

The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders

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Class action law is modeled on the assumption that a large group of individuals have similar legal claims of such small value that no one of them has the incentive or ability to litigate alone. Rule 23 resolves that collective action problem by enabling one class member to represent the group, with a common fund fee award sharing the costs across the class. The Constitution guarantees class members the options of opting out (exit) or objecting (voice), but given the small stakes, most do nothing (loyalty). While elegant, this model does not capture the reality of all class suits. In many cases, some class members have significant enough legal claims that they are capable of litigating alone. The group dynamics accordingly change, with everything turning on the question of whether the large claimants will opt out and litigate separately. The risk that they might discourages the defendant from settling the class's small claims, lest it then have to litigate the large claimants' valuable claims. But the dynamics simultaneously create an opportunity: if the class members could unite, they might increase their leverage and extract a premium from a defendant eager to settle the whole package of claims, with that global settlement simultaneously benefiting the defendant (as evidenced by its willingness to pay a premium for

* Professor of Law, Duke University School of Law. Professor McGovern passed away on February 14, 2020. This Article was completed and had been accepted for publication prior to Professor McGovern's untimely death. It is published with permission from his estate. The ideas at the core of the Article—negotiation and cooperation in complex litigation—defined Francis's professional work, and that work in turn helped define our field. I (Professor Rubenstein) was thrilled to have had the opportunity to work on the opioid MDL with Francis, and I am honored to be able to shepherd this ultimate version of this thinking across the finish line. The big idea here is Francis's, while all remaining errors are mine.

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it). The tragedy of this commons is that, built on a different template, class action law provides no model for intraclass coordination.

In this Article, we offer heterogeneous class members a mechanism for cooperation, a new form of class certification that we call “negotiation class certification.” Under this approach, class members generate a plan for allocating a lump sum settlement and for voting on the acceptability of any lump sum offer they might receive. They then ask the court to certify a “negotiation class” according to the normal Rule 23(a)–(b) factors and to direct notice to the class explaining that any negotiated settlement will be put to a vote, with a supermajority vote binding the whole class; the notice also explains the distributional metric. Any class member that does not want to bind itself to either the distributional metric or the supermajority voting process can opt out. By establishing the contours of the class prior to settlement discussions, negotiation class certification provides the defendant with a precise sense of the scope of finality a settlement will produce, hence encouraging a fulsome offer by ensuring meaningful peace. The negotiation class therefore redounds to the benefit of both the class and the defendant—and hence of the judicial system as well.

The proposal is a novel use of Rule 23, but it is, in many ways, a less ambitious one than certification of a settlement class: there, lawyers negotiate a settlement on behalf of a class without ever asking a court to assess either the cohesiveness of the group or their own adequacy to speak for that group. Settlement class certification was accordingly quite controversial when developed out of whole cloth in the late twentieth century, but even absent an explicit textual mooring, it soon became a “stock device” in class action practice. By requiring a judicial ruling that a class coheres and its agents are adequate prior to those agents negotiating with a defendant, negotiation class certification adheres more closely than settlement class certification to the requirements of both Rule 23 and the Constitution. Moreover, engaging large class members in the settlement negotiation process ex ante improves on a system that delegates that authority to unauthorized agents and involves the class only ex post.

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Introduction

In the conventional class action lawsuit, each member of a large group of dispersed persons possesses a legal claim of such small value that the cost of liquidating it through litigation outweighs the value of the claim itself. This presents a particular type of collective action problem: the group would benefit if it could sue collectively and spread the litigation expenses across the class, but no class member has the incentive to undertake the organizational effort, and each would be best off if it could free-ride on someone else stepping forward to do so. The class action lawsuit rather brilliantly solves this particular collective action problem by enabling one or a few class members to represent the whole group, with a common fund fee award then spreading the cost of the case across the entire class. Fully cognizant of these dynamics, class action law demands nothing of the absent class member: “[h]e may sit back and allow the litigation to run its course,” the Supreme Court has famously held in rejecting the requirement that absent class members opt in to the case, “content in knowing that there are

safeguards provided for his protection.”¹ Among those safeguards are the opportunities for the absent class members to opt out of the class (exit), express objections to the court (voice), or, as is expected, simply ride along and reap the benefits of having been adequately represented (loyalty).²

Notwithstanding its elegance in addressing the collective action problem posed by a mass of small claimants, this model does not fit all class action cases—even all money damage class actions—for a variety of reasons. Most centrally, in many cases, class members possess small, medium, and large value claims. This heterogeneity in claim value³ is most obvious in securities class actions, where large institutional investors own huge stakes in the outcome of the litigation and individual investors maintain smaller ones, and in many antitrust cases, where there may similarly be very large and small stakeholders; but claim-value heterogeneity also typifies the occasional mass tort class action, such as the National Football League (NFL) concussion litigation, and much public litigation, such as the tobacco and opioid matters.⁴ In *In re National Prescription Opiate Litigation* (MDL 2804),⁵ for example, a vast array of municipalities have filed claims seeking

1. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810, 812–13 (1985) (stating that “[r]equiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit” and explaining that was so because the “plaintiff’s claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution”).

2. *Id.* at 811–12. The genesis of the parenthetical trilogy is ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 4, 77 (1970).

3. Classes may be characterized by heterogeneity along axes other than claim value, such as in the ends that they seek or in the means that they are willing to employ to reach those goals. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 507–11 (1976) (asserting that courts should “develop greater sensitivity” to group heterogeneity in school desegregation cases); Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U. L. REV. 492, 504–05 (1982) (noting that the types of conflict arising among classes may vary considerably); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186–91 (1982) (describing intraclass conflicts that may result because of “divergent client interests”); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1655–62 (1997) (arguing that a “democratic approach” to group litigation would remedy potential intraclass conflicts over goals and means); *cf.* Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 363–70 (1996) (documenting analogous group heterogeneity in mass tort litigation).

4. William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 395–401 (2001) (documenting growth of institutional ownership of equities to show large stakes of many class members in securities class actions and stating that “[t]he PSLRA has helped reveal that securities classes are not comprised solely of a multitude of small stakeholders in need of a court-appointed representative to overcome the collective action problems hindering deterrence and restitution;” and further showing that “[m]ass tort classes tend to aggregate small, medium, and large size claims into one action, not unlike securities classes do”).

5. *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio filed Dec. 17, 2017).

compensation for costs attributable to the opioid epidemic, and the District Court has certified a class of all counties and cities in the United States;⁶ that class encompasses both Los Angeles County, California (population about 10 million)⁷ and Kalawao County, Hawaii (population 86).⁸

A heterogeneous class⁹ does not experience the same type of collective action problem as that confronting a homogeneous class of small claimants; moreover, depending upon the mix of claimants, the varieties of collective action problems only multiply. The key variable is the fact that the large-value claimants in these classes have enough at stake to do something other than “sit back and allow the litigation to run its course.”¹⁰ Each has a significant enough legal claim to litigate on its own,¹¹ and if, and how, it does so will impact the other claimants in the class. One might say that small-claim classes are all alike, while every heterogeneous class is hetero in its own way.

Large claimants within otherwise small-claim classes have acted in at least three familiar ways. In cases pursued under the Private Securities Litigation Reform Act of 1995 (PSLRA),¹² Congress has encouraged large-

6. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 543 (N.D. Ohio 2019), *appeal docketed*, Nos. 19-4097/4099 (6th Cir. Nov. 8, 2019).

7. *QuickFacts: Los Angeles County, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/losangelescountycalifornia,CA/PST045219> [<https://perma.cc/R7EK-5WST>].

8. *QuickFacts: Kalawao County, Hawaii*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/kalawaocountyhawaii> [<https://perma.cc/6N6J-L667>].

9. As noted above, *see supra* note 3, we use the term *heterogeneous class* to refer to classes characterized by heterogeneity of claim values. *See also* Rubenstein, *supra* note 4, at 402 n.141 (similarly using term “heterogeneity” in discussing classes composed of different claim values). In one of the few scholarly discussions of these classes, Professor Jack Coffee has employed the term “high variance” classes. In some work, Professor Coffee characterizes claims as high or low variance depending both on the dollar value of the claim and its relative merit. *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 880, 905–06 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*] (explaining that “[t]he litigation merits and settlement values” in a class action may “vary widely” and remarking on the “high variance” in classes with “both marketable and unmarketable claims”); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 652–53 (1987) (same). Elsewhere, he appears to employ the term in reference to claim-value variance alone. *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 425 (2000) [hereinafter Coffee, *Accountability*] (“[T]he most difficult problems in modern class actions have arisen not in small claimant class actions, but in class actions involving a high variance in claim values: i.e., classes having both high value and low value claims within the class.”). While the term “high variance classes” is likely more user-friendly than “heterogeneous classes,” it can be read to imply a class containing a lot of claim-value variance as opposed to a class with even just a few large claimants and a mass of small claimants. Heterogeneity is more generic in that sense.

10. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

11. *See id.* at 813 (“If, on the other hand, the plaintiff’s claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to ‘opt out.’”).

12. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

claimant institutional investors to step up and perform a monitoring role within the heterogeneous class action (voice).¹³ In a surprisingly significant number of cases with heterogeneous classes, large claimants simply remain inactive (loyalty), and the class action unfolds just as it would if the class contained only small claimants. Most importantly, in some cases, the large claimants opt out (exit), presumably on the assumption that the value of their claims is greater outside the class suit. Large-claimant opt-outs may litigate elsewhere; or, they may litigate alongside the class suit and in conjunction with it; or, they may litigate in competition with the class suit and one another. As the possibility that these large claimants will exit increases, the opportunity for a class settlement decreases: the defendant fears making a meaningful settlement offer to the class, only then to have to litigate against the most potent plaintiffs; put differently, the defendant is confronted by an “adverse selection” of litigants.

In the face of this logjam, large claimants may experience their interests as antagonistic to one another and to those of the class. What may be less immediately obvious is the latent value in the opposite conclusion: if the group could stick together, its leverage could maximize the value of the pot and minimize costs, enabling it to reap a “peace premium.”¹⁴ The large claimants might not fully appreciate this option because, without a clear procedural roadmap, the odds of it seem remote and no examples of it exist in practice. Heterogeneous classes therefore present a collective action problem somewhat akin to a prisoner’s dilemma: everyone in the group might be best off—along several dimensions—if they could work together, but lacking a clear mechanism by which to do so, coordination costs render that option elusive. The tragedy of this commons is that, built on a different template, class action law does not immediately appear to provide a coordination mechanism.

In this Article, we offer heterogeneous class members a mechanism for cooperation, a new form of class certification that we call *negotiation class*

13. For a discussion, see 7 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* §§ 22:24–22:45 (5th ed. 2020) [hereinafter *NEWBERG ON CLASS ACTIONS*].

14. The first use of this term in this context appears to be Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1894 (2000) (discussing a “peace premium for corporate predictability”). More recently, Professor Teddy Rave has developed the concept across a series of insightful articles. *See, e.g.*, D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 *FORDHAM L. REV.* 2175, 2199 (2017) [hereinafter Rave, *Closure Provisions*] (considering how closure provisions may “prevent strategic holdouts” attempting to capture the peace premium for themselves); D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 *GA. L. REV.* 475, 527–28 (2016) [hereinafter Rave, *When Peace*] (discussing the scope of a peace premium); D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 *VAND. L. REV.* 1183, 1193 (2013) [hereinafter Rave, *Anticommons*] (examining “reasons why defendants might be willing to pay a ‘peace premium’ for a comprehensive settlement”). We discuss this scholarship in greater depth below. *See infra* subpart III(A).

certification. The approach builds on a model that the American Law Institute has endorsed for aggregate (nonclass) litigation: a group of plaintiffs represented by a single lawyer agree on a formula for allocation of a lump sum settlement among themselves, negotiate with the defendant as a group, and then take a vote on any proposed deal, with a supermajority binding everyone in the group.¹⁵ As applied in the class context, the idea unfolds in five stages: (1) active class members initially work together to generate a distributional metric for allocating a lump sum settlement among the class members and a related voting scheme for responding to any proposed settlement; (2) once these mechanisms are in place, putative class counsel moves for certification of an opt-out Rule 23(b)(3) class, with certification limited to the sole purpose of negotiating a lump sum settlement with the defendant; (3) if the court grants class certification, class members receive notice explaining the allocation metric and the supermajority voting scheme, and they are given a one-time opportunity to opt out of the class; (4) after the opt-out period ends and the class size is fixed, the class's counsel and representatives attempt to negotiate a lump sum settlement with one or more defendants; (5) if achieved, the amount of the lump sum is put to a classwide vote, and if it garners supermajority support, the entire class is bound by that vote; class counsel and the defendant then move for final judicial approval of the settlement.

Negotiation class certification, as a means, serves various important ends. The single-class unit is in a stronger bargaining position than is an uncertified class of uncertain size with an uncertain number of opt-outs. Negotiation class certification accordingly provides the bargaining leverage necessary to secure a peace premium for the group. By binding everyone to the supermajority vote, it also guards against strategic opt-outs—often labeled “holdouts” in related contexts—after a settlement offer has been secured. As a collateral set of benefits, the class's development of its own allocation metric and voting scheme, and the ultimate group vote, are more participatory methods of making allocation and settlement decisions than occur when class counsel and class representatives alone make these decisions,¹⁶ and they help ensure that any settlement will be distributed

15. AM. LAW. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (2010).

16. See Rubenstein, *supra* note 3, at 1654–62 (discussing mechanisms for democratic decision-making in group litigation); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 482 (1984) (noting that where class members do not or cannot opt out, and affiliation is maintained, class members with divergent interests/perspectives are forced to engage in intraclass resolution such that “[a] potential byproduct of such efforts is to contribute to the democratization of the organization or class, to strengthen it by making its leadership more sensitive to its members or by broadening patterns of member participation”); see also Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 859–60 (2017) (describing how class members—particularly those with large stakes—have become more active in class action

equitably among the class, as Rule 23 demands it be.¹⁷ Finally, negotiation class certification “corrects one of the longstanding concerns of settlement class actions: that un-approved agents have settled un-certified claims.”¹⁸ These facets should work to the benefit of the whole class. But the defendant’s willingness to pay a premium for total peace suggests that the negotiation class provides a benefit to it as well.

Negotiation class certification is a new use for the Rule 23 class action mechanism, but that fact alone is not fatal: settlement class certification was also a new—and in many ways far more adventuresome—approach to using Rule 23 when it arose in the 1970s, but after an initial period of controversy, it soon became what the Supreme Court, in 1997, labeled a “stock device.”¹⁹ Moreover, a court can only certify a negotiation class if all of the Rule 23 class certification requirements are met, thus assuring compliance with the Rule. And because class members are given a full opportunity to opt out up front, their due process rights are protected. It is true that those who do not opt out but later vote against the aggregate sum may nonetheless be bound to a settlement they do not support; but their decision to remain in the negotiation class, coupled with their *ex ante* opportunity to opt out and their *ex post* opportunities to vote, lobby other class members, and object, sufficiently protects their constitutional interests. Indeed, in a conventional trial class, Rule 23 provides class members an opportunity to opt out up front, but due process does not, and could not, guarantee a second opportunity to opt out once the outcome of the trial is known. Similarly, in any class action, those who chose to remain in a class and object—but lose their objection—are bound to a settlement that they may not fully endorse. The constitutional guarantee is one of process, not success, and negotiation class certification safeguards the full range of procedural rights.

litigation and noting relationship to democratic-like values); Abraham B. Dyk, *A Better Way to Cy Pres: A Proposal to Reform Class Action Cy Pres Distribution*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 635, 655 (2018) (espousing a model for *cy pres* settlements whereby class members get to vote on which charities should receive the money); Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1362 (2012) (discussing the possibility of class members voting to hire and fire lawyers and otherwise participate in the case, including to ratify settlements); Jeremy R. McClane, *Class Action in the Age of Twitter: A Dispute Systems Approach*, 19 HARV. NEGOT. L. REV. 213, 271 (2014) (arguing that technological advances enable more class member input such as through voting on whether to accept a settlement); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 1007–09 (2012) (discussing democratic aspects of group decision-making within coercive bankruptcy proceedings). *But see* Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 86–87 (2003) (expressing skepticism that class member voting will capture preferences adequately given that small-claim class members tend to be uninformed and uneducated about the nature of their legal claims and remedies).

17. FED. R. CIV. P. 23(e)(2)(D).

18. *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 541 (N.D. Ohio 2019).

19. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997) (“Among current applications of Rule 23(b)(3), the ‘settlement only’ class has become a stock device.”).

This Article lays out the idea in greater detail. It begins by examining the collective action problem heterogeneous classes face (Part I) and the solution the negotiation class offers (Part II). It then proceeds to identify the benefits of the negotiation class (Part III) and explain how Rule 23 authorizes—and the Due Process Clause does not prohibit—negotiation class certification (Part IV).

I. The Heterogeneous Class Problem

Class actions come in many varieties.²⁰ The 23(b)(3) money damage class action is built on the idea that each member of a large and dispersed group of injured parties has a similar legal claim against a common defendant but that the costs of litigating individually outweigh the value of the claim.²¹ The class members possess “negative value claims,”²² and the group faces a “collective action problem.”²³ Many class actions continue to fit that model: if 50,000 consumers each purchase a single quantity of a single product (say, a car) that contains a small defect (say, a faulty windshield wiper mechanism), each might have a \$1,000 problem. No one of them can afford to pay a lawyer by the hour to recover the \$1,000, nor is a lawyer likely to take a single \$1,000 case on a contingent fee basis. Yet hidden within that

20. Rule 23 itself identifies five distinct types of class actions—those in Rule 23(b)(1)(A), 23(b)(1)(B), 23(b)(2), 23(b)(3), and issue classes under Rule 23(c)(4). *See* FED. R. CIV. P. 23. But as is evident from the text, multiple varieties of each of those exist in practice.

21. *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 684 (1941) (explaining that “redress” for injuries to large groups of plaintiffs likely involves “expense totally disproportionate to any of the individual claims”).

22. *See, e.g.,* Coffee, *Accountability*, *supra* note 9, at 430 (defining “negative value” claims as those in which “the transaction costs in establishing and collecting them are greater than the potential recovery”).

23. The origin of the scholarly literature on collective action problems is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). Olson observed that in most groups, no individual has sufficient incentive to act, yet somehow groups form—and he set out to explain how and why they do so. Numerous scholars have utilized this nomenclature in discussing class actions. *See, e.g.,* Elizabeth Chamblee Burch, *CAFA’s Impact on Litigation As A Public Good*, 29 CARDOZO L. REV. 2517, 2518 (2008) (examining the Class Action Fairness Act of 2005 through the collective action lens); Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 997 (2005) (discussing use of collective action concept in class action literature); Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 371 (2012) (noting that the class action “overcomes a variety of collective action problems”); Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?*, 66 TENN. L. REV. 81, 83 (1998) (examining collective action issues in the shareholder-derivative setting); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 847 (2002) (arguing that the collective action problems that give rise to the class action are best resolved by mandatory class actions, as only these can achieve maximal deterrence); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 715–18 (2006) (explaining how Olson’s collective action hypothesis suggests that the “only plausible mechanisms for inducing group action” in small-claims class actions are coercive in nature); *see also infra* note 33.

same fact pattern may lie a different set of circumstances: among the car buyers, there may well be a taxi fleet that owns 1,000 cars, or a police department that owns 200 cars, or a Hertz that owns 5,000 cars. It is immediately apparent that the group dynamics change rather dramatically, with one type of collective action problem giving way to a different type. That shift is only exacerbated when the change is one of claim quality, not just claim quantity, as in employment classes that contain plaintiffs with disparate work histories or mass tort classes that contain plaintiffs suffering distinct personal injuries. This Part examines the shift from the pure small-claims class to a class containing members with heterogeneous individual or aggregated claim values.

A. *The Unity of the Homogeneous Class of Small Stakeholders*

A class consisting of a large number of stakeholders, each with a relatively similar small-value claim, presents a particular type of collective action problem with several key characteristics:

- Individually, no single class member has a significant enough claim to make it worthwhile for her to litigate.
- Yet collectively, every member of the group would be better off if the group could act as one by litigating together and sharing the costs of the single litigation across the whole group.
- The group is in need of some champion.
- If one is found and litigation does take place, no class member would have any incentive to opt out of the class.

The initial collective action problem facing the small-claims class is that, absent some form of government intervention (or other coercive mechanism),²⁴ litigation will never be brought.²⁵ The government acts to address this problem in two ways. It can vindicate the class members' interest through a government enforcement action, with the costs of the action spread among the polity's entire tax base. Typically, the proceeds of such an action are not distributed to the class members, but the offender is penalized and deterred. Or, the government can vindicate the class members' interest by enabling a private class action, with the costs of the action spread among the group members themselves through a tax on their recovery—a common-fund attorney's fee. Typically, the proceeds of such an action are distributed to the

24. In his seminal work on collective action problems, Mancur Olson identified five mechanisms for coordination among group members, of which government coercion constituted only one. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 19–30 (1982) (discussing (1) coercion, (2) selective incentives, (3) social incentives, (4) small-group incentives, and (5) heterogeneity of interests, with some group members having significant enough stakes to act).

25. On why it should be brought, see generally Rubenstein, *supra* note 23.

class members, but sometimes distribution is infeasible,²⁶ and regardless, a primary goal is, again, that the wrongdoer be penalized and deterred.²⁷

Once the small-claims class is formed, its representatives can generally reach an aggregate settlement with the defendant. The Constitution²⁸ and Rule 23²⁹ guarantee class members three familiar options:³⁰ they can opt out (exit); participate and, if they want, object (voice); but given the minute value of their claim, invariably almost all of them do nothing (loyalty).³¹ Perhaps as importantly, the defection of some small-claim class members through the exit option is usually meaningless: the defendant does not care because the defector's claim is so small that it is unlikely to be litigated individually. Accordingly, the defendant can go ahead with the aggregate settlement in the face of this risk—and therefore, the class members and class counsel are also indifferent.³² Put simply, no single class member matters much in a small-claims situation.

While the class action solves the initiation and settlement problems facing the small-claims class, its operation re-poses the same collective

26. See 4 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 12:26 (describing full *cy pres* settlements).

27. See 1 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 1:8 (explaining that small-claims class actions deter wrongdoers by exposing them to liability).

28. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) (holding that absent class members in money damage class actions, at least those without a territorial connection to the forum, must be accorded “minimal procedural due process protection” including “notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel,” “an opportunity to remove [themselves] from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form,” and adequate representation).

29. FED. R. CIV. P. 23(c)(2)(B)(v) (guaranteeing exclusion opportunity); FED. R. CIV. P. 23(e)(5)(A) (guaranteeing objection opportunity).

30. As noted above, the genesis of the trilogy is HIRSCHMAN, *supra* note 2. Class action scholarship employing it includes: John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why “Exit” Works Better Than “Voice”*, 30 CARDOZO L. REV. 407, 409 (2008); Coffee, *Accountability*, *supra* note 9, at 376–79; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 366–80; Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 637–39 (2008). These authors discuss loyalty in terms of the class representative's duties to the class; as used here, the trilogy is meant to focus on the options available to the absent class members. See, e.g., Lahav, *supra* note 16, at 81–85 (employing exit, voice, loyalty framework to examine class member options).

31. Empirical evidence shows that about 0.6% of a class will opt out, and about 1.1% of a class will object. Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1549–50 tbls.2 & 3 (2004).

32. In some cases, defendants protect themselves against the risk of significant class-member defection by insisting that a settlement agreement contain a “blow up” provision, by which the settlement will be terminated if too many class members exit. See 4 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 13:6 (defining blow up provisions). These provisions would rarely matter or be triggered in small-claims cases but are quite pertinent to heterogeneous-class cases as explained in the succeeding section. See *infra* subpart I(B).

action problem that stalled its initiation: just as no class member has enough incentive to file suit, so too does each class member lack an incentive to monitor class counsel in their handling of the case.³³ This has generated significant concern about self-dealing by the class's agents, with much of the class action literature for the past half-century focused on how to contain these agency costs.³⁴ Given the class members' generally minute interests, few of the proposals imagine the class members themselves undertaking this monitoring.³⁵ The one exception is the Private Securities Litigation Reform Act of 1995 (PSLRA).³⁶ That law presumptively empowers the largest shareholder in a securities class action to control the suit and in turn to hire and monitor class counsel.³⁷ Critically for present purposes, in granting that

33. See, e.g., Louise Sadowsky Brock, *Overcoming Collective Action Problems: Enforcement of Worker Rights*, 30 U. MICH. J.L. REFORM 781, 800–01 (1997) (discussing how class actions can overcome collective action problems in the employment setting but noting that “once a class is formed, collective action problems make it unlikely that class members will have the incentive to monitor the lawyer’s behavior because each member’s stake in the outcome is quite small”); Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 81 (2008) (discussing how the lead plaintiff provisions of the PSLRA may have recreated the collective action problem giving rise to the class action); Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 ARIZ. L. REV. 559, 565 (1996) (positing that a representative plaintiff’s “typically small stake” in a class action “creates insufficient incentives” to monitor class counsel); Charles R. Korsmo & Minor Myers, *Aggregation by Acquisition: Replacing Class Actions with a Market for Legal Claims*, 101 IOWA L. REV. 1323, 1386 (2016) (“[T]he very collective action problem that creates the need for the class action also ensures that no class members can monitor the performance of the attorneys acting on behalf of the class.”); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73–74 (2007) (arguing that collective action problems not only necessitate the class action, they then plague its effectuation such that courts should not interpret class member silence as to proposed settlements as acceptance); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 8, 20 (1991) (arguing that “[t]he class action is a tool for overcoming the free-rider and other collective action problems” but that the collective action problems that necessitated the class suit then pervade it because “no rational plaintiff would take on the role of litigation monitor because she would incur all the costs of doing so but would realize only her pro rata share of the benefits” (footnotes omitted)).

34. Professor Coffee’s seminal work from the early 1980s is largely responsible for this strain of the literature. See, e.g., John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS., Summer 1985, at 5, 76 (stating that the “proper focus should be on the interests of the client and the classic problems that arise when the client, as principal, cannot closely control the attorney, his agent”).

35. For a review of the proposals, see generally William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435 (2006).

36. 15 U.S.C. § 78u-4 (2018).

37. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). For a discussion, see 7 NEWBERG ON CLASS ACTIONS, *supra* note 13, §§ 22:23–22:45. Professor Coffee was the first to propose this large-client monitor approach. See Coffee, *Entrepreneurial Litigation*, *supra* note 9, at 894 (1987) (“[I]f agency costs are to be reduced, the most effective monitor is likely to be the plaintiff who has the largest stake in the action.”); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND.

authority to the *largest* shareholder, Congress recognized the heterogeneous nature of securities classes,³⁸ within which some class members have a large enough stake that they will bother to act.³⁹ That presumption requires review of a different paradigm, a task to which we next turn.

In sum, the small-claims class has (1) an initiation problem and (2) a monitoring problem but (3) no inherent settlement problem.

B. The Disunity of the Heterogeneous Class of Large and Small Stakeholders

A class consisting of a large number of stakeholders, some with relatively similar small stakes but others with medium or large stakes, presents a distinct type of collective action problem with several key characteristics, each different than the purely small-claims class:

- Individually, one or more class members may have a significant enough claim to make it worthwhile for them to litigate, although many other class members do not.
- Collectively, it is not necessarily clear that every member of the group would be better off if the group could litigate together and share the costs of the single litigation across the whole group: the large stakeholders might—or might not—do better if they litigate without the rest of the class, while the class action may be the only hope for the small stakeholders.
- While the small claimholders still need a champion, the large stakeholders generally do not, and the large stakeholders themselves may—or may not—be the small claimholders' champion.
- If a class action does proceed, the large stakeholders may—or may not—have an incentive to opt out of the class and litigate individually, perhaps even competing with the class lawyers and vying for a larger share of the suit's proceeds.

L.J. 625, 643–44 (1986–87); (same). Professors Weiss and Beckerman then provided a sustained investigation of it, upon which Congress relied in enacting the PSLRA. *See generally* Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995); *see also* S. REP. NO. 104–98, at 11 (1995) (citing Professors Weiss and Beckerman's article to support the PSLRA's focus on institutional investors serving as lead plaintiffs).

38. *See, e.g.*, H.R. REP. 104–369, at 34 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 733 (“Institutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake.”).

39. That presumption turned out not to be entirely accurate, as it failed to account for the full panoply of incentives large institutional investors confront. For an account, see Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 58–59 (2002).

Small claimants within the heterogeneous class still face the same initiation and monitoring problems as they do in the homogeneous class. The conventional mechanisms (public enforcement or private class actions) remain, but there is now an additional possibility: the large stakeholders may act as their champions. Given this bonus, the collective action literature rather felicitously refers to heterogeneous groups as “privileged.”⁴⁰ In the litigation arena, the privilege most likely manifests when the group is seeking only declaratory or injunctive relief. For example, an individual action that secures a Supreme Court ruling striking down a law as unconstitutional functions as a sort of “public good”⁴¹ in that it invariably benefits those similarly situated to the litigant; so too may an injunction enforcing that decision.⁴²

In money damage cases, the large claimants may act, but not necessarily as the class’s champions. In a surprisingly significant swath of cases, large stakeholders are blindly *loyal* to the group and do nothing at all.⁴³ These cases

40. *E.g.*, OLSON, *supra* note 24, at 29–32. Even if these large stakeholders’ benefits do not outweigh their costs—and the group is therefore not privileged—they might nonetheless be expected to take a lead in acting for the group given their disproportionate interest. Smaller stakeholders would accordingly be particularly likely to shirk. Olson therefore surmised that a particular collective action dynamic in heterogeneous groups is that the large stakeholders shoulder a disproportionate share of the costs: there is, he wrote, “a systematic tendency for exploitation of the great by the small.” OLSON, *supra* note 23, at 29 (emphasis, footnote, and quotation omitted).

41. Public goods are characterized by “jointness of supply and impossibility of exclusion.” RUSSELL HARDIN, *COLLECTIVE ACTION* 17 (1982) (emphasis omitted); *see also id.* (“If a good is in joint supply, one person’s consumption of it does not reduce the amount available to anyone else. . . . If a good is characterized by impossibility of exclusion, it is impossible to prevent relevant people from consuming it.”). The example of a lighthouse helps illuminate these two characteristics: one person’s use of its signal in no way diminishes anyone else’s (jointness of supply) and it is generally impossible to provide a lighthouse to some while excluding others (impossibility of exclusion). For an argument that litigation’s positive externalities constitute a public good, see Rubenstein, *supra* note 23, at 723–25.

42. For this reason, many courts have questioned whether class certification is necessary in injunctive relief cases. For a discussion and critique, see 2 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 4:35.

43. *See, e.g.*, AMIR ROZEN, JOSHUA B. SCHAEFFER, & CHRISTOPHER HARRIS, CORNERSTONE RESEARCH, *OPT-OUT CASES IN SECURITIES CLASS ACTION SETTLEMENTS 1* (2013), <http://securities.stanford.edu/research-reports/1996-2011/Opt-Out-Cases-Securities-Class-Action-Settlements-1996-2011.pdf> [<https://perma.cc/T9TQ-GBGM>] (finding in empirical study of 1,272 securities class action settlements from 1996–2011, “38 cases in which at least one plaintiff opted out of the class action settlement and pursued a separate case against the defendant”). Moreover, large institutional investors often leave million-dollar stakes unclaimed at the end of securities class actions. *See* James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411, 425 (2005) (“Financial institutions with significant provable losses fail at an alarming rate (approximately seventy percent) to submit their claims in settled securities class actions. Moreover, not only are their losses significant, but the sums of money they likely would gain by filing claims are also not trivial . . .”). Similarly, large major national corporations often sit back and allow class action lawyers to pursue their claims in antitrust cases. *See, e.g.*, *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 259 (3d Cir.), *as amended*

proceed just like any small-claims class action. In only one subset of cases—those litigated under the PSLRA—does the law envision large stakeholders acting, and, as discussed above,⁴⁴ there solely to use their *voice* function to select and monitor class counsel. The most significant actions large stakeholders take is that they *exit* the class, either by filing (or threatening) their own parallel actions prior to class certification or by opting out (or threatening to opt out) if a class is certified. Large stakeholders may prefer to go it alone because they think they are likely to enhance their own recovery by doing so,⁴⁵ and that enhancement is just as likely at the class's expense.⁴⁶

Not only does the presence of large class members rarely resolve the initiation and monitoring problems confronting the small claimants; the large claimants' exit options generate a new problem, unique to heterogeneous classes. In the homogeneous small-claims setting, the defendant can make a settlement offer to the class and worry little if some class members opt out. In the heterogeneous class setting, however, the risk that the large class members will opt out poses a real threat to the defendant. If it makes a lump

(Sept. 29, 2016) (expressing surprise that “three class members, each with billions of dollars at stake and close to 100% of the total value of class claims between them, have been allowed to sit on the sidelines as unnamed class members”).

44. See *supra* text accompanying note 37.

45. Somewhat perversely, large stakeholders may opt out and save costs because private lawyers agree to represent them at a fee below what they would pay to class counsel were they to remain in the class action. See John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 316 (2010) (commenting on the reduced agency costs opt-outs pay). Interestingly, even if an opt-out receives the same gross recovery as that of each class member, its net recovery will be higher. What's more, the opt-out's private lawyers can piggyback on class counsel's efforts by paying a common benefit fee to them, thus creating a profit margin for themselves simply by arranging this set of transactions. Fees aside, some limited empirical evidence suggests that large-claim opt-outs tend to outperform small-claim stakeholders in the returns they realize in these situations. See, e.g., Coffee, *supra*, at 312 (providing an example of how large pension fund opt-outs received seven to fifty times more than class members in a large securities class action); ROZEN, *supra* note 43, at 1 (concluding that “[b]ased on limited anecdotal evidence, opt-out settlement plaintiffs may succeed in obtaining a larger recovery than would have been received by remaining part of the class action,” although noting that was not invariably true and could require higher expenses).

46. Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1133–34 (2011) (explaining that “[o]pting out systematically disadvantages smaller, individual investors,” in that defendants set aside extra money to deter (or pay off) large-claim opt-outs, and that large stakeholders who “exit” thereby “eliminate a would-be objector's dissenting voice,” to the detriment of the remaining class members); see also Benjamin P. Edwards, *Disaggregated Classes*, 9 VA. L. & BUS. REV. 305, 355–56 (2015) (speculating that the continued trend of high-value claimants opting out of securities class actions could lead to its diminished relevance as a litigation vehicle); Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 160 (noting that opt-outs seeking a larger share of the recovery fund will likely have a detrimental impact on small stakeholders). But see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1464 (1995) (arguing that exit by strong-claim class members may negatively impact weaker-claim class members, but simultaneously noting that the right to exit can also “serve [as] a checking function that deters collusive settlements”).

sum settlement offer but the largest claimants opt out, it may have overpaid to settle the small claims; worse, it still has to litigate against the largest claimants and will likely have to pay them more to settle than it paid the small claimants. From the defendant's perspective, this is a form of an adverse selection problem⁴⁷ and, again, one unique to a heterogeneous class: when everyone's claim is of the same small value, no selection is adverse. From the class's perspective, this problem has some of the features of a holdout problem: in flexing their opt-out muscle, the large claimants, regardless of their intention, run the risk of scuttling the deal for the whole group.⁴⁸

In some settings, a defendant can insure against the adverse selection problem by conditioning a settlement's effectuation on a certain participation level. In the opt-out class action, this is accomplished by a "blow up" or "tip over" provision, which holds that if a certain percentage of the class opts out, the defendant has the option of walking away from the settlement.⁴⁹ The tip over threshold may be met by a particular percentage of the class opting out or a particular percentage of the claim values opting out, or the threshold may simply be left to the defendant's discretion,⁵⁰ and for strategic reasons, it may or may not be transparent to the class.⁵¹ Generally, the defendant will want to gauge precisely what claims opted out before deciding whether to take advantage of the walk-away option.⁵² In an opt-in aggregate settlement, the same result is accomplished by the settlement agreement setting a threshold participation rate before it would be effectuated. In the much-discussed *Vioxx* settlement, for example, the Judicial Panel on Multidistrict Litigation consolidated about 20,000 individual personal injury claims against manufacturer Merck arising out of the plaintiffs' use of the painkiller. The

47. As discussed below, Professor Rave has applied this characterization in a series of articles examining this dynamic. *See infra* text accompanying notes 131–35; *see also* Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 ARIZ. L. REV. 559, 572 (1996) (discussing the "adverse selection effect, [that] when present, thus tends to drive the 'stronger' claims out of the class action"); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 760 (1997) ("[D]efendants may face a risk of adverse selection. When plaintiffs can opt-out of settlements, there is a danger that those with the strongest claims will do so, leaving a defendant with a settlement dominated by weak claims.").

48. *See infra* section III(B)(2).

49. *See* 4 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 13:6 (explaining that these provisions allow "the defendant to withdraw from—or 'blow up'—a settlement if a certain number of class members opt out of the settlement"); *see also* Rave, *Closure Provisions*, *supra* note 14, at 2179–81 (describing "walk-away provisions").

50. *See* 4 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 13:6 (explaining that blow up provisions are "usually included" as part of settlement agreements but that "it may also be the case" that "no set number of opt-outs [is] necessary" to trigger withdrawal).

51. *See id.* (suggesting that a lack of transparency may "dissuade attorneys . . . from attempting to organize an opt-out campaign").

52. *See id.* (noting that "[t]ypically, the right is voluntarily [sic], and a defendant can choose not to exercise it if and when the condition to do so arises").

court denied class certification.⁵³ But after coordinated pretrial discovery and a series of bellwether trials (most of which Merck won),⁵⁴ the parties reached a global settlement just shy of \$5 billion (for roughly 50,000 federal and state cases). The settlement amount only became available, however, if 85% of the outstanding claims chose to take from it.⁵⁵

These solutions are imperfect for a variety of reasons. *First*, if they work, they insure a defendant against a bad deal, but that's all they do. They do not deliver a good deal. They leave everyone with no deal. *Second*, the means by which they are effectuated can be more coercive than voluntary. The *Vioxx* case is much-discussed precisely because, to ensure the 85% mark was hit, the settlement contained several provisions that strongly encouraged—arguably coerced—plaintiffs' lawyers into leading their clients through the settlement. These included requirements that plaintiffs' firms recommend the settlement to all their clients and withdraw from representing those who would not accept it.⁵⁶ These provisions provoked significant criticism.⁵⁷ *Third*, defendants may be wary of even making a settlement offer, notwithstanding these protections, because if the settlement fails, the failed offer nonetheless establishes a negotiation mark that is difficult to reverse. The adverse selection problem can therefore be fully disabling. In the face of imperfect information about the scope of peace it is buying, and cautious about policies meant to give heart, a defendant is hesitant to engage in meaningful settlement discussions.

In sum, the heterogeneous class has (1) initiation and (2) monitoring problems akin to those of the homogeneous class, neither of which are likely resolved by the presence of large claimants; yet those large claimants create a (3) settlement problem unique to these heterogeneous classes.

* * *

Class action scholarship has long focused on the common initiation and monitoring problems that plague small-claim classes. The former inquiry

53. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 463 (E.D. La. 2006).

54. Judge Fallon, who oversaw the MDL, provides a history of the litigation. See Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2334–37 (2008).

55. SETTLEMENT AGREEMENT BETWEEN MERCK & CO., INC. AND THE COUNSEL LISTED ON THE SIGNATURE PAGES HERETO § 11.1 (Nov. 9, 2007), <https://www.beasleyallen.com/alerts/attachments/Vioxx%20Master%20Settlement%20Agreement.pdf> [https://perma.cc/DQC8-UHMW].

56. *Id.* §§ 1.2.8.1, 1.2.8.2.

57. For discussions of the ethical concerns, see generally Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 513 (2011); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 281–92 (2011); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010); and Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

examines the ends that the class action serves, the latter the means for accomplishing those ends. There have been occasional references to the existence of heterogeneous classes,⁵⁸ even a few considerations of the unique settlement problem they pose.⁵⁹ But there has yet to be a careful consideration of the dynamics just sketched, nor a class-action specific proposal about how to solve the settlement puzzle. We now turn to that task.

II. The Negotiation Class Solution

Part I established that the presence of large stakeholders within a class action generates a collective action problem specific to that setting. The question class action law confronts is whether it can turn those large stakeholders from deal-breakers into deal-makers. Our premise is that class action law can harness the involvement of large stakeholders if it can satisfy them that their interests are sufficiently protected. The interest that large stakeholders enjoy as individual litigants is that they have complete control over their litigation decisions. In money damage cases, that control enables a large stakeholder to pinpoint the price for which it is willing to compromise its claim.⁶⁰ Put that large stakeholder into a class, however, and its recovery becomes the function of the class's allocation formula multiplied by its total recovery. Thus, to provide large stakeholders something akin to the settlement autonomy they otherwise enjoy, a group mechanism needs to give them some control over both their share of the pie and the pie's total size. Our proposal does so by providing stakeholders a voice in developing an allocation metric and a vote as to whether to accept any lump sum settlement.

The proposal unfolds in five stages, with two unique features simply folded into the existing structure of a class suit, as follows: (1) uniquely in a negotiation class, class members and their counsel develop a metric for allocating a lump sum settlement across the class and a voting procedure for responding to any lump sum settlement; the case then unfolds as any other class action when (2) putative class counsel move for certification of a negotiation class, aiming to demonstrate that the requirements of Rule 23 are satisfied; (3) if certification is granted, the court sends notice of the negotiation class to the putative class members, informing them of the distribution and voting schemes and enabling those who do not wish to tie their claims to the negotiation to opt out; (4) following the opt-out period, with the class size fixed, class counsel attempts to negotiate a lump sum settlement with the defendant(s); and (5) if a settlement is reached, the parties

58. See *supra* note 9 (referencing Professor Coffee's work); Rubenstein, *supra* note 4, *passim*.

59. See *supra* note 14 (referencing Professor Rave's work).

60. MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2020) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation A lawyer shall abide by a client's decision whether to settle a matter.").

seek preliminary approval which, if granted, leads to a normal objection period and a unique classwide vote on whether the lump sum settlement amount is sufficient; assuming a supermajority of the voting class members so find, class counsel then moves for final judicial approval. The succeeding subparts describe these stages—particularly the two novel ones—in greater depth.

A. Development of Allocation and Voting Schemes

Putative class members—especially those with large claims—are unlikely to bind themselves to the group without some sense of what their share will be when the lump sum is distributed and some control over the size of the lump sum. Accordingly, prior to putative class counsel moving for certification of a negotiation class, participatory plaintiffs and their lawyers will have to develop a plan for allocating a lump sum settlement among the class members and a plan for voting on the acceptability of any lump sum their agents negotiate. The court can then include these plans in the class notice, and they can inform class members as they decide whether to opt out of the class. The development of the allocation and voting plans has two components, one procedural and one substantive.

The procedural component concerns *how* these plans will be developed. The ideal process for generating these plans is one that includes representatives of each of the various sections of the heterogeneous class. Our assumption is that the key negotiators will be the larger claimants and their lawyers, on the one hand, and putative class counsel and class representatives on the other; it is unlikely the vast bulk of small claimholders would have enough of an interest to expend the time necessary to be part of this process, so putative class counsel should represent their interests in the plans' development. Nonparties, like state attorneys general, might also be included in the bargaining process to help safeguard the interests of their citizens; they will have this opportunity if a settlement is ultimately reached;⁶¹ it may therefore be fruitful to garner their perspective on the front

61. The Class Action Fairness Act requires a defendant settling a class action in federal court to serve notice on these officials, 28 U.S.C. § 1715(b) (2018), and compels a court to wait ninety days thereafter before entering a final judgment, 28 U.S.C. § 1715(d) (2018). These provisions implicitly invite state attorneys general to safeguard their citizens' interests at settlement. *See In re Flonase Antitrust Litig.*, 2015 WL 9273274, at *6 (E.D. Pa. Dec. 21, 2015) (“By notifying States about class actions impacting their citizens, the CAFA Notice is ‘intended to give states a role in ensuring that [their] citizens are equitably compensated in class action settlements.’” (alteration in original) (quoting *California v. IntelliGender, LLC*, 771 F.3d 1169, 1173 (9th Cir. 2014))); *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010) (noting that “[a]lthough CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class action settlement,” the law does “presume[] that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the

end rather than be surprised by it on the back end. The lawyers negotiating for the various interests—particularly for the small-claim, absent class members—should be loyal, unconflicted agents and should consult with their clients in undertaking these negotiations.⁶² The point is not that the “right” outcome will elude a differently composed group, but rather that an outcome designed by a representative group is legitimated by the very process of its development. Particularly because there is no one right allocation or voting plan in these circumstances, the composition of the group generating these plans is critical. That composition may subsequently be pertinent to assuring the court that the class’s counsel and representatives are adequate, to satisfying class members that the process is fair and hence guarding against opt outs, and to legitimizing any aggregate settlement later achieved.

The substantive component of these plans—particularly the distributional metric—is the proposal itself. Rule 23 provides some guidance in insisting that a court deem the ultimate settlement amount fair, reasonable, and adequate,⁶³ and in doing so, that it ensure “the proposal treats class members equitably relative to each other.”⁶⁴ The overall adequacy and distributional fairness of settlements are fact-specific inquiries that will vary greatly across different types of cases. In a straightforward economic damages case, the allocation and voting metrics may be purely objective in nature and noncontroversial. Yet even the simple automobile defect case discussed above belies the ease of this formulation, as there, the large fleet owners may have more valuable legal claims solely because of their quantity—and the leverage that such a large set of claims supplies—even if each underlying claim is precisely similar. The voting structure may therefore require a supermajority vote of both the group of single-car owners and the group of fleet owners, somewhat akin to the manner in which bankruptcy counts votes on a pro rata and per capita basis.⁶⁵ If the vote were one owner/one vote, the owners of the single cars would control the outcome and could approve a settlement skewed in their favor; similarly, if the vote were one car/one vote, the fleet owners would control the outcome and could

class action settlement procedures”). See generally 3 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 8:18 (“The idea appears to be that if problematic class actions settlements are proposed, and government officials receive notice of them, those government officials might be able to act on behalf of their constituents in opposing the settlement in some way.”).

62. See Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L. 163, 169 (2006) (“The composition of trustees is generally reflective of the bargaining power of the various segments of the plaintiffs’ bar.”).

63. FED. R. CIV. P. 23(e).

64. FED. R. CIV. P. 23(e)(2)(D). For a discussion of courts’ application of this idea, see 4 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 13:56.

65. See 11 U.S.C. § 1126(c) (2018) (allowing acceptance when creditors holding “at least two-thirds in amount and more than one-half in number” have accepted a bankruptcy plan).

approve a settlement skewed in their favor.⁶⁶ In personal injury cases like the asbestos cases, the distribution and voting plans would likely account for different types of injuries in a grid-like fashion.⁶⁷ While the metric itself will vary by situation, the goal of any distribution and voting plan is to be acceptable to a significant portion of the class, lest the entire purpose of the negotiation class be undermined by opt-outs.

The opioid MDL, in which plaintiffs' counsel employed the negotiation class certification concept for the first time, provides several guideposts regarding this first step in the process.⁶⁸ In December 2017, the Judicial Panel on Multidistrict Litigation consolidated all federal litigation by cities and counties against opioid manufacturers, pharmaceutical distributors, and retail pharmacies into an MDL in front of Judge Daniel Polster in Cleveland, Ohio.⁶⁹ Judge Polster appointed a plaintiffs' leadership team (including the Plaintiffs Executive Committee (PEC)) in early 2018.⁷⁰ That leadership team was in place and accordingly able to jump-start a process for considering how to distribute a nationwide opioid settlement among all counties and cities in the United States—and how those entities might vote on a proposed settlement—when the negotiation class certification concept first emerged. The PEC employed public health experts, and the lawyers and experts jointly devised an elaborate distributional metric based on various public health factors.⁷¹ They then created a website and posted an “allocation map” that enabled any county or city in the country to assess its share of a settlement.⁷² When the plaintiffs moved for class certification, they proposed that 75% of any settlement be distributed according to the metric, with 25% allotted

66. Rave, *Anticommons*, *supra* note 14, at 1251 (“Voting procedures should be designed with the potential for minority exploitation in mind, and may require steps such as subclassing to account for significant differences among groups of plaintiffs that could create conflicts of interest.”).

67. McGovern, *supra* note 62, at 173 (reporting that in the allocation of asbestos trust monies over time, “factors to be taken into account by the claims evaluators became more standardized, evolving into a more formulaic methodology” with “[p]ayments now . . . made based upon a schedule with maximum benefits”).

68. For a discussion of the litigation's early dynamics, see generally Morgan A. McCollum, Note, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, 94 N.Y.U. L. REV. 938 (2019).

69. *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1380 (U.S. Jud. Pan. Mult. Lit. 2017).

70. Order, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio Jan. 4, 2018), ECF No. 37; *see also* Order, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio Feb. 7, 2018), ECF No. 118 (confirming the composition of the negotiating teams).

71. *See* Report of Special Master Cathy Yanni at 5, *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019) (No. 17-md-02804), ECF No. 2579 (explaining and approving the parties' proposed allocation metric based on “opioid-related overdoses, opioid-related deaths, and the distribution of opioid-related pills per capita in a given jurisdiction”).

72. *Allocation Map*, IN RE: NATIONAL PRESCRIPTION OPIATES LITIGATION (June 18, 2019), <https://allocationmap.iclaimsonline.com/> [<https://perma.cc/6J6G-ATZZ>].

initially to other purposes, including fees and costs.⁷³ They also proposed an elaborate voting mechanism, with six different sets of supermajority votes needed to approve any lump sum settlement offer.⁷⁴

Prior to ruling on the certification motion, Judge Polster directed one of the MDL's Special Masters to provide an assessment of the fairness of this distributional mechanism, stating that, although no settlement had been negotiated, "[i]t would be perverse—and an enormous waste of judicial and societal resources—to launch this whole negotiation class only to later hold that the allocation or voting schemes, identified at the outset, were inequitable *ab initio*."⁷⁵ The Special Master then submitted a seventeen-page report analyzing the distributional metric itself and proposed voting system and finding no inequities among the class members.⁷⁶ The Court in turn adopted these findings, holding that "the method for allocating the core class recovery (75% of the fund) reflects a lot of hard work and is a significant and eminently fair step toward resolution of these many cases" and that "[n]othing in the allocation model appears to skew toward any group other than those hardest hit by the opioid epidemic."⁷⁷ The Court also accepted the Special Master's conclusion that the voting plan did not unfairly discriminate among class members.⁷⁸ In affirming the intraclass equity of the allocation plan, the Court rejected the argument of several class members that the plan skewed in favor of large cities and against hard-hit areas, and it relied on the parties' allocation map to discredit the argument.⁷⁹ The disgruntled class members—as well as a number of defendants—have appealed the court's certification order to the Sixth Circuit.⁸⁰ The opioid experience shows that a distributional and voting plan—even a nationwide plan encompassing every county in the country—is an achievable end.

73. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 538 (N.D. Ohio 2019).

74. *Id.* at 537 (noting that a settlement proposal would "need to secure approval from six separate supermajority vote counts, reflecting different slices of the class"); *see also* Plaintiffs' Memorandum in Support of Renewed & Amended Motion for Certification of Rule 23(b)(3) Cities /Counties Negotiation Class at 53–54, *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019) (No. 1:17-md-02804), ECF No. 1820-1 (describing different voting counts).

75. Order Directing Special Master Yanni to Assess Fairness of Allocation & Voting Proposals to Non-Litigating Entities at 3, *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019) (No. 1:17-md-02804), ECF No. 2529.

76. Report of Special Master Cathy Yanni, *supra* note 71, *passim*.

77. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 553 (N.D. Ohio 2019).

78. *Id.* at 554.

79. *Id.* at 553.

80. *See In re Nat'l Prescription Opiate Litig.*, No. 19-4099 (6th Cir. *appeal docketed* Nov. 8, 2019) (*appeal by six Ohio cities*); *In re Nat'l Prescription Opiate Litig.*, No. 19-4097 (6th Cir. *appeal docketed* Nov. 8, 2019) (*appeal by certain manufacturer and pharmacy defendants*).

B. Class Certification

If the interested parties are able to generate a satisfactory distributional metric, class counsel may move for certification of a negotiation class. Since money damages are at issue, they would seek certification under Rule 23(b)(3).⁸¹ Application of the class certification requirements will vary depending on the situation giving rise to the negotiation class, but several issues are likely to recur in most negotiation classes.

First, and perhaps most pertinently, defendants will have a complicated relationship to certification of the negotiation class. It is arguable that defendants ought not even be involved in the class certification process, in that the goal is simply to identify which plaintiffs are interested in cooperatively negotiating as a single bargaining unit, somewhat like a labor unionization drive.⁸² Moreover, the defendants need not actually oppose negotiation class certification since they have the ultimate ability to render it meaningless: they can (unlike the employer in the labor context) simply refuse to bargain with the negotiation class. But as a key purpose of negotiation class certification is to provide the defendant with information as to the scope of peace a settlement offer will purchase, defendants should welcome certification of a negotiation class. As with settlement class certification, therefore, the expectation might be that the defendant would not oppose certification of a negotiation class.⁸³ Yet the defendant may be more hesitant to sit idly with regard to certification of a negotiation class than it is with regard to certification of a settlement class for a simple reason: no settlement has yet been achieved, and the stakes of not contesting class certification appear higher if the certification could morph into a trial class. The defendants in the opioid litigation perfectly expressed the ambivalence described here: many of the major manufacturing defendants took no position (and have yet to show any interest in employing the device),⁸⁴ while a number

81. FED. R. CIV. P. 23(b)(3).

82. Negotiation class certification has some attributes of a unionization drive in that sense, and of course, labor law sets limits on employer involvement in the employees' votes. 29 U.S.C. § 158 (2018) ("It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.").

83. The defendant nonetheless has an interest in ensuring that the class certification requirements are genuinely present, as the legitimacy of any resulting judgment—and the finality it will deliver—turns on the accuracy of that decision. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (discussing defendant's interest in ensuring validity of class action judgment); 6 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 18:42 (explaining availability of collateral attack on class action judgment on grounds that the class was not adequately represented).

84. Manufacturer Defendants' Response to Plaintiffs' Renewed & Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class at 1–2, *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019) (No. 1:17-md-02804), ECF No. 1952 (stating that manufacturer defendants "take no position on whether the Court should grant or deny" negotiation class certification).

of the primary distributor defendants actively opposed class certification,⁸⁵ and some have appealed Judge Polster's entry of it.⁸⁶

Given a defendant's nontrivial concerns about any class certification order, the negotiation class certification decision can protect the defendant in several distinct ways: (1) it can explicitly state that a defendant's lack of opposition is limited to certification of a negotiation class and that if no settlement is ultimately reached, the defendant retains the right to contest a later motion for trial class certification; Rule 23, as amended in 2018, supports that position in the context of settlement class certification;⁸⁷ and (2) negotiation class certification can be time-limited with the default position being that it expires if a settlement is not reached within a certain period, unless explicitly recertified at the end of the time period.⁸⁸ Such provisions would provide the parties time to negotiate a settlement while preserving the status quo for trial if no settlement is reached: that is, requiring the plaintiffs to seek trial class certification in the absence of a settlement.

Second, while our hope is that the absent class members will welcome negotiation class certification, those that do not—or have concerns about the application to their situation—ought to have standing to contest the motion. Notice of a motion for *trial* class certification is not provided to absent class members; they first receive notice after certification, with the opt-out right being their primary option if they are unhappy with the court's certification

85. Memorandum of Certain Defendants in Opposition to Plaintiffs' Renewed & Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class at 1–2, *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019) (No. 1:17-md-02804), ECF No. 1949 (opposition by various distributor and pharmacy defendants).

86. Joint Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) at 1–2, *In re Nat'l Prescription Opiate Litig.*, No. 19-0305 (6th Cir. Sept. 26, 2019), ECF No. 1.

87. FED. R. CIV. P. 23(e)(1) advisory committee's note to 2018 amendment (“If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.”).

88. Judge Polster's decision certifying a negotiation class in the opioid case embodied these protections:

This Order is without prejudice to any party's ability to oppose the certification of this or any other class, proposed for litigation or settlement, with respect to any opioids-related claim, defense, issue, or question. Accordingly, no class member or any party, or counsel to a party, to this proceeding may cite this Order or the accompanying Memorandum Opinion as precedent or in support of, or in opposition to, the certification of any class for any other purpose in any opioids-related litigation by or against any party thereto. Persons not parties to this proceeding are informed that this Order and the accompanying Memorandum Opinion are not intended to serve as a precedent in support of, or in opposition to, any motion for class certification of any type pursued in any court on opioid-related matters.

Order Certifying Negotiation Class & Approving Notice at 6–7, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio Sept. 11, 2019), ECF No. 2591; *id.* at 8 (“In light of its purpose to facilitate settlement, the Negotiation Class will terminate five (5) years from the date below, except as necessary to enable then-ongoing settlement negotiations, approval processes, enforcement and administration to be completed.”).

decision.⁸⁹ So too here, even if a court should indeed hear absent class members if they raise objections to negotiation class certification, there is no inherent requirement that they be provided notice of the motion. That said, if a negotiation class arises within an MDL, as it did in the opioid matter and likely will most often, any lawyer representing a client in the MDL (and arguably many outside) will—and should—receive notice of the motion and an opportunity to be heard on it.

Third, although the Supreme Court has held that the standards for certification of a settlement class are, but for one prong, the same as the standards for certification of a trial class *and* that these standards ought to be applied with *more*, not less, scrutiny at settlement,⁹⁰ in practice, most courts undertake a more relaxed examination of the certification requirements for a settlement class.⁹¹ If the motion is unopposed by the defendant, certification of a negotiation class is likely to benefit from a similar bias so long as the absent class members' interests are adequately protected. And, because of the precertification allocation negotiation, the robust opt-out right, and the added voting right, negotiation class members' situation is, in some ways, far more informed and protected than that of absent class members in the trial or settlement classes.⁹² Of course, regardless of whether class certification is opposed, the court must necessarily engage in a "rigorous analysis" of the arguments for and against certification,⁹³ as Judge Polster did in the opioid case.⁹⁴

89. FED. R. CIV. P. 23(c)(2)(B).

90. As the Supreme Court explained in the *Amchem* case:

Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

91. See, e.g., 2 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 4:77 (noting that "courts have granted certification at settlement after themselves having denied it for trial purposes" and listing cases).

92. See *infra* Part III.

93. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) ("[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.>").

94. Judge Polster (1) held an initial hearing following the filing of the motion papers; (2) required the moving counsel to refile the papers after that hearing to reflect concerns raised at that hearing, including about proposed class counsel; (3) permitted any and all putative class members, defendants, and outsiders to raise objections to the motion; (4) held an extensive hearing after the final briefing; (5) appointed a special master to investigate, report, and assess the fairness of the proposed allocation method; and then (6) authored a forty-page decision, accompanied by an

Fourth, since 1998, Rule 23(f) has enabled an interlocutory appeal, within the discretion of the appellate court, from a decision granting or denying class certification.⁹⁵ Since 2018, however, the Rule has explicitly barred such a process for orders preliminarily approving certification of a class for settlement purposes under Rule 23(e)(1).⁹⁶ The Advisory Committee's notes justify the exception on the grounds that the certification decision at the preliminary stage of settlement approval is not final⁹⁷—a court must find at that stage only that it is “likely” it will be able to certify a settlement class in conjunction with its final review of the proposed class action settlement.⁹⁸ A court's decision to grant or deny negotiation class certification may seem tentative in the sense that a settlement may or may not follow, but it is final in the sense that it will not be revisited—indeed, the entire point is to lock in a class size at the end of the opt-out period—if a settlement is reached. Accordingly, Rule 23(f) likely should apply at the time the decision is rendered. In the opioid case, a number of objecting parties sought, and the Sixth Circuit granted,⁹⁹ interlocutory appellate review, perhaps for these reasons.

Fifth, if a class is certified and negotiations commence, the court will need to decide what effect that development has on the underlying litigation. Negotiation class certification does not logically require that the litigation be stayed during settlement negotiations, and indeed, we would argue that it not be.¹⁰⁰ Continuing discovery and motion practice throughout negotiations can only serve to better inform the negotiators about the relative strengths and weaknesses of their positions, and it keeps the case moving toward resolution should a settlement not emerge. That said, nothing in our proposal would bar

eight-page order, analyzing all of the requirements of class certification and all of the objections raised to it. See *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 537–38, 553 (N.D. Ohio 2019) (discussing course of negotiation class certification motion); Transcript of Status Conference Proceedings, *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019) (No. 1:17-md-02804), ECF No. 1732 (transcript of initial hearing); Transcript of Proceedings, *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019) (No. 1:17-md-02804), ECF No. 2147 (transcript of hearing after final briefing).

95. FED. R. CIV. P. 23(f).

96. FED. R. CIV. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1).”).

97. See FED. R. CIV. P. 23(f) advisory committee's note to 2018 amendment (noting that the certification ruling at preliminary approval “does not grant or deny class certification” and stating that “review under Rule 23(f) would [accordingly] be premature”).

98. FED. R. CIV. P. 23(e)(1)(B).

99. *In re Nat'l Prescription Opiate Litig.*, No. 19-0305, 2019 U.S. App. LEXIS 33631, at *5 (6th Cir. Nov. 8, 2019).

100. In the opioid case, Judge Polster explicitly held that it was not. See Order Certifying Negotiation Class & Approving Notice, *supra* note 88, at 6 (holding that the certification order was “without prejudice to the ability of any Class member to proceed with the prosecution, trial, and/or settlement . . . of an individual claim, or to the ability of any Defendant to assert any defense thereto”).

a court from issuing a stay during negotiations if the court determined that to be the better course.

C. *Notice and Opt-Out Period*

Certification of a negotiation class triggers notice to the class under Rule 23(c)(2)(B)¹⁰¹ and commences a period during which the class members enjoy a right to opt out of the class.¹⁰² The notice must meet the constitutional and statutory requirements, including individualized notice when possible.¹⁰³ Similarly, the opt-out right must be protected by giving class members sufficient information and sufficient time to exercise it in a straightforward manner.¹⁰⁴ As the goal of certifying a negotiation class is to fix the size of the class for settlement negotiation purposes, this stage of the proceeding is critical. It must hit several important marks to be effective. Particularly, given its current novelty, the content of the class notice must clearly explain the purpose of negotiation class certification, the distributional metric, and how the class members can currently assess the relative value of their claim, the voting mechanism and its binding nature, and the class members' right to opt out.¹⁰⁵ Moreover, the timing of the notice must be such as to clearly protect the class members' right to opt out: it must give class members sufficient time to receive the notice, digest it, consult with counsel, and make an informed decision about the opt-out right.¹⁰⁶ Because the Due Process Clause protects class members' rights to receive notice and to opt out,¹⁰⁷ a failure on these fronts may render any subsequent judgment open to collateral attack.¹⁰⁸

101. FED. R. CIV. P. 23(c)(2)(B).

102. On the nature of the class members' opt-out right, see *infra* notes 104–07.

103. See FED. R. CIV. P. 23(c)(2)(B) (“For any class certified under Rule 23(b)(3) . . . the court must direct to class members the best notice that is practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort.*”) (emphasis added).

104. See 3 NEWBERG ON CLASS ACTIONS, *supra* note 13, §§ 9:42–9:46 (explaining the information, timing, and content required when providing notice of the opt-out right).

105. See *id.* §§ 9:44–9:46 (describing the content required by class notice).

106. See *id.* § 9:45 (indicating that a goal when setting opt-out deadlines is to allow class members to consult with counsel and make informed decisions).

107. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (holding, at least with respect to class members beyond the forum’s jurisdictional reach, that absent class members in money damage class actions must be accorded “minimal procedural due process protection,” including “notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel,” “an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form,” and adequate representation).

108. See 6 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 18:43 (discussing collateral attack for failure to provide sufficient notice); *id.* § 18:45 (discussing collateral attack for failure to provide sufficient opt-out opportunity).

In the opioid case, following Judge Polster's certification of a class, notice was distributed, and class members were given a sixty-day period during which to opt out. At the end of the opt-out period, class counsel filed a report stating that 569 of 34,458 class members had requested exclusion, though 18 of the 569 subsequently rescinded their exclusion requests;¹⁰⁹ this means that about 1.6% of the class members opted out, and we estimate those opt-outs reflect about 13% of the U.S. population.¹¹⁰ Although a key goal of the negotiation class is to fix a class size, it is unlikely any of the parties would object to opt-out parties coming back into the class (as with those who rescinded their exclusion in the opioid case); this is so because the defendant is happy to get more peace, and class counsel should be able to extract a large settlement (and fee), the larger the class.

D. Settlement Negotiation

At the end of the opt-out period, the size of the negotiation class will be fixed. At that time, the parties can decide whether to proceed with settlement negotiations as to that class. If too many class members—or too many key class members—have opted out, a settlement may be unlikely, and the entire process may be terminated. However, if the opt-out opportunity has not thinned the class excessively, the plaintiffs' class representatives and class counsel may proceed to negotiate a lump sum settlement with one or more defendants.¹¹¹ Of course, nothing in negotiation class certification requires any defendant to negotiate with the certified class. A purpose of the exercise is to help the defendant avoid an adverse selection problem should it settle with the class,¹¹² so the hope is that once the negotiation class is certified, the defendant will come to the table. But that step remains voluntary.

109. Request for Entry of Proposed Rule 23(c)(1)(B) Negotiation Class Membership Order at 2–3, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio Jan. 10, 2020), ECF No. 3073.

110. Some of the opt-outs overlap in the populations they represent. For example, both Harris County, Texas, and Houston, Texas (part of which is in Harris County) opted out. After adjusting for this overlap—and relying on the U.S. Census Bureau's population estimates for July 1, 2018—we estimate that the opt-out jurisdictions represent over 40 million people, or roughly 13% of the U.S. population. See Exhibit C to Request for Entry of Proposed Rule 23(c)(1)(B) Negotiation Class Membership Order, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio Jan. 10, 2020), ECF No. 3073-4 (listing the 551 opt outs); *Sub-County Resident Population Estimates: April 1, 2010 to July 1, 2018*, U.S. CENSUS BUREAU, https://www2.census.gov/programs-surveys/popest/datasets/2010-2018/cities/totals/sub-est2018_all.csv [https://perma.cc/6W98-MFRC]; *Population, Population Change, and Estimated Components of Population Change: April 1, 2010 to July 1, 2018*, U.S. CENSUS BUREAU, <https://www2.census.gov/programs-surveys/popest/datasets/2010-2018/counties/totals/co-est2018-alldata.csv> [https://perma.cc/XZS7-DR7Z]. Data on file with authors.

111. In a multidefendant case, with a class certified as to all defendants, class counsel can negotiate with defendants simultaneously or sequentially, depending on the overall settlement dynamics of the situation.

112. See *supra* subpart I(B).

Settlement negotiations would be conducted no differently than in any other large class action: there will likely be some sort of third-party (special master/mediator) oversight,¹¹³ and the negotiations will culminate in a signed settlement agreement. The negotiations should be more straightforward than in many class action settlements, as the plaintiffs' side of the equation will have worked out a distributional mechanism in advance and as the class size will be fixed in advance; these attributes mean that the settlement negotiations can focus intently on the primary variable of the settlement's dollar amount, with significant certainty all around.

If certification of the negotiation class fails to generate a settlement, at some point it should be terminated, with the expectation of further litigation and/or trial. A court order certifying a negotiation class might accordingly give the parties, say, twelve months to reach a settlement (perhaps commencing after any certification appeals) and schedule a termination proceeding for the conclusion of that period; if the parties felt settlement impossible after, say, six months, nothing would prohibit them from jointly notifying the court of that fact and seeking earlier decertification accordingly. As discussed above,¹¹⁴ it may give the defendant comfort if there is a presumption in favor of termination written into the certification order rather than the full showing required by a motion for decertification.¹¹⁵ Moreover, as the class received notice of the initial negotiation class certification, it should receive notice if the class is dissolved.¹¹⁶

E. Class Vote and Settlement Approval

Assuming certification of a negotiation class leads to a classwide settlement, the parties would then seek judicial approval of the settlement in precisely the same three-step manner as with any other class action

113. Rule 23(e) now explicitly encourages this by directing the court to consider whether the settlement "was negotiated at arm's length" in reviewing the fairness of any proposed settlement. FED. R. CIV. P. 23(e)(2)(B). The Advisory Committee's notes amplify the point in stating that "the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." FED. R. CIV. P. 23(e)(2)(B) advisory committee's note to 2018 amendment.

114. *See supra* subpart II(B).

115. For a discussion, see 3 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 7:39.

116. Generally, the filing of a putative class action lawsuit tolls the statute of limitations for putative class members. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) ("[T]he commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status."); *see also* *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350 (1983) ("While *American Pipe* concerned only intervenors, we conclude that the holding of that case is not to be read so narrowly. The filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to intervenors." (citation omitted) (quoting *Am. Pipe*, 414 U.S. at 554)). *See generally* 3 NEWBERG ON CLASS ACTIONS, *supra* note 13, §§ 9:53–9:69 (describing the history and requirements of this rule). A decision then denying or decertifying a class starts the clock anew. *Id.* § 9:53.

settlement;¹¹⁷ unique to the negotiation class, however, there would be a classwide vote on the acceptability of the settlement amount as part of the second stage of the process and, likely, no opportunity for class members to opt out (a second time).

1. Preliminary Approval.—At the initial stage, the settling parties seek judicial authorization to send notice of the proposed settlement to the class and to solicit the class’s reactions to it. Simultaneously, per the requirements of the Class Action Fairness Act of 2005, the defendant must provide notice of the proposed settlement to federal and state government officials.¹¹⁸ At that stage, the court must find that it will “likely” be able (1) to approve the settlement and (2) to certify the class for purposes of judgment on the settlement.¹¹⁹ Since the court has already made a determination of class certification prior to the negotiation, it need not undertake the analysis again.¹²⁰ Thus, the sole question at preliminary approval is whether the court is likely to find the substance of the settlement to be fair, reasonable, and adequate.

2. Notice, Objection, and Voting Period.—If the court finds that the settlement hits this mark, it authorizes that notice be sent to the class. In a normal (b)(3) class action, this triggers a period during which class members may file objections¹²¹ or, in most cases, opt out of the class. Class members have a right to opt out if they have not previously been given that opportunity; however, if the court had previously certified the class, an opt-out opportunity would have been provided at that time, and a second opt-out

117. Rule 23 requires judicial approval of any proposed class action settlement. FED. R. CIV. P. 23(e); see also 4 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 13:1 (describing the three-step process).

118. 28 U.S.C. § 1715(b) (“[E]ach defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement . . .”).

119. FED. R. CIV. P. 23(e)(1)(B).

120. The preliminary analysis of class certification referenced in Rule 23(e)(1) pertains only to cases in which the court has not certified a class at the time of settlement and does so solely for purposes of settlement. In cases certified before settlement, the Advisory Committee’s notes state that the only class certification issues at the settlement stage concern “whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted.” FED. R. CIV. P. 23(e)(1) advisory committee’s note to 2018 amendment; see also *In re Nat’l Football League Players Concussion Injury Litig.*, 775 F.3d 570, 581 (3d Cir. 2014) (“[W]here class certification has already occurred, a district court’s review of a settlement ‘may provide an occasion to review the cogency of the initial class definition.’” (quoting FED. R. CIV. P. 23(e) advisory committee’s note to 2003 amendment)). Though the text of Rule 23 is open to other interpretations, see 4 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 13:18, the Committee’s conclusion that no new certification is required at settlement for previously certified cases is likely to be followed by the courts.

121. FED. R. CIV. P. 23(e)(5).

opportunity is permitted but not required.¹²² In a negotiation class situation, the court generally should not permit a second opt-out opportunity as that would undermine the purpose of organizing the class for negotiation purposes *ex ante*. Separate from their right to vote, class members must be granted the opportunity to object to the settlement's terms that Rule 23 guarantees them.¹²³ However, since the allocational decision was made *ex ante*, a strong settlement should not trigger significant grounds for objection *ex post*, other than to the value of the lump sum (through the vote) and/or to the proposed attorney's fees.¹²⁴

Class members have been told, since the outset, that they would be given the opportunity to vote on the proposed settlement's value, with a supermajority needed for the proposal to move forward.¹²⁵ Accordingly, during this normal opt-out/objection period, class members should be asked to register a yes/no vote as to the settlement proposal. The voting results will dictate whether class counsel moves forward to seek final approval of the proposed settlement. If the proposal is not supported by the required supermajority, class counsel and the defendant should so notify the court, terminate the approval process, and return to the settlement table. If the proposal does receive the required supermajority support, class counsel will move for final judicial approval.

122. See FED. R. CIV. P. 23(e)(4) ("If the class action was previously certified under Rule 23(b)(3), the court *may* refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." (emphasis added)).

123. FED. R. CIV. P. 23(e)(5)(A) ("Any class member may object to the proposal if it requires court approval under this subdivision (e).").

124. Class members have a separately protected right to object to any proposed attorney's fees. FED. R. CIV. P. 23(h)(2).

125. In this final phase, the class's vote could precede the three-step judicial approval process (preliminary approval, notice/objection period, final approval) rather than be sandwiched in the midst of it. If the class is going to reject the proposal, there is no reason to utilize judicial resources, send CAFA notices, gin up objections, etc. On the other hand, if the court's preliminary review suggests that it is unlikely to grant final approval to the settlement, there is similarly no reason to subject the proposal to a classwide vote, only to have the court ultimately override the class's approval. While either ordering is defensible, the argument for erring on the side of having the judiciary look first is that class members are less knowledgeable about judicial processes and should not be subjected to a situation in which they vote in favor of a proposed settlement only to have a court then reject it out of hand. The value of the preliminary judicial review is that it ensures that the classwide vote will be meaningful and guards against the confusion that could result from the reverse procedure. The argument for erring on the side of having the class look first is that the class vote is likely to be a higher hurdle than judicial approval; in the opioid case, it entailed six different sets of supermajority votes. See *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 537 (N.D. Ohio 2019) (noting that settlement proposal would "need to secure approval from six separate supermajority vote counts, reflecting different slices of the class"). Absent clearance of that hurdle, it might not make sense to utilize scarce judicial resources.

3. *Final Approval*.—The court will hold a fairness hearing, consider all objections, and ultimately render a final determination on the adequacy of the settlement, as required by Rule 23(e)(2).¹²⁶ The supermajority vote is not meant in any way to displace the requirement of judicial approval, nor could it. But it should serve as a significant factor in support of approval. Normally, a court infers the class’s consent from the absence of a significant quantity of objections,¹²⁷ but here—in the presence of a supermajority vote—no such inference will be necessary.

* * *

In sum, our proposal provides a solution to the collective action problem of the heterogeneous class—while fully respecting and tracking the familiar legal requirements for class actions (the prerequisites in Rule 23(a) and 23(b), the notice and opt-out requirements of Rule 23(c), and the settlement approval provisions of Rule 23(e))—by folding in opportunities for class member participation at the front end (in generating an allocation scheme and voting scheme) and at the back end (in voting on the acceptability of a lump sum settlement). Parts III and IV of this Article explicate the many benefits of this approach and defend its legitimacy.

III. The Benefits of the Negotiation Class

By providing a mechanism for keeping the whole class together as a bargaining unit, the negotiation class’s primary goal is to resolve the collective action problem presented by a heterogeneous class of large and small stakeholders.¹²⁸ It thereby accomplishes an end that a settlement class action cannot, and in doing so, it improves on the mechanics of the settlement class action in other ways. In this Part, we first explicate the central benefits of the negotiation class to plaintiffs and defendants alike; we then discuss a series of collateral benefits the negotiation class action device provides as compared to the settlement class action.

A. *Outcome Benefits: The Peace Premium and Global Peace*

In Part I, we demonstrated that a defendant may be wary of making a settlement offer to a heterogeneous class as it fears that large stakeholders may opt out and pursue individual litigation; if they do, the defendant will have settled the class’s middling claims but will still have to litigate all of the best claims among the class’s inventory. As noted there,¹²⁹ this is a form of

126. See FED. R. CIV. P. 23(e)(2) (requiring a hearing and a finding that a proposed settlement is “fair, reasonable, and adequate” prior to judicial approval of the settlement proposal).

127. See 4 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 13:58 (providing examples showing that “courts often cite to the absence of opt-outs as evidence in support of settlement approval”).

128. See *supra* Part I.

129. See *supra* Part I.

“adverse selection” from the defendant’s perspective but one that, at the extreme, leaves the class’s claims incapable of aggregate resolution. The negotiation class solves this problem by fixing the class’s size in advance and thereby enabling the defendant to make a fulsome settlement offer. What’s more, class action scholarship suggests that the defendant so desires global peace that it will pay a premium—a “peace premium”—if the entire class’s claims can be packaged together.

Commentators have often described a class action settlement as “global peace”¹³⁰ and have occasionally noted that such global peace is worth a premium to the settling defendants. But that generic argument may oversell the simple small-claims settlement and underappreciate the more specific peace premium available to heterogeneous classes. Professor Teddy Rave, who has provided the most sustained investigation of this peace premium in the scholarly literature, explains that “the potential for adverse selection is the main driver of the peace premium.”¹³¹ Professor Rave explains that the plaintiffs’ attorneys have inside information about their full inventory of claimants, and they can therefore package and sell a group of middling claims while holding back and individually litigating the particularly good claims.¹³² Yet as Professor Rave explains, “Defendants . . . do not want to pay top dollar to settle a collection of weak claims only to be left facing the strongest claims in continued litigation.”¹³³ Labeling this a form of “adverse selection,” he argues that “defendants will necessarily pay less per plaintiff to settle the incomplete aggregation,”¹³⁴ or conversely, they will pay a “peace premium” to someone who can deliver the whole lot.¹³⁵ As Professor Rave’s

130. A search for <“class action” /p “global peace”> in the Law Reviews & Journals database of Westlaw returns 197 articles as of September 16, 2020.

131. Rave, *When Peace*, *supra* note 14, at 527–28 (explaining that for adverse selection to operate, there must be “claims that are (1) large enough to be viable in individual or small group litigation and [that] (2) vary significantly in strength or value so that the plaintiffs have an informational advantage over the defendant”); *see also* Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 611 (2015) (“Where the class action involves high-value individual damages claims, opt-out rights may diminish the negotiating leverage of class counsel by limiting their ability to extract a ‘peace premium’ from defendants who wish to secure a complete release from all future litigation.” (emphasis added)).

132. Rave, *Anticommons*, *supra* note 14, at 1193.

133. *Id.* at 1194.

134. *Id.*

135. D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 J. TORT L. 91, 103 (2012) (positing that defendants “may be willing to pay a peace premium” when “some claims are viable” within a heterogeneous class); *see also* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 415 (2014) (arguing that a “compounding effect[]” exists when settling claims and that an aggregation threshold may be “critical to defendants”).

Some scholars have asked whether the peace premium delivers to members of a cohesive group—or their lawyers—more than their due. *See* Robert G. Bone, *Replacing Class Actions with*

examination demonstrates, the peace premium depends on the existence of a heterogeneous class: if there are no large claimants, no selection of claims for trial is adverse to the defendant, and no threat exists.

In the presence of a heterogeneous class, however, a device packaging all of the claims should advantage all of the parties. The defendant avoids the adverse selection problem, with the peace premium it pays reflecting the value that a package deal delivers. The large stakeholders must weigh the upside of opting out against the potential peace premium. If they opt out and litigate individually, they may secure a larger return for themselves than in a normal class action, but they will have to pay individualized costs, the litigation will take time,¹³⁶ and they will bear an individualized risk. The peace premium should be an attractive alternative: with the bargaining leverage they gain by delivering a full package of claims to the defendant, they can inch their portion of the class recovery toward the value of their opt-out recovery (particularly with some control over the intraclass allocation decision) while accelerating the time for payment and decreasing their overall cost. In short, if the peace premium's benefits outweigh the net benefits of opt-out litigation, large stakeholders should prefer a negotiation class to that other option. Moreover, when they do, the peace premium they extract raises the recoveries—and ought to lower the costs—to the class's small claimants.

Large stakeholders should be attracted to the negotiation class for the financial benefit of the peace premium, and our proposal is largely premised on that pecuniary magnet. But the cooperative solution of the negotiation class may be attractive to large stakeholders for nonpecuniary reasons as well. In the types of complex litigation at the core of our proposal, the large stakeholders are likely to be government entities, including public pension funds, and corporations, including large institutional investors. The literature on litigation by state attorneys general shows that these entities increasingly

Private ADR: A Comment on "Settlement, ADR, and Class Action Superiority," 5 J. TORT L. 127, 134 (2012) (arguing that "the substantive law does not give plaintiffs any right to benefit from a peace premium or impose any obligation on the defendant to pay it"); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 127 (2017) (noting that a "defendant[']s need to end lawsuits to ease shareholders' minds about future business prospects" enables a peace premium—that is, "gains for plaintiffs that might not exist otherwise"—but expressing concern that "repeat [lawyer] players may be tempted to design mutually beneficial deals that allow them to reap the peace premium—not the plaintiffs"). These critiques of the peace premium pose the question of whether class members should be encouraged to secure it. But it seems as plausible that the peace premium enhances the value of the class's settlement without necessarily delivering relief in excess of the value of the class's claims. See Rave, *When Peace*, *supra* note 14, at 526 (contending that "the chances of undercompensation relative to the substantive entitlement seem at least as great as the chances of overcompensation, given the cost of litigation" and that it would therefore "take a pretty big peace or *in terrorem* premium to offset litigation costs, even taking the economies of scale of a class action into account").

136. A court overseeing a bundle of claims can make this particularly problematic for large stakeholders by delaying all individual opt-out cases until the resolution of the aggregate matter.

work cooperatively with one another.¹³⁷ Moreover, large-claim class members may favor cooperation over defection because they are institutional agents with incentives that may not track simple profit-maximization alone. For example, since Congress's 1995 enactment of the Private Securities Litigation Reform Act (PSLRA), the primary institutional investors that have stepped forward to guide securities class actions have been large public pension funds; elected officials generally control these funds, plaintiffs' lawyers contribute to their reelection campaigns, and commentators have ascribed the fund's decision to lead PSLRA cases as following from those contributions.¹³⁸ Bracketing normative concerns about "pay to play,"¹³⁹ the situation demonstrates that what the public official is maximizing is likely reelection, and she may direct her entity to lead a securities class action, rather than simply free-ride, even though a pure cost-benefit analysis to the fund might not support that decision. Similarly, a state attorney general aspiring to higher office may seek engagements that promote her name recognition, such as leading a national coalition of state attorneys general against tobacco or opioid manufacturers.

In sum, the negotiation class should not only make a settlement possible, it ought to return *greater relief* to the defendant and to the large and small stakeholders. By essentially resolving an information asymmetry concerning the class's size and makeup, the negotiation class generates an outcome that is preferable to all the parties involved. This is the device's core function, but as mentioned above, in achieving that function, the negotiation class improves on current class action practice in a variety of other ways.

137. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 523 (2012) (noting that "states can achieve some economies of scale by banding together in multistate actions, creating what may amount to a nationwide class of claimants" or they can alternatively employ a "rolling thunder," strategy by "filing separate lawsuits across the country and pooling their resources while forcing the defendant to respond to a multitude of actions"); see also, e.g., Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 LAW & POL'Y 429, 430 (2003) ("Acting together, the [state attorneys general] have won legal settlements or concessions from tobacco companies, auto manufacturers, toy makers, paint producers, and others, agreements that would have been quite unlikely if sought by individual [state attorneys general] acting alone.").

138. See, e.g., Stephen J. Choi, Drew T. Johnson-Skinner & A. C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUD. 650, 651 (2011) (examining relationship between campaign contributions and selection of lead counsel).

139. For a discussion, see generally David H. Webber, *Is "Pay-to-Play" Driving Public Pension Fund Activism in Securities Class Actions? An Empirical Study*, 90 B.U. L. REV. 2031 (2010).

B. Participatory Benefits

Under current class action practice, class members are rarely involved in a case in any way. This comports with the fact that class suits are conceptualized as involving stakeholders with claims too small to justify individual litigation. As to such stakeholders, the costs of participation outweigh the benefits, and the genius of the class action is that it delivers relief without the need for any action on the small stakeholder's part.¹⁴⁰ Yet the heterogeneous class encompasses stakeholders with claims of such significant size that their claims could be litigated individually. These stakeholders have sufficient interest either to monitor the class proceedings and ensure themselves sufficient relief and low agency costs or to take action by participating individually or opting out. These large stakeholders do occasionally opt out, but they rarely take advantage of the participatory rights embedded in Rule 23,¹⁴¹ and courts are unsure how to proceed when they do.¹⁴²

We count as an advantage of our proposal, therefore, that it invites large stakeholders (in particular) to participate in the litigation in two distinct ways: (1) by joining in negotiations about (a) how to allocate a lump sum settlement and (b) how to generate a fair voting system and then (2) by voting on any proposed settlement amount. Participation alone is of normative value,¹⁴³ but here it is also instrumental: large stakeholder participation may help optimize both the total settlement size and its allocation.

140. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (“[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.”).

141. Rule 23 speaks to the possibility of class member participation in two distinct places. *See* FED. R. CIV. P. 23(c)(2)(B)(iv) (authorizing court to provide notice to class members that they may “enter an appearance through an attorney if the member so desires”); FED. R. CIV. P. 23(d)(1)(B)(iii) (authorizing court to require the class members receive notice of their “opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action”). Given the scant interest of most class members, these prongs of the Rule are rarely invoked.

142. For a discussion, see 3 NEWBERG ON CLASS ACTIONS, *supra* note 13, §§ 9:30–9:37.

143. *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE*, 176–77 (1988) (discussing the value of participation); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172–73 (1973) (discussing dignity values, participation values, deterrence values, and effectuation values).

1. Allocation.—Currently, it is class counsel and the defendant alone who generate an allocation plan,¹⁴⁴ and typically they do so—if at all¹⁴⁵—at the conclusion of their lump sum negotiation.¹⁴⁶ Class action scholarship has long lamented this situation for at least four independent reasons. First, before a lump sum settlement is reached, with its allocation unclear, the defendant can play various parts of the class off against one another in negotiating the settlement, plausibly forcing class counsel into a difficult and disarmed situation.¹⁴⁷ Second, once a lump sum settlement has been reached, none of the parties involved in the allocation has any particular interest in the allocation task beyond the fact that Rule 23 demands the result be equitable.¹⁴⁸ The defendant has already agreed to pay a sum certain and is indifferent to whom it goes, while class counsel will receive a percentage of that sum regardless of to whom it is allocated.¹⁴⁹ Third, with the lump sum

144. Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1478 (1998) (“[A]ttorneys representing plaintiff classes routinely helped design allocation plans. They did so in the course of negotiating settlements with defendants before submitting them for judicial approval.”).

145. Sometimes, settling parties may simply foist the allocation decisions onto the claims administrator. *See, e.g.*, Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1370–74 (2005) (discussing methodologies used by administrators to evaluate claims).

146. In the related aggregate litigation field, Professor Rave describes this as a “two-stage dynamic” that starts with a settlement and proceeds through allocation of that settlement. Rave, *Anticommons*, *supra* note 14, at 1213. That ordering is not inevitable. The ALI’s aggregate litigation proposal permits it to run in either order. AM. LAW. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (2010) (“The agreement must specify the procedures by which all participating claimants are to approve a settlement offer. The agreement may also specify the manner of allocating the proceeds of a settlement among the claimants or may provide for future development of an appropriate allocation mechanism.”).

147. For example, as Professors Silver and Baker explain:

[D]efendants often condition aggregate settlements on acceptance by a very high percentage of plaintiffs with high-value claims. If more than two or three mesothelioma victims decline a defendant’s offer, an entire settlement may collapse. This creates an incentive for plaintiffs’ attorneys to move money around in ways that may seem inequitable or unjustifiable.

Silver & Baker, *supra* note 144, at 1531 (footnote omitted).

148. FED. R. CIV. P. 23(e)(2)(D).

149. *See, e.g.*, John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent to Give Away Their Clients’ Money*, 84 VA. L. REV. 1541, 1549–50 (1998) (“[P]laintiffs’ counsel has little incentive to expend the time or effort, or to incur the costs, necessary to effect a ‘fair’ allocation.”); Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1471 (1997) (“The defendant is indifferent to paying a dollar to A and paying a dollar to B; in either case, the defendant pays a dollar. In addition, class counsel’s situation is the same; the attorney receives the same fraction of that dollar no matter which subclass it goes to.”); Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 PEPP. L. REV. 301, 313 (2003) (arguing that a contingent fee lawyer “is indifferent to all possible allocations among the claimants because, on all possible allocations, the fee remains the same”); Matthew C. Stiegler, *The Uncertain Future of Limited Fund Settlement Class Actions in Mass Tort Litigation After Ortiz v. Fibreboard Corp.*, 78 N.C. L. REV. 856, 888 n.181 (2000)

sitting on the table, interested parties—including courts—may be more willing to overlook allocation problems so as to ensure that the settlement is effectuated.¹⁵⁰ Fourth, not only do none of the allocating parties have any skin in the game, those who do are completely uninvolved in the allocation decision. Class members are simply given a take-it-or-leave-it deal when the settlement is announced or, worse, not even told what that individual allocation will be.

Under our proposal, the class members assist in generating both a metric for distributing a lump sum settlement and a voting scheme. They must do so before moving for class certification so that class members can have this information when deciding whether to exercise their opt-out right. We envision that the allocation metric will most likely be developed through bargaining between large stakeholders and their lawyers, on the one hand, and putative class counsel and putative class representatives—speaking for the smaller stakeholders—on the other. In practice, it is likely the lawyers themselves will do most of the negotiating—particularly as the lawyers have the largest stakes in the case’s outcome—so we do not want to oversell the democratic nature of the bargain. Indeed, the participants are surely driven by self-interest, and the process is just as surely messy, complex, and not perfectly democratic.¹⁵¹ But in its defense, its results may improve on current practice. That is so because the negotiation class certification allocation is made by parties with real incentives and at a time before they are compelled to compromise by the temptation of money on the table.¹⁵² Moreover, because class members are given the opportunity to opt out once they learn of their proposed share—but again, before the money is on the table—there is a meaningful check on the terms of the allocation. This is important because if the negotiating large stakeholders generate an allocation or voting

(“[N]either party to settlement negotiations has a financial incentive to negotiate the often complex allocation.”).

150. This desire may be a particular manifestation of the endowment effect or status quo bias. See generally Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003) (dealing with implicit biases and their intersection in legal analysis).

151. Cf. THURMOND W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 230 (1937) (“[Bankruptcy] is a combination of a municipal election, a historical pageant, an antivice crusade, a graduate-school seminar, a judicial proceeding, and a series of horse trades, all rolled into one . . .”).

152. As Professor Rave explains:

[B]y designing a procedure before there is money on the table, plaintiffs may take advantage of a partial veil of ignorance in reaching agreement on what sort of allocation scheme would be fair Plaintiffs will rarely be totally ignorant of the relative strength of their claims, of course, but an ex ante agreement on allocation procedures is more likely to be fair than waiting until facts are developed, settlement offers have been made, and heterogeneities have emerged. Indeed, plaintiffs may be able to agree on a governance structure that makes every individual better off from an ex ante perspective, given the expected surplus from aggregation and each individual’s expected share in the allocation.

Rave, *Anticommons*, *supra* note 14, at 1250–51 (footnotes omitted).

scheme skewed in their own favor, the larger quantity of small stakeholders might defect, leaving the negotiation class an unattractive bargaining unit for the defendant. Finally, with the allocation decision in the rearview mirror, the defendant cannot play portions of the class off one another in the bargaining process—the class emerges from negotiation certification as a cohesive bargaining unit.

2. *Voting*.—Currently, class members have little say in the group’s decision whether to accept a proposed settlement. Such a decision is always the client’s to make,¹⁵³ and in a class action, the class representatives act as that client.¹⁵⁴ But given the complexities of most class action settlements, the input of lay class representatives is marginal, and class action law authorizes class counsel to disregard the class representative’s interests for their own sense of the larger class interest.¹⁵⁵ Those class members, in turn, are notified of a class action settlement, but their options are then limited to objecting or opting out. Few class members ever do either.¹⁵⁶ None of this is surprising in the small-claims case, as again, class members’ interests are too small to warrant any active monitoring or involvement. For this reason, “the information that the court gets from those few class members who object or opt out is likely more arbitrary or selective than it is representative.”¹⁵⁷ Not surprisingly, then, there are but a few cases in which courts have made

153. MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2018) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation A lawyer shall abide by a client’s decision whether to settle a matter.”).

154. For a discussion, see 1 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 3:52.

155. See FED. R. CIV. P. 23(g) advisory committee’s note to 2003 amendment (noting that “class representatives do not have an unfettered right to ‘fire’ class counsel,” that “the class representatives cannot command class counsel to accept or reject a settlement proposal,” and that “class counsel must determine whether seeking the court’s approval of a settlement would be in the best interests of the class as a whole”); *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig.*, No. MD 16-2695 JB/LF, 2018 WL 4200315, at *3 (D.N.M. Aug. 31, 2018) (“[C]lass counsel, once appointed, is now the paramount representative of the class, not the class representatives.” (quoting 1 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 3:82)); *Lowery v. City of Albuquerque*, No. CIV 09-0457 JB/WDS, 2013 WL 1010384, at *33–34 (D.N.M. Feb. 27, 2013) (stating that “Professor William B. Rubenstein explains that the advisory committee’s notes indicate that ‘class counsel, once appointed, is now the paramount representative of the class, not the class representatives’” and approving settlement despite disagreement by one former class representative on grounds that firm’s disagreement with that individual did “not alter [firm’s] duty, as Class Counsel, to fairly and adequately represent the class’ interests above those of [that individual]” (quoting 1 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 3:82)).

156. See *supra* note 31.

157. 4 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 13:58 (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.61 (2004)). The *Manual for Complex Litigation* elaborates:

The lack of significant opposition may mean that the settlement meets the requirements of fairness, reasonableness, and adequacy. On the other hand, it might signify no more than inertia by class members or it may indicate success on counsel’s part in obtaining, from likely opponents and critics, agreements not to object.

MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.61 (2004).

passing reference to class members voting on a settlement's acceptability, usually because the class constituted a pre-existing group, such as a union or limited partnership,¹⁵⁸ while more often, courts reviewing proposed settlements disclaim any reliance on class members' settlement approval votes,¹⁵⁹ even in cases involving groups like unions.¹⁶⁰

In the heterogeneous class, however, a large stakeholder with a significant interest is more likely to monitor the case and may find the outcome unacceptable. It can opt out and go it alone, but it must then start over again and shoulder the burden of the opt-out case individually. It can object, but its odds of upsetting a negotiated settlement as being insufficient for the class are not great. For active large stakeholders within a heterogeneous class, the class action device, written for a mass of small stakeholders, therefore provides little opportunity for meaningful involvement.

Under our proposal, class members get to vote (yes or no) on whether any lump sum settlement agreement reached with a defendant is sufficient. At the outset of the case—prior to class certification—the stakeholders will create a voting system. It is likely the voting scheme will not enable a

158. *See, e.g.,* San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio, 188 F.R.D. 433, 449–50 (W.D. Tex. 1999) (discussing various vote-like opportunities given to members of the plaintiff union due to impact of proposed consent decree on their collective bargaining agreement); *Hinkley v. Kelsey-Hayes Co.*, 1998 U.S. Dist. LEXIS 6112, at *12 (E.D. Mich. Apr. 21, 1998) (refusing to enforce a class action settlement that was not approved by union members because class agents had clearly informed the defendant that “plaintiffs’ acceptance of the agreement could only be effective after the settlement was approved through a vote by the class”); *Hoffman Elec., Inc. v. Emerson Elec. Co.*, 800 F. Supp. 1279, 1281 (W.D. Pa. 1992) (preliminarily approving settlement of securities fraud claims brought by a class of limited partners, soliciting limited partners to vote on whether or not to accept the proposal, and stating, “[i]f a majority of the class accepts the settlement, and if, after the full hearing, we continue to believe that this is an adequate settlement, this Court will approve the settlement”).

159. *See, e.g.,* *Williams v. Quinn*, 748 F. Supp. 2d 892, 896 (N.D. Ill. 2010) (stating in response to a coordinated effort by opponents of settlement that led to a large number of form oppositions being filed, that “[n]o scientific poll [of class members] was conducted and, regardless, approval or disapproval of a class settlement is not decided by a vote of class members”).

160. In response to objectors who criticized a settlement for not being put to a vote of the class, the court in one union case stated:

A vote by class members is not the means provided by Rule 23(e) for ensuring the fairness of a class action settlement. Rather, the class members’ interests are protected by Rule 23(a)’s requirements such as commonality and adequacy, and by the fact that class members may not be bound to a compromise without independent judicial review to ensure that the proposed settlement is fair, reasonable, and adequate.

UAW v. Chrysler LLC, No. 07-CV-14310, 2008 WL 2980046, at *30 (E.D. Mich. July 31, 2008) (quoting *UAW v. Gen. Motors Corp.*, No. 05-CV-73991-DT, 2006 WL 891151, at *23 (E.D. Mich. Mar. 31, 2006)); *see also, e.g.,* *IUE-CWA v. GMC*, 238 F.R.D. 583, 601 (E.D. Mich. 2006) (same); *Volkman v. United Transp. Union*, No. Civ. A. 83-6025-FGT, 1993 WL 561013, at *1 (D. Kan. Dec. 15, 1993) (noting that class counsel had solicited votes from various bargaining units as to reasonableness of class action settlement but not referencing votes as pertinent in approving settlement).

settlement to be accepted absent both a per capita approval and an approval weighted by claim size. This helps the large stakeholders ensure that the settlement is sufficient for them and in doing so, should reap the peace premium that helps ensure a strong settlement for the absent class members. It also provides an additional check on class counsel's capacity to sell out the class.¹⁶¹ And the outcome of the vote provides additional information to the court, which remains charged with the ultimate decision about whether to approve the settlement.

Two other areas of complex litigation—bankruptcy and mass tort inventory settlements—similarly employ the franchise to engender some sense of participation and to provide stakeholders with some control of their rights. Bankruptcy law sorts creditors into different classes and then puts the debtor's reorganization plan, which includes how to distribute the debtor's assets, to a vote of the various classes.¹⁶² Within a class, the plan must be supported by a majority of the class's number of claims and two-thirds of the value of its claims (of those voting).¹⁶³ In the specialized world of asbestos bankruptcy trusts,¹⁶⁴ the law creates a class of current tort claimants and requires that the plan be put to a vote of that class and be approved by "at least 75 percent of those voting,"¹⁶⁵ while also complying with the weighted voting required by the basic bankruptcy norm.¹⁶⁶ Bankruptcy voting thereby

161. As the class action literature explains, class counsel may be tempted to accept a low settlement offer for the class in return for a high, uncontested fee for themselves. *See generally* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 699 (1986); Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377 (2000).

162. Technically, only those classes whose claims are "impaired" must vote. *See* 11 U.S.C. § 1129(a)(8)(A)–(B) (2018) (requiring that "with respect to each class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan").

163. 11 U.S.C. § 1126(c)–(d) (2018). Across classes, bankruptcy law hopes for approval by all classes but allows for plan approval with less: specifically, if a class dissents, through a "cram down," the court may confirm the plan if at least one other class consents and after a finding that the plan "does not discriminate unfairly, and is fair and equitable, with respect to each [dissenting] class." 11 U.S.C. § 1129(b)(1). This cram-down procedure is uncommon, but it is helpful in deterring unjustified holdouts and encouraging parties to reach consensual settlement. *See* McKenzie, *supra* note 16, at 1008 (citing Richard F. Broude, *Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative*, 39 BUS. LAW. 441, 450–54 (1984) (explaining the democratic processes of group decision making in these proceedings).

164. *See* 11 U.S.C. § 524(g) (2018) (organizing a system of bankruptcy trusts for asbestos-related injuries).

165. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

166. *See supra* text accompanying note 163. At least two factors complicate voting in asbestos trusts. First, it would seem that if 75% of "those voting" approved the plan, as required by § 524(g), the two-third's value requirement of § 1129 would likely be met, but as Professor Brown explains:

[Because] the voting conditions under Section 1129 and 524(g) are wholly independent—acceptance by 75% of those in an asbestos creditor class for the purposes

acknowledges heterogeneity in claim value by insisting that votes be both per capita and weighted. The Third Circuit has characterized bankruptcy's voting right as serving a monitoring function,¹⁶⁷ but it is easy to exaggerate the extent to which stakeholders themselves actually participate in bankruptcy voting. Because lawyers tend to have large inventories of claimants,¹⁶⁸ their interests have generally dominated, and it is the lawyers who often exercise their clients' votes on their behalf, particularly in asbestos trusts.¹⁶⁹

Mass tort voting, when it occurs, is organized by the plaintiff's attorney, and its outcome may well be determined by her as well. Voting has been proposed in mass tort cases because a lawyer representing an inventory of mass tort claimants who receives a lump sum settlement offer from the defendant is ethically bound to advise all of the clients of the amount and each client's share, but the lawyer cannot accept the offer unless 100% of the inventory agrees to it.¹⁷⁰ This unanimity requirement triggers a holdout problem: one member of the group can extract a rent by threatening to

of Section 524(g) may not be sufficient to qualify as 'acceptance' under Sections 1126(c) and 1129. . . . [G]iven the wide disparity among the potential values of asbestos claims, it is possible that a large block of low-value claimants will vote in favor of a plan (thereby satisfying the super-majority 'number of claimants' requirement of Section 524(g)) while a much smaller number of high-value claimants will vote against the plan (thereby preventing the plan from satisfying the two-thirds 'value of claims' requirement of Section 1126(c)).

S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 859–60 (2008) (citing *In re Quigley Co.*, 346 B.R. 647, 658 (Bankr. S.D.N.Y. 2006)). *Second*, as one of us (Professor McGovern) previously explained, assigning claim value to votes is complicated when the claims have not yet been liquidated:

The procedures for voting on a plan of reorganization are traditionally rather simple: one dollar, one vote; one claimant, one vote. In the case of asbestos personal injury claimants, however, the dollar value of actual claims can vary considerably. Since there is no individual evaluation of claims prior to a vote on the plan of reorganization, courts recently have allowed each claimant to indicate the type of disease claim the individual is asserting and have assigned that individual a voting value equal to the value of the claim in the eventual plan of asset distribution.

Francis E. McGovern, *Asbestos Legislation II: Section 524(g) Without Bankruptcy*, 31 PEPP. L. REV. 233, 240–41 (2003) (footnotes omitted).

167. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 244 (3d Cir. 2004) ("By providing impaired creditors the right to vote on confirmation, the Bankruptcy Code ensures the terms of the reorganization are monitored by those who have a financial stake in its outcome.").

168. See McGovern, *supra* note 166, at 247–48 (explaining how a small group of lawyers tend to be repeat players who dominate prepackaged bankruptcies).

169. *Id.*

170. See MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2018) (barring a lawyer who represents two or more clients from "making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client" and requiring that the lawyer to disclose "the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement").

withhold consent.¹⁷¹ Inventory lawyers generated a solution: have group members agree at the outset—before a settlement offer is negotiated but knowing what their share of it will be—that everyone in the group will accept the settlement offer if a majority or some supermajority of the group does.¹⁷² Notwithstanding the advantages of this approach, including the likely peace premium for the group,¹⁷³ in the few judicial decisions on point, courts have uniformly refused to allow *ex ante* voting arrangements to displace individualized *ex post* consent.¹⁷⁴ Perhaps in response to these formalistic legal decisions, the American Law Institute, in its 2010 report, the *Project on the Principles of Aggregate Litigation*, embraced the supermajority voting approach,¹⁷⁵ as has at least one state’s (West Virginia’s) ethics code.¹⁷⁶

171. Silver & Baker, *supra* note 47, at 767 (“A strategic plaintiff with little at stake in a lawsuit, such as a person who was exposed to asbestos but has no disease, can . . . make a credible threat to veto a desirable group deal unless paid a disproportionately large amount.”).

172. For a sustained defense of the approach, see generally Silver & Baker, *supra* note 47.

173. *Id.* at 745–48; see also Rave, *Closure Provisions*, *supra* note 14, at 2190 (stating of this process that “claimants might find [it] advantageous because it allows their lawyer to offer to settle their claims as a single package in exchange for a peace premium”).

174. See, e.g., Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892, 894–95 (10th Cir. 1975) (holding “majority rule” agreement to be “violative of the basic tenets of the attorney-client relationship in that it delegates to the attorney powers which allow him to act not only contrary to the wishes of his client, but to act in a manner disloyal to his client and to his client’s interests” and that “[b]ecause of this, it is essential that the final settlement be subject to the client’s ratification particularly in a non-class action case such as the present one”); Abbott v. Kidder Peabody & Co., 42 F. Supp. 2d 1046, 1051 (D. Colo. 1999) (noting that “Colorado law states that any provision of an attorney-client agreement which deprives a client of the right to control their case is void as against public policy”); Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 522 (N.J. 2006) (holding that New Jersey’s version of Rule 1.8(g) “forbids an attorney from obtaining consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement” and that “[b]efore a client may be bound by a settlement, he or she must have knowledge of the terms of the settlement and agree to them”).

175. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (AM. LAW INST. 2010). The ALI’s supermajority voting approach provides that:

[I]ndividual claimants may, before the receipt of a proposed settlement offer, enter into an agreement in writing through shared counsel allowing each participating claimant to be bound by a substantial-majority vote of all claimants concerning an aggregate-settlement proposal (or, if the settlement significantly distinguishes among different categories of claimants, a separate substantial-majority vote of each category of claimants).

Id. The ALI explained that this proposal was meant to ensure that a holdout could not alone undermine the collective good:

To the extent that reasonable aggregate settlements—achieved after good-faith, arm’s-length negotiations and independent review—cannot go forward because one claimant (or a small number of claimants) objects, the other claimants lose the benefit of the collective representation. . . . Even the threat of such a holdout may cause the defendant to withhold the premium associated with complete peace, thereby inuring to the detriment of all the represented claimants.

Id. at cmt. b.

176. W. VA. RULES OF PROF’L CONDUCT r. 1.8 cmt. 17.

Our proposal that class members vote on any proposed settlement is not therefore written on a blank slate. It adapts to class action law the use by a heterogeneous group of the franchise as a means of generating agreement and moving as a bloc, while providing the stakeholders some participatory control over their litigation rights. As we did with regard to the benefits of class member participation in the allocation decision,¹⁷⁷ we acknowledge that the class member vote may be something less than an idealized version of the franchise.¹⁷⁸ It may be primarily a means for large stakeholders to safeguard their own interests. But the fact that active participants in the democratic process pursue their own self-interest is, of course, one familiar definition of that process. Moreover, class members who participate within the negotiation class action, even in pursuit of their own interest, are exercising democratic values and may well be assisting the common good,¹⁷⁹ for the reasons we outlined above.¹⁸⁰

C. *Negotiation Benefits: Legitimacy and Certainty*

Under current class action practice, putative class counsel and putative class representatives typically negotiate a settlement prior to class certification and seek certification of the class only in conjunction with the motion for settlement approval. As we have noted throughout the Article, this puts the defendant at an information disadvantage as to the class's size and shape and may deter a fulsome settlement offer. The negotiation class solves that problem by fronting class certification—and hence the opt-out period. At the conclusion of the opt-out period, the defendant knows precisely whose claims it is settling and can make a bespoke settlement offer, fit precisely to the size of the class with which it is negotiating. This should benefit the class as well.

But to focus solely on the outcome benefits of the negotiation class misses an important collateral benefit of the device: the negotiation class solves a central legitimacy problem of the settlement class, a problem largely swept under the rug over the past fifty years. At its inception in the 1970s, the settlement class action was extraordinarily controversial for myriad reasons. A version of the first *Manual for Complex Litigation* from 1972 stated that, “There is, to say the least, serious doubt that [the settlement class

177. See *supra* section III(B)(1).

178. For a rich examination of this point in the related mass tort context, see Burch, *supra* note 57, at 512–18.

179. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988) (“In the strongest versions of republicanism, citizenship—participation as an equal in public affairs, in pursuit of a common good—appears as a primary, indeed constitutive, interest of the person.”); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541, 1548–51 (1988) (elaborating on the first principle of “liberal republicanism” as “deliberation in politics”).

180. See *supra* subpart III(A).

action] is authorized by Rule 23 as amended, even if it is conceded that the courts are expected to develop new methods of employing the amended Rule 23.”¹⁸¹ Explaining that “serious doubt,” the *Manual* proceeded to tick off nine separate concerns in an argumentative tone uncharacteristic of that publication. The passage is such an astonishing bill of particulars that it is worth reviewing in full:

- (1) Rule 23 does not authorize formation of tentative classes for the purpose of settlement.
- (2) There can be no assurance that the class members will be adequately represented in the settlement negotiations until the findings which are condition precedent to the formation of a class are made by the court after an opportunity for an evidentiary hearing. Formation of a tentative class for the purpose of settlement with a requirement that the class member accept the settlement or opt out and litigate independently denies to the members of the class the opportunity to show the inadequacy of the representation of the class by the representative party or parties agreeing to the settlement and their counsel.
- (3) The appropriate membership of the class and the identity of the members cannot be determined in the absence of an opportunity for hearing and judicial findings of fact and conclusions of law. Nor can there be any assurance that the tentative class will be composed of interests which are not conflicting. Absent such findings and conclusions it will be impossible to determine how many members there are in the class, who they are, the aggregate of claims of all members of the class, the amount of the individual claim of each member in relation to the total claims of all members of the class and, therefore, the amount of money which will be payable to each member of the class. This information would seem to be essential to making any rational choice whether to remain in the class and accept the benefits of the settlements or to opt out.
- (4) In the absence of the development of the information relevant to liability, damages, and the expense of preparation for trial and of trial, there cannot be a fair recognition in settlement negotiations of the potential liability of the party or parties opposing the class and the potential damages that might be recovered for the class.
- (5) Formation of such a class preempts determination of the question of whether the claim for relief should be litigated for the members of the class or should be the subject of further pretrial preparation with a view toward securing a better settlement or a trial on the merits; and it also preempts the question of what parties and counsel should

181. MANUAL FOR COMPLEX LITIGATION § 1:46 (rev. ed. 1973) (CCH 1973).

represent the tentative class since there must be an unofficially negotiated earlier settlement for the purpose of the tentative formation of the class.

(6) The formation of a tentative class for the purpose of settlement denies to the class member the choice contemplated by amended Rule 23 to become a member of the proposed class for the purpose of litigation with adequate representation as a member of the litigating class.

(7) Formation of such a class denies to a member of the class the right to appear in the action as a party and to maintain the position of a litigating party.

(8) Formation of such a class results in a long delay in preparation of the case for trial of those parties who desire to litigate their claims for relief.

(9) In the absence of reasonable discovery conducted on an adversary basis by counsel representing the class, it is impossible to determine whether the proposed settlement has any relation to the economic facts of life relevant to the case.¹⁸²

The smart money was clearly against the settlement class action, yet within a quarter century, the Supreme Court's *Amchem* decision had endorsed it, calling it a "stock device"¹⁸³ and noting its authorization by "all Federal Circuits."¹⁸⁴ How the device garnered such widespread acceptance despite this depth of concern is a story for another time.¹⁸⁵ For present purposes, it is worth noting that although *Amchem* authorized settlement class actions (with some restrictions), it never truly quelled the underlying concerns: that because the lawyers lack authorization to negotiate for a certified class, they negotiate illegitimately and therefore from a weak position. Nearly twenty years after *Amchem*, Professor Howard Erichson provided a strong account of that position.¹⁸⁶ Similarly, one federal judge—William Alsup in the Northern District of California—generally bars counsel in class actions from "any discussion of class settlement prior to the certification of claims worthy of class treatment and identifying the scope of

182. *Id.* For a later accounting of the problems of the settlement class, see *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 787–90 (3d Cir. 1995).

183. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997) ("Among current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device.").

184. *Id.* ("Although all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes, courts have divided on the extent to which a proffered settlement affects court surveillance under Rule 23's certification criteria.").

185. See generally Aditi Shah & William B. Rubenstein, *From Villain to Hero: A History of the Settlement Class Action* (July 20, 2020) (unpublished manuscript) (on file with authors).

186. See Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 957–65 (2014) (discussing this "leverage problem" faced by lawyers negotiating settlements on behalf of uncertified classes).

any class.”¹⁸⁷ Echoing Professor Erichson’s critique, Judge Alsup explains that “[p]rior to formal class certification, there is a risk that class claims will be discounted, not only on the merits (which is proper) but also by the risk that class certification might be denied (which is improper or at least adverse to absent class members).”¹⁸⁸ By contrast, “[o]nce a class is certified, counsel for the class can negotiate with the strength of a certification order in hand, all to the good of the class.”¹⁸⁹ The Ninth Circuit denied a petition seeking a writ of mandamus to bar Judge Alsup from adopting this procedure.¹⁹⁰

Regardless of whether one embraces Professor Erichson and Judge Alsup’s full critique, we deem it an advantage of our proposal that no agents negotiate on behalf of the group with the defendant until the court has authorized them to do so, finding the class worthy of certification and class counsel worthy of appointment. This adds a layer of protection to forestall poor settlements negotiated by unauthorized putative class counsel and to forestall settlements that might sweep too large or small a group together into one class. It is true that any of these problems should be rooted out even in settlement class actions because the court eventually has to review them. However, as discussed above, once a settlement is on the table, the instinct to avert one’s gaze from potential problems may tempt even the most honorable jurist. Although our primary goal in fronting class certification is to fix the class’s size prior to a negotiation,¹⁹¹ that early certification also reaps these legitimation benefits and thereby strengthens class counsel’s negotiation position.¹⁹²

187. *Porath v. Logitech, Inc.*, No. C 18-cv-03091 WHA, 2019 WL 6134936, at *1 (N.D. Cal. Nov. 18, 2019). We say Judge Alsup “generally” prohibits settlement discussions before class certification because his standing order does permit the plaintiffs’ lawyers to seek appointment as interim class counsel so as to pursue classwide settlement discussions prior to full certification. *Id.* at *2. Earlier versions of Judge Alsup’s standing order, available on Westlaw, reflect this approach. *See, e.g.*, Notice Regarding Factors to be Evaluated for Any Proposed Class Settlement at 5, *Luna v. Marvell Tech. Grp.*, (No. C 15-05447 WHA), 2016 WL 10586308, at ¶ 10 (N.D. Cal. Nov. 28, 2016) (“Counsel should remember that merely filing a putative class complaint does not authorize them to extinguish the rights of absent class members. *If counsel believe settlement discussions should precede a class certification, a motion for appointment of interim class counsel must first be made.*”); Notice Regarding Factors to be Evaluated for Any Proposed Class Settlement at 5, *Ribeiro v. Sedgwick LLP*, (No. 3:16-cv-04507-WHA), 2016 WL 4625798, at ¶ 10 (N.D. Cal. Aug. 15, 2016) (same).

188. *Porath*, 2019 WL 6134936, at *1.

189. *Id.* at *2.

190. *In re Logitech, Inc.*, 784 F. App’x 514, 516 (9th Cir. 2019) (“Given the discretion afforded district courts by Rule 23 and its lack of mandatory class settlement language, we cannot say the Order’s prohibition on class negotiations before certification is clear error.”).

191. *See supra* subpart III(A).

192. We concede that our approach may not necessarily satisfy Professor Erichson or Judge Alsup as the class certification motion in a negotiation class may be uncontested or contested only tepidly. Thus, even if the law requires a judge, under our proposal, to undertake a rigorous analysis of the class certification criteria, it still likely does not provide the full protections they so strongly

All of the prior passages may sound plaintiff-friendly, but our proposal is even-handed. The negotiation process in a negotiation class action is better for the defendant as well as for the plaintiffs. The defendant's gains are at least twofold. *First*, and most importantly, the defendant gains the certainty of knowing the size and scope of the group with which it is negotiating. This corrects the information problem that exists when the quantity and quality of opt-outs is unknown, and it accordingly insures the defendant against the adverse selection problem that hampers a fulsome settlement offer in the first place. *Second*, the fact that a court reviews the class certification requirements prior to settlement negotiations enables a defendant to probe possible defects in the class, such as conflicts among class members or inadequate class representation. This is something of a win-win for the defendant: either the class certification motion is rejected, or if it is not, defense counsel can negotiate a deal with the certified class with some certainty that the deal will not fall apart for want of a legitimate class at the end of the process.

* * *

While the central goal of the negotiation class is to provide a framework for a class containing large stakeholders to cooperate in pursuit of their mutual interests, negotiation class certification also enables class member participation and provides for a more legitimate plaintiff-defendant negotiation. It would be surprising if Rule 23 or the Due Process Clause forbade an approach that serves this many interests. In Part IV, we explain that they do not.

IV. The Legitimacy of the Negotiation Class

Certification of a negotiation class is a new idea, and like all new ideas, it immediately invites skepticism. We defend it on the grounds that Rule 23 enables it and nothing in the Constitution prohibits it.

A. Rule 23 Authorizes the Negotiation Class

Within class action practice, there are two common forms of class certification: class certification for trial and class certification for settlement.

- In a Rule 23(b)(3) *trial class*, putative class counsel move for class certification, showing compliance with the Rule 23(a)-(b)

desire. In our defense, our proposal is not meant to address their critique but to address the collective action problem facing heterogeneous classes. Yet because our approach to the heterogeneous class problem partially resolves the settlement class action legitimacy problem, we list this as a *collateral* benefit of our proposal.

requirements relatively early in the case,¹⁹³ and the motion is typically contested by the defendant. If it is granted, class members are provided notice¹⁹⁴ and an opportunity to opt out.¹⁹⁵ The case then proceeds to judgment, with the outcome binding all class members who did not opt out at the outset.¹⁹⁶

- In a ***settlement class***, the parties enter into settlement negotiations before the court has been asked to certify a class. If they reach a settlement, putative class counsel then move for class certification, showing compliance with the Rule 23(a)–(b) requirements, in conjunction with the settlement approval process. They propose certification solely for a limited purpose, settlement,¹⁹⁷ and they do so with the defendant’s cooperation. Class members are given notice of the terms of the settlement and an opportunity to object or opt out, with the opt-out decision now informed by the amount the class member will receive if she does not opt out.¹⁹⁸ Regardless of the class members’ cumulative preferences, the court must ultimately decide whether the settlement is fair, reasonable, and adequate;¹⁹⁹ once it does, that assessment, codified as a judgment, binds all class members who did not opt out.²⁰⁰

Our proposal is a hybrid of these existing types:

- In a ***negotiation class***, putative class counsel move for class certification, showing compliance with the Rule 23(a)–(b) requirements, prior to settlement (as in a trial class); but they propose certification solely for a limited purpose, negotiation, and ideally with the defendant’s cooperation (as in a settlement class). Class members can opt out immediately following certification (as in a trial class), but they likely cannot opt out again when a settlement is reached (as in a trial class, when a judgment is reached). Class members must accept the settlement by a supermajority vote, and Rule 23(e) still requires the court independently to decide whether the settlement is fair, reasonable,

193. See FED. R. CIV. P. 23(c)(1)(A) (mandating that “[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action”).

194. FED. R. CIV. P. 23(c)(2)(B).

195. FED. R. CIV. P. 23(c)(2)(B)(v).

196. FED. R. CIV. P. 23(c)(3)(B).

197. See FED. R. CIV. P. 23(e)(1)(B) (requiring for preliminary settlement approval that the movants be able to demonstrate that it is likely the court will ultimately be able to “certify the class for purposes of judgment on the proposal”).

198. FED. R. CIV. P. 23(e)(1), (e)(4).

199. FED. R. CIV. P. 23(e)(2).

200. See 6 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 18:14 (explaining that a final judgment in a class action lawsuit “binds all members of a certified class who did not opt out”).

and adequate; once it does, that assessment, codified as a judgment, binds all class members who did not opt out (as in a settlement class).

Negotiation class certification is, most importantly, precisely the same as trial and settlement class certification in that its proponents must demonstrate compliance with the Rule 23(a)–(b) requirements for class certification. And it is remarkably similar to settlement class certification with one hitch: when the negotiation is complete and the settlement value is known, class members get a right to vote (yes or no) on its acceptability, but they generally will not be given a right to opt out at that time. The chance they took by staying in the class up front was that the leverage the class obtained through its cohesion, coupled with the pre-known allocation and the final voting opportunity, was worth more than a chance to opt out at the end.

Given this understanding of the device, negotiation class certification poses two central Rule 23 questions: (1) Does Rule 23 permit the development of a new *purpose* for class certification? (2) Does Rule 23 permit a court to approve a proposed settlement without granting class members a second opportunity to opt out once the total settlement value is known? We address each issue in turn.

1. Rule 23 Does Not Define or Limit the Purposes for Which a Class May Be Certified.—Rule 23 labels its four Rule 23(a) requirements to be the “prerequisites”²⁰¹ for class certification, and it specifies that “a class action may be maintained if Rule 23(a) is satisfied *and*”²⁰² the case fits into one of the Rule 23(b) categories. The most important aspect of negotiation class certification is that its users must demonstrate compliance with these requirements.²⁰³ This point bears repeating because our proposal is easily misunderstood: for a court to certify a negotiation class, its proponents have to demonstrate that all of the Rule 23(a) requirements are met and that the case fits into one of the Rule 23(b) categories. There is simply no doubt in class action law that the Rule 23(a) and Rule 23(b) certification requirements are necessary criteria for pursuit of a class action in federal court, and ***a negotiation class in no way seeks to evade these requirements.*** The more

201. The word “prerequisites” prefaces the Rule 23(a) requirements. FED. R. CIV. P. 23(a).

202. FED. R. CIV. P. 23(b) (emphasis added).

203. Negotiation classes also safeguard the notice and opt-out procedures of Rule 23(c) and then heed the settlement provisions of Rule 23(e). *See supra* Part II. We do not outline this here, but all of the “implicit” class certification requirements, see 1 NEWBERG ON CLASS ACTIONS, *supra* note 13, §§ 3:1–3:10 (reviewing the two implicit requirements of definiteness and class membership), Rule 23(g)’s requirements governing class counsel, and Rule 23(h)’s requirements regarding attorney’s fees would apply no differently in a class action settled under this new procedure.

interesting question is whether these criteria are also sufficient.²⁰⁴ We believe they are.

Why? For present purposes, the key characteristic of Rule 23—as equally clear as the necessity of the requirements of Rule 23(a)–(b)—is that its text does not direct the purposes to which class certification may be put. “Certification for trial” or “certification for settlement” are not phrases that appear in the Rule, they are not categories with separate sections within the Rule, and they are not assigned different prerequisites. The text of Rule 23 simply does not define,²⁰⁵ nor therefore delimit,²⁰⁶ the purposes for which a class may be certified (trial, settlement, negotiation, etc.).²⁰⁷

If there were any doubt whether the text of Rule 23 limits the purposes for which a class can be certified, it is fully dispelled by the remarkable history of the settlement class action. Congress adopted the current text of Rule 23 in 1966. Within the decade, parties began to present class action settlements to courts prior to class certification, asking these courts to certify

204. We use “sufficient” here to mean in conjunction with the additional Rule 23 requirements not explicitly discussed in the Article but mentioned in the previous footnote.

205. In the opioid case, the negotiation class’s opponents note that Rule 23(a)’s prefatory language states, “One or more members of a class may sue or be sued as representative parties on behalf of all members only if [the Rule 23(a) requirements are met].” FED. R. CIV. P. 23(a)(1). They argue that a negotiation class is illegitimate because its proponents do not seek to “sue or be sued.” Reply Brief for Defendant-Appellants at 11, *In re Nat’l Prescription Opiate Litig.*, No. 19-4097 (6th Cir. argued June 28, 2020), ECF No. 74 (appeal by certain manufacturer and pharmacy defendants). This argument fails for two independent reasons. Initially, there is little doubt that the representative members of the opioid class have “sued” the negotiation class defendants—there are over 2,000 complaints on file in the MDL alone. *See In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 541 (N.D. Ohio 2019) (stating that more than “2,000 complaints [are] pending” in the opioid MDL). More to the point, the opponents of the negotiation class concede, as they must, that the settlement class is a legitimate device, yet the proponents of a settlement class no more seek to “sue or be sued” than do the proponents of a negotiation class. Accordingly, if Rule 23(a)’s “sue or be sued” language admits of settlement class actions, *a fortiori*, it should do no less for negotiation class actions. The negotiation class opponents attempt to evade this conclusion by, literally, rewriting the language of Rule 23(e) to make it appear that that clause is an independent authorization of settlement class certification. *Compare* FED. R. CIV. P. 23(e) (“The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court’s approval.”), *with* Brief of Appellants at 23, *In re Nat’l Prescription Opiate Litig.*, No. 19-4097, ECF No. 44 (“[A] class [may be] certified for purposes of settlement’ after the district court evaluates a proposed agreement and enters a judgment of approval.” (alteration in original) (quoting FED. R. CIV. P. 23(e))). That effort is unconvincing not only because the astonishingly brazen rewriting is so contrived, but also because—even if they are otherwise *referenced* in Rule 23—settlement classes must nonetheless meet the requirements of Rule 23(a), the subsection that is the source of the “sue or be sued” language.

206. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 792 (3d Cir. 1995) (“Although not specifically authorized by Rule 23, settlement classes are not specifically precluded by it either . . .”).

207. *See In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. at 539 (“An important starting point is that the text of Rule 23 does not dictate, nor therefore limit, the uses to which the class action mechanism can be applied.”).

a class solely for purposes of implementing the settlement.²⁰⁸ As discussed above,²⁰⁹ skeptics cast doubt upon this development.²¹⁰ Summarizing that doubt, an early version of the *Manual for Complex Litigation* listed as the first concern the fact that “Rule 23 does not authorize formation of tentative classes for the purpose of settlement.”²¹¹ Yet over the ensuing decades, courts rejected the “no-authorization” argument,²¹² with the Third Circuit noting (in 1995) that “few cases since the late 1970’s and early 1980’s even bother to squarely address the propriety of settlement classes.”²¹³ By the time of its 1997 decision in the *Amchem* case,²¹⁴ the Supreme Court noted—with little

208. Early examples of the settlement class action concept include *West Virginia v. Pfizer*, 314 F. Supp. 710, 723 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (2d Cir. 1971), and the “plumbing fixture” cases, *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364 (E.D. Pa. 1970), *adhered to*, 322 F. Supp. 834 (E.D. Pa. 1971), *aff’d and modified sub nom. Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971). As early as 1976, a district court in New York noted that “creating provisional classes for settlement, although not a common practice, is not unheard of, nor, where appropriate, frowned upon.” *Stull v. Baker*, 410 F. Supp. 1326, 1331 n.1 (S.D.N.Y. 1976) (first citing *Girsh v. Jepson*, 521 F.2d 153, 155 n.3 (3d Cir. 1975); then citing *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973)). By 1979, a district court in Florida stated that “the formation of tentative settlement classes is a recognized and useful tool for the amicable disposition of sometimes otherwise unmanageable class suits.” *Fla. Power Corp. v. Granlund*, 82 F.R.D. 690, 693 (M.D. Fla. 1979). Cases in the 1980s also recognized that the settlement class was “not uncommon,” *Plummer v. Chem. Bank*, 668 F.2d 654, 657 (2d Cir. 1982), though controversial. For a more rigorous discussion of this history, see Shah & Rubenstein, *supra* note 185.

209. See *supra* subpart III(C).

210. See, e.g., MANUAL FOR COMPLEX LITIGATION § 1:46 (rev. ed. 1977) (CCH 1978) (“There is, to say the least, serious doubt that this practice is authorized by Rule 23 as amended, even if it is conceded that the courts are expected to develop new methods of employing the amended Rule 23.”).

211. MANUAL FOR COMPLEX LITIGATION § 1:46 (rev. ed. 1973) (CCH 1973).

212. See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 786 (3d Cir. 1995) (“[N]otwithstanding that there is an absence of clear textual authorization for settlement classes, many courts have indulged the stipulations of parties by establishing temporary classes for settlement purposes only.”); see also *In re A.H. Robins Co.*, 880 F.2d 709, 739 (4th Cir. 1989) (supporting authorization of a temporary class for settlement purposes); *Mars Steel v. Cont’l Ill. Nat’l Bank & Tr.*, 834 F.2d 677, 680 (7th Cir. 1987) (same); *Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983) (same); *Plummer v. Chem. Bank*, 668 F.2d 654, 657 (2d Cir. 1982) (same); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (same); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979) (same); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1978) (same); *In re Taxable Mun. Bond Sec. Litig.*, Civ. A. No. MDL-863, 1994 WL 643142, at *7 (E.D. La. Nov. 15, 1994) (same); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1994 WL 578353, at *24 (N.D. Ala. 1994) (same); *In re First Commodity Corp. of Bos. Customer Accounts Litig.*, 119 F.R.D. 301, 308 (D. Mass. 1987) (same); *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239, 241 (S.D. Ohio 1984) (same), *rev’d on other grounds*, 749 F.2d 300 (6th Cir. 1984); *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1391 (D. Md. 1983) (same); *In re Chicken Antitrust Litig.*, 560 F.Supp. 957, 960 (N.D. Ga. 1980) (same).

213. *In re Gen. Motors Corp.*, 55 F.3d at 794; see also *id.* at 793 (“It is noteworthy that resistance to more flexible applications of Rule 23 has diminished over time.” (citing *In re Taxable Mun. Bond Sec. Litig.*, 1994 WL 643142, at *4 (E.D. La. Nov. 15, 1994))).

214. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

apparent disapproval²¹⁵—that the settlement class action had become a “stock device,”²¹⁶ and it reported that “all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes.”²¹⁷ The issue in *Amchem* was the extent to which the normal class certification requirements applied in a case certified solely for the purposes of settlement, not the propriety of lawyers settling a case prior to certification itself.

This history demonstrates the flexibility of Rule 23. Notwithstanding the fact that trial class certification was the template envisioned by the 1966 framers,²¹⁸ the Rule—*without any textual modification*—enabled courts to certify settlement classes. Since December 2018, Rule 23 has encompassed a few new passages that identify specific subprocedures for settlement classes.²¹⁹ But these passages are not intended to *authorize* this type of class certification—which, as just described, has been in existence for at least fifty years; they simply codify several practices that have developed around its use. Congress’s adoption of these passages in December 2018, after about a half-century of settlement class actions, shows that the text of Rule 23 codified some existing practices, not vice versa.²²⁰

215. The harshest note in Justice Ginsburg’s opinion simply characterized settlement class actions as a “more adventuresome . . . means of coping with claims too numerous to secure . . . determination one by one.” *Id.* at 617–18 (internal quotations omitted).

216. *Id.* at 618 (“Among current applications of Rule 23(b)(3), the ‘settlement only’ class has become a stock device.”).

217. *Id.*

218. See Samuel Issacharoff, *An Oral History of Rule 23*, 74 N.Y.U. ANN. SURV. AM. L. 105, 126 (2018) (quoting Professor Arthur Miller, who was present at the 1966 drafting of Rule 23, as stating in response to the question of whether there was any discussion of a settlement class, “God, no, no, no, no. . . . [Settlement] was not part of the discussion. I think they were conceiving the rule as a trial-ready rule. . . . Settlement back in the early ‘60s was thought of as being a non-judicial function. . . . [T]hat was not in the thinking of the Advisory Committee in the early 1960s”).

219. See FED. R. CIV. P. 23(c)(2)(B) (specifying notice procedures for a “class proposed to be certified for purposes of settlement”); FED. R. CIV. P. 23(e) (specifying that the judicial approval standards for certified classes apply as well to classes “proposed to be certified for purposes of settlement”); FED. R. CIV. P. 23(e)(1)(B)(ii) (authorizing notice of a proposed settlement for previously uncertified classes only upon a showing that the court will “likely be able to . . . certify the class for purposes of judgment on the proposal”); FED. R. CIV. P. 23(f) (stating that orders preliminarily certifying a class for settlement purposes are not subject to interlocutory appeal).

220. This is true of much of the text of Rule 23. For example, the current multistep settlement approval process of Rule 23(e) codified practices that had emerged from a rule that previously stated only that a court had to find a settlement fair, reasonable, and adequate to approve it. Thus, the 2003 Advisory Committee notes state, in expanding Rule 23(e), that one revision “confirms and mandates the already common practice” and that another “confirms the right” existing in practice. FED. R. CIV. P. 23(e) advisory committee’s note to 2003 amendment; see also FED. R. CIV. P. 23(e)(2) advisory committee’s note to 2018 amendment (noting that the goal of the rule amendments was not to “displace” the law that had developed in the circuits but to “focus the court and the lawyers on the core concerns”); FED. R. CIV. P. 23(g) advisory committee’s note to 2003 amendment (noting, when adopting Rule 23(g)’s requirement that a court approve class counsel as adequate, that, given courts’ prior practice of examining counsel’s adequacy under Rule 23(a)(4), “this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process”).

Combining these points, the fact that Rule 23 contains no explicit definition of the purposes of class certification (trial/settlement) and that Rule 23's text has enabled the practical development of a new type of class certification is not an accident.²²¹ Rule 23 emerged from equity practice,²²² and therefore, the text of the Rule is, not surprisingly and likely purposefully, open-ended. The text identifies the necessary conditions for binding absent parties to a representative's adjudication—that they are sufficient in number,²²³ their claims are sufficiently similar,²²⁴ their representatives sufficiently adequate,²²⁵ and the class device sufficiently preferable²²⁶—without limiting the ways in which the Rule might be employed. Thus, the *Manual for Complex Litigation*, even while reporting on skepticism about the development of the settlement class action in 1972, nonetheless conceded that “the courts are expected to develop new methods of employing the amended Rule 23.”²²⁷

Similarly, when summarizing an exhaustive history of the settlement class action that foreshadowed the Supreme Court's *Amchem* ruling, the Third Circuit noted: “We acknowledge that settlement classes, conceived of either as provisional or conditional certifications, represent a practical construction of the class action rule. Such construction affords considerable economies to both the litigants and the judiciary and is also ***fully consistent with the flexibility integral to Rule 23.***”²²⁸

These last points are particularly important. The first, textual point supports the conclusion that nothing in Rule 23 *prohibits* negotiation class certification. But the equitable nature of the Rule and its historic uses across the past half-century supply sound grounds for concluding that the Rule—so long as its central preconditions are met—in fact encourages practical developments, such as negotiation class certification, and accordingly authorizes courts to utilize them.

221. See *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 540 (N.D. Ohio 2019) (“Finally, it is not surprising that the history of Rule 23 supports different uses of the class action device, and the text does not prohibit these, because Rule 23 is equitable in nature and its purpose is to provide practical means for addressing complex litigation problems.”)

222. See FED. R. CIV. P. 23 advisory committee's note to 1937 adoption (explaining that the original Rule 23 constituted a “substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed” (alteration in original)). The classic account of this emergence is STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION*, 213–37 (1987).

223. FED. R. CIV. P. 23(a)(1).

224. FED. R. CIV. P. 23(a)(2), 23(b)(3).

225. FED. R. CIV. P. 23(a)(3)–(4), 23(g).

226. FED. R. CIV. P. 23(b)(3).

227. *MANUAL FOR COMPLEX LITIGATION* § 1:46 (rev. ed. 1977) (CCH 1978).

228. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 794 (3d Cir. 1995) (emphasis added).

2. *Rule 23 Does Not Require a Second Opt-Out Opportunity.*—The most significant legal distinction between certification of a settlement class and certification of a negotiation class—other than all the ways that the negotiation class improves on the settlement class²²⁹—concerns the timing of the opt-out right. As discussed above, in a settlement class, a case is settled before a class is certified; the parties jointly move for class certification and settlement approval. Class members therefore receive notice and an opportunity to opt out of the class at the same time that they know what they will get if they remain in the class. This is a nice outcome for the class members—indeed, it was long thought so unfair to the defendant that a related procedure was pejoratively referred to as “one-way intervention,” meaning the class members could intervene if they liked the outcome but could stay out if they did not.²³⁰ But just because courts and class members have become accustomed to the class knowing the outcome of the case before making the opt-out decision does not mean that Rule 23 (or as discussed below,²³¹ the Due Process Clause) requires such an approach. Indeed, several aspects of Rule 23 demonstrate conclusively that the Rule does not require that class members know a case’s outcome prior to the opt-out deadline. Before surveying them, it is important to note that, while it may appear that in a settlement class action class members know what they are getting before they have to opt out, as a matter of fact that is often an exaggeration. A settlement notice will typically provide class members with the general size of the settlement and some idea about how it might be allocated, without giving them specific information about their own likely recovery; indeed, in many common fund cases where the fund is allocated to those who file claims, an individual’s recovery cannot be calculated with specificity until the claims rate is known.

Rule 23 requires no more specificity. *First*, there is no explicit provision of Rule 23 requiring that the opt-out opportunity occur with full knowledge of the case’s outcome. *Second*, it makes perfect sense that the Rule does not

229. See *supra* Part III.

230. In re *Gen. Motors Corp.*, 55 F.3d at 789 (“[A] number of cases have also criticized settlement classes on the grounds that they create an opportunity for ‘one-way intervention,’ allowing putative class members to wait to see whether they think the settlement is favorable before deciding whether they want to be bound by it.” (citing *McDonald v. Chi. Milwaukee Corp.*, 565 F.2d 416, 420 (7th Cir. 1977))); see also *Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n, Inc.*, 814 F.2d 358, 363 (7th Cir. 1987) (criticizing delay of certification); *Watkins v. Blinzinger*, 789 F.2d 474, 475 n.3 (7th Cir. 1986) (“A deferred ruling [on certification] converts the class action to an opportunity for one-way intervention, which Rule 23 is designed to avoid.”); see generally 3 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 7:11 (explaining the “win-win” nature of one-way intervention: “[I]f the ruling goes against the named plaintiff, then others can ‘opt out’ of the class and not be bound by that adverse decision, and if the ruling is favorable, then others can ‘opt-in’ to the class knowing that the defendant’s liability has already been established.” (quoting *Owens v. Hellmuth & Johnson, PLLC*, 550 F. Supp. 2d 1060, 1070 (D. Minn. 2008))).

231. See *infra* section IV(B)(4).

contain this provision because the conventional trial class action unfolds in precisely the opposite way. In a normal litigation class action, a class is certified “[a]t an early practicable time,”²³² class members are given an opportunity to opt out, and then the case is litigated. If a class member does not opt out and the class loses, the class member cannot then claim a right to opt out of the (litigated) case. By not opting out up front, she cast her lot with the group and must live or die by its outcome. Thus, *third*, the only portion of Rule 23 close to point supports the conclusion that the Rule does *not* promise class members knowledge of the outcome prior to the opt-out opportunity. Specifically, if a case is certified for trial and class members are given the opportunity to opt out, but the case is then settled before, during, or after the trial, the case proceeds through Rule 23’s settlement approval process. In that circumstance, Rule 23 explicitly *permits* a court to authorize a second opt-out opportunity (now with some knowledge of the case’s outcome), but the Rule explicitly does not *require* a court to offer this second opt-out opportunity.²³³ The very fact that the Rule makes this downstream opt-out option discretionary supports the conclusion that Rule 23 provides class members no right to know a case’s outcome—by litigation or settlement—prior to the opt-out deadline.²³⁴

It is fair to note that under our proposal, courts generally should not grant a downstream opt-out opportunity—although Rule 23 might authorize them to do so—as the entire purpose of the negotiation class procedure is to fix the class size prior to the negotiation and to bind the class to the will of its supermajority. But this does not damn our proposal. A court could still utilize this power—the parties cannot stop it from doing so—even if it would upset the process.²³⁵ More pertinently, the second opt-out opportunity is less critical in a negotiation class than in a trial class that morphed into a settlement class. In the latter situation, the class member declined to opt out on the grounds that class counsel would litigate her claims; that those counsel then settled the class’s claims is something of a changed circumstance arguably supporting application of the downstream opt-out right. In the negotiation class, however, there is neither bait nor switch: class members are given full information about what remaining in the class means, and they make the opt-out decision knowing what their rights will be if and when a

232. FED. R. CIV. P. 23(c)(1)(A).

233. *See* FED. R. CIV. P. 23(e)(4) (“If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”).

234. *See In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 540 (N.D. Ohio 2019) (“If there were a constitutional right to opt out once the outcome was known, Rule 23 would require a second opt-out opportunity, not just authorize it.”).

235. As Judge Polster noted in the opioid litigation, “the Court always retains the option of enabling a second opt-out opportunity if circumstances require.” *Id.*

settlement is later reached. Moreover, they even know the portion of the settlement that will be allocated to them at the time they make the opt-out decision. Thus, there is no equitable argument in support of a downstream opt-out opportunity, as there might be in a trial-class-turned-settlement-class situation.

Finally, as we earlier noted,²³⁶ our proposal builds on the practice of some mass tort lawyers, endorsed by the American Law Institute, of organizing their inventories of clients into voting blocs. In a small set of cases adjudicating disputes arising out of such agreements—all pre-dating the American Law Institute recommendations—courts have held that a lawyer’s ethical duties prohibit her from forcing a client to accept a settlement amount that it does not approve.²³⁷ These rulings might be read to require class members to have a second opt-out opportunity when the lump sum settlement (and hence its final amount) is reached. However, class actions differ from aggregate settlements in one important regard: class members do not have individual acceptance rights within a class.²³⁸ The prior paragraphs explain why, but a simple situation brings the point home: in a normal Rule 23(b)(3) settlement class action, disgruntled class members are given the opportunity to object *or* opt out; if they select the former option and lose, they are thereby forced to accept a settlement with which they disagree. What Rule 23 promises class members is the objection opportunity, not an individualized approval right. The negotiation class not only fully safeguards the objection opportunity, it actually goes a step further by enfranchising class members with the collective opportunity to reject a settlement.

B. The Negotiation Class Furthers Due Process Values

Any approach to class certification must necessarily comply with the requirements of Rule 23, but that alone is not sufficient to justify the approach: it must, as well, comply with the constitutional commands governing civil litigation found within the Due Process Clause. As applied to the money damages class action, the Supreme Court has held that the class action court must at least “provide minimal procedural due process protection.”²³⁹ The Court explicitly enumerated those protections as

236. *See supra* subpart III(B).

237. *See supra* note 174 (listing cases).

238. *See In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. at 540 (rejecting the argument that nonclass cases doom negotiation class certification, stating that “the two contexts are distinct: class members in class actions, unlike individual mass tort plaintiffs, are not given individualized settlement approval rights” and that “[a]ll class members are automatically bound unless they can and do opt out”).

239. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985). *Shutts* itself involved a challenge to a state court’s authority to bind class members beyond its jurisdictional reach, and its

encompassing five prongs: (1) notice; (2) an opportunity to be heard; (3) an opportunity to “participate in the litigation, whether in person or through counsel;”²⁴⁰ (4) an “opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court;”²⁴¹ and (5) adequate representation by the “named plaintiff at all times.”²⁴² Negotiation class certification complies with each prong—indeed, as we explain in the succeeding sections, the negotiation class provides more due process than does the current settlement class.

1. Notice.—Class members in a negotiation class receive at least two types of formal notice²⁴³: notice that a class has been certified²⁴⁴ and then, assuming a settlement is reached with the defendant, notice of that settlement.²⁴⁵ The initial notice will provide class members with information about what their share of any settlement will be and of the voting scheme should there be a settlement. They will have full knowledge of these two aspects of the negotiation class in advance of the deadline for exercising their opportunity to opt-out. The settlement notice will provide class members with information about the lump sum amount and their right to vote on whether they deem it sufficient (as well as their right to object).

There is no inherent information deficit in the notices issued in a negotiation class.²⁴⁶ The primary objection class members could raise would

holding is therefore arguably limited to that context. However, the Court’s constitutional language contained no such qualification, and the Court itself has later restated the *Shutts* holding as if it applied across the board. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (“In the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process.”) (citing *Shutts*, 472 U.S. at 812); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011) (“For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.”) (citing *Shutts*, 472 U.S. at 812).

240. *Shutts*, 472 U.S. at 812.

241. *Id.*

242. *Id.*

243. Rule 23 authorizes discretionary notice in other circumstances, FED. R. CIV. P. 23(d)(1)(B), and nothing in the negotiation class procedure would hamper a court’s ability to use that discretion when necessary. Indeed, it would be important to our proposal that some, if not all, class members received notice of the intraclass allocation discussions that precede class certification, *see supra* subpart II(A), and an opportunity to be heard in those discussions.

244. FED. R. CIV. P. 23(c)(2)(B).

245. FED. R. CIV. P. 23(e)(1). As is typical, in conjunction with the settlement notice, the class members would also receive notice of class counsel’s proposed fee and cost request. FED. R. CIV. P. 23(h)(1).

246. In the opioid case, class members were informed of their share of a lump sum settlement via a website containing an allocation calculator. *See Allocation Map*, IN RE: NATIONAL PRESCRIPTION OPIATES LITIGATION, (June 18, 2019), <https://allocationmap.iclaimsonline.com/> [<https://perma.cc/6J6G-ATZZ>]. The website displayed shares at a county level, although the class

be about the *timing* of the notice: that they would prefer to get notice of the settlement amount, and hence of their final take, before the opt-out deadline. This is an understandable concern, but one we address under the “opt out” prong below, as it speaks more to the meaningfulness of that opportunity than to the reasonableness of the notice.

2. *Opportunity to Be Heard.*—Class members in a negotiation class receive at least two formal opportunities to be heard²⁴⁷: if a settlement is reached, they will receive notice of that settlement and the opportunity (1) to vote on it and (2) to object to it.²⁴⁸ The former feature is unique to negotiation classes, the latter required by Rule 23.²⁴⁹ The negotiation class, therefore, improves on the settlement class. In a settlement class, class members’ hearing opportunities are limited solely to objecting after a settlement is reached. Class members in a negotiation class enjoy the additional right to vote on that settlement, and their vote can block the settlement from taking effect. The “hearing” opportunity is therefore significantly greater than that of a normal class action.

That conclusion is likely most true for the large stakeholders. While each individual class member will get the right to vote—and hence a hearing opportunity more amplified than that in a normal class action—a single class member vote is unlikely to be decisive given the supermajority requirement. However, since votes will also likely be weighted—specifically to protect the

was defined as counties and cities (and other municipalities). This meant that subcounty-level municipalities receive a more general than specific sense of their share of the settlement. While this is less than ideal, it is consistent with class action practice generally, as explained in the text above, and an objection that Judge Polster rejected. *See In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 553 (N.D. Ohio 2019) (citation omitted) (noting that there were “a variety of intricacies of the model – how counties and cities will divide their county’s recovery; how to deal with cities with recoveries so small as to be impractical to distribute; how the model works when a county opts out but its cities do not, etc.” but concluding that ““despite opponents’ contentions, none of these is fatal and the movants’ approach to each – as reflected in the updated notice and FAQ documents – is thoughtful and defensible.”).

247. A court is authorized to grant class members other opportunities to be heard. *See, e.g.*, FED. R. CIV. P. 23(d)(1)(B)(iii) (authorizing a court to order notice be given to absent class members so as to give them the “opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action”). In the opioid matter, many class members sought to be heard on the motion for certification of the negotiation class, and the Court provided them that opportunity. *See In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. at 538 (noting that “[a] group of six (6) Ohio cities filed a brief in opposition” to the negotiation class certification motion that was “later joined by a seventh city” and that “another putative class member (City of Fargo, North Dakota) filed a brief asking the Court to clarify the end date for inclusion in a particular sub-group of the proposed negotiation class”). Moreover, as noted just above, see *supra* note 243, class members should be given an informal opportunity to be heard during the intraclass allocation discussions we envision, preceding any motion for certification of a negotiation class.

248. *See supra* subpart II(E).

249. FED. R. CIV. P. 23(e)(5)(A).

interests of the larger stakeholders—those with significant claims will have more of an opportunity for their votes to be decisive and hence their “hearing” to be more “meaningful.” While this would seem to differentiate the hearing opportunity among class members in the negotiation class, it more meaningfully differentiates the hearing opportunities between the settlement class and the negotiation class. In the settlement class, no one has any vote, while in the negotiation class, large stakeholders have a meaningful vote and hence a more meaningful opportunity to be heard. The small stakeholders are no worse off in a negotiation class than they are in a settlement class because they still may object and, with a strong objection, stand a good chance of being heard; and if a settlement truly disadvantages the small stakeholders, they can band together to veto it.

3. *Opportunity to Participate.*—Class members in a negotiation class have significant participatory opportunities: they may assist in constructing an allocation metric and voting scheme, and they then get to vote on a proposed settlement.²⁵⁰ We have already explicated these participatory benefits of the negotiation class²⁵¹ and need not repeat them here. We note again, however, that these far exceed the extent to which class members currently participate in class suits. Built on the assumption that most class members have small stakes and little interest in participating, the class action normally proceeds without class member participation, and this prong of the Due Process Clause remains somewhat dormant. For class actions that encompass larger stakeholders, with a greater interest in participating, there is a gap between the participation to which the Constitution aspires and the opportunities Rule 23 provides. The negotiation class begins to fill that gap.

4. *Opt-Out Right.*—Class members in a negotiation class enjoy a full opt-out right²⁵²—the same right that exists in all class actions litigated under Rule 23(b)(3), as required by Rule 23(c).²⁵³ Their right to opt out occurs up front, before the size of the settlement is known but after the decisions on allocation and voting have been approved by the court. This timing is different from the timing of the opt-out right in a settlement class action: there, class members may exercise their opt-out right with full knowledge of the outcome of the case (the amount of the lump sum settlement and some sense of their share of it). Yet the distinction is not of constitutional significance for two reasons: one factual, one legal.

250. See *supra* subparts II(A), II(E).

251. See *supra* subpart III(B).

252. See *supra* subpart II(C).

253. FED. R. CIV. P. 23(c)(2)(B)(v).

Factually, it appears that the settlement class participant's opt-out right comes at a time of full knowledge—as just stated, she knows the size of the class's fund and is given some information about her share. But as mentioned above,²⁵⁴ that is a bit of a fudge. In most common fund cases, a class member's share is a function of several factors, such as any allocation grids according different relief to different members and, more importantly, the claiming rate. It is quite common that a common fund will be distributed pro rata among those who claim,²⁵⁵ meaning that until the claims period has ended, each class member's share cannot be known with any certainty. In a negotiation class, the opposite is true: the class member's share is known with more certainty, but the size of the common fund is somewhat unknown. We say "somewhat" because the class retains the right to vote down a bad settlement, so the class members have some knowledge that this franchise should help guarantee a decent lump sum settlement amount. Hence, the factual difference between what a settlement class member knows at the opt-out moment and what a negotiation class member knows may be less meaningful than at first blush.

Legally, however, there is no due process right to opt out when the outcome of the case is known. As we explained in examining Rule 23,²⁵⁶ the opt-out right in a trial class action occurs at the outset of the case. A class member must decide whether to cast her lot with the class before the outcome of the case is known. If she does and the class loses, she enjoys no right to opt out once news of that judgment reaches her. The Constitution is often capacious but rarely that foolish. Of course, when the class member chooses not to opt out of a trial class, she is casting her lot with a trial (and possible settlement), while when she chooses not to opt out of a negotiation class, she is casting her lot with a negotiation. It is not immediately obvious that there is any *constitutional* distinction—that is, that the Due Process Clause would not require a later opt-out opportunity in a tried case but would in a settled case. The strongest argument might be that if class members could opt out after a trial, that right would undermine the very meaning of a "judgment," but if class members can opt out after a settlement is reached, that does not similarly undermine the very meaning of a settlement. The argument sounds good but only because we are so used to the perverse procedure of the settlement class action: the forestalling of certification until after settlement. To see the hole in the argument, one need only substitute the word "contract" for "settlement," since a settlement is, after all, a contract. If one enjoyed a constitutional right to opt out of a contract after one's agents negotiated it, it

254. See *supra* section IV(A)(2).

255. For a discussion of this process, see 4 NEWBERG ON CLASS ACTIONS, *supra* note 13, § 12:30.

256. See *supra* section IV(A)(2).

would surely undermine the nature of contract just as a post-trial opt-out undermines the meaning of judgment.

The Constitution requires class members be given an opportunity to opt out of a money damages class action, and the negotiation class action gives class members precisely that opportunity—just at a different time.

5. *Adequate Representation.*—Class members in a negotiation class enjoy the same right to adequate representation that is required by Rule 23(a)(4) and Rule 23(g) in all class actions.²⁵⁷ We have already explained that the negotiation class improves on the adequacy of the class's representation by ensuring the legitimacy of its agents before those agents negotiate a settlement for the class,²⁵⁸ and we need not repeat that argument here. However, it is noteworthy that the Constitution requires that the class be adequately represented “at all times,”²⁵⁹ yet the settlement class action permits the class's claims to be negotiated by agents not yet vetted in any way by any court. It is true that those agents' adequacy will be analyzed before their settlement will be preliminarily²⁶⁰ or finally approved.²⁶¹ But as we indicated earlier,²⁶² a court may be tempted to undertake that late review with a little less rigor than the law requires once a settlement is in hand. The negotiation class's fronting of the adequacy analysis therefore enhances the Due Process Clause's adequacy guarantee.

* * *

The negotiation class protects each of the five due process guarantees and arguably augments the most important among them: the rights to be heard, to participate, and to be adequately represented. It alters the timing of the notice that is given in conjunction with the opt-out right as compared to the settlement class but not the trial class, and thus, even in what its critics consider its worst moment, it does no constitutional damage. Negotiation class certification is novel, but it is constitutional.

257. See FED. R. CIV. P. 23(a)(4) (requiring adequate class representatives); FED. R. CIV. P. 23(g) (requiring adequate counsel).

258. See *supra* subpart III(C).

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

260. FED. R. CIV. P. 23(e)(1)(B) (requiring for preliminary settlement approval that the settlement's proponents show “that the court will likely be able to . . . certify the class for purposes of judgment on the proposal”).

261. FED. R. CIV. P. 23(e)(2)(A) (requiring for final settlement approval that the settlement's proponents show that “the class representatives and class counsel have adequately represented the class”).

262. See *supra* text accompanying note 150.

Conclusion

Class action law grew out of a template that imagined a homogeneous class of small stakeholders. Its rules and procedures are structured on that model, and accordingly, they neither expect nor require significant class member involvement in most cases. Yet in some class actions—including many large and important ones—some class members have significant stakes, and their incentives exceed passivity. Those incentives can lead the class members to act in ways that are competitive in nature and can threaten interests that may be shared by the entire class. In this Article, we have proposed an alternative: an approach to Rule 23 that seeks to harness class members' cooperative instincts and that enables them to work together as a cohesive unit in bargaining with the defendant(s). The approach invites large stakeholders into the class action by encouraging them to assist in developing an allocation and voting plan and then by voting on the acceptability of any lump sum settlement their agents negotiate. This cooperative, class-empowering approach to class actions will not fit all cases, but for those cases it does fit, it improves on the inapposite small-claims template. This is particularly true in that the class's cohesiveness should benefit the defendant as well, by providing clarity about the contours of the group with which it is negotiating and the scope of finality it may be purchasing.

While again, these dynamics do not arise in every case, the instances in which they do arise tend to involve issues of enormous importance, such as the ongoing government litigation arising out of the opioid epidemic. Using the class action mechanism to facilitate cooperation among such stakeholders accordingly serves an important public function, fully consistent with the equitable goals underlying Rule 23.

Postscript

As this Article was going to press, a divided panel of the Sixth Circuit reversed the decision certifying a negotiation class in the opioid MDL.²⁶³ The majority held that Rule 23 did not authorize certification of a negotiation class²⁶⁴ and that the district court's specific application of it in the opioid case raised other concerns.²⁶⁵ Emphasizing the flexibility of the Federal Rules of Civil Procedure, the dissenting judge stated that “[c]ertifying a negotiation class honors the Rules’ equitable heritage, complements the settlement

263. *In re Nat'l Prescription Opiate Litig.*, Nos. 19-4097/4099, 2020 WL 5701916, at *1 (6th Cir. Sept. 24, 2020), *rev'g*, 332 F.R.D. 532 (N.D. Ohio 2019).

264. *Id.* at *5-7.

265. *See id.* at *7 (discussing, *inter alia*, problems arising out of the district court's certification of “issues” in addition to “claims” and its authorization of negotiations to encompass claims and issues arising out of the identical factual predicate as those certified).

class's history, hews to Federal Rule of Civil Procedure 23's textual requisites, and stirs no constitutional or policy qualms."²⁶⁶

The plaintiffs have asked for the full Sixth Circuit to review the panel's decision en banc²⁶⁷ and, depending upon the ultimate outcome of that motion, it is possible that the losing side will file a writ of certiorari in the Supreme Court. Regardless of the opioid case's outcome, nothing in the Sixth Circuit's decision challenges the value of the negotiation class certification approach nor holds that the constitution puts that approach off-limits. Accordingly, even if the Sixth Circuit's panel decision is upheld, the Rules Committee should consider amending Rule 23 to explicitly permit certification of negotiation classes.

266. *Id.* at *9 (Moore, J., dissenting).

267. Petition for Rehearing En Banc, Doc. 97, *In re Nat'l Prescription Opiate Litig.*, No. 19-4097 (6th Cir. October 8, 2020).