The Article suggests a strategy that might be useful for ensuring the fairness of some class action settlements. When counsel presents a settlement for evaluation, the court could allow objectors to file *ex post* bids for lead counsel rights. The bids would be backed by guarantees that class members would be no worse off if the lead counsel rights are transferred. If a proposed guarantee offers satisfactory assurances, the court would presumptively transfer lead counsel rights to the objector’s counsel. When the case is eventually resolved, the attorneys’ fee would be allocated between new and old counsel according to a principle that provides rewards for maximizing class recovery while not impairing incentives to bring suit. *Ex post* bids could have special relevance in the context of “reverse auctions” in which the defendant effectively sells the case to the low-bidding class counsel, and might improve class action settlements more generally as a corrective for bad results and as a deterrent against abuse.

I. THE SETTLEMENT DILEMMA

Class litigation is brought on behalf of groups of persons too numerous to join individually.1 Because of collective action problems, absent class members do not control the litigation. The class action

1. See FED. R. CIV. P. 23(a)(1).
device uses the fiction that class interests will be protected by the representative plaintiff whose name graces the marquee. But representative plaintiffs are usually mere eponyms. The litigation is controlled by plaintiffs' attorneys, who function as entrepreneurs with little monitoring by their ostensible clients. In consequence, counsel may prefer their own interests to those of the class. The arena of greatest conflict is settlement. Because of the omnipresent specter of a trade in which the attorney accepts a higher fee in exchange for lower class compensation, a settlement cannot be rubber-stamped. Rather, the trial judge must approve the settlement only if she finds it to be fair, adequate, and reasonable.

Judges face significant obstacles in carrying out the task of evaluating proposed settlements. Because the matter has been settled, plaintiffs' counsel is now aligned with the defendant. These parties often make good faith efforts to present an accurate analysis, but their common interest in promoting the settlement undermines the safeguard of adversarial testing. Objectors to the settlement can provide a corrective by engaging in an independent appraisal. But they do not


5. The standard is variously expressed, but the essential inquiry is the same. See, e.g., In re Jiffy Lube Sec. Litig., 927 F.2d 155, 159 (4th Cir. 1991); Jones v. Nuclear Pharmacy, Inc., 741 F.2d 927 (10th Cir. 1984); Reed v. Gen. Motors Corp., 710 F.2d 170, 172 (5th Cir. 1983); Grunin v. Int’l House of Pancakes, 513 F.2d 114, 122 (8th Cir. 1975). The Advisory Committee on Civil Rules recommends that the standard be “fair, reasonable, and adequate.” ADVISORY COMM. ON THE FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMM. 39 (2002).

6. See Macey & Miller, supra note 2, at 46 (referring to fairness hearings as “pep rallies jointly orchestrated by plaintiffs’ counsel and defense counsel”).

solve the problem. Because objectors enter at the last minute, they are often poorly informed and offer little of substance. And objectors have their own conflicts. Some are stand-ins for disappointed lawyers who want a larger share of the spoils. Others just want to hold up the settlement to extract a commission.\footnote{These objectors resemble the sokaiya, shadowy figures who extort money by threatening to disrupt Japanese shareholder meetings. See Mark D. West, \textit{The Pricing of Shareholder Derivative Actions in Japan and the United States}, 88 NW. U. L. REV. 1436, 1451-52 (1994).}

Lacking fully effective assistance from others, the judge has no alternative but to investigate the settlement herself.\footnote{So far, courts have not experimented with privatizing the review process by appointing monitors with incentives to maximize class benefits. See Klement, supra note 2, at 61 (recommending private monitor approach).} The task is difficult. The judge is largely at the mercy of the evidence introduced by the parties.\footnote{Courts may have power under the class action rules and principles of equity jurisprudence to take an active role in developing information relevant to assessing the proposed settlement. But this inquisitorial style is unfamiliar to American judges. See John H. Langbein, \textit{The German Advantage in Civil Procedure}, 52 U. CHI. L. REV. 823, 831-32 (1985). Judges almost always take a passive role at fairness hearings, allowing the parties to determine what information will be presented. See Klement, supra note 2, at 45-46 (stressing the passive role of courts in reviewing settlement proposals).} Although the judge can observe the terms of the settlement, these are often difficult to quantify.\footnote{See Susan P. Koniak & George M. Cohen, \textit{Under Cloak of Settlement}, 82 VA. L. REV. 1051, 1059-60 n.25 (1996).} But the trial judge's difficulties go beyond appraising the settlement. That analysis is meaningless unless compared with what \textit{might have been} obtained from continued litigation. Presumably, a court should approve a settlement only if the result is as good as what could have been secured if the case went to judgment (or if class counsel fought harder in settlement negotiations). The amount that could have been obtained depends on intangible factors such as the strength of the class claims at time of settlement, the willingness of the defendant to compromise, the attitudes of judge and jury, developments in parallel cases, possible changes in applicable law, and likely results of appeals. Moreover, because the court is comparing the bird-in-the-hand of settlement against a covey of outcomes if the case proceeds, risk-aversion can be a consideration. As risk aversion increases, the class would have a greater preference for certainty of settlement over the vagaries of litigation. None of these questions is easy to evaluate; all of them together are daunting.

Recognizing these difficulties, the appellate courts offer guidance in the form of factor tests. The Fourth Circuit, for example, calls attention to ``(1) the posture of the case at the time settlement was
proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel." In the Fifth Circuit, the inquiries are:

(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members [and objectors].

The Eighth Circuit requires analysis of four factors, with greatest emphasis on the first: (1) "the strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement"; (2) "the defendant's overall financial condition and ability to pay"; (3) "the complexity, length and expense of further litigation"; and (4) "the amount of opposition to the settlement." Other circuits have their own lists. These factor tests provide some guidance, but not much. They direct the trial court's inquiry, but they are not comprehensive and provide little help in assessing how the factors should be weighed or what to do in the event of conflict. Moreover, the inquiries that these tests encourage are themselves open-textured and uncertain.

Ultimately, the evaluation of the settlement is committed to the trial court's "discretion." But discretion is no cure-all either—otherwise appellate courts would not try so hard to provide standards to guide it. Although trial courts undoubtedly have the ability to exercise judgment based on experience, intuitions do not guarantee reliability. Class action settlements do not have auras, and if they did, trial courts could not read them. Behind the portentous references to discretion may be little more than a sense of the inadequacy of other strategies. Yet the case must be decided and the court must do its best to protect the class.

In light of these difficulties, courts have turned to attorney compensation as an ex ante device for inducing good outcomes. In

13. Reed v. Gen. Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983); see Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir. 1982).
15. See, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (noting that the court's decision to approve or reject a settlement is "committed to the sound discretion of the trial judge because he is 'exposed to the litigants, and their strategies, positions and proof' ") (quoting Officers for Justice v. Civil Ser. Comm'n of S.F., 688 F.2d 615, 626 (9th Cir. 1982)).
COMPETING BIDS

particular, agency costs can be reduced by employing the percentage-of-recovery method for calculating fees, which is now the favored approach in class actions seeking money damages. Because attorneys get paid a percentage of total recovery, they have an incentive to maximize class benefits. But incentive alignment strategies rarely work perfectly. Despite its superiority to other approaches, the percentage method is an imperfect fix to the agency cost problem. Class attorneys who know their compensation will be based on a percentage have an incentive to settle too early, inflate the value of the relief obtained, or even collude with the defendant. The percentage approach may also overcompensate counsel when liability is clear. Accordingly, this methodology does not relieve courts of the duty to oversee settlements. Yet, despite sanguine fantasies that “well-developed” caselaw can ensure accurate fees, the process is not scientific. Courts consider fee awards in analogous cases, evidence on the risks of the litigation, and expert witness testimony (among other factors). But at the end of the day they face the bugaboo of judgment.

17. See Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 963 (E.D. Tex. 2000). Some courts utilize the percent-of-recovery approach exclusively. See, e.g., Camden I Condo Ass’n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993). Elsewhere, courts permit the alternative “lodestar” method either as a cross-check, see, e.g., In re Cendant Corp. Prides Litigation, 243 F.3d 722, 735 (3d Cir. 2001), as an alternative methodology for calculating the fee, see, e.g., In re Continental Illinois Securities Litigation, 962 P.2d 566, 572-73 (9th Cir. 1992), or, in a minority of jurisdictions, as the ostensibly exclusive method (which may however be checked against the percentage method), see, e.g., In re Agent Orange Products Liability Litigation, 818 F.2d 226, 232 (2d Cir. 1987), cert. denied, 516 U.S. 824 (1987). More general equitable discretion methods are also used. See generally Geoffrey P. Miller & Lori S. Singer, Nonpecuniary Class Action Settlements, 60 LAW & CONTEMP. PROBS. 97 (1997) (surveying methodologies across the federal circuits).


20. See Miller & Singer, supra note 17, at 112.


22. See Macey & Miller, supra note 2, at 23-24 (noting that the percentage method effectively guarantees that plaintiffs’ attorneys will be systematically compensated at a rate higher than the rate they would demand in an efficiently functioning competitive market).

23. See Miller, supra note 3.


25. See id. at 423-24.
An auction strategy offers a potential avenue for overcoming some of these problems, at least in the context of large-scale, small-claim cases. The purest form of auction would be for the trial court to organize a judicial sale of the entire case. The court would prepare an informational package, advertise for bids, structure the auction, and oversee the transfer of the proceeds to the class. Any party would be allowed to bid, including the defendant which, if it won the auction, would achieve an instant settlement. Whole-case auctions promise to overcome the lawyer-client agency problem (since the winner of the auction owns the claim) and offer immediate and certain compensation for the class. If the whole-case auction worked, it would obviate the problem of judicial review of class action settlements because the winner of the auction could make settlement decisions without judicial assistance. Whole-case auctions have been criticized, however, on the grounds that the process would be plagued by information and financing problems and that the procedure is impracticable. Most commentators have viewed whole-case auctions as theoretically interesting but not a solution to the problem of class action settlements.

A more limited approach, which has been used in real world settings, is the auction of lead counsel rights. The genius of lead

26. See Macey & Miller, supra note 2, at 105-08 (discussing whole-case auctions); Jonathan R. Macey & Geoffrey P. Miller, A Market Approach to Tort Reform Via Rule 23, 80 CORNELL L. REV. 909, 912-14 (1995) (exploring potential use of whole-case auctions in mass tort cases) [hereinafter A Market Approach to Tort Reform].

27. See A Market Approach to Tort Reform, supra note 26, at 913.

28. However, the winner would have to litigate the case and, unless she acted as her own counsel thereafter, would need to employ attorneys to conduct the litigation.


31. See Thomas & Hansen, supra note 29, at 426 (arguing that the role of auctions in class action suits must be limited).

counsel auctions is that they promise to emulate a market solution to attorney compensation. Any rational purchaser would prefer to buy a desired good or service at the lowest cost. Lead counsel auctions seek to achieve this result in the selection of class counsel by assigning representational rights to qualified attorneys who are willing to take on the case at the lowest percentage of the recovery. Proponents of lead counsel auctions assert that they reduce attorneys’ fees, conserve on judicial resources, select counsel on a more defensible basis than victory in a race to the courthouse, reduce risk for attorneys by establishing the fee methodology in advance, establish a data set of market-driven fees that can be used as a basis for comparison in future cases, and introduce competition into the class action bar. Despite these advantages, the bulk of recent authority has been against lead counsel auctions, on the grounds, inter alia, that they are difficult to structure, do not guarantee the best outcome for the class, do not minimize fees, and may result in a lower quality of representation. In the case of securities fraud litigation in particular, lead counsel auctions have come under criticism as being inconsistent with the mandate of the Private Securities Litigation Reform Act which specifies that the lead plaintiff selects class counsel. Given the trend of opinion away from lead counsel auctions, exploration of other approaches to handling attorney-client agency problems in class action settlements appears to be in order.

II. AN EX POST BID APPROACH

This section proposes a different procedure to assist with the problem of review of settlements: ex post bids for lead counsel rights. Under an ex post bid approach, an objecting class member would guarantee that the class will be no worse off if lead counsel rights are transferred. If an acceptable guarantee is provided, the court would presumptively assign lead counsel rights to the attorney for the dissenting party. The court would mandate that the litigation files be

34. See id. at 373-74; Aggregation, Auctions, and Other Developments, supra note 32, at 83-85; Lawyers on the Auction Block, supra note 32, at 681.
35. See In re Cavanaugh, 306 F.3d 726, 734-35 (9th Cir. 2002) (holding that court-mandated lead counsel auctions are not generally permissible in litigation under the Private Securities Litigation Reform Act); In re Cendant Corp. Litig., 264 F.3d 201, 220 (3d Cir. 2001) (holding the same).
36. Any class member may object to a settlement, and (at least in federal court) can appeal an adverse ruling. See Devlin v. Scardelletti, 122 S. Ct. 2005, 2013 (2002) (holding that an unnamed class member who objects to a proposed settlement in federal court may take an appeal without intervening).
transferred from prior counsel to the new lead counsel. The court could either reject the prior settlement or provisionally approve it but defer a final decision until the results of the litigation under new counsel are known. The case would then proceed as before.

To take a simple example, imagine that counsel seeks judicial approval of a settlement under which the defendant will pay $10 million in exchange for a general release. Out of this amount, counsel requests a fee award of $3 million, leaving $7 million for the class. We assume that these amounts will actually be paid. Suppose further that a class member (or, more realistically, her attorney) believes that the defendant could have been induced to pay more. In such a case the dissenting party would be allowed to post a bond or other form of guarantee for the proposed recovery ($10 million plus any amounts necessary to adjust for delay in payment). If such a bond is posted and found to equal or exceed the relief obtained in the proposed settlement, the court would presumptively transfer lead counsel rights to the dissenter’s attorney.

Now suppose that new lead counsel achieves a settlement of $16 million, with a request for $4 million in counsel fees and expenses. Notice of the new settlement would be distributed to the class and the matter would be set for a hearing. In reviewing the fairness of this settlement, the court would take account of the fact that the class has been made better off by the new counsel’s actions (by a net of $5 million). The court would also evaluate the requested fee. If the fee is found to be reasonable, the court would distribute the amount between new and old counsel, attempting to make a fair allocation reflecting the respective contributions of both while recognizing that the first counsel did not achieve the best result for the class. The matter could be left to the discretion of the trial court, or the court could experiment with a formula. One possibility would be to allocate the fee based on the amount of the recovery for which each lawyer is responsible (subject to certain caps). In the example above, suppose the court concludes that the requested $4 million fee is reasonable. The first counsel obtained $10 million and the second counsel obtained an additional $6 million. This would suggest that the first counsel should receive 10/16 of the fee ($2.5 million) and the second counsel should receive 6/16 of the fee ($1.5 million). Notice that in this case, the first attorney’s compensation falls (from $3 million to $2.5 million). This would seem appropriate given that the first counsel failed to maximize recovery for the class. If the court approves the settlement, the funds would be distributed among the class and counsel and the second counsel’s bond would be vacated.
This formula would not always result in a reduction of fee for the first counsel. Suppose that the second counsel negotiated a settlement for $12 million with an attorneys' fee of $4 million. The class would still be better off than under the first settlement. If the new fee is approved and allocated among the two attorneys according to the amount of recovery they respectively obtained, the first counsel would get about $3.33 million (10/12 of $4 million) and the second counsel would get $666,000. It does not make sense to increase the first attorney's compensation because of the second counsel's contribution, especially because the second counsel's efforts raise questions as to the performance of the first. Accordingly, it would seem appropriate to cap the compensation of the first counsel at the amount she would have received under the initial settlement. With such a cap in place, the first counsel would receive a fee of $3 million and the second counsel would receive $1 million.

What happens if the new counsel obtains an inferior result for the class? Say the new counsel eventually settles the matter for $8 million. The shortfall of $2 million would be taken from the bond. The court would revisit and approve the initial settlement, this time armed with the information that the value obtained for the class in the initial settlement has been tested in an adversarial context and proven to be substantial. The first counsel would revive her request for the originally-negotiated fee of $3 million, which the court would evaluate in light of the fact that the second counsel tried and failed to obtain a better result.

What if the defendant settles the case in a different forum for less than the original settlement, leaving counsel with an obligation to satisfy the shortfall out of the bond? Suppose, in the example above, that an attorney obtained lead counsel rights upon posting a $10 million bond. Now the defendant settles the case in a different jurisdiction for $5 million less a $1 million fee. The defendant would be delighted with this outcome since it is better off—by $5 million—than it would have been under the initial settlement. Class counsel in the new jurisdiction is also happy with the settlement because she receives a $1 million fee for minimal effort. However, the new lead counsel in the first case would be much worse off because she would have to pay over $3 million to the class and $3 million to the original class counsel. If this strategy were allowed, objector's counsel would rarely make ex post bids for lead counsel rights because of the ease with which the case could be settled

out from under them. To address this problem, it would be appropriate for the court in the first case to specify that the new lead counsel's bond would be released if and to the extent that class claims are finally resolved in a different forum.\textsuperscript{38}

Another scenario is the case in which the objector does not improve the substantive terms of the settlement but does obtain a reduction in attorneys' fees. Suppose in the example above that the winning bidder eventually settled the case for $10 million, but agreed that the class should receive $8 million and counsel should receive only $2 million. This appears to be beneficial to the class because it reduces the fee. The problem is that it would be too easy for new counsel to make such a deal. Since the defendant is presumably indifferent as to who receives its $10 million, it might agree to pay more to the class and less to the attorneys, knowing that such an adjustment will enhance prospects for judicial approval of the settlement. New counsel might request that the trial court allocate $1.5 million of the fee to the original counsel and $500,000 to herself. The result would be to cut the compensation of original counsel in half. This deal between new counsel and defendant would not reflect arm's-length bargaining and therefore should not be accepted by the court without further investigation. If the court concludes that the initial fee request of $3 million was justifiable, the court should reject the proposed settlement and affirm the deal originally presented ($3 million for original class counsel and $7 million for the class).

A variant on this example is a case in which new counsel does increase the overall recovery, but only slightly, and also negotiates a better fee for the class. Suppose, for example, that the new counsel agrees to settle the case for $11 million instead of $10 million, and agrees also to a 20% fee rather than the 30% fee originally negotiated by the first counsel. This second settlement should be carefully investigated by the court because of the possibility that the new counsel is using the improved fee structure as a means for obtaining a generous fee. In many cases, however, the formula suggested above should generate sensible outcomes. New counsel, in this case, would receive 1/11 of $2.2 million, or $200,000—an amount that appears easy to justify in light of the $1 million improvement in total class compensation as well as the risk she

\textsuperscript{38} If settlement in the new forum has the effect of releasing the bond in the first forum, then counsel would face the daunting task of persuading the court in the second case that a settlement is fair, adequate, and reasonable when it provides less than they could have received in a proposed settlement elsewhere. The bond should not be released, however, if the new class counsel participated in any way in obtaining the settlement in the second forum.
COMPETING BIDS

took on in posting the bond. The former counsel would receive a reduction in her fee from $3 million to $2 million. This seems harsh but might be justifiable in light of the fact that the previous counsel failed to generate the best result for the class. To get the fee, moreover, new counsel has to extract greater compensation from the defendant. Unlike the case discussed above, where the defendant pays no more money in the new settlement, here the defendant must cough up another $1 million. Moreover, by agreeing to reduce the fee from 30% to 20%, the new counsel has reduced her own fee by $100,000. New counsel has, in effect, bargained against her own interests. Where such bargaining takes place, it may be surmised that the fee originally agreed to might have been excessive. Thus, although the trial court must scrutinize cases like this to ensure fairness to the original counsel, the risks appear fairly small as long as the new counsel achieves an improvement in the overall settlement.

III. PROS AND CONS OF THE EX POST BID APPROACH

The *ex post* bid approach can increase recoveries for class members and deter counsel from presenting inadequate proposals in the first place. At the same time, the approach provides information about the value of the proposed settlement in the form of a “super” objector whose disagreement with the settlement is backed by a substantial financial commitment. Moreover, because bids for lead counsel rights at settlement must be backed by adequate security, the procedure carries little danger for the class.

This approach is not subject to many objections made against lead counsel auctions. One of the paramount criticisms of *ex ante* lead counsel auctions is that they do not maximize class recovery. Having won the auction for lead counsel rights with a percentage bid, the lead counsel has the usual incentives to settle too early and for too little. And because counsel is the low bidder, she may cut corners or refrain from investments that would benefit the class, reducing the class recovery still further. *Ex post* auctions would not be subject to these concerns. Indeed, one of the arguments in favor of this approach is that it is likely to increase the benefits to the class. The bond requirement guarantees that the class will be no worse off if lead counsel rights are transferred;

39. The objector, in this sense, functions in a way similar to that of the private monitor recommended in Klement, *supra* note 2, at 28.
40. See Bebchuk, *supra* note 32, at 899.
41. See id.
and, having posted the bond, the new lead counsel has an incentive to enhance class recovery in order to obtain a return of expenses and earn a profit.

It is also argued that lead counsel auctions do not guarantee reasonable fees. This argument has little merit as applied to ex post bids. The ex post bid does not purport to immunize counsel fees from judicial scrutiny for reasonableness, and therefore is at least as good a method for controlling fees as the traditional approach. Further, the ex post bid can reduce fees because, if the new counsel negotiates more reasonable compensation, the reduced fee percentage would usually be folded back into the amounts received by the first counsel. The first counsel’s fees can only decrease or remain constant under the ex post bid approach. Meanwhile, although new counsel can earn a fee—potentially a generous fee—for participating in the case, that fee is also subject to judicial scrutiny for reasonableness and can never make the class worse off than it would be under the initial settlement proposal.

Some have argued that auctions do not economize on judicial resources in light of the efforts that a court must undertake to structure a successful auction. A similar criticism could be directed at ex post bids for lead counsel rights. Such bids would not reduce the burden on courts. In fact, they could require the expenditure of increased judicial resources because they would protract class action litigation that might otherwise be settled. However, conserving judicial resources is not an absolute value. Courts appropriately expend resources when doing so is necessary to fulfill their responsibilities. A judge would not, for example, refuse to hear a complex antitrust case on the ground that the trial would take a long time. If in reviewing a class action settlement, the court receives a bid for transfer of lead counsel rights backed by a substantial financial commitment, this fact in itself would be good evidence that additional time should be expended on the case to ensure that the class is well represented. If trial courts are “fiduciaries” for class members, there would appear to be nothing problematic about expending the resources necessary to ensure that the class receives the best possible representation.

42. See Third Circuit Task Force Report, supra note 24, at 374.
43. See Lawyers on the Auction Block, supra note 32, at 691-92 (noting that auction design and administration are complex tasks requiring substantial judicial resources); Third Circuit Task Force Report, supra note 24, at 374-76.
44. See Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 279-80 (7th Cir. 2002) (describing the role of a trial court reviewing a proposed class action settlement as that of a “fiduciary”).
Lead counsel auctions have been criticized as not placing the interests of the class in the most capable hands.⁴ The idea is that the attorney willing to take the case for the lowest percentage of the recovery is unlikely to be the one best qualified to carry out the representation. Quality of representation is not a serious problem for ex post bids, however. Because the ex post bidder is required to post a bond protecting the class against unfavorable outcomes, the quality of the bidder is not a matter of crucial importance. Further, any lawyer willing to post the required bond presumably believes that she has a capacity to extract more from the defendant.

Informational difficulties have also been mentioned as a problematic feature of ex ante lead counsel auctions.⁵ Bidders may not know much about the case, and thus may shave their offers in order to protect against the risk of overpaying. The result may be that the class receives lower compensation than what would be paid if the strength of the case were known. But this argument applies only to auctions conducted at the outset of a case. By the time the case is presented to the trial court for evaluation of possible settlement, much more will be known. Plaintiffs' counsel will have conducted discovery in order to evaluate the strengths and weaknesses of the claims. Pleadings and arguments by the defendant will identify the defenses that will be interposed to liability and damages. The sufficiency of those arguments may have been tested in pretrial motions. The parties will have had the chance to evaluate one another's bargaining strategies through settlement discussions.⁶ The parties, moreover, are usually required to share their evaluations with the court in order to justify the compromise. The court will also have developed its own sense of the case.⁷ Perhaps most importantly, the bond requirement protects against excessively low bids. In effect, the settlement itself represents an informed bid for the case. Any ex post bidder for lead counsel rights must meet or beat the defendant's bid. Thus problems of valuation that may distort, for example, lead counsel auctions, are simply not present in ex post bids.

Ex ante lead counsel auctions are sometimes said to be afflicted by problems of comparing bids.⁸ The argument is that bidders may set up

---

⁴ See Bebchuk, supra note 32, at 890 (noting that auctions would undervalue qualitative dimensions of the choice of counsel); Third Circuit Task Force Report, supra note 24, at 382.
⁵ See Third Circuit Task Force Report, supra note 24, at 387.
⁶ Indeed, it would arguably be irresponsible for counsel to present a settlement proposal to the court unless the case has been rather carefully valued in order to assess the fairness of the defendant's settlement offer.
⁷ See Aggregation, Auctions, and Other Developments, supra note 32, at 88.
different schedules correlating proposed fees with levels of class recovery, resulting in difficulties for assessing which bid is better: a bid may be more favorable to the class at one point and less favorable at others. In the case of ex post lead counsel bids, comparability issues are not a serious concern. The choice is between two outcomes: one that is presented to the court in the form of a settlement, and the other that promises to be as good or better for the class. It is not difficult for the court to assess such a choice.

Ex ante lead counsel auctions have been criticized as requiring subjective evaluations as to the quality of counsel. But quality control is always required in class actions regardless of how counsel is selected. Ex post bids, moreover, present features that reduce the importance of quality vetting. Unlike other means for selecting lead counsel, ex post bids offer the protection of the bond requirement, which places a floor on class recovery and thus protects against the worst outcomes that could occur if counsel proved ineffective. The bond requirement also provides assurance that the bidder believes she is able to provide effective service. The subjectivity of the court’s evaluation of class counsel’s abilities is thus less of a concern for ex post lead counsel bids.

A well-recognized problem with ex ante lead counsel auctions is the need to compensate attorneys who have identified the claim and investigated its merits prior to filing a suit. If new counsel could free-ride on another lawyer’s costly preliminary work and then usurp the case, incentives to develop cases for litigation might be undermined. This problem of compensating first movers is also present in ex post lead counsel bids. Here, the “first mover” is the original lead counsel who developed and litigated the case and negotiated the proposed settlement. It would obviously be undesirable for an ex post lead counsel bid to deprive the first attorney of fair compensation for her services. However, the approach described above makes provisions to protect the original lead counsel. If the bidder fails to improve on the settlement, the court will call on the bond to compensate the class and its original counsel. In such a case, the original counsel’s claim to a fee is not impaired and may even be strengthened: since another lawyer had a shot at the case and

50. See id. at 378-80.
51. See Lawyers on the Auction Block, supra note 32, at 685-90 (identifying problems with quality evaluation); Third Circuit Task Force Report, supra note 24, at 380-81.
52. See Third Circuit Task Force Report, supra note 24, at 381.
53. See id. In the case of ex ante lead counsel auctions, this problem can be addressed by providing a bounty to the lawyers who investigated the lawsuit if they are not selected as lead counsel. See In re Bank One S’holders Class Actions, 96 F. Supp. 2d 780, 785 (N.D. Ill. 2000) (indicating that investigating counsel would receive compensation for services to the class).
was unable to improve the outcome, the quality of the original counsel’s services is vindicated by a market test, thus strengthening the fee request. It is true that under an ex post bid approach the original counsel’s fee can be reduced if the new counsel obtains a superior result. But this hardly seems unfair since the original counsel has been shown to have obtained too little. Even in such a case the original counsel would receive a reasonable fee as measured by the respective contributions to the class recovery. Overall, the fees can be set so as to reward the new counsel for taking on the risk of a bad outcome and for generating an improved result for the class while not unduly penalizing the original attorney.

Some have criticized ex ante lead counsel auctions on the ground that there are too few bidders. The problem, according to these critics, is that firms find it too expensive to prepare bids, in light of the possibility that they will not win the auction and the risk that their fees will eventually be reduced. In the case of ex post lead counsel bids, there are also likely to be few bidders. In fact, it would be uncommon for there to be more than one. However, the lack of numerous bidders is not a problem because the bidder’s bond must at least equal the value of the settlement. Further, there is no risk that the process will fall apart because of a lack of bidders: one “bid” (the proposed settlement) will always be on the table even if no competitors for lead counsel rights appear. Thus, the shortage of qualified bidders would not be a serious problem for ex post bids.

Some have argued that ex post lead counsel auctions threaten the court’s neutrality. The idea is that the court must form a preliminary opinion as to the merits of the case in evaluating the competing bids, and that this may create an unintentional but distinct bias against the defendant as the case progresses. Whether or not this idea has merit in the context of ex ante auctions, it is no objection to ex post bids. By the time of the settlement, the trial court will have had numerous opportunities to review the case. And unlike the case of ex ante auctions, which may require an early peek into the merits that would not otherwise be conducted, the ex post bid for lead counsel rights would require no more than what the court is required to do in any event. Indeed, if the concern is for adversarial presentation, ex post bids would enhance rather than detract from the integrity of information presented to the
court since at this point both the defendant and class counsel are aligned in promoting the proposed settlement.

Lead counsel auctions have also been criticized on the ground that they create a public perception of windfalls to attorneys. But the \textit{ex post} bid recommended in this article would not create windfalls. It would not substitute for judicial review of the reasonableness of the proposed fee. Far from generating windfalls, \textit{ex post} lead counsel bids could keep fees in check because they could reduce the fees awarded to the initial lead counsel.

\textit{Ex post} bids do have potential shortcomings. The amounts and risks involved would deter many attorneys from making bids. In the example presented above, any bidder for \textit{ex post} lead counsel rights would have to come up with a guarantee of at least $10 million. It should be noted, however, that a guarantee is not paid until drawn on. The plaintiffs’ bar has members with funds sufficient to make this kind of commitment. A related objection is that the guarantee, in addition to being expensive to obtain, creates significant financial risks for the bidder. If the eventual outcome of the case is below what was presented to the court in the original settlement, the bidder would forfeit some or all of the bond and would receive no fee for her services. Many lawyers would prefer to avoid such risky investments when other, safer cases are available. However, the bond requirement does not impose unlimited risks. Presumably, attorneys would seek lead counsel rights \textit{ex post} only if they believed that the settlement in question could readily be improved. Thus, people would post bonds in cases where they believed there was a substantial probability that the bond would never be called. Further, the most serious risk—the possibility that the case would be sold out from under counsel by settlement in another jurisdiction—would not trigger obligations under the bond. And the risks of posting the bond would be weighed against the potential for a lucrative fee if new counsel obtains an enhanced recovery. All these factors suggest that, despite the risks, some cases might be candidates for \textit{ex post} transfers of lead counsel rights. This is not to say that the pool of potential bidders for \textit{ex post} lead counsel rights would be enormous, but it appears to be sufficiently large to generate bids in some cases.

The \textit{ex post} bid approach also faces difficulties of appraisal. To determine that the proposed bond will protect the class against being worse off under new lead counsel than under the proposed settlement,

\begin{footnotesize}
59. See id. at 342-43.
60. See \textit{supra} notes 37-38 and accompanying text.
\end{footnotesize}
the court must evaluate and assign a financial value to the settlement. In many cases, it would not be easy for a court to make this judgment. For example, the settlement may include elements of injunctive relief that are difficult to value. The settlement may provide compensation for injuries and harms that have not yet developed and which may never become manifest. Future payments may have to be discounted to present value, using some interest rate appropriate for the class. The settlement may include non-pecuniary forms of relief such as coupons or reversionary funds that are recaptured by the defendant if not fully claimed. These are substantial problems, but they are not insurmountable. It is, presumably, the court’s responsibility to value the settlement whether or not a party comes forward with an ex post bid for lead counsel rights. Thus, when an ex post lead counsel bid is made, it would merely require the court to quantify with greater precision a value that the court is required to appraise in any event. In fact, the presence of an ex post bid can have a disciplining effect because the court would be forced to engage in a more careful effort at quantification.

Ex post bids would have their greatest potential for improving class action litigation in the context of “reverse auctions”—cases in which the defendant effectively selects the class counsel willing to settle the case most cheaply. In such a case, some members of the class will be represented by counsel in an overlapping case that will be mooted if the proposal is approved. Counsel for the overlapping class has a strong incentive to appear and object to the settlement in order to preserve the value of her investment. This attorney knows a great deal about the case because she represents a competing class. And, if it is a true reverse auction situation, this attorney knows that the relief obtained for the class falls short of what could be obtained in litigation that was not

61. See Coffee, supra note 21, at 1430.
62. This may differ from market rates. See Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 287 (7th Cir. 2002).
marred by collusion between defendant and plaintiff's counsel. All these factors provide an incentive to file the necessary bond in order to obtain a transfer of lead counsel rights. In such cases, *ex post* lead counsel bids can provide value by placing impediments in the path of harmful settlements.

IV. CONCLUSION

Competing bids in class action settlements are no panacea to the problem of controlling agency costs and protecting the class against poor representation. But they do offer a potentially valuable supplement to existing procedures in some cases. They could correct some settlements that offer poor relief for the class and overly generous fees for attorneys, and appear to be especially useful at combating reverse auctions. *Ex post* lead counsel bids are not subject to many of the problems that threaten the utility of *ex ante* auctions. It appears, moreover, that courts have ample authority under existing law to invite such bids.66 *Ex post* bids for lead counsel rights may be worth further investigation as one means among others for improving the fairness of class action settlements.

---

66. Courts have inherent authority to require posting of bonds in appropriate circumstances. See Pedraza v. United Guar. Corp., 313 F.3d 1323, 1325 (11th Cir. 2002).