaluating proposed settlements. Because the judge has already preliminarily approved the proposed settlement, she is predisposed to granting final approval of the settlement. Even judges who sincerely want to do the right thing are hamstrung since they cannot modify the proposed settlement. Finally, judges feel pressure to approve settlements in order to clear their dockets. Settlements conserve judicial resources. In short, the case law creates a strong presumption in favor of settlement. Taking these incentives into consideration, it becomes easier to understand why some judges misinterpret the silence of class members as endorsement. The judge is operating under systemic pressure to approve the settlement. A multi-factor test gives greater discretion to judges to interpret and balance the relevant factors than a bright-line rule. Because one of the most important factors is the response of the

328. See Issacharoff, supra note 36, at 829.
329. See Coffee, Class Wars, supra note 43, at 1370 (“In any event, the best and bottom line generalization here is not that courts are incapable of detecting the signs of collusion, but that they will not invest scarce judicial time in monitoring ‘small claimant’ class actions; thus they approve some dubious settlements as the lesser evil when dismissal on the merits is not possible.”).
330. See WILGLING ET AL., supra note 11, at 169.
333. See, e.g., In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995) (“The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.”) (citations omitted).
334. See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) (“We are mindful of the ‘strong judicial policy in favor of settlements, particularly in the class action context.’” (quoting In re Painewebber Ltd. P’ships Litig., 147 F.3d 132, 138 (2d Cir. 1998))); Coffee, Understanding, supra note 73, at 714 n.121.
class, the judge has a significant incentive to interpret silence as supporting the proposed settlement. Judges see the class members’ non-response as a blank canvas upon which they can project their own support for the settlement.

V. THE SILENT OBJECTOR PROBLEM AND POTENTIAL SOLUTIONS

Because judges often misinterpret class member silence and the current class action system has failed to provide proper incentives for class participation, this section will discuss two possible responses to the problem of silent objectors. First, judges could require that counsel use web-based methods to better inform classes about proposed settlements, to facilitate communication among class members, and to solicit more comments from class members. Alternatively, judges could make a conscious effort to alter their interpretations of class member silence after the announcement of a proposed settlement, perhaps by the creation of new judicial presumptions about the meaning of silence. The approaches are not mutually exclusive and could be adopted simultaneously, providing a multi-pronged response to the problem of the silent objector.

A. The Silent Objector Problem and the Internet Solution

Class members historically have been unresponsive to proposed settlements, even though the settlement will terminate their rights to pursue independent lawsuits against a defendant. Part of the reason for class inaction is the collective action problem: The individual’s cost of action outweighs the benefits to the acting individual. Related to this is the critical mass problem: One objection is unlikely to derail an inadequate settlement, so why bother investing one’s resources in activity that will secure no benefits? Judges should consider mechanisms to solve both problems that plague class action litigation.

The classic solution to the collective action problem is to have the affected individuals coordinate their efforts. When it is not cost-beneficial for any individual to provide a particular good, individuals must find a way to combine their efforts. This, in turn, requires a mechanism whereby the individuals can negotiate a common solution. Although coordination

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335. Of course, many judges do everything correctly, trying to elicit class member reactions and reasonably interpreting the responses of those objectors who voice concerns. Unfortunately, because many other judges ignore or misinterpret class member objections, even these good judges are not going to receive meaningful input from the class. Left with no external sources of information or criticism, they may approve a settlement (which is arguably inadequate) because they honestly believe the settlement is reasonable.

336. In some cases, an enforcement scheme is needed to insure that everybody pays, like
can assist class members in solving the collective action problem, coordination in the class action context is often difficult when classes are large and widely dispersed.

Communication is necessary to solve the collective action problem of class member silence in response to inadequate settlements. There can be no coordination without communication, yet in the context of class action litigation, class members often do not know who else is in the class, have no means of communicating with each other, and have no confidence that others will object in order to create the necessary critical mass of objections to have a chance of affecting the decision.

Judges should affirmatively seek ways to facilitate communication. While many courts talk about the importance of the reaction of the class to the proposed settlement, it is simply inconsistent for courts to claim to care about the reaction of the class and yet fail to solicit the true reaction of a significant number of class members. While courts should not attempt to motivate class members to participate for the sake of participating, judges should attempt to alleviate the coordination hurdles that make it difficult for interested and informed class members to solve the collective action problem. A decade ago these coordination problems would have been impossible to overcome. There was no cost-effective way for class members to communicate with each other or the court. But the Internet has changed the class action landscape. Some courts have already begun experimenting with websites as mechanisms to provide notice or for class members to request claims forms. Early indications suggest that these efforts have been successful.

The channels of communication need to be opened in all directions. There needs to be more communication to the class members, among the mandatory taxes to support national defense and education.

337. See generally Leslie, supra note 264, at 538 (discussing communication and the Prisoner’s Dilemma).

338. See supra note Part IV.C.3.c.


340. See, e.g., Wershba v. Apple Computer, Inc., 110 Cal. Rptr. 2 d 145, 152 (Cal. Ct. App. 2001) (“Apple mailed or e-mailed notice to approximately 2.4 million class members, including claim forms, releases and instructions, and in addition posted notice on its internet web site and published the class notice in USA Today and MacWorld.”); In re Motorsports Merch. Antitrust Litig., 112 F. Supp. 2d 1329, 1332-33 (N.D. Ga. 2000) (“Plaintiffs’ [sic] reported that the settlement website had received 48,088 ‘hits,’ and 13,043 claim forms had been downloaded. The claims administrator has mailed 505 hard copies of the notice and received 247 claim forms.”).

341. See In re Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) (“[O]ver 11,000 requests for claims forms have been received and the web-page has received over 10,000 ‘hits.’ Based on their research, counsel has estimated that approximately 1,000 valid claims exist.”).
class members, and from the class to the court. While courts have employed the Internet to communicate to class members, class members have generally not been able to use the Internet to initiate communications to each other, to counsel, or to the court.

Communication to the other class members is the most critical. If class members do not know about the underlying class action or the proposed settlement, it is nonsensical to talk about their reaction to the proposed settlement. Thus, the first thing the courts must do is to develop meaningful mechanisms to keep the class members informed. More attention is being paid to making notices to the class easier to understand. But class members still often do not have meaningful access to the proposed settlement itself. The proposed settlement in its entirety should be posted on the Internet. While many class members may not be able to understand the legal document, some class members probably will. At a minimum, it would allow class members who are considering seeking outside counsel to show the proposed settlement to an independent attorney, who should be able to comprehend the document.

However, it is not enough for the courts to merely inform class members of the proposed settlement. Judges must also develop channels of communication from the class members to each other and back to the judge. Courts are not required to disseminate the objections received. So, a class member considering objecting does not know whether she will be the lone (and consequently ineffectual) objector or part of a larger group of (potentially effective) objectors. Currently, the only real avenue for discussion among class members and between the class and the other participants is the fairness hearing. But the fairness hearing is a vastly inadequate forum. As one commentator noted,

[T]he idea that class members in the modern large-scale, small-claim setting can simply attend the settlement hearing, ask their questions and hence be duly informed and ready to make a decision is not realistic. Such a forum is not

342. See Hensler et al., supra note 3, at 496.

343. In one case, only a summary notice of the proposed settlement was posted electronically. See, e.g., In re Airline Ticket Comm’n Antitrust Litig., 268 F.3d 619, 621 (8th Cir. 2001). Given the relatively low cost and lack of space constraints—notice published in wide-circulation newspapers, by contrast, are both expensive and space-limited—there is no reason not to require a hyperlink to the actual proposed settlement.

Website notice and communication also provide the advantage of being able to cost effectively speak to the class in a range of relevant languages. See generally In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503, 516 (E.D.N.Y. 2003) (“It would have been a useful addition to the notice to have included a bulletin (in Spanish) that a Spanish translation of the notice was available on a specified website.”).

344. See Carter, supra note 9, at 1153.
conducive to an open, informative discussion in which issues and concerns can be rationally addressed.\textsuperscript{345}

Courts can use Internet-based mechanisms to create a freer flow of information among class members. Because class members cannot coordinate cost-effectively with each other, judges should require counsel to create a website for each class action. In addition to having the notice, proposed settlement, and relevant court filings posted, the website should have a bulletin board where class members can communicate with each other and air their concerns. All class members should have access to, and be permitted to participate in, the discussion. Class counsel and defense counsel should be able to respond to members’ concerns.\textsuperscript{346} Such a system would reduce search costs for class members seeking information about the class litigation and proposed settlement. Implemented properly, a website could solve the costly problem of forcing class members to go to court to object. Most importantly, class members considering objections could determine whether there is a critical mass of objectors. For example, an individual class member could create an objection in the form of a petition, which other class members could then sign onto via the Internet.

Finally, judges themselves should accept comments and objections to proposed class settlement through Internet-based communications, such as a web page dedicated to the particular class action, allowing class members to communicate at a lower cost.\textsuperscript{347} If courts are going to claim that the reaction of the class is the most important factor in evaluating a proposed settlement,\textsuperscript{348} then judges should endeavor to facilitate class member responses to such proposals.\textsuperscript{349} Allowing class members to use e-mail and to post their objections on a public website should increase class member participation. Empirical evidence suggests that class members are more willing to write their objections than to undertake the cost and potential stress of attending the fairness hearing.\textsuperscript{350} By reducing the cost of objecting, judges would be more likely to get an accurate reading of

\textsuperscript{345} Id. at 1138.
\textsuperscript{346} Involved counsel should not be allowed anonymity when conversing on the website.
\textsuperscript{347} I am not suggesting that class members be able to email judges directly.
\textsuperscript{348} See supra note 94 and accompanying text.
\textsuperscript{349} See HENSNER ET AL., supra note 3, at 496 ("Rather than distancing themselves from class members, judges ought to invite questions from potential class members via ‘800’ telephone numbers, electronic mail, and more traditional correspondence. Judges presiding over large complex class actions should have sufficient staff to monitor such communications. Information about the pendency of a class action and about its proposed settlement ought to be available on a court Web site, and comments by potential class members ought to be solicited on that Web site.").
\textsuperscript{350} See WILLING ET AL., supra note 11, at 10 ("Nonrepresentative parties participated by filing written objections to the settlement far more frequently than by attending the settlement hearing.").
how class members view a proposed settlement.

In sum, more thought should be given to solving the collective action problems presented at the settlement stage of class action litigation. In order to properly gauge the reaction of a class to a proposed settlement, courts must first develop mechanisms to solicit meaningful information from a majority of class members. Courts should use the Internet to facilitate communications regarding proposed settlements. Communications to, from, and among the class members all should increase. This would give judges who are evaluating proposed settlements a better sense of the attitude of the class regarding the proposed settlement.

Unfortunately, greater communication from class members will mean little if judges do not give sufficient weight to objections. Courts sometimes ignore objections even when a majority objects. So, increased participation alone will not solve the problem. A complete solution will require judges to reconsider how to interpret class member objections, as the following section argues.

B. The Silent Objector Problem and the One-Way Presumption Solution

In general, proposed settlements of class action litigation do not receive sufficient judicial scrutiny. For better or worse, the current system relies on judges to protect class members from unreasonable settlements. Nevertheless, systemic pressures, limited information, and the persuasive efforts of defense and class counsel all combine to lead judges to approve inadequate settlements. Part of the problem is that many judges fail to treat the class members—the very parties that judges are commanded to protect—as a valuable source of information. While some judges seem eager to interpret class member silence as endorsement of a proposed settlement, they are reticent to give any weight to the objections of class members who decide to participate. Such an approach is backwards: Class members should be listened to more when they speak than when they fail to speak.

To properly interpret class reaction to a proposed settlement, courts should employ a one-way presumption where significance is attached only to the affirmative statements of class members. While the presence of objectors shows (at least some level of) dissatisfaction with the proposal,
the absence of objectors does not prove that any class members support the proposed settlement. The collective action problem prevents us from inferring approval from silence because, as Part IV shows, even a class member who believes the proposed settlement to be unreasonable would find silence—not objection—to be a rational response. The presence of objectors has significance that the absence of objectors does not. When class members object to a proposed settlement, this is proof of opposition. But class member silence is not proof of support. The proponents of a proposed settlement to a class action have the burden of proving its fairness. They should have to satisfy this burden with affirmative evidence, not a lack of negative evidence.

An absence of objectors also does not relieve judges of their duty to independently scrutinize the proposed settlement. The judge has an independent duty to examine the proposed settlement. The court’s fundamental duty is to protect the interests of class members, even if they do not object. Indeed, it is particularly important to protect those class members who are not engaged in the process and are completely dependent upon the reviewing judge. Yet, courts hold that “the lack of objections may well evidence the fairness of the [settlement].” For judges to assume that a class member’s silence means that the proposed settlement is fair turns the entire inquiry on its head: The whole purpose of judicial approval is for the judge to protect the interests of absent class members. Of course, many judges agree that “[t]he absence or silence of [class members] does not relieve the judge of his duty and, in fact, adds to his responsibility.” All judges should follow this edict.

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356. See, e.g., Grunin v. Int’l House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975) (“Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members. The court cannot accept a settlement that the proponents have not shown to be fair, reasonable, and adequate.”).
357. See, e.g., In re “Agent Orange” Prod. Liab. Litig., 818 F.2d 179, 185-86 (2d Cir. 1987) (“One of the district court’s prime functions in distributing . . . a [settlement] fund is to protect the less vocal and less activist members of the class.”).
359. Norman v. McKee, 290 F. Supp. 29, 32 (N.D. Cal. 1968), aff’d, 431 F.2d 769 (9th Cir. 1970); accord Polar Int’l Brokerage Corp. v. Reeve, 187 F.R.D. 108, 113-14 (S.D.N.Y. 1999) (“The lack of substantial opposition weighs in favor of approving the settlement. The fact that only a very small number of class members objected to the settlement, however, is not dispositive. In assessing a settlement, the court’s duty is to protect absent class members, and thus it must reject a settlement if it determines to be inadequate or unfair even if class members have not submitted any
Judges should be exceedingly hesitant to approve a settlement over the objection of a majority of class members. After all, the class is the client. If the client wants to litigate, then the attorney for the class (along with the attorney for the defendant and the approval of the court) should not be able to force a settlement on the client. The role of the judge is to protect the class from a bad settlement, not to protect the class from itself. If the class, as client, makes the decision that it would rather litigate than accept the settlement, then the class should be allowed to litigate. Judges should not take it upon themselves to extinguish the viable legal claims of class members who would rather litigate than settle. More importantly, when judges approve settlements over objections from a majority of class members, this sends a message of futility to future class members: Objection is a waste of time, so don’t bother.

Judges should not deter class member participation because objections may indicate relevant bad facts about the proposed settlement. For example, the presence of objectors may indicate a unique subclass that is particularly harmed by—or denied compensation under—the proposed settlement. Objectors may provide a source of unbiased information. The Third Circuit has noted that “objectors play an important role by giving courts access to information on the settlement’s merits” because the class counsel and defendants “can be expected to spotlight the proposal’s strengths and slight its defects.” Objectors may be the only source of critical information about the proposed settlement because the theoretically adversarial defense and class counsel are singing the same song to the trial court. Finally, objectors may have spent more time poring over the details of the proposed settlement than the judge or her clerks.

By the time of settlement hearings, class members may be the only source of independent information about the reasonableness of a proposed settlement. One of the problems with our system is that when attorneys shift from adversaries to common proponents of a class settlement, the judge is often left without all of the information necessary to evaluate the

significant opposition.”) (citations omitted).

360. See, e.g., Morawetz, supra note 156, at 22.
361. See Gerard & Johnson, supra note 93, at 416-17.
363. See Howard M. Downs, Federal Class Actions: Diminished Protection for the Class and the Case for Reform, 73 Neb. L. Rev. 646, 699 (1994) (“Most settlement hearings are cheerleading sessions in which class counsel and class opponents present the court with minimal information . . . .”); Susanna M. Kim, Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?, 66 Tenn. L. Rev. 81, 126 (1998) (“When the parties as former adversaries appear before the court as fellow cheerleaders for the amicable disposal of their dispute, the circumstances are hardly conducive to scrutinizing judicial review.”).
proposed settlement.\textsuperscript{364} The result is that some judges are left with “too little information to recognize when the settlement is collusive.”\textsuperscript{365} This is particularly the case with complicated settlement structures, such as those involving the distribution of coupons instead of cash.\textsuperscript{366} Yet judges apparently do not see class members as particularly valuable sources of information in evaluating the reasonableness of a proposed settlement. Judges have historically shunned the class as co-monitors of the attorneys handling the litigation.\textsuperscript{367} Courts should not be so quick to dismiss the assistance of class members. At a minimum, the presence of objectors raises a serious red flag. Judges presumably loathe engaging in a “detailed and thorough investigation” of a proposed settlement;\textsuperscript{368} they should overcome this reluctance when faced with non-frivolous objections from the class.

If judges took class members’ objections more seriously, this could help solve the collective action problem. Class members who perceive that their comments will be ignored are less likely to alert a reviewing judge to serious problems with a proposed settlement. Conversely, if class members believe that their objections can derail an inadequate settlement, informed class members will be more likely to share relevant information with the judge, even if that means letting other class members free ride on their efforts. Greater input from class members could lead to rejection of unreasonable settlements and lead to the creation of a positive feedback

\textsuperscript{364} See Alon Klement, \textit{Who Should Guard the Guardians? A New Approach For Monitoring Class Action Lawyers}, 21 Rev. Litig. 25, 45-46 (2002) (“Yet common law courts are institutionally incapable of obtaining information unless presented to them by the litigants. Unlike inquisitorial civil law judges who may demand that parties produce documents in their possession, examine witnesses, and select and commission expert opinions, the paradigmatic common law court is passive and relies solely on the adversary process for its education about the case.”) (footnotes omitted).

\textsuperscript{365} John C. Coffee, Jr. & Susan P. Koniak, \textit{Rule of Law: The Latest Class Action Scam}, Wall St. J., Dec. 27, 1995, at 11; \textit{see also} Kane, supra note 49, at 403 (arguing that judicial oversight of proposed settlement is ineffective and “protects the parties only against the most egregious and blatant abuses”).

\textsuperscript{366} \textit{See, e.g., In re Superior Beverage/Glass Container Consol. Pretrial,} 133 F.R.D. 119, 124 (N.D. Ill. 1990) (attempting to figure out 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”); \textit{see also} Leslie, supra note 37, at 1066.

\textsuperscript{367} \textit{See, e.g., Hensler et al., supra} note 3, at 118 (“Judges rarely turn to mass tort litigants for help in monitoring lawyers’ behaviors.”); \textit{see id.} at 496 (“Many judges presently ignore a potentially large group of helpers: the class members themselves.”).

\textsuperscript{368} \textit{In re Visa Check/MasterMoney Antitrust Litig.}, 297 F. Supp. 2d 503, 509 (E.D.N.Y. 2003) (“In making this determination [to approve or reject a proposed class action settlement], a court must neither rubber stamp the settlement nor engage in ‘the detailed and thorough investigation that it would undertake if it were actually trying the case.’” (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974), \textit{abrogated on other grounds}, Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000))).
As part of this one-way presumption—where the presence of objectors is considered significant but an absence is not—courts should pay attention to the number of class members choosing to opt out of the class action litigation in response to the proposed settlement. When class members opt out in response to a proposed settlement, this shows that they found the proposal to be inadequate. Of course, an opt-out confers significantly less information than an objection. Nevertheless, judges should interpret even a relatively small number of opt-outs as a significant red flag and should scrutinize the settlement more closely, including any objections received. At a minimum, courts should not treat either the absence or presence of opt-outs as a reason to approve a proposed settlement.

This Article is not an argument to increase the number of objectors just for the sake of increasing class member participation in class action litigation. When it operates as intended, class action litigation is an efficient mechanism to resolve millions of legal claims in a single case without significant participation by most class members. Significantly increasing the number of participants and decision-makers in any given class action will slow down the process, drive up litigation costs, and may deplete the amount of money available to class members. Nevertheless, judges should make every effort to read the reaction of the class members correctly.

C. The Silent Objector Problem and the Re-Weighing Factors Solution

If judges are unwilling to follow either of the above two approaches, then they should downgrade the importance assigned to the reaction of the class as a factor in determining whether the proposed settlement is reasonable, at least in those cases where the class members are non-responsive. It is simply inconsistent to raise this factor to a level of preeminence when collective action problems generally prevent rational class members from expressing their views. At a minimum, courts should cease claiming that the reaction of the class is the most important—and sometimes decisive—factor in evaluating a proposed settlement when the class members have expressed no clear opinion one way or the other. Without the crutch of interpreting class member silence as evidence of the proposed settlement’s fairness, judges would be compelled to more thoroughly analyze the substance of a proposed settlement, comparing the settlement amount to the expected value of litigation for the class members. This would represent a marked improvement over much of the current judicial analysis of proposed settlements.

369. See Brunet, supra note 51, at 408-09.
370. See id. at 409.
VI. CONCLUSION

Collective action problems are bad for society because they mean that efficient beneficial actions are not taken and social problems are not solved. Class action litigation exists in part to solve the collective action problem associated with small injuries inflicted upon members of a large group, none of whom have sufficient incentives to seek compensation through legal action. But the same collective action paradox may prevent individual class members from objecting to an inadequate settlement. For judges to suggest that silence constitutes acceptance of a proposed settlement shows a fundamental misunderstanding of the collective action problem. The same collective action problem that necessitated the class action process in the first place replicates itself in the process used to review proposed settlements to class action litigation.

Judges need to recognize the significance—or, rather, insignificance—of silence. Silence is not a reaction to the proposed settlement; silence is a lack of response. If rational class members would remain silent when confronted with either an adequate or inadequate settlement, then a judge should read nothing into their silence. Class member silence is rational; interpreting this silence as endorsement of a proposed settlement is not.