No. 17-55635

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SONNY LOW, et al.,

Plaintiffs-Appellees,

SHERRI B. SIMPSON,

Objector-Appellant,

v.

TRUMP UNIVERSITY, LLC, AKA TRUMP ENTERPRENEUR INITIATIVE, and DONALD J. TRUMP,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
Hon. Gonzalo P. Curiel
Nos. 3:10-CV-00940-GPC-WVG, 3:10-CV-02519-GPC-WVG

BRIEF OF CIVIL PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF OBJECTOR-APPELLANT

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INTEREST AND IDENTITY OF *AMICI CURIAE*[1]

Amici curiae are professors at American law schools who are scholars and teachers of civil procedure and complex civil litigation. The *amici*'s interest in this litigation arises from this work, especially with respect to class actions, and the common desire to ensure that Federal Rule of Civil Procedure 23 is construed in a manner that protects the ability of class members to vindicate their individual interests. *Amici* agree that the settlement of this case, which sought to deprive class members both of an opportunity to opt out upon first learning the terms of settlement and of the opportunity to participate in the settlement if their request to opt out were denied, requires reversal of the judgment approving the settlement. *Amici curiae* are:

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[1] The parties have consented to the filing of this *amici* brief. *See* Fed. R. App. P. 29(a). No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

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SUMMARY OF ARGUMENT

To be deemed adequate under the Due Process Clause and Rule 23, class representatives and class counsel must protect the substantive and procedural rights of class members. Two of the procedural rights that class members in Rule 23(b)(3) class actions enjoy are the right to object to a settlement and the right to request exclusion from a previously certified class action at the time of settlement. Both rights were codified in the 2003 amendments to Rule 23, which adopted best practices for settling class actions.

The right to object and the "time-of-settlement" opt-out opportunity are critical safeguards that advance the interests of class members, ensure that class settlements are fair, and honor class members' autonomy to control important decisions regarding their claims. For this reason, scholars, as well as the American Law Institute, have argued that class members' interests are best served by provision of an opportunity to opt out "when [members] learn the details of the proposed settlement, when they hear objectors' challenges to the terms of the settlement, or when they see the judicially-crafted distribution plan and can determine how much they will actually recover."

The class settlement in this litigation was engineered in such a way that the procedural rights to object and request exclusion were not protected. Although it is the role of the court, and not counsel, to determine whether class members in a

previously certified Rule 23(b)(3) class may enjoy a time-of-settlement opt-out opportunity, class counsel negotiated a settlement in which counsel agreed that class members would receive "no new opportunity to opt out."[2] Counsel enforced this agreement through the structuring of the claims process. A class member who asserted a claim against the settlement fund was deemed to have waived the ability to object and request an opportunity to opt out; a class members who wished to object and request an opportunity to opt out could not also submit a claim. Withholding the benefits of a settlement from class members who sought to exercise their rights by challenging one of the settlement's terms was an impermissible and unprecedented move. In undertaking these actions, class counsel failed to adequately represent the interests of class members who wished to object and request exclusion from the settlement.

Taken together, these maneuvers violated the guarantee in the Due Process Clause and Rule 23 that class representatives and class counsel will adequately represent the interests of all class members. Nonetheless, the district court refused to permit the objector-appellant, Sherri B. Simpson, to opt out of the settlement. This refusal was an error of law and thus an abuse of discretion. As a result, the judgment must be reversed.

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[2] *See* ER 143 (Stipulation of Class Action Settlement § VII.1).

ARGUMENT

I. *General Principles.*

Class actions promise great benefits, including efficient resolution, effective deterrence, equalized incentives for plaintiffs and defendants to invest in litigation, and equitable treatment among similarly harmed class members. At the same time, class actions can create significant costs, including management difficulties, agency costs, and loss of class members' autonomy to control litigation regarding their claims. Federal Rule of Civil Procedure 23 mediates among these concerns, seeking to achieve the greatest net social benefit in collective proceedings.

In particular, Rule 23 employs three interlocking strategies to keep agency costs[3] and losses to litigant autonomy in check: exit, voice, and loyalty.[4] To begin

[3] Agency costs can arise when an asset owned by a principal is placed in the hands of an agent. An agent may have an incentive to maximize personal profit rather than the profit of the principal; agency costs are a combination of the principal's expense in monitoring the work of the agent to ensure the agent's fidelity and any difference between the asset's value in the hands of a hypothetical faithful agent and the actual value realized by a self-interested agent. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305, 308 (1976) ("In most agency relationships the principal and the agent will incur positive monitoring and bonding costs (non-pecuniary as well as pecuniary), and in addition there will be some divergence between the agent's decisions and those decisions which would maximize the welfare of the principal."). For a famous analysis of the agency-cost concerns in class actions, see Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991).

with loyalty, the Due Process Clause demands that class representatives and counsel adequately represent class members at all times during the litigation as the *quid pro quo* for class members' loss of their rights to pursue individual litigation.[5] In terms of the architecture of Rule 23, the requirements of commonality (Rule 23(a)(2)), typicality (Rule 23(a)(3)), adequacy of the class representative (Rule 23(a)(4)), and adequacy of class counsel (Rule 23(g)) interlock to ensure that class representation meets this constitutional foundation.[6]

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[4] The central work on these strategies arose in the corporate sphere, in which ownership and control of assets is similarly divided. *See* Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970). For a leading work importing these insights to class-action practice, see John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 376 (2000).

[5] The seminal case is *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present * * * ."). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) ("[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.").

[6] *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.").

Although loyal representation forms the core of the protection afforded to absent class members, Rule 23 bolsters those protections with voice and exit provisions. Thus, Rule 23 also provides class members with a voice: they can participate in the conduct of the litigation. Rule 23(d)(1)(B) authorizes a court, as a further means "to protect class members and fairly conduct the action," to "giv[e] appropriate notice" to allow class members an "opportunity to signify whether they consider the representation fair and adequate," to intervene, or "to otherwise come into the action."

Of greatest importance in terms of voice, when the parties propose a settlement of the class's claims, Rule 23(e)(5) gives "[a]ny class member" the right to "object to the proposal." Rule 23(e)(5) was added as a part of the 2003 amendment to Rule 23, which generally revamped and codified best practices for settling class actions.[7] The Advisory Committee's note made clear that this provision "confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise."

The final protection for certain class members is exit. Unlike class actions certified under Rules 23(b)(1) and 23(b)(2), class actions certified under

[7] In the 2003 amendment, the right to object now located in Rule 23(e)(5) was contained in Rule 23(e)(4). A stylistic revision in 2007 renumbered the section.

Rule 23(b)(3) contain a right to opt out at the time of certification.[8] In addition, if a Rule 23(b)(3) class is certified before the settlement, Rule 23(e)(4) permits a court to provide a second opportunity to opt out at the time of settlement.[9] Nothing in Rule 23 allows the parties, as part of the negotiation of a class settlement, to eliminate or constrain this important exit opportunity for class members.

This provision of exit rights in Rule 23(b)(3) actions recognizes their unique status. A creature of the pathbreaking 1966 amendment to Rule 23, Rule 23(b)(3) is the only class action for which damages are generally available,[10] and is therefore the class action in which the interests of class members in controlling their claims is greatest.[11] Because interest in exercising that control is often at its

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[8] *See* Fed. R. Civ. P. 23(c)(2)(B)(v) (requiring that class members in an action certified under Rule 23(b)(3) be notified that "the court will exclude from the class any member who requests exclusion"). In unique circumstances, some courts have permitted class members to opt out of a mandatory Rule 23(b)(1) or 23(b)(2) class action. *See, e.g.*, *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997); *Cty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990).

[9] *See* Fed. R. Civ. P. 23(e)(4) ("[I]f the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.").

[10] *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-67 (2011) (holding that monetary recovery is not generally permitted in Rule 23(b)(2) class actions); Jay Tidmarsh & Roger H. Trangsrud, *Modern Complex Litigation* 379 (2d ed. 2010) ("For the most part, * * * mandatory class actions involve injunctive relief and (b)(3) class actions involve damages.").

[11] *See* Fed. R. Civ. P. 23(c)(2) advisory committee's note to 1966 amendment ("[T]he interests of the individuals [in (b)(3) class actions] in pursuing their own litigations may be * * * strong * * * [and] is respected.").

zenith at the time that a class settlement is announced—and class members can best assess the risks and benefits of individual litigation against class litigation at that point—the 2003 amendment to Rule 23 made explicit through Rule 23(e)(4) the district judge's authority to provide a time-of-settlement opt-out opportunity.[12]

This time-of-settlement opt-out opportunity serves two related purposes. First, it advances the practical interests of class members. Thus, the Advisory Committee's note justified this opportunity by explaining that a class member's "decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known."[13] Numerous scholars concur that class members' interests are best served by the opportunity to opt out "when they learn the details of the proposed settlement, when they hear objectors' challenges to the terms of the settlement, or when they see the judicially-crafted distribution plan and can determine how much they will actually recover."[14] After

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[12] In 2003, the opt-out opportunity now located in Rule 23(e)(4) was contained in Rule 23(e)(3).

[13] Fed. R. Civ. P. 23(e)(3) advisory committee's note to the 2003 amendment.

[14] Rhonda Wasserman, *The Curious Complications with Back-End Opt-Out Rights*, 49 Wm. & Mary L. Rev. 373, 377 (2007). *See also* Geoffrey P. Miller, *Rethinking Certification and Notice in Opt-Out Class Actions*, 74 UMKC L. Rev. 637, 646-49 (2006); Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving* Amchem Products, Inc. v. Windsor, 59 Ohio St. L.J. 1155, 1158 (1998); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 490 n.109 (1996).

all, "[i]t is their claim, and it is therefore their decision what to do with it."[15] The American Law Institute agrees.[16] Next, "[t]his second opt-out opportunity helps to provide the supervising court the 'structural assurance of fairness,' called for in *Amchem Products Inc.*"[17] As the Advisory Committee similarly stated, provision of an exit opportunity at settlement "may be one factor supporting approval of the settlement."[18] If a court allows class members a time-of-settlement opt out and "few exercise it," the court may have "an additional basis for believing that the proposed settlement is fair, reasonable, and adequate."[19]

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[15] *See* George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. Rev. 258, 281 (1996).

[16] *See Principles of the Law of Aggregate Litigation* (Am. L. Inst. 2010) ("In any class action in which the terms of a settlement are not revealed until after the initial period for opting out has expired, class members should ordinarily have the right to opt out after the dissemination of notice of the proposed settlement. If the court chooses not to grant a second opt-out right, it must make a written finding that compelling reasons exist for refusing to grant a second opt-out.").

[17] *Manual for Complex Litigation, Fourth* § 21.611 (2004). The *Manual*'s quotation from *Amchem Products, Inc. v. Windsor* paraphrases *Amchem*'s disapproval of a settlement that contained "no structural assurance of fair and adequate representation for the diverse groups and individual affected." 521 U.S. 591, 627 (1997).

[18] The Advisory Committee stated that "[m]any factors," including "the information available to class members since expiration of the first opportunity to request exclusion" and "the nature of the individual class members' claims," may weigh into a district court's decision to permit a second exit opportunity. *See* Fed. R. Civ. P. 23(e)(3) advisory committee's note to 2003 amendment.

[19] Lee Rosenthal et al., *Federal Civil Procedure Manual* § 9.7.11, at 368 (2014).

This combination of loyalty, voice, and exit ensures not only that the due-process mandate of adequate representation is met, but also that agency costs and intrusions upon class members' autonomy are kept to a minimum. In particular, providing each class member with a right to object to a settlement permits the member both to argue that class counsel has failed to consider adequately the value of that member's claim and to maintain some control over attaining proper value for the claims. Likewise, a time-of-settlement opportunity to opt out can act as an incentive to ensure counsel's faithful representation, for a significant number of opt-outs due to a poor settlement will reflect negatively on counsel's performance and on counsel's fee. Such an opt-out opportunity also advances the autonomy of class members to control perhaps the most important decision regarding the disposition of their claims: the decision to settle or litigate.[20]

II. *The Settlement In* Low v. Trump University.

Measured against these principles, the settlement in this litigation fails in important ways to respect and protect the interests of individual class members such as Ms. Simpson. The critical deficiency is the unique way in which this settlement sought to deprive class members *both* of any opportunity to opt out *and*

[20] As the Advisory Committee made clear, a district court can set conditions on the time-of-settlement opt-out right to keep the costs associated with opting out to a minimum. For instance, a court might direct that rulings made before settlement bind class members who opt out. *See* Fed. R. Civ. P. 23(e)(3) advisory committee's note to 2003 amendment.

of any effective means to speak out against the settlement's ban on the exercise of their right under Rule 23(e)(4) to request an opportunity to opt out. On the one hand, counsel for the class and for the defendants agreed to deny class members the ability to opt out of the settlement—even though the decision to permit an opt-out opportunity was for the court, and not for class counsel, to make. On the other hand, the structure for claiming against the fund put an impermissible price on objecting to this provision and seeking an opportunity to opt out: the loss of any benefits from the settlement if Judge Curiel rejected the objection requesting an opportunity to opt out. This price was extracted indirectly: claims against the fund and objections to the settlement were to be submitted on the same day, and in submitting a claim form, class members agreed to waive any rights to pursue separate litigation. Thus, class members faced a classic Catch-22: they could object and seek exclusion, but then they lost the ability to submit a claim; or they could submit a claim, but then they lost the ability to object and seek exclusion. In effect, class members who wanted to request exclusion were punished by the withdrawal of any benefits of the settlement, even though they had been told in the class notice at the time of certification that staying in the class was the only way to obtain any benefits from a possible settlement.[21]

[21] *See* ER 106 (Class Notice, dated June 8, 2016).

Nothing in Judge Curiel's order preliminarily approving the settlement countenanced that class counsel could extract such a price for filing an objection requesting a time-of-settlement exclusion from the settlement; it was instead a function of the way in which counsel orchestrated the claims and objection processes. As scholars in the field of civil procedure and complex litigation, we are unaware of any case that similarly attempted to burden the right of class members to file objections seeking a time-of-settlement opportunity to opt out. Any such effort is deeply problematic for a number of reasons.

The first is Rule 23(e)(5), whose text in no way suggests that the right to object and seek time-of-settlement exclusion is contingent on a class member's rejection of the settlement's benefits, or that the assertion of a class member's right to object on this basis makes a class member ineligible for participation in the class award. Nor does the Advisory Committee's note on the text that is now contained in Rule 23(e)(5) support the use of such a tactic.[22]

Second, conditioning a request to opt out on exclusion from the settlement discourages class members from filing objections seeking an opportunity to opt out—and may have had that effect in this litigation.[23] But Rule 23(e)(5)'s objector

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[22] On the reasons that the Advisory Committee provided a time-of-settlement opportunity to opt out, see *supra* notes 12-13, 18 and accompanying text.

[23] In approving the settlement, Judge Curiel specifically cited the lack of objections as an indicator of the settlement's fairness. *See* ER 10-11 (Order

provisions serve an important public purpose. Rather than allowing parties to discourage objections, "[i]t is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally."[24] In many cases, objections are the principal protection available to class members to prevent collusive settlements characterized by high agency costs; accordingly, the ability to freely assert objections can deter class counsel from engaging in such class-harming behavior. For this reason, one leading authority on class actions has "urge[d] courts to enhance opportunities for claimants' and objectors' direct participation in the class action settlement review and approval process" as a means to "assure that current claimants' interests are properly represented."[25] The Hobson's choice in the Trump University settlement process (either to object and seek an opportunity to opt out or to be compensated, but not both) is directly contrary to the principle that "[a]n

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Granting Joint Motion for Final Approval of the Proposed Class Action Settlement). But such a lack of objection is a poor barometer of the class's feelings when the price of objection may be disqualification from the settlement's benefits.

[24] *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002).

[25] Deborah R. Hensler, *Bringing* Shutts *into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. Rev. 585, 589 (2006).

objector is entitled to participate effectively in the settlement hearing and to have an adequate opportunity to evaluate the strength of a proposed settlement."[26]

Third, had Ms. Simpson elected *not* to submit a claim, she could well have been barred from asserting her objection. Many courts have held that an objector must submit a proof of claim in order to have standing to object.[27] Thus, the claims-and-objection process constructed by counsel created a true Catch-22 for

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[26] *McDonough v. Horizon Blue Cross Blue Shield of N.J.*, 641 F. App'x 146, 151 (3d Cir. 2015). *See also Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1558 (3d Cir. 1994) ("[T]he objecting class members must be given an opportunity to address the court as to the reasons the proposed settlement is unfair or inadequate."); *Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 619 (S.D. Cal. 2005) (noting that "objectors are entitled to meaningful participation in the settlement proceedings and leave to be heard"). Although this principle is usually invoked in connection with the ability of objectors to obtain discovery, it applies generally to the objection process. Although objectors can in some instances impose improper costs on the settlement process by strategically objecting to extort a higher award, that concern is not relevant here for two reasons. First, there is no indication that Ms. Simpson was seeking a side settlement; she wanted only to opt out and press her own claim against the defendants. Second, Rule 23(e)(5) contains a mechanism to address strategic objections, requiring court approval before withdrawal of an objection. Nothing in Rule 23(e)(5) permits the parties or court to "supplement" this protection with the Hobson's choice that Ms. Simpson faced.

[27] *See, e.g.*, *Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1128 (9th Cir. 2002) (holding that a class member lacked standing where he failed "to submit a claim for his losses, as he was required to do in order to get a share of the settlement proceeds"); *In re Mercury Interactive Corp. Sec. Litig.*, No. 5:05-CV-03395, 2011 WL 826797, at *2 n.2 (N.D. Cal. Mar. 3, 2011) ("Because neither Mr. Delluomo nor the Orloffs submitted a claim in this case, they lacked standing to object to the settlement."); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 340 (S.D.N.Y. 2005) ("Moulton did not file a proof of claim and therefore does not have standing to bring her objections.").

Ms. Simpson: fail to submit a claim and face the argument that she lacked the standing to object, or submit a claim and face the objection (as she ultimately did) that she lacked the standing to object. The only legitimate way to resolve this Kafkaesque dilemma while allowing the objection process to do its vital work is to recognize that filing a claim does not and cannot deprive a class member of the ability to object to the settlement.[28]

Finally, any argument that filing a proof of claim deprived Ms. Simpson of her right to object renders the class notice of September 21, 2015, defective as a matter of due process and Rule 23(c). In the trial court and again on appeal, counsel have argued about the exact meaning of this notice, especially Clause 13 (an issue beyond the scope of this *amicus* brief). But even on the settlement proponents' own reading of this notice—that Clause 13 did not, in their view, promise a second opt-out opportunity at the time of settlement—the notice failed to inform class members like Ms. Simpson of an absolutely critical piece of information necessary to any decision on whether to opt out at the time of certification: that if class members remained in the class, they would not receive any settlement award if they objected that they should be allowed to opt out at the

[28] This Court has recognized in a different context that objectors may participate in the settlement, and indeed often must do so in order to have standing to object to the district court's award of attorney's fees to class counsel. *See Stetson v. Grissom*, 821 F.3d 1157, 1163-64 (9th Cir. 2016).

time of settlement and lost that objection. On the contrary, the 2015 notice told class members that the only way to receive any class award was to remain in the settlement. It did not tell class members that receipt of an award would also hinge on a second choice, to be made at the time of settlement: declining to file an objection on a specific subject that Rule 23(e)(4) gave them the right to pursue.

To meet the requirements of the Due Process Clause and Rule 23(c), notice must apprise class members of the information that reasonable class members would need to know in order to make an intelligent exercise of their right under Rule 23(c)(2)(B)(v) to request exclusion.[29] The information that remaining in the class might result in a sacrifice of the right to seek time-of-settlement exclusion as a condition of receiving any potential class award, conjoined with the information that class counsel might seek to negotiate away and thwart a time-of-settlement opt-out opportunity, would have been necessary to render the notice adequate under the Due Process Clause and Rule 23(c). The fact that no such information was provided is a strong indication that any subsequent gaming of the settlement

[29] *See Shutts*, 472 U.S. at 812 (1985) ("The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950))); *id.* ("The notice should describe the action and the plaintiffs' rights in it."); Fed. R. Civ. P. 23(c)(2) advisory committee's note to 1966 amendment ("The notice setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances.").

process to force class members like Ms. Simpson to choose between objecting to obtain an opt-out opportunity and participating in the settlement was improper.

We have labored over the parties' effort to suppress class members' voice to object that an opt-out opportunity was appropriate to spotlight the district court's ultimate decision not to permit an opt-out opportunity at the time of settlement. Such a decision generally lies within the discretion of the court.[30] Nonetheless, when class counsel negotiates a settlement that prevents class members from opting out and then designs a claims-submission system to withhold settlement benefits from class members who wish to object to the settlement on this basis, counsel's conduct imposes too heavy a price on class members' right to exercise their voice. In this context, the district court's failure to permit class members to opt out is an abuse of discretion.

The reason is simple. In order for the class representative and class counsel to be regarded as adequate, both as a matter of the Due Process Clause and Rule

[30] Fed. R. Civ. P. 23(e)(4) ("If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."). Although this Court has not addressed the standard of review for a decision regarding time-of-settlement opt-out opportunity under Rule 23(e)(4), the use of the word "may" suggests that the decision is a discretionary one, reviewable on an abuse-of-discretion standard. *See* Fed. R. Civ. P. 23(e)(3) advisory committee's note to 2003 amendment (stating that the decision under Rule 23(e)(4) "is confided to the court's discretion"); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) (applying an abuse-of-discretion standard).

23, they must protect not only the class members' rights to a substantively fair outcome, but they must also protect the procedural rights of class members. The need to protect these procedural rights is the clear lesson of *Amchem Products, Inc. v. Windsor*: the substantive fairness of a settlement cannot overcome the failure of the class representatives and class counsel to abide by the procedural protections guaranteed to class members.[31] In negotiating away class members' ability to request to opt out at the time of settlement, class counsel gave away something that was not in its power to give. The court, and not counsel, is charged with the decision to permit time-of-settlement opt-outs, and Rule 23(e)(4) guarantees class members the right to request exclusion from the settlement. Counsel then compounded the error by exacting as the price of objecting to this provision the right to obtain any benefit from the settlement. In an apparent attempt to secure a substantively fair settlement, counsel conceded away class members' procedural rights. In the process, counsel created a conflict within the class between those class members who wished to object and seek an opportunity to opt out and those

[31] *See* 521 U.S. at 621 ("[T]he standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness."). *Cf. McDonough*, 641 F. App'x at 151 ("Whether an objector was denied procedural fairness in his or her effort to challenge the adequacy of a settlement is judged based on the totality of the circumstances surrounding the fairness hearing.").

who did not.[32] This internal conflict over assertion of the Rule 23(e)(4) opt-out opportunity is exactly the sort of intra-class conflict that torpedoed the judgments in *Hansberry v. Lee*[33] and *Amchem Products, Inc.*[34]

When class representatives or class counsel inadequately represent class members with respect to their procedural rights as class members, the class judgment cannot bind the members. Like the plaintiffs in *Hansberry*, class members are therefore free to pursue separate litigation as a matter of due process, whether or not the district judge grants a time-of-settlement opt-out opportunity. In such a case, a district court can step in to prevent such inadequacy by rejecting the impermissible settlement structure that counsel created. Judge Curiel unfortunately failed to do so. In the alternative, a district judge can avoid the due-process problem of counsel's making by granting a time-of settlement opportunity to opt

[32] We assume that at least some class members agreed with counsels' decision to suppress the ability of other class members to object and seek an opportunity to opt out. If no class members agreed with that decision, the conflict is even more egregious.

[33] *See* 311 U.S. at 45 ("[It is not possible] to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.").

[34] *See* 521 U.S. at 627 ("The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.").

out—for it is clear constitutional error, and therefore an abuse of discretion, to deny an inadequately represented class member an opportunity to leave the litigation and pursue her rights.[35] Judge Curiel also failed to take this route.

To be clear, a judge need not extend a Rule 23(e)(4) right to opt out in every case. But when counsel overreaches and seeks to prevent class members from exercising the procedural right to request exclusion guaranteed by Rule 23(e)(4), granting an opt-out right is the simplest, best, and necessary way for the court to correct the overreach. The failure of counsel to protect class members' rights of voice and exit also constituted a breach of the obligation of loyalty, and the only remedy for that breach is to permit the class members to exit the litigation.

That conclusion is especially plain here, where Clause 13 of the class notice of September 21, 2015 may be reasonably read to include a promise to provide an opportunity to opt out at the time of settlement.[36] Moreover, this conclusion is

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[35] *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017) ("[I]t will always be considered an abuse of discretion if the district court materially misstates or misunderstands the applicable law."); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) ("[T]his court has oft repeated that an error of law *is* an abuse of discretion.").

[36] *See* ER 113 (Class Notice, dated June 8, 2016). Our argument does not hinge on whether Clause 13 promised class members a second opportunity to opt out; it is sufficient that Clause 13 of the class notice is reasonably subject to such a construction, given the notice's failure to advise members of the later encumbrance of their right to object and request exclusion. *Cf. Stetson*, 821 F.3d at 1164 (stating that "in accordance with the general principle of *contra proferentem,* we construe the ambiguity [in a settlement agreement] against [the drafters of the agreement]").

unaffected by whether the settlement may have been a good deal for class members, nor is it relevant that class counsel declined any fee award. *Amchem Products, Inc.* is absolutely clear that the substantive fairness of a settlement does not cure the failure of the class representatives and class counsel to defend the procedural rights of class members.[37]

On appeal, Ms. Simpson has argued that she enjoyed an ability to opt out both as a matter of due process and as a matter of right under Rule 23(e)(4). Due process is often a fact-sensitive inquiry.[38] On the facts of this case, in which the district court refused to take class members off the horns of their object-or-award dilemma by affording them a Rule 23(e)(4) time-of-settlement opt-out opportunity, her argument has force.[39] Another lens through which to describe the same

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[37] *See supra* notes 17, 31, 34 and accompanying text.

[38] *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring) ("'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); *see also Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

[39] Although this Court has found no absolute due-process right to opt out when a class member learns the terms of a settlement, *see Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F.2d 615 (9th Cir. 1982), *Officers for Justice* did not present the unique circumstances that make the due-process

problem is to recognize that Rule 23(e)(4) satisfies due process by permitting district courts to extend an opt-out opportunity in circumstances in which the failure to provide that procedural opportunity creates a constitutional problem. Under this approach, the district court must honor this request to opt out, and it becomes an abuse of discretion not to permit a class member to opt out.

As Ms. Simpson has argued, there are many reasons why the district court should have exercised its discretion to permit class members to opt out. One reason to do so was to bolster the argument that the settlement was procedurally fair.[40] In our view, the district court's need to provide an opt-out right flowed directly from class counsel's attempt to impose an impossible price on Ms. Simpson for asserting her right to object and request exclusion from the litigation.

CONCLUSION

Protecting the interests of class members and minimizing the agency costs and losses of litigant autonomy in class actions are critical obligations shared by class counsel and the courts at all points during the life cycle of a class action. In particular, respect for the avenues of voice and exit is essential to ensure the adequate representation of class members that the Constitution and Rule 23

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argument particularly salient here: the suggestion in the class notice of a settlement-stage opt out and the effort to squelch any opportunity to object to the settlement by making it impossible to both object by seeking exclusion and participate in the settlement.

[40] *See supra* notes 17-18 and accompanying text.

demand. Because the approval of this class settlement failed to honor and protect these obligations, the judgment of the United States District Court for the Southern District of California must be reversed.

Dated: June 19, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word length requirements of Circuit Rule 32-1(a) because it contains 6,477 words, exclusive of the portions excluded by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: June 19, 2017

s/ Elizabeth Brannen
Elizabeth Brannen

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2017, I electronically filed the foregoing Brief of Civil Procedure Professors as *Amici Curiae* in Support of Objector-Appellant with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

Dated: June 19, 2017

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