

**How Many Kicks at the Cat?:
Multiple Settlement Protests by Class Members Who Have Refused to Opt Out**

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How Many Kicks at the Cat?¹:
Multiple Settlement Protests by Class Members Who Have Refused to Opt Out

INTRODUCTION

The Federal Rules of Civil Procedure require that any settlement of a pending class action be approved by order of the reviewing district court under Rule 23(e).² This settlement approval, by right, is appealable by any “party” to the action. Since the named plaintiffs and the defendant have, of course, negotiated the settlement, it is an infrequent occurrence that one of the named “parties” would desire to appeal settlement approval. But a class action necessarily involves other participants, namely the nonnamed class members, whose status for purposes of appeal was unsettled prior to 2002.³ The Supreme Court’s decision in *Devlin v. Scardallesi*⁴ solidified the right of class action settlement objectors to appeal the approval of a class settlement despite a failure to timely intervene under Rule 24 to become parties to the action.⁵ By broadening the range of participants who could appeal a settlement approval, and relegating the once-rigid definition of “party” to a context-specific question, the Court greatly expanded appellate rights for absent class members who become settlement objectors.⁶ Class settlement objectors, referred to alternatively as “warts on the class action process,” “pond scum,” and “bottom feeders,”⁷ may be among “the least popular litigation participants in the history of civil procedure.”⁸ Nevertheless, the Court’s decision enhanced, rather than restrained, the role played by the once unsavory objectors. In doing so, the Court ensured that objectors could pursue their gripes regarding settlement adequacy beyond the settlement hearing and into the appellate courts.

However, *Devlin* concerned a mandatory class, rather than a Rule 23(b)(3) opt-out class that allows putative members to exclude themselves from the class and litigate their claims individually at the district court level.⁹ Because the question was not before the Court, there was no discussion of the effect of a plaintiff’s failure to opt out of a (b)(3) class action, and then attempt to litigate, at the appellate level, his objection to the

¹ Cats are frequently kicked at, though apparently rarely struck, in courts. Most jurisdictions limit parties to one kick at the cat, *see e.g., Conway v. State*, 50 Wis.2d 152 (Wis. 1971) (“freely transl[ati]ng” the Latin phrases which form the basis of the res adjudicata principle, “*Nemo debet bis vexari pro eadem causa*” and “*Interest reipublicae ut sit finis litium*” into the more populist, “No one is entitled to more than one kick at the cat.”) (quoting Hon. Lewis J. Charles, *Res Adjudicata and Estoppel by Judgment*, Wisconsin Bar Bulletin (June, 1959, at 25)); though there is documented evidence of one litigation party attempting as many as eight kicks at a single cat. *Carradine v. Barnhart*, 360 F.3d 751 (7th Cir. 2004) (“it is unfathomable ...to remand this matter to give the claimant an *eighth* kick at the cat”) (Coffey, J., dissenting) (ellipsis added) (emphasis in original).

² FED. R. CIV. P. 23(e)

³ *See* Section II.A., *infra*.

⁴ *Devlin v. Scardallesi*, 536 U.S. 1 (2002).

⁵ Prior to *Devlin*, the circuits were split on this question. *See* Section II.A., *infra*.

⁶ *See* Section II.B., *infra*.

⁷ *See* Brunet, *supra* Note 32 at 411 (culling the less savory references to objectors).

⁸ *Id.*

⁹ Under FED. R. CIV. P. 23(b)(3), a plaintiff in a class action for primarily monetary damages, as opposed to injunctive relief or a limited fund case ((b)(1) or (b)(2)), has an opportunity to exclude himself from the class litigation or settlement.

settlement.¹⁰ What was made clear is that a person becomes a party, for purposes of entitlement to appeal, if he is coercively bound by a settlement in a mandatory class after having no opportunity to individually pursue his claim.

Following *Devlin*, the question remains whether such an appeal right inures to objectors who have failed to exercise their rights under subsection (b)(3) to opt out¹¹ at either the class certification or settlement stage.¹² At this point, the reader may be asking, “[b]ut what does it all mean, Basil?”¹³ Will denying or allowing appellate rights for absent members who have failed to opt out have any practical effect on class actions? Seeking to answer those questions, this paper will argue that failure to opt out of a class, either prior to settlement or at the settlement stage, should, in the interests of efficiency and equity, foreclose the opportunity to appeal a district court’s settlement approval. Section I discusses the multitude of protections available to absent class members, and, more specifically, the role of opt-outs and objectors in the (b)(3) class action settlement process. Section II discusses the effect *Devlin* has had on the appellate rights of nonnamed plaintiffs, and details the attempts by subsequent courts to limit the scope of *Devlin*. Section III outlines possible situations where this question of non-opt-out appeals might arise in a (b)(3) class, and concludes that limitation of the appeal right is the only sensible solution to this unanswered question.

I. THE PLETHORA OF PLAINTIFF PROTECTIONS IN THE CLASS ACTION

From the embryonic stages of potential class action litigation, numerous mechanisms exist to protect the individual rights and interests of aggrieved parties, particularly in the case of a (b)(3) class. Despite the plethora of protections, disagreement persists within the academic community about how to resolve the tensions that exist within prospective and certified classes, particularly as it relates to representative plaintiffs vis-à-vis absent,¹⁴ or nonnamed, class members.¹⁵ The non-

¹⁰ See *infra* Note 51.

¹¹ See Don Zupanec, *Appealability -- Opt-Out Class Actions -- Approval of Settlement*, 19 No. 3 FED. LITIG. 16 (March 2004) (“The jury is still out on whether, in an opt-out action, unnamed class members who object to a settlement but elect not to exercise their opt-out rights may appeal approval of the settlement without intervening in the district court.”).

¹² It is entirely possible that certification and settlement occur contemporaneously. See FED. R. CIV. P. 23 annot.; See also Deborah Hensler, *Symposium: What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, n.47 (discussing the “settlement class action,” whereby a class is certified solely for the purpose of settlement).

¹³ AUSTIN POWERS: THE SPY WHO SHAGGED ME (New Line Cinema 1999).

¹⁴ The terms *absent*, *nonnamed*, and *unnamed* will be used interchangeably to describe class members who are not named as representative parties.

¹⁵ See e.g. Jocelyn D. Larkin, *Incentive Awards to Class Representatives in Class Action Settlements*, available at <http://www.impactfund.org/pages/articles/Class%20Member%20Bonuses.doc> (last visited May 3, 2005) (noting that many commentators have questioned the propriety of incentive payments for representatives); The Class Action Fairness Act of 2003, S.274, 108th Cong. (2003) (Congressional legislation seeking, inter alia, the elimination of incentive payments to named class members); and Deborah R. Hensler, *Article: Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT. L. 179 (2001) (remarking that, with respect to class actions, “[t]oday there is a sense again that monsters are loose in the land.”).

exhaustive, mostly chronological, list of plaintiff protections, with some options not available in every instance, includes: the opportunity to be a named plaintiff or class representative, thus ensuring at least some measure of control over the litigation and class counsel; the right in certain cases (specifically those brought under section (b)(3) of Rule 23) to opt out and pursue, or more accurately, preserve the right to pursue, claims individually;¹⁶ the right to move to intervene as a full “party,” which is available to any class member under Rule 24;¹⁷ permissive exclusion of class members by the court under the recently amended Rule 23(e)(3) in a (b)(3) class settlement;¹⁸ objection at the fairness hearing to a settlement under Rule 23(e)(4);¹⁹ and ultimately, in some cases, appeal of a settlement after it has been approved by a district court.²⁰

In addition to these basic protections, several features of class action jurisprudence, and of Rule 23, are specifically intended to protect the rights and interests of nonnamed class members when those interests differ from their representatives'.²¹ In addition to the numerosity and commonality requirements,²² Rule 23(a) requires that class representatives' claims be “typical” of the class claims,²³ and that the interests of the class as a whole are “fairly and adequately” protected by their representatives, including the named plaintiffs and class counsel.²⁴ Rule 23(e) requires that a court approve any settlement of a class claim, and 23(e)(4) affords any class member the opportunity to object to a proposed settlement.²⁵ Additionally, Rule 23(e)(3) allows a court to refuse any settlement of a (b)(3) class action that does not afford absent class members a *second* opt-out opportunity once the proposed settlement is announced.²⁶ A

¹⁶ FED. R. CIV. P. 23(b)(3).

¹⁷ FED. R. CIV. P. 24.

¹⁸ FED. R. CIV. P. 23(e)(3) advisory committee's note (The advisory committee notes to the 2003 amendments state that “Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements.” The new (e)(3) gives a court discretion to deny settlement approval if a new opt-out opportunity is not provided at the settlement stage, because the “decision to remain in the class is likely to be more carefully considered and is better informed when the settlement terms are known.”)

¹⁹ FED. R. CIV. P. 23(e) requires that a court conduct a fairness hearing prior to the approval of any settlement. The hearing gives objectors an opportunity, through counsel if desired, to voice their displeasure with the proposed settlement. A settlement will be approved only if it is “fair, reasonable, and adequate.” *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); FED. R. CIV. P. 23(e)(1)(c).

²⁰ It should be noted at the outset, of course, that the grant of an appeal may signify a victory that is nothing more than Pyrrhic, as appeals are far more costly than opt-outs or objections, and courts of appeal are reluctant to overturn a district court's approval of a settlement, in part due to the policy favoring voluntary class settlements, and in part because the district court's decision will be reviewed with the heightened abuse of discretion standard. *See e.g. Freeman v. Berge*, 68 Fed. Appx. 783 (7th Cir. 2003) (“review of the district court's decision to approve the agreement, however, is narrow; we will reverse only if the district court abused its discretion.”).

²¹ *See e.g., In re Relafen Antitrust Litig.*, 360 F. Supp. 2d 166 (D. Mass 2005) (compiling cases providing protections for nonnamed class members in settlement).

²² FED. R. CIV. P. 23(a)(1) and (a)(2).

²³ FED. R. CIV. P. 23(a)(3).

²⁴ The adequacy requirement is contained in FED. R. CIV. P. 23(a)(4).

²⁵ *See* Elizabeth J. Goldstein, *Article: Federal Rule of Civil Procedure: A Need for Technical Innovation*, 104 DICK. L. REV 653 n.107 (2000) (“The purpose of seeking objections from absent class members is to alert a trial court to divergent views and aid the court in identifying possible inadequacies in the settlement.”).

²⁶ FED. R. CIV. P. 23(e)(3) (2003 amend.).

(b)(3) class action, one for primarily money damages, necessarily gives each class member *at least* one opportunity to opt out of the action.²⁷ With all of these procedural protections, an inference arises that there is a preference for dissident members, and that members of the class who are not “playing ball” may have *too many* procedural rights that are otherwise not available to members of the class who are seeking resolution by settlement.²⁸

A. The Opt-Out Option in (b)(3) Classes

Devlin concerned a mandatory class, and its reasoning was based, at least in part, on the fact that the objector was part of a class where opt-out rights were not afforded.²⁹ Nonnamed plaintiffs in mandatory (i.e. (b)(1) and (b)(2)) classes are in an awkward position; they are bound by the decisions of the named plaintiffs and class counsel, with whom they have little or no involvement or interaction. The settlement that is to bind them does so “coercively,” in that there is no opportunity to distance themselves from the class, the named plaintiffs, or class counsel.³⁰ The plaintiff *Devlin*, for instance, filed an individual claim, moved for intervention, and objected at the fairness hearing, yet remained a member of the mandatory class who was to be bound by the settlement agreement. A plaintiff who is offered the option to opt out is in a considerably different position.

The opt-out mechanism is the means by which a (b)(3) class member may choose who will represent his interests before the court. By opting out, a class member “[p]reserve[s] the right to litigate individually, as one’s own champion.”³¹ By electing to remove himself from the class, the opt-out plaintiff “avoids any risk of the class’s loss on the merits and also forswears any opportunity to take advantage of the class’s victory.”³² Particularly with a settlement-only class or a second settlement opt-out available to comply with 23(e)(3), where the terms of the settlement, and by extension the outcome of the class litigation, is known, the decision to opt out is made with full information.³³

On the other hand, by not opting out of a (b)(3) class, “the unnamed class members effectively cho[ose] their class representatives.”³⁴ While this is not literally true, of course, in that nonnamed class members ordinarily take no affirmative steps in

²⁷ FED. R. CIV. P. 23(c)(2)(b) requires “that the court will exclude from the class any member who requests exclusion.”

²⁸ For an early discussion of this issue, see Timothy A. Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. CHI. L. REV. 933 (Summer 1993) (advocating appeal rights for unnamed class members, a position subsequently adopted by the Supreme Court).

²⁹ See Section II.B., *infra*.

³⁰ David R. Clay, *Comment: Federal Attraction for the Interstate Class Action: The effect of Devlin v. Sardalotti and the Amendments to Federal Rule of Civil Procedure 23(e) on Class Action “Minimal Diversity” Concerns*, 52 Emory L.J. 1877, 1904 (2003).

³¹ *In re Bridgestone/Firestone, Inc.*, 333 F.3d 763, 769 (7th Cir. 2003).

³² *Id.* (citing *Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n Inc.*, 814 F.2d 358 (7th Cir. 1987)).

³³ See advisory committee notes, *supra* Note 13.

³⁴ Clay, *supra*, Note 30 at 1904-05.

the selection of representatives,³⁵ plaintiffs who choose not to opt out are impliedly consenting to be represented by class counsel and to be bound by their decisions. By foregoing the opportunity to exclude themselves from the class, class members are agreeing to “dance with them what brung ‘em”³⁶ to the litigation in the first instance.

B. The Role of Objectors

If the opt-out procedure is designed to preserve absent class members’ individual rights to pursue their claims, the fairness hearing and objection procedure is intended to give nonnamed class members a voice in deciding the fate of the entire class, named and nonnamed members alike.³⁷ Along with the “adequacy of representation” requirements of Rule 23(a)(4), objection allows absent members to assure that the named plaintiffs’ interests are representative of the other members of the class, and not merely clay to be manipulated by the attorneys negotiating the settlement.³⁸ Objecting, then, is the procedural equivalent of nonnamed class members attempting to co-opt the named plaintiff “dates” brought³⁹ by class counsel and disrupt the settlement the representative parties had reached with the defendant.

While the 2003 amendments to Rule 23(e) codified the right of any class member to object at the fairness hearing, the role objectors play in ensuring settlement fairness and efficiency has been called into question by courts and commentators. This objection to objectors stems from the ability of a lone wolf dissident to single-handedly hold up a settlement that has the approval of the rest of the class.⁴⁰ On the other hand, if indeed “[a]bsentees are the reason the class action device exists,”⁴¹ then the objection is the only tool available for the rights of members of the otherwise silent majority to be vocalized

³⁵ *But see* John Bronsteen and Owen Fiss, *Article: The Class Action Rule*, 78 *Notre Dame L. Rev.* 1419 (2003) (proposing that every class action should require an affirmative opt-in for a settlement class). There has not been a great rush to adopt this proposed measure. *See* Note 117, *infra*.

³⁶ *See In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943 (D. Ill. 2001) (appointing class counsel and directing lead plaintiff to “dance with the law firm that brung him.”). For an interesting note on the derivation of this phrase, *see* Brian D. Shannon, *Symposium: “Dancing With the One That Brung Us” –Why the Texas ADR Community has Declined to Embrace the UMA*, 2003 *J. DISP. RESOL.* 197 (2003) (attributing this old political maxim to University of Texas football coach Darryl Royal); *But see also* Patrick Emery Longan, *Upper-Level Courses: Elder Law Across the Curriculum: Professional Responsibility*, 30 *STETSON L. REV.* 1413, 1426n.10 (stating that the phrase, if not the guiding principle, is peculiar to the state of Texas, and helpfully offering the sage advice, “I do not recommend the use of this phrase outside of the Lone Star State.”).

³⁷ *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 *U. CHI. LEGAL F.* 403 (2003).

³⁸ Several commentators have questioned the role of named plaintiffs and their relationship with class counsel, *See e.g.* Larkin, *supra* Note 15 (summarizing case authority on incentive payments for representative plaintiffs and describing the “struggle” for class counsel in setting a fair bonus amount.)

³⁹ *See* Note 36, *supra*.

⁴⁰ *See e.g., Rosenbaum v. McAllister*, 64 F.3d 1439, 1442 (10th Cir. 1995) (questioning wisdom of allowing one objector to prevent the benefits of class settlement from passing to other class members: “[t]o allow a nonintervening class member to appeal approval of a settlement would permit one dissident--and there is likely always to be one--to postpone realization of any of the benefits that might otherwise come to the class members and to prevent the defendant from settling its liability.”).

⁴¹ *Id.* at 419.

and represented.⁴² The advisory committee notes to the 2003 amendments confirm that subsection (e)(4) preserves for members the right to object to any disposition that would be binding on them, including settlement.⁴³

C. Due Process Concerns: Other Means by Which Interests are Preserved and Protected

Already armed with the objection right, and with opt-out available as an escape route, is it wise to further extend procedural due process rights for absent class members in a (b)(3) action? *Mathews v. Eldridge*⁴⁴ is the leading Supreme Court authority on the contours and limits of procedural due process. In *Eldridge* the Court defined the necessary rights that must be granted in order to preserve due process when an individual is deprived of liberty or property,⁴⁵ stating that the “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”⁴⁶ Due process does not afford every person the opportunity to be heard at every level of tribunal. The *Eldridge* court established a test for measuring the constitutional sufficiency of procedural safeguards that included an analysis of: (1) the private interest affected; (2) the risk that the private interest was erroneously deprived by the procedures used; and (3) the fiscal and administrative burdens to the government if additional procedures are used.⁴⁷

In the situation of a hypothetical objector who has refused to opt out of a (b)(3) action, the analysis shows that her constitutional due process rights have been more than adequately protected by the procedures that stop just short of granting the right to appeal from any settlement approval. It is axiomatic that not every class member can have a constitutionally protected property right in the settlement of her choice, but only in a fair settlement.⁴⁸ The affected property right at issue then is merely an expectation right in a larger figure in settlement. The procedure that ensures a fair and adequate settlement is the bifurcated fairness determination in the district court, which includes a fairness hearing and independent review of the settlement by the judge.⁴⁹ During this process, a district judge “must exercise the highest degree of vigilance because in the settlement phase of a class action [the judge] is a fiduciary of the class.”⁵⁰ A district court judge, then, acts as the surrogate fiduciary representative of absent class members during settlement approval.

⁴² Of course, a court’s settlement approval necessarily requires an examination of the adequacy of representation, but the fairness hearing is an absent class member’s only opportunity to be heard on the record without intervention or institution of a collateral procedure.

⁴³ FED. R. CIV. P. 23(e) advisory committee notes.

⁴⁴ 424 U.S. 319 (1976)

⁴⁵ *Id.* at 333. The assumption that must be made to entertain this question is that an absent class member who receives a settlement that displeases him has a protected property right in the class settlement.

⁴⁶ *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

⁴⁷ *Id.* at 336.

⁴⁸ See Bronsteen and Fiss, *supra* Note 35 at 1444 (“Not every fair agreement is the best agreement (that the absent class members could legitimately expect.)”).

⁴⁹ See Larkin, *supra* Note 10.

⁵⁰ *Great Neck Capital Appreciation Inv. P’ship, L.P. v. PricewaterhouseCoopers*, 212 F.R.D. 400 (E.D.Wis. 2002).

The administrative burden at issue if appeal is allowed is no greater than the allowance of any other appeal, but the concern raised would be that if every objector could simply appeal the settlement, rather than opt out, the class would have devolved into multiple individual lawsuits, but at the appellate, rather than district court, level. Allowing absent class members in a (b)(3) class to effectively leapfrog the district court step and take their now individual cases directly to the more crowded court of appeals is not consistent with judicial economy or logic.⁵¹ This option becomes particularly less appealing when the available procedures make the erroneous deprivation of a right unlikely; and the right at issue is a mere expectancy in a larger settlement.

If the denial of an appeal does not raise significant due process concerns, then it follows that the available procedural safeguards are sufficient to protect the rights of absent class members. In addition to the opt-out and objection rights, absent class members may also collaterally attack the adequacy of the representation of named members or counsel in negotiating the settlement, which would only be necessary if their fiduciary in the judiciary⁵² was not up to the task. Further, a party may undoubtedly still intervene in the action and preserve his appellate rights. Given all the available methods for nonnamed class members to ensure that they or their representatives will be able to protect their rights, can *Devlin* possibly be read to extend to (b)(3) opt-out classes?

II. DEVLIN CONSIDERABLY EXPANDED APPELLATE RIGHTS FOR NONNAMED PLAINTIFFS

Devlin's central holding is that nonnamed plaintiffs in a mandatory class, despite their failure to intervene in the action, preserve their right to appeal a settlement approval if they have objected at the 23(e)(4) fairness hearing.⁵³ The dissent,⁵⁴ and a majority of circuits prior to *Devlin*, would have held that a nonnamed class member was required to timely intervene (and presumably also object at the fairness hearing) to preserve the right to appeal the District Court's approval of a settlement.⁵⁵

A. The Pre-*Devlin* varied approach

Before the Supreme Court issued its opinion in *Devlin*, the Circuits were split as to whether a nonnamed plaintiff was required to intervene formally under Rule 24 in order to preserve his or her right to appeal the approval of a settlement.⁵⁶ The majority

⁵¹ See *Devlin*, 536 U.S. at 22 (Scalia, J. dissenting) (“Since when has it become a principle of our judicial administration that what *can* be left to the appellate level *should* be left to the appellate level? Quite the opposite is true. District judges, who issue their decrees in splendid isolation, can be multiplied *ad infinitum*. Courts of appeals cannot be staffed with too many judges without destroying their ability to maintain, through en banc hearings, a predictable law of the circuit.”) (emphasis in original).

⁵² See *Great Neck Capital Appreciation Inv. P’ship*, *supra* note 50.

⁵³ *Devlin*, 536 U.S. at 14.

⁵⁴ (Scalia, J., joined by Justices Kennedy and Thomas)

⁵⁵ *Devlin* at 15 (Scalia, J. dissenting).

⁵⁶ See *Devlin* at 6 (discussing circuit split); and *Clay*, *supra* Note 30 at 1893 (same). For a lengthier pre-*Devlin* discussion of the varying approaches taken by the circuits, see *Duffy*, *supra* Note 28.

approach was that taken by the Eleventh Circuit in *Guthrie v. Evans*,⁵⁷ holding that individual, nonnamed class members do not have standing to appeal a judgment on behalf of a class. To allow appeals by nonnamed parties, without requiring intervention, not only would make class actions “unmanageable and non-productive,”⁵⁸ but would “defeat the very purpose of class action lawsuits.”⁵⁹ The “fundamental purpose of the class action” that would be defeated is the ability to “render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits.”⁶⁰ Because of the availability of such devices as intervention, collateral attack on the adequacy of representation, and opt-out, the court saw no reason to allow nonnamed parties to appeal an order that is binding on the class.⁶¹ This approach was subsequently adopted by the Tenth,⁶² Sixth,⁶³ Fifth,⁶⁴ and Fourth⁶⁵ Circuits, with an arguably stronger position being taken by the Tenth Circuit in *Gottlieb v. Wiles*. The *Gottlieb* court feared the demise of the class action device if nonnamed class members were permitted to appeal without intervention, saying “[s]uch a result would ... eviscerate the utility of the class action suit.”⁶⁶

By contrast, the Third⁶⁷ and Second⁶⁸ Circuits had followed the lead of the Ninth Circuit in *Marshall v. Holiday Magic*,⁶⁹ holding that nonnamed class members have standing to appeal without first intervening, because “their legal rights are affected by the settlement.”⁷⁰ It was this more permissive line of authority that the Supreme Court followed in *Devlin*, finding that the nonnamed class member was a “member of the class bound by the judgment,”⁷¹ and so clearly met the requirements of prudential standing,⁷² qualifying him as a party for purposes of appeal.

B. *Devlin* and its reasoning

The *Devlin* Court⁷³ justified its holding with the rationale that, following a timely but unsuccessful objection and an approved settlement, the interest of the objecting class member has sufficiently diverged from the rest of the class so as to require allowing the

⁵⁷ 815 F.2d 626 (11th Cir. 1987).

⁵⁸ Id. at 628.

⁵⁹ Id. at 629.

⁶⁰ Id.

⁶¹ Id. at 628. Peculiarly, the *Guthrie* appellant did not have the opportunity to opt out of the mandatory (b)(2) class, but the court nevertheless denied his motion to appeal based on the other options available.

⁶² *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993).

⁶³ *Shults v. Champion Int’l Corp.*, 35 F.3d 1056 (6th Cir. 1994).

⁶⁴ *Cook v. Powell Buick, Inc.*, 155 F.3d 758 (5th Cir. 1998).

⁶⁵ *Scardalietti v. Debarr*, 265 F.3d 195 (4th Cir. 2001).

⁶⁶ *Gottlieb*, 11 F.3d at 1009. See also Clay, 52 Emory L.J. at 1893 (noting the Tenth Circuit’s adoption and expansion of the “judicial economy rationale”).

⁶⁷ *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707 (3rd Cir. 1993).

⁶⁸ *In re Paine Webber Inc. Ltd. Partnerships Litig.*, 94 F.3d 49 (2nd Cir. 1996).

⁶⁹ 550 F.2d 1173 (9th Cir. 1977).

⁷⁰ Id. at 1176.

⁷¹ *Devlin*, 536 U.S. at 7.

⁷² *Devlin*, 536 U.S. at 7.

⁷³ (O’Connor, J.).

objector, in the words of one commentator, “another bite at the apple.”⁷⁴ This result, the Court reasoned, is mandated by the divergent interests present, in a (b)(1) mandatory (i.e. non-opt-out) class, once a party becomes bound by a settlement despite his protests at the fairness hearing. “To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court.”⁷⁵

Devlin the individual, interestingly enough, was originally proposed as a named plaintiff.⁷⁶ He declined the invitation to represent the class, and pursued an individual claim against the disputed pension plan.⁷⁷ Devlin’s individual claims were dismissed,⁷⁸ and the (b)(1) mandatory class, of which Devlin was a part, was conditionally certified consequent to, and as part of, settlement negotiations. Devlin, by bringing his individual claim, had unsuccessfully attempted to effect a pseudo-opt-out, and ultimately became part of the mandatory (b)(1) class. He then objected to the proposed settlement at the fairness hearing and filed an untimely motion to intervene.⁷⁹ Clearly, by exercising the panoply of available options, Devlin indicated that he wanted no part of the settlement agreement, and the Court sympathized with his plight, remarking that:

[p]articularly in light of the fact that petitioner *had no ability to opt out* of the settlement, appealing the approval of the settlement is [Devlin’s] *only* means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.⁸⁰

Justice Scalia and the dissent took issue with the Court’s loosey-goosey approach to “party” definition, derisively questioning the scope of the “oh-so-sophisticated new inquiry.”⁸¹ The offending inquiry, adopted by the majority, included the preface that “[t]he label ‘party’ does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.”⁸² Perhaps more notably, the dissent questioned the majority’s “sunny surmise that the appeals will be few” in light of the new expanded rights.⁸³ By requiring an objector to intervene in order to preserve his appeal right, the dissent believed district courts would be able to “perform an important screening function”⁸⁴ and substantially limit the

⁷⁴ David R. Clay, *supra* Note 30 at 1898.

⁷⁵ *Devlin*, 536 U.S. at 10.

⁷⁶ *Id.*

⁷⁷ See *Devlin v. Transportation Communications Int’l Union*, 1995 U.S. Dist. LEXIS 8813, No. 95 Civ. 0742, 1995 WL 380374, at *4 (S.D.N.Y. June 26, 1995).

⁷⁸ *Devlin v. Transportation Communications Int’l Union*, 175 F.3d 121 (2nd Cir. 1999). Devlin was eventually enjoined from filing any further individual actions after repeated attempts to have his claims litigated individually. See *Scardallesi v. Santoro*, 172 F. Supp. 2d 744 (D. Md. 2001).

⁷⁹ See *Devlin*, 536 U.S. 1.

⁸⁰ *Devlin v. Scardallesi*, 536 U.S. at 10-11 (emphases added) (internal citations omitted).

⁸¹ 536 U.S. at 20 (Scalia, J. dissenting).

⁸² *Id.* at 10.

⁸³ *Id.* at 23n.5 (Scalia, J. dissenting).

⁸⁴ *Id.* at 21 (citing Brief for United States et al. as Amici Curiae 23).

availability of appeal for certain objectors.⁸⁵ *Devlin* did not address the question, and it remains open, what effect the opportunity to opt out of a settlement would have on the now-determinative “context,” and consequently the applicability of procedural rules granting or denying appellate rights.

C. *Ballard* and the Debate Over Whether to Apply *Devlin* to Opt-out classes

1. Several courts have since chosen to limit or question the applicability of *Devlin*.

Following *Devlin*, and with a particular focus on the Court’s “no ability to opt out” rationale⁸⁶ for allowing the appeal, the Arkansas Supreme Court refused to extend *Devlin* to an opt-out class certified under the state class action rule paralleling Federal Rule 23(b)(3).⁸⁷ The court repeatedly characterized the appellants’ failure to opt out or timely intervene as a calculated, strategic risk that they might become bound by the settlement.⁸⁸ By objecting at the fairness hearing, but not opting out of the settlement, the objecting parties had, in the court’s words, “sat on their rights and waited until they were not satisfied with the way the litigation was progressing.”⁸⁹ When the objectors finally moved for intervention, the court denied the motion as untimely.⁹⁰ The *Ballard* objectors, then, by “sitting on their rights,” had lost standing to appeal approval of the settlement, and were bound by a settlement to which they objected due to their failure to opt out.

Two federal circuit courts have subsequently endorsed the reasoning of *Ballard* in dicta.⁹¹ In *Rutter & Wilbanks Corp. v. Shell Oil Co.*⁹² the Tenth Circuit passed on the opportunity to comment on the scope of *Devlin*⁹³ when it denied the appeal of class action objectors who had failed to opt out of a (b)(3) class. But, in doing so, the court noted *Ballard*, remarking that “were we to similarly narrow *Devlin*’s application, this entire appeal could be dismissed because Objectors did have the right to opt out of the settlement.”⁹⁴ The implicit endorsement of *Ballard*’s reasoning was clear, as the court, in

⁸⁵ 536 U.S. at 21. For instance, a district court could verify that the objector does not fall outside the class definition or that the objection has not already been resolved in favor of the objector.

⁸⁶ See *supra* Note 80.

⁸⁷ *Ballard v. Advance Am.*, 349 Ark. 545; 79 S.W.3d 835 (Ark. 2002). *Ballard* involved a class action usury suit certified under AR RCP 23(b), which differs from FED. R. CIV. P. 23(b) in that it requires predominance and superiority in all class actions, rather than only for (b)(3) actions as under the Federal Rules.

⁸⁸ See *Ballard*, 349 Ark. at 549; 79 S.W.3d at 837 (appellants “had the ability to opt out and instead elected to object to the settlements and risk being bound by it”); *and Id.* (“appellants willingly undertook the risk that their motion to intervene might be denied ... and that they would then be bound by the settlement.”).

⁸⁹ *Id.* at 546.

⁹⁰ *Ballard v. Garrett*, 349 Ark. 371 (Ark. 2002).

⁹¹ See *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1185 n.2 (10th Cir. 2002); *In re Gen. Am. Life Ins. Co. Sales Practice Litig.*, 302 F.3d 799 (8th Cir. 2002).

⁹² 314 F.3d 1180 (10th Cir. 2002).

⁹³ *Id.* at 1185n.2.

⁹⁴ *Id.*

denying the objections, stated that “the result of our decision is the same (unfavorable to Objectors).”⁹⁵

The Eighth Circuit, in *In re Gen. Am. Life Ins. Co. Sales Practice Litigation*,⁹⁶ similarly denied an appeal from an objector on other grounds, but not before “question[ing] whether *Devlin*’s holding applies to opt-out class actions certified under Rule 23(b)(3).”⁹⁷ Because the objector’s reason for disapproving the settlement (a provision that could have prevented some class members from participating) had become effectively moot (no one was denied relief),⁹⁸ the court did not dismiss the appeal on the grounds that the objector had passed on the opportunity to opt out. It is likely, however, that the appeal would have been dismissed for failure to exercise the opt-out right; the court questioned the applicability of *Devlin* to opt-out classes, asserting, “we believe the limited reading of *Devlin* has considerable merit.”⁹⁹ The Eighth Circuit again, in *Snell v. Allianz Life Ins. Co. of No. Am.*,¹⁰⁰ held *Devlin* inapplicable to an opt-out class action where the prospective appellant had opted out of the class, only to be later returned.¹⁰¹ The court refused to consider an appeal of the settlement approval, stating that “*Devlin*... does not apply because this is an opt-out class action in which [plaintiff] made no objections to the settlement in the court below either before settlement was final or after she was reintroduced to the class.”¹⁰²

Following the lead of the Eighth Circuit, the Eleventh Circuit, in *AAL High Yield Bond Fund v. Deloitte & Touche LLP*,¹⁰³ declined to apply *Devlin* or expressly limit its scope, but not without comment. The non-party objectors’ argument, the court stated, “misses the point of *Devlin*, which was to allow appeals by parties who are actually bound by a judgment, not parties who merely could have been bound by the judgment.”¹⁰⁴

Finally, and most recently, the Third District Court of Appeal of Florida, in *Barnhill v. Fla. Microsoft Antitrust Litig.*,¹⁰⁵ has “agree[d] with those courts which have found that the basis of the *Devlin* decision was that the objectors were bound by the terms

⁹⁵ Id.

⁹⁶ 302 F.3d 799 (8th Cir. 2002).

⁹⁷ Id. at 800.

⁹⁸ Id. The settlement provided scores ranging from zero to three for wrongs suffered in a life insurance fraud case, and Henderson, the objector, was opposed to the perceived unfairness of a zero score, which would have provided no compensation to certain victims. Because no zero scores were actually awarded in the settlement figure, Henderson’s objection was mooted.

⁹⁹ Id.

¹⁰⁰ 327 F.3d 665 (8th Cir. 2003).

¹⁰¹ The plaintiff, Wolinsky, was readmitted to the class based on a telephonic miscommunication with class counsel. *Snell*, 327 F.3d at 667.

¹⁰² Id. at 670n.2.

¹⁰³ 361 F.3d 1305 (11th Cir. 2004).

¹⁰⁴ Id. at 1310; (also noting that “this feature of *Devlin* has led at least one court to believe that it applies only to mandatory class actions.” 361 F.3d at 1310n.7 (citing *Ballard* and *In re Gen. Am. Life Ins. Co Sales Practices Litig.*)).

¹⁰⁵ 2005 Fla. App. LEXIS 4672, 2005 WL 766971 (Fla. Dist. Ct. App. 3d Dist. Apr. 6, 2005).

of the settlement because they did not have the opportunity to opt out.”¹⁰⁶ Because the Supreme Court had explained that this was the “‘most important’ factor”¹⁰⁷ and the instant objectors had failed to opt out, the court reasoned that “there is no reason to allow them to appeal without intervening.”¹⁰⁸

No federal court had yet expressly decided to so limit *Devlin*, but it appeared that this would be the path that courts were likely to follow, refusing to extend *Devlin* to (b)(3) opt-out classes. This result appeared particularly likely in light of the fact that the majority of circuits, prior to *Devlin*, had refused appeal rights even for mandatory (i.e., (b)(1)) class members.

2. Some courts, however, have declined opportunities to limit *Devlin*.

But what confused and unsettled emergent body of law would be complete without a befuddling appearance by our friends in the occasionally wacky Ninth Circuit? In *Churchill Village, L.L.C. v. Gen. Elec. Co.*,¹⁰⁹ the court allowed a group of objectors who had failed to opt out of a (b)(3) class to appeal the district court’s approval of a class settlement. Finding that *Devlin* was intended to apply whenever a nonnamed class member was to be bound by the settlement, the court concluded that the parties’ appellate rights must be preserved, especially because the miniscule nature of their individual claims made opting out an unappealing option. Noting that the objectors indeed were free to opt out of the settlement, the court (O’Scannlain, J.) remarked that “this ostensible independence is belied by an essential impracticability. Because each objector’s claim is too small to justify an individual litigation, a class action is the only feasible means of obtaining relief.... They therefore occupy precisely the status the *Devlin* Court sought to protect.”¹¹⁰ So, despite the fact that the objectors had an opportunity to pursue individual claims as their “own champion,” because the ratio of costs to potential benefits of non-class litigation apparently was unpalatable, they remained in the class rather than opting out. Yet they were able to object to the settlement and ultimately (though unsuccessfully) appeal the approval of that settlement.¹¹¹

The Tenth Circuit, in *In re Integra Realty Resources, Inc.*,¹¹² without further amplification, contemporaneously held that “a class member who does not opt out of a settlement but objects at the fairness hearing and against whom a final judgment is entered has the right to appeal the district court’s approval of the settlement.”¹¹³ Though

¹⁰⁶ 2005 Fla. App. LEXIS 4672 at *7.

¹⁰⁷ Id. (quoting *Devlin*, 536 U.S. at 10-11).

¹⁰⁸ 2005 Fla. App. LEXIS 4672 at *7.

¹⁰⁹ 361 F.3d 566 (9th Cir. 2004), cert. denied, *Beckwith Place L.P. v. Gen. Elec. Co.*, 122 S. Ct. 56 (2004).

¹¹⁰ 361 F.3d at 572 (Citing *Devlin*, 536 U.S. at 10 (“what is most important to this case is that nonnamed class members are parties to the proceeding in the sense of being bound by the settlement”).

¹¹¹ The appeal was, in the end, summarily denied and the settlement upheld. *Churchill Village*, 361 F.3d at 577. For an oft-cited district court opinion tending to side with *Churchill Village*, see *Thompson v. Metro Life Ins.*, 216 F.R.D.55 (S.D.N.Y. 2003) (denying a motion to intervene, but indicating that the denial would not be prejudicial, per se, to the movant’s appeal rights despite their failure to opt out).

¹¹² 354 F.3d 1246 (10th Cir. 2004).

¹¹³ Id. at 1257 (emphasis added).

the court held that failure to opt out does not foreclose appeal of a settlement,¹¹⁴ it is unclear what, if any, effect *In re Integra* will have on other circuits. For one, the case involved a defendant class, which are, in the words of Professor John Coffee, “as rare as unicorns.”¹¹⁵ Perhaps more importantly, the case limited appeal rights to parties “against whom a final judgment is entered.”¹¹⁶ Even if we are to assume that a *plaintiff* class member qualifies as a person “against whom a final judgment is entered” when his objection is dismissed, his adverse judgment is markedly different than a *defendant* class member who is paying out the contested settlement. A plaintiff who objects, but nevertheless participates in a settlement (and presumably receives something of value, however minimal) over his objections, has suffered no real negative impact, other than perhaps the wounding of pride or deflation of expectations of a grander settlement.

III. LIMITING OBJECTORS’ APPEAL RIGHTS: ILLUSTRATIVE SITUATIONS WHERE OBJECTORS MIGHT SEEK TO APPEAL

When would a class member not avail himself of an opportunity to opt out, remain in the class, and yet insist on objecting to the settlement and then assert an appeal right if the settlement is approved over the objections? From a (b)(3) settlement, there could possibly be four types of objectors who had failed or declined to opt out: (A) The absent-minded objector, who simply fails to opt out in the process either at an initial certification stage or an optional second (e)(3) opt-out; (B) The conscientious objector, who strongly disapproves of the settlement as a whole on behalf of the class for one reason or another; (C) The extortion artist objector, who opposes the settlement in the hopes that he can reap an individual payoff for eventual withdrawal of his objections; and (D) The self-interested objector, who feels the settlement does not meet his expectations of a class settlement, but who lacks either the resources or the leverage to pursue a greater amount or earn a worthwhile return individually.

A. The Absent-Minded Objector

It is unlikely that a party who inadvertently fails to opt out from a settlement would be able to, or even want to, later appeal an approved settlement. First, the situation is not likely to arise with any regularity. Settlement requires the best practicable notice, consistent with due process.¹¹⁷ It is not an absolute requirement that every class member *actually* receive notice,¹¹⁸ so initially there may be a number of class members who

¹¹⁴ Despite the odd procedural history of the case, *In re Integra Realty* purports to “answer[] the question [the Tenth Circuit] left open in *Rutter & Wilbanks Corp. v. Shell Oil Co.*, as to whether *Devlin* applies to opt-out class settlements.” 354 F.3d at 1257 (citation omitted).

¹¹⁵ Coffee, ARTICLE: *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000).

¹¹⁶ *Integra*, 354 F.3d at 1257.

¹¹⁷ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (holding that notice by first-class mail is sufficient to protect due process rights of absent plaintiff class members, and rejecting the suggestion that plaintiffs should have to opt in to class settlements).

¹¹⁸ See *Id.*

would have opted out, but because they did not actually receive notice, they do not. The possibility that notice is received and not properly understood, or received and ignored, always exists. But in each of these situations, notice has been provided and the opportunity to opt out of the class has passed. It is not entirely clear what purpose would be served by protecting the appellate interest of a class member who has failed to participate in the litigation in any way. Rather, the efficient solution is to chalk this situation up to “rational ignorance.”¹¹⁹ “Rationally ignorant parties remain ignorant of a legal rule’s existence or lack thereof because the rule does not have any significant effect on them. . . . The market only pushes parties to gain information that is valuable or useful to them.”¹²⁰ By denying the appeal right in the situation of an absent-minded objector, parties would be encouraged to discover their legal rights if it would have a significant effect on them. If not, they should be left in their rationally ignorant bliss.

B. The Conscientious Objector

The high-minded objector who individually attempts to oppose the settlement as a representative of the whole class, and not for his own financial interests, is a rare breed indeed. Perhaps he objects to the incentive payments made to representative class members,¹²¹ or simply because he feels that a critically important feature was left out of the final settlement package. In any event, this admirable attempt to shoulder the objecting burden of the entire class should not allow appeal as of right after objecting at the settlement approval stage. If there is truly something objectionable about the settlement, other members of the class will speak up, and a district judge will exercise her discretion, acting as a fiduciary for the class, to strike down the settlement.¹²² If, on the other hand this is truly a “lone wolf” objector purporting to represent some interest of the class that no other member has recognized, the court will likely approve the settlement.¹²³ One of the issues a court examines in approving a settlement is the acceptance by the class. The presence of only a single objector, particularly if coupled with a low opt-out rate, indicates that a settlement should be, and is likely to be, approved. Allowing a “crank”¹²⁴ objector to uphold a settlement that has the approval of the class does not comport with judicial or economic efficiency.

C. The Extortion Artist Objector

¹¹⁹ See Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-At-Will in Light of Findings that Employees Believe They Possess Just Cause Protection* 23 BERKELEY J. EMP. & LAB. L. 307.

¹²⁰ Id. at 340.

¹²¹ These incentive payments are routinely made to the class representatives for agreeing to be named plaintiffs, but run the risk of destroying class cohesion. Judges, therefore, play an important role in ensuring the fairness of the payments. See e.g., *Plummer v. Chemical Bank*, 668 F.2d 654, 660 (2nd Cir. 1981) (requiring heightened evidentiary support for class representative’s payments).

¹²² See e.g., *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243 (S.D.N.Y. 1998)

¹²³ See e.g., Id. at 263 (discussing “reaction of the class” as a settlement approval factor and finding that low objection and opt-out rates indicate that a settlement should be approved).

¹²⁴ *Dilworth v. Dudley*, 75 F.3d 307 (7th Cir. 1996) (Posner, J.) (“A crank is a person inexplicably obsessed by an obviously unsound idea-- a person with a bee in his bonnet. To call a person a crank is to say that because of some quirk of temperament he is wasting his time pursuing a line of thought that is plainly without merit or promise.”).

The extortion artist, in contrast to the conscientious objector, objects with the purpose of holding up the settlement for his individual gain. By burdening the class, the extortionist hopes that he will receive an additional payout from those parties to the litigation that are most interested in settlement. While the crank conscientious objector at least operates with a noble, though misguided, purpose, there is no justification whatsoever for allowing the extortionist objector, whose object is merely to frustrate the settlement and extort a payment, an appeal right. It is lamentable enough that the settlement is dragged out and payment to pro-settlement class members suspended. It would be far more wasteful to allow these objectors, who failed in their extortion attempts and in preventing approval, to further prolong litigation at the appellate level while another individual settlement is negotiated.

D. The Self-Interested Objector

The only situation where an objector's appeal rights should arguably be preserved after failing to opt out is in the situation of a negative value suit. As in the case of the *Churchill Village* objectors,¹²⁵ where the interest at issue is not large enough to justify an individual suit, the class action may indeed be the only feasible, reasonable method of pursuing the claim. While the class device aggregates individual claims, in the negative value situations, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or fanatic sues for \$30."¹²⁶ Nevertheless, the infeasibility of the individual claim should not necessarily create appellate opportunities as a matter of right. As discussed in Section I.C., *supra*, the interest protections built into the class action process ensure that a fair settlement will be reached. Further, the individual has not been denied all compensation for his claim. Rather, the class action has made it possible to pursue the claim, a settlement has been reached, and it is only because the nonnamed plaintiff has not received *enough* that he chooses to object.

CONCLUSION

The suggestion that an "adversarial void"¹²⁷ exists whenever class representatives, or their counsel, negotiate a settlement with defendants is overcome by the presence of judiciary oversight at the district court level of the settlement negotiations. The district court's review must be "exacting and thorough. The task is demanding because the adversariness of litigation is often lost after the agreement to settle."¹²⁸ With this heightened review, and the role of judge as fiduciary, the class representatives have means by which they can protect themselves, including opt out and objection, and the assistance of the court in guaranteeing a fair and adequate settlement. Allowing an appeal may simply go too far in providing an opportunity for a small minority of absent class members to try to squeeze the last drops out of a settlement.

¹²⁵ See *Churchill Village*, *supra* note 109.

¹²⁶ *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.).

¹²⁷ See Bronsteen and Fiss, *supra* Note 35.

¹²⁸ Manual for Complex Litigation (4th) § 21.61.

By way of illustration, if the Ninth Circuit's approach is followed, it appears that a plaintiff, injured or aggrieved in some legally cognizable way that affects a potential (b)(3) class, may first refuse to be named as a class representative (*Devlin*) or to participate in the class litigation in any way, then choose not to opt out, whether because his individual claim is not worth enough to pursue on his own dime (*Churchill Village*) or for no readily apparent reason (*Integra*), and allow class counsel and the named plaintiffs to haggle with the defendant over a settlement. Then, once a settlement is agreed upon, rather than intervening, a plaintiff need only object at the fairness hearing (*Devlin*) if the settlement does not meet his standards, and his right to appeal its approval will be preserved. This right of appeal, of course, would extend to *all* nonnamed plaintiffs who speak up at the fairness hearing.¹²⁹ Is this a good result?

On the one hand, this result protects nonnamed plaintiffs in a (b)(3) class who could not or did not envision that class counsel or the named plaintiffs would possibly negotiate a deal that would prove to be so adverse to their interests. However, there seems to be little justification for allowing a plaintiff to effectively opt in (by not opting out) for settlement negotiations, ride the coattails of the named plaintiffs and counsel in negotiating a settlement, and then object if class counsel is unable to secure what the nonnamed plaintiff desired.¹³⁰ There are at least three checks already built in to the process to protect the interest of nonnamed plaintiffs in a (b)(3) class.

First, plaintiffs have the ability to opt out and pursue the claim individually. The plaintiff who does not opt out because it is not economically justifiable to pursue the claim individually (presumably because of court and attorney costs relative to potential settlement or damages) should not be heard to complain when "free" class counsel does not get them "enough" in settlement negotiations. By choosing to stay in the class rather than champion their own cause, class members have ventured nothing and gained something, however minimal. Further, where the terms of the settlement are known and a class member does not opt out, they should not be allowed to "spoil the settlement" for the rest of the class.¹³¹

Secondly, a 23(e) inquiry requires that a district court judge look into a settlement agreement to assure that the interests of the class are met, and that the settlement is not self-serving from the standpoint of the named plaintiffs and class counsel. This function is best reserved for district, rather than appellate, judges. The *Ballard* court seems to have recognized the folly in allowing plaintiffs to opt in (by their silence) to settlement

¹²⁹ The author recognizes that this represents a simplification of the settlement objection process, but entrance of the formal objection, by all accounts, is not a cumbersome exercise, requiring little more than a note stating, "I object."

¹³⁰ *But see Shutts*, 427 U.S. at 810 ("Unlike a defendant in a normal civil suit, an 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.")

¹³¹ *See Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977) (Denying adequacy of representation attack and admonishing the objectors, "[w]e believe that [the objectors] should not now be allowed to play the role of spoilers for a class of more than 31,000 people when they could have chosen not to be bound by the settlement."); and advisory committee notes, *supra* note 6 (describing the full information and careful consideration to opt out when terms of the settlement are known).

negotiations, only to use the objection and appeals process to opt out when the settlement is later deemed disagreeable.¹³² Finally, a State Attorney General or other qualified third party may be invited to serve as an independent, extra-judicial guarantor of the adequacy of the settlement.¹³³

Ultimately, while only two circuits have weighed in on the issue to date, it seems likely, and advisable, that the other appeals courts will follow the lead of *Ballard*, and heed the language from *Devlin* suggesting that access to the appellate courts should be preserved only for objectors who are unwilling parties to a settlement. Courts should therefore refuse to give those who forewent the opportunity to opt out another kick at the cat when they are disappointed by the deal netted by their tacitly approved representatives.

¹³² Cf. *Green v. Analytical Surveys, Inc.*, 84 Fed. Appx. 640 (7th Cir. 2003) (plaintiff who opted out of class could not appeal after consenting to and then disapproving of settlement without formal objection).

¹³³ See e.g., *Ansoumana v. Gristede's Operating Corp.*, 2004 U.S. Dist. Lexis 3754; 2004 WL 504319 (Jan. 07, 2004) (allowing New York Attorney General to submit, and accepting, recommendations regarding settlement figures and compensation for class counsel).