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NAVIGATING CONFLICTS OF INTEREST IN SECURITIES CLASS ACTIONS

Dealing with conflicts of interest in the class action context requires class counsel to find a proper balance between the class's interest in recovery and the lawyer's interest in getting paid. Conflicts among class members also arise, particularly when class representatives are paid "incentive awards" for their service in bringing the lawsuit. The author explores these conflicts and the courts' responses to them at various points in the litigation. She finds that judges do not strictly apply normal conflict rules to disqualify counsel in class actions, since in their view that would substantially weaken the class action device.

By Anne P. Ray *

The rules of professional conduct serve as a valuable tool in a lawyer's arsenal to avoid and resolve potential conflicts of interest. But the rules of professional conduct are not the end of the story when it comes to conflicts, particularly in the context of class actions. Indeed, the rules are largely silent about class action litigation, and provide next to no guidance regarding conflicts of interest unique to the class action framework.[1]

By definition, a class action permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or "class," most of whom will have no contact with the lead plaintiff or lead counsel. This can lead to abuses and may create conflicts between the class and class counsel. Class counsel has a fiduciary duty to the class as a whole, complicating matters and potentially leading to additional conflicts between the class and class counsel, particularly where the conflict must be reported to the court. The sheer number of individuals involved also intensifies the opportunity for conflicts to arise among the class members.

[1] A rare exception is MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 25 (AM. BAR ASS'N 2016) (unnamed members of class are not clients for the purpose of obtaining consent in conflict situations).

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THE CLASS VERSUS CLASS COUNSEL

In a class action, the usual checks and balance of a traditional attorney-client relationship are missing. The Seventh Circuit has suggested that class actions "are the brainchildren of the lawyers who specialize in prosecuting such actions, and in picking class representatives who have no incentive to select persons capable or desirous of monitoring the lawyers' conduct of the litigation."[2] That is to say, potential conflicts between class members and class counsel arise frequently and are often exacerbated because class members have little control over class counsel. Although class representatives generally have more attorney contact than other class members, their control over counsel is also lacking in most instances.

As a result, it can be tempting for class counsel to pursue their own interests over the interests of the class. The most noteworthy and problematic example arises when an unscrupulous attorney pursues a settlement for the purpose of maximizing attorney's fees at the class members' expense.[3] But this may occur to some extent even when class counsel is not deceitful or acting against the interests of the class. Because class counsel usually does not get paid until there is a recovery, there is an incentive — indeed, a necessity — for class counsel to advance his or her own interest by ensuring recovery of attorney's fees as part of any settlement. The class action device works when the proper balance is found between the class's interest in recovery and the lawyer's interest in getting paid. The court serves as an important check to ensure that this balance is achieved.

Conflicts between class counsel and the class may also arise where class counsel attempts to serve as class representative, has a close personal relationship with the class representative, or otherwise has a personal interest in the litigation.[4] The class representative "should be independent of class counsel, as the representative is acting as the 'client' on behalf of the class."[5] When a conflict is discovered, a court may disqualify class counsel and/or the class representative, or even decline to certify the class.

CLASS MEMBERS VERSUS CLASS MEMBERS

Conflicts among class members occur when the interests of various portions of the class differ, such as when different levels of proof are required or different relief is sought for different portions of the class. Likewise, class members' interests may diverge in limited fund or "zero-sum" situations, where recovery by one portion of the class takes directly from that of another portion of the class.[6]

Conflicts among class members, however, are not inherently problematic, though they may create a conflict for class counsel that needs to be addressed. Even where subclasses have fundamental diverging interests, disqualification is not necessarily required. Rather, a court may appoint separate counsel for each

[2] *Eubank, v. Pella Corp*., 753 F.3d 718, 719-20 (7th Cir. 2014) (the class's control over counsel is "attenuated, often to the point of nonexistence"); *see also* Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. Chi. Legal. F. 581 (2003) ("attorney-client conflicts are exacerbated in class actions due to the inability of class representatives to monitor counsel").

[3] *See, e.g., Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011) (collecting cases where courts found class counsel was incentivized, "in complicity with the defendant's counsel, to sell out the class" by agreeing to recommend approval of a settlement with a "meager recovery for the class but generous compensation for the lawyers"); *Cal Pak Delivery, Inc. v. United Parcel Serv., Inc*., 52 Cal.App.4th 1, 11 (1997) (disqualifying counsel who surreptitiously contacted the opposing party, offering to dismiss the case in return for payment of fees directly to the attorney).

[4] *See, e.g., Eubank*, 753 F.3d at 722 (the impropriety of permitting the plaintiff to serve as class representative when his son-in-law was class counsel was "palpable").

[5] Alba Conte & Herbert B. Newberg, *Newberg On Class Actions* § 19.20 (5th ed. 2011).

[6] *See, e.g., In re Cardinal Health, Inc. ERISA Litigation*, 225 F.R.D. 552, 557 (S.D. Ohio 2005) (counsel may not represent different portions of class "with conflicting claims who are seeking recovery from a common pool of assets").

subclass to resolve the intra-class conflict.[7] The need to appoint separate counsel will not arise until a theoretical conflict becomes real; the mere possibility of divergent interests in the future is generally insufficient to necessitate separate counsel or otherwise disqualify class counsel from representing some or all of the class.[8]

Conflicts between class representatives and the class may also become problematic if the representative puts his interest above the interests of the class. This, in turn, may create a conflict for class counsel, who owes duties of loyalty to both the class representatives and the class. For example, when a monetary settlement is reached, incentive awards for class representatives — a payment to class representatives for their service in bringing the lawsuit — may be included and may come at the expense of the rest of the class's recovery. Incentive awards are not *per se* a problem, but they should be carefully scrutinized, as they can "corrupt the settlement by undermining the adequacy of the class representatives and class counsel."[9]

Incentive awards may, for example, incentivize class representatives "to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard."[10] When class representatives agree to a settlement that provisionally provides inappropriately large incentive awards, their interests diverge from those of the absent class members. Similarly, when an incentive award is conditioned on the class representative's support of the settlement, the interests of the class representative diverge from those of the class. Class counsel, however, has a duty to the class as a whole. As a result, counsel has a conflict in that he or she is simultaneously representing clients with conflicting interests. Counsel has an obligation to address that conflict by seeking appropriate waivers where feasible, reporting the conflict to the court, and/or seeking the appointment of additional, conflict counsel.[11] Where counsel fails to take the appropriate steps, the court may disqualify counsel, and/or decline to approve the settlement and fee request.

A recurring issue in class action litigation involves a twist on the conflict among class members. Specifically, class counsel may settle a class action, but one or more class representatives may disagree with the settlement and decide to object. Class counsel is then faced with a situation in which he or she is essentially representing two adverse parties to a litigation. Under normal circumstances this would result in automatic disqualification. In the class action context, however, many courts have adopted a flexible approach to situations in which some class representatives object to the settlement: "class counsel may continue to represent the remaining class representatives and the class, as long as the interest of the class in continued representation by experienced counsel is not outweighed by the actual prejudice to the objectors of being opposed by their former counsel."[12] If normal conflict rules requiring disqualification applied, given the multitude of individuals and interests involved, class actions would be nearly impossible and the benefits of the device would be severely impacted.

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[7] *In re Cmty. Bank of N. Va.*, 795 F.3d 380, 393 (3d Cir. 2015) (although large tort class actions may have many divergent interests that could require separate counsel to adequately handle conflicts among the class, appointing counsel for subclasses with divergent interests is not required in every case).

[8] *See, e.g., Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir.2003) (to defeat the adequacy requirement, a conflict "must be more than merely speculative or hypothetical"); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2007 WL 2589950, at *11 (D.N.J. Sept. 4, 2007), *aff'd,* 579 F.3d 241 (3d Cir.2009) (a conflict is not sufficient to defeat class certification unless it is "apparent, imminent, and on an issue at the very heart of the suit"); Conte & Newberg, *supra* note 5 § 3:58 (to defeat certification, "conflict must manifest at time of certification rather than turn on [a]future event that might never occur").

[9] *See, e.g., Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013); *Staton v. Boeing Co.*, 327 F.3d 938, 975–78 (9th Cir. 2003) (reversing district court's approval of a class action settlement because it provided disproportionately large incentive payments to class representatives).

[10] *Weseley v. Spear, Leeds & Kellogg*, 711 F.Supp. 713, 720 (E.D.N.Y.1989).

[11] *Radcliffe*, 715 F.3d at 1167 (class counsel could not settle case on behalf of absent class members because of conflict created by conditional incentive awards for class representatives, and where counsel made no attempt to obtain a waiver or alert the court to the conflict).

[12] *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 590 (3d Cir. 1999); *In re Agent Orange Product Liability Litigation*, 800 F.2d 14, 19, (2d Cir. 1986) (motion to disqualify class counsel who is retained by a faction of the class in opposition to proposed settlement cannot be automatically granted; rather, balancing the interests of the various groups of class members with the interests of the public and court in achieving a just and expeditious resolution of the dispute is required); *see also Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir. 1988) (conflicts of interest are built into the class action device, so strict application of rules governing conflicts are often unworkable).

THE ROLE OF THE COURT

Because client oversight in class actions is limited, the court system provides some of the necessary oversight. Judges are tasked with the job of approving class representatives and class counsel, certifying the class, and approving any class settlement, including the fees to which class counsel is entitled. Judges consider potential conflicts at each of these stages of the litigation, in addition to ruling on any disqualification motion that might arise in the ordinary course. Despite this important role, when addressing conflicts in class actions, judges have little guidance about how to proceed and are often forced to conduct an ad hoc analysis to address the situation.[13]

It can be difficult for judges to adequately protect against conflicts in class actions, as they have to rely on conflicts being brought to the court's attention. Only then can the court determine whether it is necessary to impose some form of remedy or sanction. In a recent Seventh Circuit opinion, Judge Posner commented that, "unfortunately American judges are accustomed to presiding over adversary proceedings. They expect the clash of the adversaries to generate the information that the judge needs to decide the case. And so when a judge is being urged by both adversaries to approve the class action settlement that they've negotiated, he's at a disadvantage in evaluating the fairness of the settlement to the class."[14] Courts have the power to reduce the fees to which counsel is entitled, disqualify counsel, or even impose sanctions under Federal Rule of Civil Procedure 11. Still, courts may hesitate to invoke severe sanctions because there is not uniform guidance regarding conflicts of interest for class counsel.

APPOINTMENT OF LEAD PLAINTIFF AND CLASS COUNSEL

In the context of securities class actions, the Private Securities Litigation Reform Act ("PSLRA") has attempted to bring some clarity to an otherwise murky system.[15] The PSLRA governs the selection of lead plaintiff and class counsel in securities class actions. Congress enacted the PSLRA in response to perceived abuses of the class action procedure, and particularly abuses by plaintiff-side lawyers "racing to the courthouse" to be designated lead counsel and, as a result, to be in a position to recover substantial attorney's fees.[16] Under the PSLRA, lead plaintiff will generally be the individual or entity "most capable of adequately representing the interests of class members" rather than simply the first to file.[17] In drafting the PSLRA, there was an "explicit hope that institutional investors, who tend to have by far the largest financial stakes in securities litigation, would step forward to represent the class and exercise effective management and supervision of the class lawyers."[18]

In selecting a lead plaintiff, the court must conclude that the plaintiff has no conflicts with the other class members that would prohibit him from adequately representing the class and that he will vigorously prosecute the claims, including by retaining experienced counsel with the ability to prosecute the claim. The PSLRA includes a three-step process pursuant to which a lead plaintiff is chosen: (1) the first plaintiff to file provides notice, alerting the public of the claims and class period; (2) the court selects the party with the most to gain as the presumptive lead plaintiff, assuming that party also satisfies Rule 23(a); and (3) those not selected may attempt to "rebut the presumptive lead plaintiff's showing that it satisfies Rule 23's typicality and adequacy requirements."[19] If the court determines the presumptive lead plaintiff does not satisfy Rule 23, the court returns to step two, selects the plaintiff with the next-largest financial stake, and repeats the process until a lead plaintiff is chosen.

One factor courts consider when determining whether the presumptive lead plaintiff satisfies Rule 23 is that plaintiff's choice of counsel. The PSLRA gives lead plaintiffs the express right to select class counsel, but counsel must be approved by the court. Class counsel must be willing and able to prosecute the claims at issue, including having familiarity and experience with class actions generally, and the PSLRA specifically.[20] The

[13] Miller, *supra* note 2 at 589–90.

[14] *Eubank*, 753 F.3d at 720.

[15] *See, e.g.*, *In re Olsten Corp. Securities Litigation*, 3 F.Supp.2d 286, 294 (ED NY 1998); *Fischler v. AmSouth Bancorporation*, 1997 WL 118429, at *1 (citing H.R.Rep. No. 104-369 (1995), reprinted in 1996 U.S.C.C.A.N. 730).

[16] *Id.*

[17] 15 U.S.C. § 78u–4(a)(3)(B)(i).

[18] *Sakhrani v. Brightpoint, Inc.*, 78 F.Supp.2d 845, 850–51 (S.D. Ind. 1999).

[19] *See, e.g., In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002); *In re Solar City Corporation Securities Litig.*, 16-cv-04686-LHK, 2017 WL 363274, at *3 (N.D. Cal. Jan. 25, 2017).

[20] *See In re Solar City*, 2017 WL 363274, at *5-6 (potential lead plaintiff satisfied Rule 23, in part, by submitting sworn certification of his willingness to represent the class and his understanding of lead plaintiff's duties and responsibilities, as

court may not "reject a lead plaintiff's proposed counsel merely because [the court] would have chosen differently."[21] So long as lead plaintiff's choice of counsel is reasonable, the district court should defer to that choice. If lead plaintiff's choice of counsel has a conflict, that choice may be deemed unreasonable or ultimately may not satisfy the adequacy requirement of Rule 23.[22] Like many other conflicts, the general existence of a conflict in a securities class action does not result in automatic disqualification, but if the court rejects lead plaintiff's choice of counsel, the court may not appoint other counsel; rather, the court must allow lead plaintiff to select new counsel.[23]

When considering the adequacy of a potential lead plaintiff and class counsel, courts also look at whether the plaintiff is an individual, entity, or an aggregated group. The PSLRA allows a "group of persons" to be selected as lead plaintiff. But the interpretation of this portion of the statute has resulted in a circuit split regarding whether unrelated individuals may aggregate their losses to become the lead plaintiff.[24] Because the PSLRA is supposed to reduce attorney-driven litigation, a number of courts disapprove of the tactic whereby "enterprising counsel have competed with one another to collect scores, hundreds, sometimes even thousands of volunteers to serve as class representatives as each law firm tries to assemble the largest possible group with the largest possible aggregate losses."[25] If a court concludes a proposed group of plaintiffs was created by counsel, rather than by class members for the purpose of becoming the lead plaintiff, the court may reject the group proposed as lead plaintiff and/or the group's choice of counsel. Under most circumstances, such a group of plaintiffs does not fairly or adequately represent the class and creates an insurmountable conflict between counsel and the class.[26]

Nevertheless, many courts are unwilling to say that unrelated investors may *never* aggregate their financial losses to become lead plaintiff. Groupings may be permitted where it will "best serve the class."[27] Courts generally look at the quality of representation the proposed group will provide to the class rather than the existence — or lack thereof — of a pre-existing relationship among members of the group.[28] Ultimately, courts remain focused on ensuring the individual, entity, or group that will best protect the interests of the class is

footnote continued from previous page…

well as evidence of counsel experienced in prosecuting cases under the PSLRA); *see also Philips v. Ford Motor Co.*, 2016 WL 7428810, at *12 (N.D. Cal. Dec. 22, 2016) (finding counsel adequate at the certification stage partly because counsel had "experience in prosecuting consumer protection actions involving claims similar to those in the instant case").

[21] *Cohen v. U.S. Dist. Court*, 586 F.3d 703, 711 (9th Cir. 2009) (citation omitted).

[22] *But see In re Nw. Corp. Sec. Litig*., 299 F. Supp. 2d 997, 1007 (D.S.D. 2003) (lead counsel not disqualified in federal securities class action under the PSLRA on conflict of interest theory based on counsel's filing of complaint in another action alleging securities law violations by the same defendants because counsel's role in other action was limited).

[23] *Cohen*, 586 F.3d at 709 (district court has limited power to accept or reject lead plaintiff's choice of counsel; district court may not choose counsel if lead plaintiff's selection is rejected).

[24] *Compare In re Bally Total Fitness Sec. Litig*., No. 04C3530, 2005 WL 627960, at *4 (N.D. Ill. Mar. 15, 2005) (no benefit to giving a group whose connection is merely a common losing investment lead plaintiff status) *with In re Cendant Corp. Litig*., 264 F.3d 201, 266–67 (3d Cir. 2001) (PSLRA does not require that groups of individuals be related in some manner).

[25] *Sakhrani*, 78 F. Supp. 2d at 850–51 (rejecting aggregate group of unrelated investors as lead plaintiff in a securities class action under the PSLRA); *see also, Khunt v. Alibaba Grp. Holding Ltd.*, 102 F. Supp. 3d 523 (S.D.N.Y. 2015) (court disqualified a lawyer-created group of unrelated investors "cobbled together in the hope of thereby becoming presumptive lead plaintiff" because evidence suggested counsel chose the members, rather than vice versa); *In re Atlas Mining Co. Sec. Litig.*, No. CV 07-428-N-EJLMHW, 2008 WL 821756, at *5 (D. Idaho Mar. 25, 2008) (declining to aggregate losses of group of plaintiffs without a pre-existing relationship because group was driven by lawyers, in direct contrast to intent of the PSLRA).

[26] *See, e.g., McGee v. Am. Oriental Bioengineering, Inc*., No. 2:12-CV-5476-SVW-SH, 2012 WL 12895668, at *3 (C.D. Cal. Oct. 16, 2012) (allowing lawyers to assemble as many investors as necessary to become lead plaintiff undermines the PSLRA's purpose of preventing lawyer-driven litigation).

[27] *Fries v. N. Oil & Gas, Inc.*, No. 16 CIV. 6543 (ER), 2017 WL 1880819, at *2 (S.D.N.Y. May 8, 2017); *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 100 (S.D.N.Y. 2005) (rejecting group of unrelated investors as lead plaintiff because group would displace the institutional investor preferred by the PSLRA, but noting that a small group of unrelated investors may serve as lead plaintiff, assuming they meet the other necessary requirements).

[28] *See, e.g., Hansen v. Ferrellgas Partners, L.P.*, No. 16-CV-7840 (RJS), 2017 WL 281742, at *3 (S.D.N.Y. Jan. 19, 2017); *Eshe Fund v. Fifth Third Bancorp*, No. 1:08-CV-421, 2008 WL 11322108, at *5 (S.D. Ohio Dec. 16, 2008).

appointed as lead plaintiff and that class counsel is not putting her interests above that of the class.

THE CLASS CERTIFICATION STAGE

Approval of a class representative and class counsel is often the first point in a class action where a court might be alerted to a potential conflict, but it is certainly not the only point. Courts also look at potential conflicts at the class certification stage. To be certified, a class must satisfy the four requirements of Federal Rule of Civil Procedure 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. The principal purpose of the adequacy requirement is to determine if the named plaintiff — and her choice of counsel — can vigorously represent the class.[29] A defendant opposing class certification may target class counsel as part of a challenge to the adequacy requirement, which primarily examines two matters: the interests and incentives of the class representatives, and the experience and performance of class counsel.[30] Courts interpret Rule 23 as providing judges with the authority to evaluate potential conflicts. Thus, if a court finds counsel should be "disqualified because of a conflict of interest," she would not be "able to conduct the proposed litigation"[31]

APPROVAL OF SETTLEMENT AND ATTORNEY'S FEES

Even if the court appoints a lead plaintiff and class counsel early in the litigation and certifies the class, conflicts may still arise and/or come to light later in the litigation, often during the settlement stage. In any class action — under the PSLRA or otherwise — Federal Rule of Civil Procedure 23 requires court approval of the settlement, which implicitly includes approval of attorney's fees. The PSLRA goes a step further and explicitly requires that the total attorney's fees and expenses awarded "not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."[32] The court's obligation to oversee class action settlements stems from the concern that class members generally have no ability to select, retain, and monitor class counsel, as a client would in ordinary litigation.[33] The PSLRA attempted to remedy this concern in securities class actions by encouraging sophisticated, institutional investors to step forward and commence securities class actions, putting to use their unique ability to monitor class counsel. But the PSLRA has not entirely eliminated attorney-driven class action litigation. Approval by the court helps quell concerns regarding the risk of collusion between class counsel and the defendants, in which class representatives may or may not be complicit, as well as helping ensure counsel's thumb does not weigh too heavily on the scale of attorney's fees. The court, therefore, serves as a disinterested check to help protect the class.

One common way conflicts may arise late in class action litigation is through incentive awards. As previously noted, a class action settlement may be rejected if it includes incentive awards that are disproportionally large or are conditioned on approval of the proposed settlement agreement, though such a conflict does not always require disqualification of class counsel.[34] That said, disproportionately large or conditional incentive awards are a sufficient basis to reject a settlement, and may also render counsel inadequate, potentially requiring disqualification. Because the conflict develops later in the litigation, adding conflict counsel may be an appropriate remedy, but the issue must be brought to the court's attention. In certain situations, it may also be appropriate for a court to award reasonable attorney's fees even if counsel is ultimately disqualified.[35]

Similarly, a court may decline to approve a class action settlement — or reduce or reject the proposed attorney's fee request — that includes excessive or

[29] *In re Cmty. Bank of N. Va*., 795 F.3d at 391.

[30] *Id.* at 392.

[31] *In re Fine Paper Antitrust Litigation*, 617 F.2d 22, 27 (3d Cir. 1980).

[32] 15 U.S. § 78u–4.

[33] *In re Cardinal Health Inc. Sec. Litigations*, 528 F.Supp.2d 752, 757 (S.D. Ohio 2007).

[34] *Radcliffe v. Hernandez*, 818 F.3d 537, 546 (9th Cir. 2016) (declining to disqualify class counsel where conditional incentive awards created a conflict between the named plaintiffs and the rest of the class because the law did not "require automatic disqualification for simultaneous conflicts of interest in class actions"); *but see Rodriguez v. Disner*, 688 F.3d 645, 656, 658 (9th Cir. 2012) (denying attorney's fees where incentive agreements created a conflict between counsel and the class).

[35] *Radcliffe v. Experian*, 715 F.3d at 1168 (because conflict arose late in litigation, on remand, district court was permitted to consider whether, and to what extent, counsel was entitled to fees).

improper advancement of attorney's fees.[36] When determining whether a fee award is reasonable, some courts consider the fee agreements reached between the lead plaintiff and class counsel.[37] Ex-ante fee agreements entered into prior to, or at the beginning of, the representation are more likely to be negotiated at arm's length and without the benefit of hindsight. Some courts afford such ex-ante agreements a rebuttable presumption of reasonableness, though such a presumption does not absolve the court of its obligation to confirm that the fee award is indeed reasonable under the circumstances.[38]

DISQUALIFICATION MOTIONS

In addition to appointment of class counsel, class certification, and approval of settlement agreements in class actions, courts may address potential conflicts as they arise in the ordinary course. If a party to litigation — class actions or otherwise — seeks disqualification, most courts employ a balancing test to determine whether disqualification is required. Considerations are given to the party's right to counsel of their choice, counsel's interest in continuing the representation, the financial burden involved in replacing counsel, any tactical abuse underlying a disqualification motion, and the fundamental principle that fair resolution of disputes requires independent counsel unencumbered by conflicts.[39] Many courts, however, do not strictly apply conflict rules in the context of a class action. If class counsel could easily be disqualified, "not only would the objectors enjoy great 'leverage,' but many fair and reasonable settlements would be undermined by the need to find substitute counsel after months or even years of fruitful settlement negotiations."[40]

In normal litigation, a disqualification motion is typically filed by a party's adversary — usually the lawyer's present or former client whose interests are at stake in the litigation. In many jurisdictions, only the conflicted client or former client has standing to seek disqualification. In a class action setting, the class representative — i.e., the lawyer's immediate client — undoubtedly has standing, but at least some courts also permit absent class members to seek disqualification, treating those absent class members as class counsel's client for the purpose of raising a conflict.[41] Still, other courts allow a defendant to seek disqualification of class counsel on the theory that all parties to a litigation are entitled to a fair proceeding. If an attorney's conflict of interest will infect the fairness of the proceeding, any party's interest — including the defendant's interest — may be so tangible that even the defendant is entitled to seek disqualification of opposing counsel despite having no conflicted relationship with opposing counsel.[42] This is a particularly strong concern in the class action context because conflicted or otherwise inadequate counsel may provide the basis upon which absent class members may attack a settlement. A defendant's interest in finality results in an unusual interest in ensuring that its adversary is adequately represented.

CONCLUSION

Like any lawyer in any litigation, class counsel may not simultaneously represent two clients with directly adverse interests if there is significant risk that the representation will materially limit the lawyer's ability to adequately represent either or both clients. Courts, however, have wide discretion when it comes to determining whether class counsel is conflicted, and in

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[36] *Eubank*, 753 F.3d at 724 (reversing district court's approval of class action because, among other things, class counsel was the son-in-law of the lead class representative, incentive awards were conditioned on the class representatives' approval of the settlement, and the attorney's fees were excessive in light of class's recovery).

[37] *In re Luxottica Grp., S.P.A. Sec. Litig*., No. 01-CV-3285, 2004 WL 2370650, at *7 (E.D.N.Y. Oct. 22, 2004) (looking to retainer agreement when approving lead plaintiff's choice of lead counsel); *Craig v. Sears Roebuck & Co*., 253 F.Supp.2d 1046, 1049–50 (N.D. Ill. 2003) (considering fee agreements and other evidence of negotiation in assessing the proposed lead plaintiff).

[38] *In re Cardinal Health Inc. Securities Litig.*, 528 F.Supp.2d 752, 756-57 (S.D. Ohio 2007) (noting presumption of reasonableness given to ex-ante fee agreements, but conducting both the loadstar and percentage analysis to determine reasonableness of attorney's fees).

[39] *Radcliffe v. Hernandez*, 818 F.3d at 542.

[40] *Lazy Oil Co. v. Witco Corp*., 166 F.3d 581, 589 (3d Cir.1999).

[41] *See, e.g*., *In re Luxottica*, 2004 WL 2370650, at *3-4 (because public confidence in the fairness of public securities markets is at issue in litigation under the PSLRA, the court should be open to all arguments of possible plaintiffs, defendants, and friends of the court on the issue of appropriate counsel); *but see* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 25 (AM. BAR ASS'N 2016), *supra* note 1.

[42] *See, e.g., Pirelli Armstrong Tire Corp. v. LaBranche & Co.*, No. 03 Civ. 8264, 2004 WL 1179311, at *9 (S.D.N.Y. May 27, 2004) (because PSLRA does not contain any clear language precluding or limiting the right of defendants to be heard on the issue of lead counsel designations, defendants have standing to be heard during the appointment process).

fashioning the appropriate remedy in the face of an actual or perceived conflict. Many courts, therefore, do not mechanically apply the conflict rules to class action litigation. "[A]lthough automatic disqualification might 'promote the salutary ends of confidentiality and loyalty' in traditional cases, 'it would have a serious adverse effect on class actions.'"[43] Class actions may be the only practical way for plaintiffs with small, individual claims to protect their rights, and class counsel usually has unequal knowledge of the case as compared to the class members and even class representatives. Disqualifying the lawyers most familiar with the case whenever class members have conflicting interests would substantially weaken the usefulness of the class action device and ultimately harm the individuals (i.e., the class) the conflict rules are meant to protect. ■

[43] *In re Agent Orange Product Liability Litigation*, 800 F.2d 14, 18 (2d Cir.1986).