The adversary system contemplates a neutral and passive fact-finder; the presentation of evidence by the parties’ attorneys; highly-structured procedural, evidentiary, and ethical rules; and appellate review to ensure compliance with these rules. Judicial passivity is a key feature of this system: if judges could actively seek out evidence on their own, they might prematurely assess the merits of the case, compromise their neutrality, and undermine the public’s confidence in the integrity of the system.

Thus, the adversary system holds attorneys, rather than the court, principally responsible for the protection of their clients’ interests. The rules of professional responsibility obligate attorneys to zealously represent their clients’ interests, and fee arrangements, such as the contingent fee, often reinforce the alignment of clients’ and attorneys’ interests. Since clients typically have far more at stake in any given case than their attorneys do, clients have an incentive to monitor their attorneys’ behavior to ensure loyalty and competency.

Class actions do not fit comfortably within this theoretical framework. Unlike attorneys representing plaintiffs in most civil cases, attorneys representing the class often have much more at stake financially than any of the individual class members. Rarely do class members have a financial incentive to monitor the conduct of class counsel. Since class counsel’s financial interests may diverge from the interests of the class, class action litigation presents unique risks of disloyalty, collusion between class counsel and the defendant, and sub-par representation.

The questions are whether, in these circumstances, the court owes absent class members a special duty; if so, what is the nature and scope of that duty; and whether such a duty can be squared with the precepts underlying the adversary system.