

I CUT, YOU CHOOSE: THE ROLE OF PLAINTIFFS' COUNSEL IN ALLOCATING SETTLEMENT PROCEEDS

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INTRODUCTION

THERE are two realms of group litigation. One contains mass actions and other consensual proceedings with more than one plaintiff. Lawsuits in this realm are consensual because each plaintiff has an engagement agreement with the attorney(s) acting for the group. The second contains class actions and other nonconsensual proceedings. These lawsuits are nonconsensual because attorneys represent plaintiffs (in whole or in part) without their consent freely given in market transactions.

From an economic perspective, litigation groups in both realms look much the same except for their manner of creation. All resemble corporations.¹ Plaintiffs contribute assets—their claims—to capitalize these joint enterprises. In a fraction of the cases, they also contribute money or time. In return for their investment, the plaintiffs become shareholders with rights to any money the enterprise recovers after expenses. They hope to make themselves better off by selling the enterprise's assets to a defendant at the most profitable price. Sale can occur via a forced exchange at a price set

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¹ By saying this, we do not mean to take a position as to whether or not plaintiff classes, like corporations, are entities. See generally David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 *Notre Dame L. Rev.* 913 (1998) (endorsing treatment of classes as entities apart from the class members). But see Jules L. Coleman & Charles Silver, *Justice In Settlements*, 4 *Soc. Phil. & Pol'y* 102 (1986) (espousing entity theory).

by a court or via a negotiated settlement at a price set by the parties. Settlement is by far the most common means of valuing a group's claims.²

As in corporations,³ ownership and control are separated in litigation groups. Lawyer-managers make most day-to-day decisions and, like managers generally, have obligations and incentives to act for the benefit of the owners. Principals become involved mainly in fundamental decisions, such as whether to settle a case by selling claims to a defendant on particular terms. Even then, plaintiffs rely heavily on lawyers to advise them on whether to accept a settlement offer and how to structure the deal. Like shareholders of a company that proposes to sell substantially all of its assets, plaintiffs expect management to help evaluate a proposed sale and then to effectuate it.

From this perspective, rules of professionalism and civil procedure that govern the operation of litigation groups are like default provisions of incorporation statutes. They are form constitutions for group enterprises whose provisions control when plaintiffs do not or cannot amend them. These constitutions serve many functions, including reducing agency costs and fixing procedures for making fundamental decisions.⁴

The form constitutions that currently govern consensual litigation groups differ in important respects from those regularly employed in nonconsensual undertakings. For example, in voluntary groups, the decision to enter into a settlement binding on all plaintiffs must be made under a unanimity rule.⁵ A class action, in contrast, is governed by a dictatorship rule in which a judge acting as a guardian or trustee casts the lone ballot.⁶ As a result, classwide settlements can be, and often are, imposed against group members' wishes.

² See Thomas E. Willging et al., *Federal Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 60 (1996)* (reporting settlement rates ranging from 62% to 100% for certified class actions).

³ See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305 (1976).

⁴ See Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theory and Evidence from LLCs*, 73 *Wash. U. L.Q.* 369, 373-82 (1995).

⁵ See Model Rules of Professional Conduct Rule 1.8(g) (1997). In the absence of unanimity, only those group members who consent to the settlement are bound. See *id.*

⁶ See Fed. R. Civ. P. 23(e).

That different form constitutions govern consensual and nonconsensual litigation groups is unsurprising. Nonconsensual groups are regulatory alternatives to voluntary collective actions. They are available mainly when voluntary group lawsuits are unlikely to form. The source of the difficulty may be that lawyer-entrepreneurs have insufficient incentives to organize latent groups or that plaintiffs have little interest in participating. Because these problems are structural, it makes intuitive sense that nonconsensual and consensual litigation groups should operate differently. Even though both categories of groups are similar in many respects, a single set of governing arrangements may not serve both equally well.

In this Article, we will examine an emerging and seemingly important difference between the rules that govern the settlement process for consensual and nonconsensual litigation groups, in particular the rules governing the conduct of attorneys in this process. In consensual proceedings, attorneys dominate the settlement process and actively help determine each plaintiff's share of a group-wide deal. In nonconsensual proceedings, attorneys had long been similarly involved but recently had their role scaled back. *Amchem Products v. Windsor*,⁷ a 1997 Supreme Court decision, seems to require class counsel to stay out of the portion of the settlement process in which settlement proceeds are allocated among plaintiffs. If this reading is correct, *Amchem* is a revolutionary case with profound implications. It will require major changes in the conduct of settlement negotiations.

There is also a normative question to consider, whatever *Amchem* may state or imply. *Should* lawyers representing (nonconsensual or consensual) groups help allocate settlement funds? Or should they remain apart from this process in which group members' interests inevitably conflict? This question arises every time a lawyer representing an injured driver and passenger receives a lump-sum settlement offer from the defendant who caused the collision. It also arises when a team of attorneys represents thousands of purchasers in a securities fraud class action and an issuer or underwriter offers to settle the whole case. Whenever lawyers represent multiple claimants, the normative question about the proper role of lawyers in the allocation process must be faced.

⁷ 117 S. Ct. 2231 (1997).

The normative question is difficult to answer, however. First, it requires one to develop a theory of lawyers' conflicts. This is no easy task, especially when conflicts in both consensual and nonconsensual lawsuits must be considered. Because of the nonconsensual nature of class actions, client consent cannot cure conflicts. One must therefore decide which conflicts, if any, class counsel can incur *without the informed consent* of their clients. Second, the normative question forces one to ask what good group settlements look like. The rules that govern lawyers' conduct are elements of the procedural system, and procedures are justified, when they are, by virtue of their tendency to promote desirable substantive outcomes.⁸ Therefore, different ways of regulating lawyers' conduct must be evaluated in light of their impact on the terms settlements contain, the terms being the substantive results.

In turn, the task of deciding what a good group settlement looks like is itself complicated by the possibility that one set of norms may apply to consensual group settlements and another to nonconsensual group settlements. It is tempting to assume that all good group settlements will conform to the same standards, but this may not be so. We may look with favor upon any and all settlements of consensual group lawsuits that bind only plaintiffs who consent. But we may apply stricter standards to class action settlements because these occur without plaintiffs' consent and bind even plaintiffs who oppose them.

Our conclusion is that lawyers representing both consensual and nonconsensual litigation groups must be allowed to make inter-plaintiff tradeoffs in the course of litigation and should also be allowed to participate in the allocation process. For this reason, we think that *Amchem*, if it in fact establishes a strict "no conflicts" rule for class actions, is unworkable and wrong.⁹ Conflicts of interests and associated tradeoffs among plaintiffs are an unavoidable part of all group lawsuits and all group settlements. There being no way

⁸ See Shapiro, *supra* note 1, at 929.

⁹ It is important not to exaggerate the extent of our disagreement with *Amchem*. The case raised many important issues, and we disagree with the Supreme Court on only one of them. On the central question, which was whether a group of claims that could not be tried as a class could nonetheless be settled as a class, we agree with the Court that the right answer is "no." See Brief Amici Curiae of Law Professors in Support of Respondents, *Amchem Prods. v. Windsor*, 117 S. Ct. 2231 (1997) (No. 96-270) [hereinafter Brief Amici Curiae] (written by Professor Silver).

to eliminate conflicts from multiple-claimant representations, the only question is how to deal with them. We recommend an explicit recognition that in both consensual and nonconsensual proceedings, counsel can properly help decide how these conflicts are resolved.

In Part I, we describe the legal regulation, pre-*Amchem*, of counsel's role in the settlement allocation process for both consensual and nonconsensual litigation groups. We show that the conduct of lawyers in the two kinds of lawsuit was basically the same. In Part II, we consider the role that counsel *should* play in allocating settlement proceeds and handling other conflicts in group proceedings. We first criticize the unreality of the *Amchem* Court's "no trade-offs" approach that would apparently preclude counsel from making any settlement allocation decisions, or handling other conflicts, in the class action context. We then argue that in consensual group lawsuits lawyers should be permitted, with reasonably informed client consent, to incur and help resolve all conflicts among concurrent clients so long as the clients have some common interests at the time consent is given. Finally, we contend that attorneys must be allowed to incur conflicts in class actions too, and that they should operate under a reasonableness standard like that governing trustees. The latter conclusion is supported by two determinations: First, no alternative arrangement is clearly superior to counsel's involvement in the allocation process; and, second, regulatory bodies should replicate market-based arrangements whenever possible.

In Part III, we undertake a critical examination of the substantive norms that underlie the existing rules governing settlements in consensual group litigation. In particular, we question the appropriateness of horizontal equity as the apparent governing norm. We conclude that, as a procedural matter, the aggregate settlement rule is correct in permitting a group's attorney(s) to play a central role in the settlement allocation process. We also conclude, however, that the nonwaivable disclosure and unanimous consent procedures required by the rule are not especially effective means of ensuring good group settlements or, even, of preventing uncontroversially bad ones. Having shown in Part II that the consent requirements should be made waivable, we suggest in this Part that the disclosure requirement should be altered so that group members are entitled only to their attorney's opinion of the expected net value of their own claims at trial.

I. COUNSEL'S ROLE IN THE ALLOCATION PROCESS
BEFORE *AMCHEM*

A. Consensual Litigation Groups

Rules of professional responsibility constrain the conduct of counsel for both consensual and nonconsensual litigation groups. One such rule that applies uniquely to counsel for consensual litigation groups is the aggregate settlement rule,¹⁰ a version of which is in force in every state. The aggregate settlement rule permits an attorney to negotiate a deal binding on an entire plaintiff group only when all the plaintiffs consent and have received information about the nature of every other group member's claim and the settlement payments others are to receive.¹¹ Settlements binding on fewer than all plaintiffs can also be effected, but only plaintiffs who consent can be bound.

As currently framed and as construed in case law, the aggregate settlement rule is constitutional in the strongest sense. It establishes rights that neither lawyers nor clients have any power to alter or waive, even by unanimous agreement.¹² For present purposes, however, it is significant that the rule *does* allow lawyers to help allocate settlement funds in consensual group proceedings. This is clear from the text of the rule, from judicial glosses on it, and from widespread lawyering practices that have grown up around it.

The rule states that a lawyer who "participate[s] in making an aggregate settlement" must give each client information about "the existence and nature of all the claims . . . involved and of the participation of each person in the settlement."¹³ The first quoted phrase plainly anticipates that lawyers can and will negotiate group-level deals. The second anticipates that these negotiations will determine how much individual plaintiffs are to receive, since the extent of

¹⁰ See Model Rules of Professional Conduct Rule 1.8(g) (1997).

¹¹ See *id.*

¹² See Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733, 767-68 (1997) (citing sources). Our thesis in that article was that the rule should be a waivable default instead of a fixed requirement. We further develop this critique later in this Article, when we suggest that the rule's default disclosure requirements should be altered so that members of consensual litigation groups are entitled only to information reasonably bearing on the value of their claim. See *infra* Section III.A.

¹³ Model Rules of Professional Conduct Rule 1.8(g).

each plaintiff's proposed "participation" can be known only after a proposed allocation has been determined.

The few cases to date that construe the aggregate settlement rule agree with these observations.¹⁴ For example, in *Hayes v. Eagle-Picher Industries*,¹⁵ the court refused to enforce a unanimous voluntary agreement made at the outset of litigation that the members of the plaintiff group would all be bound by any settlement that received the consent of a simple majority of group members.¹⁶ The court's decision rested in part on its belief that, under the aggregate settlement rule, no agreement to abide by a collective settlement decision could be binding unless each plaintiff entered into it knowing the size of the payments each of the group members was slated to receive.¹⁷ This may not be a sensible position,¹⁸ but it shows that the court expected someone, most likely the group's attorney, to hammer out an allocation formula before putting the proposed settlement to a vote.

Given the absence of any prohibition, attorney domination of settlement allocation decisions in consensual litigation groups should not be surprising. Two polar practices are common, only one of which is thought to yield aggregate settlements.¹⁹ The first practice involves negotiating a lump sum to cover a group of cases and then carving individual settlement payments from it, sometimes assigning plaintiffs to disease categories or slots on payment grids.²⁰ The

¹⁴ See Annotated Model Rules of Professional Conduct 134-35 (3d ed. 1996) (collecting cases).

¹⁵ 513 F.2d 892 (10th Cir. 1975).

¹⁶ See *id.* at 894-95.

¹⁷ See *id.* at 894.

¹⁸ Indeed, we criticize this result in Silver & Baker, *supra* note 12, at 768-70. See also *infra* Section II.C (arguing that plaintiffs should be permitted to consent to conflicts).

¹⁹ A third practice also exists. It involves the negotiation of a formula that will govern individual payments irrespective of the total settlement amount. Formula settlements are also common in class actions. See Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 12.07 (3d ed. 1992).

²⁰ See Silver & Baker, *supra* note 12, at 736-37; see also Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 *Cornell L. Rev.* 1159, 1181 (1995) ("Mass torts lawyers have long been settling 'inventories' of cases in which they settle for large amounts of 'fixed funds' and then allocate specific awards themselves to individual plaintiffs."); *id.* at 1196 ("[I]t is a common practice for plaintiffs and defendants to agree to global sums to be divided by plaintiffs' attorneys . . ."); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1364-65 (1995) [hereinafter Coffee, *Class Wars*]

second practice works the opposite way. An individual payment is separately negotiated for each plaintiff, with the total for the group equaling the sum of the individual payments.²¹

By describing the approaches as polar types, we do not mean to imply that they differ substantively, although judges applying the aggregate settlement rule seem to think they do.²² To the contrary, there is no apparent economic difference between the two approaches. One has the group's lawyer bargain for \$10 million and then carve it up. The other has the lawyer bargain for a series of payments that sums to \$10 million. Either way, the same amount of money changes hands and everyone winds up in the same position. Even the attorney's fee is the same on the standard contingent percentage approach. One might easily conclude that the doctrinal distinction reflects a superficial rather than a substantive difference.²³

The artificiality of the distinction between the two approaches seems even clearer when one considers that, because bargaining occurs in an information-rich environment, lawyers commonly use both approaches at once. Participants in settlement negotiations often know a great deal about claim values and the total amount the defendant will be able or willing to offer for an aggregate settlement. They obtain information from jury verdict reporters, claims adjusters, insurance policies, securities filings, a database of cases previously handled by the firm, and other lawyers. Negotiations between the same participants in previous cases are also sources of

("[A]ttorneys specializing in the mass tort field tend to accumulate a large inventory of clients with similar claims . . . [T]hey also tend to deal in inventories, settling their cases not on an individual basis, but on an inventory-wide basis with a particular defendant."); Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. Times, Mar. 24, 1995, at B6 (discussing block settlement of personal injury claims resulting from an explosion).

²¹ See Silver & Baker, *supra* note 12, at 756-59.

²² See *id.* at 758 n.84 (citing cases).

²³ The practice of avoiding the aggregate settlement rule by structuring a group deal as a series of individual demands is an example of "avoision":

[P]eople "get around" rules in various ways, some legitimate, some not. The ways we consider legitimate we call avoidance; the others we call evasion. "Avoision" is how [the author, Katz] referred to the panoply of questionable conduct about whose status as either avoidance or evasion we couldn't make up our minds. The avoision problem is to determine how and why to put which cases in either of those two slots.

Leo Katz, III-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law 52 (1996).

information.²⁴ Finally, parties often reveal information during the course of litigation. Negotiating is expensive, and parties are reluctant to invest in negotiations that are bound to fail. To avoid wasting time, they signal each other, discussing aggregate figures and ballpark totals even when they intend to bargain claim by claim. When negotiations are proceeding on the assumption that a settlement must wrap up all pending cases, it is senseless to work through the first n cases if negotiations are certain to fail at case $n + 1$.

Our point in describing the two negotiating practices is not to show that they differ. It is to suggest that attorneys allocate settlement proceeds regardless of how negotiations are structured. Whether working from gross amounts to individual payments or from individual payments to gross amounts, attorneys dominate the allocation process in consensual group litigation. A group-wide deal may or may not formally qualify as an aggregate settlement under Model Rule 1.8(g), but the pattern of individual payments will bear an attorney's imprint all the same.

One could argue that attorneys who help allocate group settlements violate professionalism rules other than the aggregate settlement rule. The obvious alternative candidate is Rule 1.7 of the Model Rules of Professional Conduct, the general conflict of interests rule.²⁵ Insofar as the law on the books is concerned, this sugges-

²⁴ See Coffee, *Class Wars*, supra note 20, at 1365 ("In practice, . . . mass tort litigation is reduced to battles between repeat players who have litigated and negotiated settlements in similar cases many times in the past.").

²⁵ Rule 1.7 states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules of Professional Conduct Rule 1.7(b) (1997).

tion is not clearly right; and insofar as the law in action is concerned, it is plainly wrong.

At the blackletter level, Model Rule 1.7(b)(2) expressly allows a lawyer to represent multiple clients in a single lawsuit, and it does so without imposing any conditions on the scope or nature of lawyers' involvement in these representations. For example, nothing in the rule prohibits a lawyer from helping co-clients allocate settlement proceeds. The omission suggests that lawyers do not violate the rule by participating in the allocation process. This point acquires special force when one considers that lawyers cannot avoid some allocation decisions, as we explain below.²⁶

The natural reading of Model Rule 1.7 is therefore that lawyers, with informed client consent, may help with all aspects of multiple-client representations, including settlement, but the matter is open to doubt. For example, there is authority encouraging or requiring lawyers to let clients divide lump sums without their help.²⁷ Most of it is drawn from driver/passenger cases and other small-number representations in which co-clients know each other and have ongoing relationships, and can therefore sit down face to face with some hope of agreeing on terms.²⁸ Little of this authority addresses cases involving large numbers of unrelated clients where, because it is impossible for clients to work things out on their own, the assistance of counsel or a third party may be indispensable to the allocation process.²⁹

The long and short of it is that the case law concerning counsel's permitted role in consensual group lawsuits, as in class actions, is

²⁶ See *infra* text accompanying notes 93-96.

²⁷ See, e.g., North Carolina Ethics Op. 251, available in 1997 WL 331718 (1997) (declaring that attorney representing multiple adults injured in bus accident may not advocate for one client against another, but may help clients arrange to mediate dispute over division of settlement fund); North Carolina Ethics Op. 109, available in 1991 WL 734397 (1991) (declaring that lawyer representing parents individually and as guardians ad litem of injured infant cannot help clients divide joint settlement offer); North Carolina State Bar v. Whitted, 347 S.E.2d 60, 64 (N.C. Ct. App. 1986) (affirming discipline of lawyer who helped allocate a limited insurance fund among co-claimants).

²⁸ See Texas Ethics Op. 500, available in 1995 WL 913236 (discussing joint representation of driver and passenger in limited insurance situations).

²⁹ Some cases and advisory opinions also concern situations in which defendants have too few assets to satisfy all plaintiffs fully. These authorities do not transfer easily to contexts in which defendants are solvent. But cf. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-371 (1993) (discussing settlement-related conflicts in mass tort litigation).

ambiguous and immature. In the latter context, commentators have pointed out that conflict of interests rules “were not drafted with the special issues of mass tort . . . settlements in mind.”³⁰ This observation is just as true for consensual group lawsuits. Even the aggregate settlement rule, which by its terms seems to govern multiple-client representations, appears not to have been designed with these litigation groups in mind.³¹

Insofar as the law in action is concerned, the rule in consensual group litigation appears to be “let your conscience be your guide.” Lawyers representing large client groups routinely handle allocation matters and do so with minimal supervision. The extent of their involvement varies from lawyer to lawyer and from case to case. Some lawyers handle all types of apportionment decisions. Others feel comfortable negotiating individual settlements but not carving up lump sums. Some employ third parties to look over their shoulders as they do allocation-related work. Others have third parties do the actual apportioning, effectively withdrawing from the process after bargaining for a lump sum.³²

The principles or criteria upon which allocation plans for consensual litigation groups are based also vary widely. Sometimes, money is doled out in equal shares even if clients lost unequal amounts or had claims of different strengths. In mass asbestos cases, all lung cancer victims may receive equal payments even though some smoked and others did not, and all mesothelioma victims may receive equal payments even though some died at advanced ages,

³⁰ See Menkel-Meadow, *supra* note 20, at 1172.

³¹ The aggregate settlement rule originated in the Model Code of Professional Responsibility. Our colleague John Sutton, A.W. Walker Centennial Chair Emeritus at the University of Texas School of Law, was the Reporter on the Model Code. In a conversation with the authors in July 1997, Sutton indicated that the rule was not designed for group litigation. To the contrary, it was intended to cover the situation in which a lawyer *separately* represents multiple clients with unrelated claims. For example, a lawyer may represent several victims injured in unrelated accidents who happen to be suing defendants who are covered by the same liability insurer. If the lawyer and the carrier's claims adjuster were to combine the cases for settlement purposes, a danger of horse-trading would arise. That is, the adjuster could offer to pay something to settle the weaker claims in return for the lawyer's agreement to discount the stronger ones. The point of the aggregate settlement rule was to require lawyers to make clients aware of such practices, and thereby presumably to deter their occurrence.

³² The factual observations in this paragraph reflect the authors' experiences in mass litigation.

some died young, some left behind families, and some did not.³³ There are also examples of share-and-share-alike settlement allocation plans in consensual group litigation. As is true in class actions, these settlements usually involve small per-plaintiff payments.³⁴

More often, efforts are made to tailor payments to clients' individual circumstances, but there is nothing approaching a universal standard for an acceptable fit. The number of factors that are taken into account and the weights they are assigned are highly discretionary and inherently subjective matters. Lawyers rely both on their experience in other cases and on their intuitions concerning what makes sense or seems fair, but their decisions often seem arbitrary and are always disputable.

Consider, for example, the allocation plan that was used in the settlement of a consensual group lawsuit that involved approximately 900 persons who suffered property damage and personal injuries when a cloud of natural gas exploded outside Brenham, Texas.³⁵ Technically speaking, this was not an aggregate settlement. A separate demand was generated for each client, although all 900 demands were presented to the defendants at roughly the same time. The size of each demand reflected counsel's judgment as to which factors would have mattered to a jury and how a jury would have weighed them had the group lawsuit been tried. When evaluating property damage claims, for example, counsel considered estimated repair costs, a structure's age and distance from the center of the blast, whether a residential property had to be abandoned during the period of repair, whether a commercial property suffered a business interruption loss, the number of undeveloped acres surrounding a structure, and whether the owner had previously signed a settlement agreement that would have had to be set aside in the current proceeding.

It was an educated guess on counsel's part that these factors would have mattered most if the group lawsuit had been tried. Other lawyers might have chosen other factors or assigned the

³³ See Silver & Baker, *supra* note 12, at 760-61.

³⁴ See *id.* at 758 n.78 (discussing settlement of East Austin Tank Farm Case).

³⁵ For a description of the disaster, see Paul McKay, *Paradise Lost: Blast Erased Simple Life in Brenham*, *Hous. Chron.*, June 7, 1992, at 1, available in 1992 WL 8069986. Professor Silver advised counsel representing the plaintiffs in this matter. The facts set out in this paragraph are personally known to him.

same factors different weights. For example, the topography of the land, which was hilly, may have caused the blast to exert unequal force in different directions. Buildings with concrete foundations may have fared better or worse than those built on piers and beams. Brick houses may have been more or less explosion-resistant than homes made of wood. Any of these factors could have mattered in a trial in which a causal connection between the explosion and damage to each structure would have had to be proved. A lawyer determining the amount of each plaintiff's settlement demand (or apportioning an aggregate settlement for all 900 plaintiffs) could therefore have justified adding a topography factor, a foundation factor, or a building-materials factor to the calculus, each with a corresponding weight. Had these factors been selected instead of, or in addition to, those actually employed, the size of individual settlement payments likely would have changed. Some plaintiffs would have received more, others less.

By pointing out that different factors and weights could have been used in determining individual settlement amounts in the Brenham explosion case, we do not mean to suggest that the lawyers who negotiated the settlement did anything wrong or that any plaintiff was paid the wrong amount. To the contrary, plaintiffs' counsel used good judgment and bargained with the defendants appropriately. The point is that rough justice is done in all settled group lawsuits, consensual and nonconsensual alike, and that lawyers' judgments affect the degree of roughness in all such cases.

In view of the fact that lawyers regularly help carve up settlement funds, it may seem surprising that settlements of consensual group lawsuits have generated few malpractice suits and little law on lawyers' professional obligations. Many factors may explain the dearth of litigation in this area, but the possibility that most plaintiffs are satisfied with the way their lawyers do their jobs should be the first considered. Mass lawsuits settle with plaintiffs' consent, and usually they settle for money. These are not the lawsuits in which one finds coupon deals, meaningless injunctive reforms, awards of attorneys' fees that exceed the plaintiffs' recoveries, or the use of settlement funds to endow research institutions.³⁶ When

³⁶ Coupon deals and other collusive settlements occur mainly in class actions. See, e.g., *In Camera*, 16 *Class Action Reps.* 269 (1993) (criticizing coupon deals); *In Camera*, 16 *Class Action Reps.* 369 (1993) (same); Bob Van Vovis, *Class Action Abuse*,

these cases end, settling plaintiffs receive cash in amounts they knew of and approved of in advance. And group members who reject the terms of a settlement offer are not bound by it. If members of consensual litigation groups are typically satisfied with the deals their lawyers strike, it is not surprising that they rarely assert malpractice claims.³⁷

B. Nonconsensual Litigation Groups

Before *Amchem*, attorneys representing plaintiff classes routinely helped design allocation plans. They did so in the course of negotiating settlements with defendants before submitting them for judicial approval. Judges were well aware of this practice. They did not imagine that allocation plans formed themselves.³⁸ They even rejected proposed settlements that failed to provide in sufficiently detailed ways how moneys recovered by a class would be used.³⁹ They also knew that there were many possible ways to apportion settlement proceeds among plaintiffs and that different allocations would entitle different class members to different sums. This is why judges have long demanded explanations of allocation plans before approving class settlements.⁴⁰

Nat'l L.J., Feb. 23, 1998, at A1 (discussing collusive class settlements); *In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998) (reviewing settlement granting class members \$1,000 coupons redeemable toward purchase of new truck); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993) (approving settlement granting discount travel certificates to class members). For a defense of these settlements, see Geoffrey Miller & Lori Singer, *Nonpecuniary Class Action Settlements, Law & Contemporary Problems* (forthcoming 1999).

³⁷ But see *Arce v. Burrow*, 958 S.W.2d 239 (Tex. App. 1997) (reviewing clients' claim against attorneys for breach of fiduciary duty in lawsuit settlement).

³⁸ Often, the role of attorneys in allocating settlement benefits was made explicit. See, e.g., *Agreement in Principle*, Part IV.B, *Brodie v. Physicians Mutual Ins. Co.* (Nov. 1997) (stating "other members of the settlement class . . . will be compensated according to formulae to be developed by counsel for the parties after analysis of the records of Physicians Mutual").

³⁹ See *Martens v. Smith Barney, Inc.*, 77 Fair Empl. Prac. Cas. 532 (BNA), available in 1998 WL 344802, at *22 (S.D.N.Y.).

⁴⁰ See Federal Judicial Ctr., *Manual for Complex Litigation* § 30.42 (3d ed. 1995) (instructing judges to consider whether "particular segments of the class are treated significantly differently from others" as part of the fairness inquiry under Fed. R. Civ. P. 23(e)); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 218-21 (5th Cir. Apr. 1981) (discussing acceptability of allocation plan); *Cotton v. Hinton*, 559 F.2d 1326 (6th Cir. 1977) (discussing acceptability of allocation plan for employment discrimination class action). That said, judges rarely use improper allocation plans as a

The *Amchem* settlement is a poor example from which to learn about typical lawyering practices because it is unusually complicated. The settlement covered both persons with asbestos-related diseases and healthy persons who, having been exposed to asbestos, might become ill in the future.⁴¹ The settlement occurred in connection with, and was allegedly contingent upon, a separate settlement of class counsel's inventory of signed clients who, it has been contended, received better terms than the class.⁴² And the class itself was a so-called "settlement-only" class: a collection of claims that could not have been tried as a class.⁴³ These features make the *Amchem* settlement a poor vehicle for discussing the basic and less controversial role that class counsel have long played in the allocation process.⁴⁴

More representative is the settlement negotiated in the Texas Double-Rounding Case.⁴⁵ The lawsuit was a paradigmatic small-claim class action brought against two insurance companies that allegedly calculated premiums for automobile coverages incorrectly. On average, the error cost policyholders only a few dollars apiece, but it netted the insurance companies tens of millions of dollars in additional income.⁴⁶ After exceptionally intense litigation and a

reason to prevent a class action from settling. See, e.g., Willging et al., *supra* note 2, at 57-58 (reporting that "90% or more of the proposed settlements were approved without changes in each of the four districts").

⁴¹ See *Amchem*, 117 S. Ct. at 2239-40.

⁴² See Coffee, *Class Wars*, *supra* note 20; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995) (criticizing the settlement). But see Richard A. Nagareda, *Turning from Tort to Administration*, 94 Mich. L. Rev. 899, 960-67 (1996) (defending the settlement).

⁴³ The Court rejected the notion that the class qualified as a trial class under Fed. R. Civ. P. 23(a)-(b). See *Amchem*, 117 S. Ct. at 2249-52.

⁴⁴ There are also other complications associated with class settlements that we will ignore. These include the last-minute expansion of the class definition that greatly and rightly concerns Professor Coffee. See John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 Va. L. Rev. 1541, 1548-49 (1998) [hereinafter Coffee, Comment]. We regard this as a separate problem that raises important but essentially distinct due process issues.

⁴⁵ See *Sendejo v. Texas Farmers Ins. Co.*, No. 95-08-09165-CV (365th Judicial Dist. Zavala County, Tex.); *Martinez v. Allstate Insurance Co.*, No. 95-08-09169-CV (365th Judicial Dist. Zavala County, Tex.). Professor Silver was a consultant in these cases and testified at the fairness hearing as an expert witness when they settled.

⁴⁶ See Stuart Eskenazi, *Insurers told to stop "double-rounding"; Commissioner says method of tallying auto premiums is unfair to consumers*, *Austin Am.-Statesman*, May 8, 1996, at B1, available in 1996 WL 3428432.

war in the press, the class was certified for trial and the case settled on terms that entitled policyholders to \$5.75 apiece.⁴⁷

Attorneys for the class and for the defendants hammered out the settlement allocation formula. It entitled all current and former policyholders to identical payments.⁴⁸ In this sense, it treated policyholders equally. But in other respects it treated policyholders unequally. Insureds with policies in force for five years each received the same refund as those who were covered for only one year even though the former paid more in overcharges. Insureds with larger numbers of coverages were not distinguished from those with fewer coverages even though the number of coverages also affected the total overcharge one paid. Class members whose policies incepted at the beginning of the class period were paid the same as those whose policies incepted at the end even though the former confronted statute of limitations problems not encountered by the latter, and even though the former had claims to larger amounts of interest.⁴⁹

No effort was made to tailor payment amounts to the size or strength of claims, or to vary them on any other basis, because any such effort would have been ridiculously expensive given the total size of the settlement and the total number of class members. Each plaintiff would receive only a small amount in any event, and it was obvious to everyone that the benefits of a more finely tuned allocation formula would not justify the substantial cost. This was explained to the judge at the fairness hearing, and the judge, who approved the settlement, evidently agreed.⁵⁰

⁴⁷ The litigation and settlement were ridiculed in the *Wall Street Journal*. See Taken For a Ride, Wall St. J., Oct. 23, 1996, at A22; Max Boot, A Texas-Sized Class Action Fraud, Wall St. J., May 22, 1996, at A23. For defenses of the settlement, see D.J. Powers & John Cracken, Letters to the Editor: Illegal Practice Reaps a Windfall for Insurers, Wall St. J., June 3, 1996, at A15; Christopher B. Horn, Letters to the Editor: Point Men Fighting Corporate Wrongdoing, Wall St. J., Nov. 12, 1996, at A19.

⁴⁸ See Terrence Stutz, Insurers will repay clients \$35.7 million, Allstate, Farmers settle class-action suit that said they overbilled policyholders, Dallas Morning News, Oct. 5, 1996, at 1A, available in LEXIS, News Library, Dalnws File.

⁴⁹ Plaintiffs' Application for Preliminary Approval of Proposed (1) Settlement Classes and (2) Settlement at 14 (filed Oct. 4, 1996) ("Plaintiffs and Defendants propose a system of distributing the settlement funds which does not discriminate between groups within each settlement class. For example, all groups within the Farmers settlement class shall be eligible to receive the same net recovery.").

⁵⁰ See Terrence Stutz, Settlement approved in insurance suit, Dallas Morning News, Dec. 19, 1996, at 40A, available in LEXIS, News Library, Dalnws File.

The Double-Rounding Case is not the only class action to employ an equal-payments allocation plan. A share-and-share-alike plan was also approved in *In re Corrugated Container Antitrust Litigation*⁵¹ on the ground that sorting claims on the basis of their relative size and strength would have been an administrative nightmare.⁵² Equal payment plans are an extreme example of a phenomenon called “damage averaging” that, according to Professor John C. Coffee, Jr., is characteristic of class actions.⁵³ Damage averaging occurs when an allocation plan ignores or minimizes the importance of differences between claims that could or would affect their expected value at trial. When differences are minimized, claim values converge. When differences are ignored entirely, as they were in the Double-Rounding and *Corrugated Container* cases, equal payments result.

Allocation plans used in class actions inevitably involve some degree of damage averaging. All plans ignore many aspects of claims that could affect their value in litigation. Settlement payments in securities class actions tend to be more finely tuned than most because information about prices and sales volumes is readily and cheaply available. But even these settlements typically ignore differences that could affect a plaintiff’s prospects at trial, such as an individual’s age, sex, wealth, investing experience, time of purchase, and whether purchases of securities during the period covered by the fraud were also accompanied by sales at inflated prices.⁵⁴

Most class action settlements are cut even more roughly than those in securities cases. Distinctions are usually drawn among plaintiffs mainly on the basis of significant objective factors that are easy to apply, while smaller differences and subjective factors are ignored. In the famous “Agent Orange” case, one of the few examples of an allocation plan designed by a judge, only totally disabled veterans received cash payments.⁵⁵ Veterans whose injuries

⁵¹ 659 F.2d 1322 (Former 5th Cir. Unit A Oct. 1981).

⁵² See *id.* at 1329.

⁵³ See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 917 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*].

⁵⁴ See, e.g., *Lyons v. Scitex Corp.*, 987 F. Supp. 271, 272-73 (S.D.N.Y. 1997) (setting out allocation formula).

⁵⁵ See *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 869-70 (E.D.N.Y. 1984).

were less severe received nothing. In employment discrimination cases, settlement benefits commonly correlate to job title or years of employment.⁵⁶ In vanishing premium and other insurance cases, policy type, premium amount, or size of the deductible are frequently determinative.⁵⁷ In a class action brought on behalf of former residents of an apartment complex in Austin, Texas, settlement payments were based on the number of people per apartment and whether they were adults or children.⁵⁸ In class action settlements, fine-tuning is not the norm.

According to Professor Coffee, and consistent with the settlements in the Double-Rounding and *Corrugated Container* cases, “[d]amage averaging is most likely to be accepted by courts and attorneys where the transaction costs of individualizing the damage determination are the highest.”⁵⁹ But it is also true that the nature of class litigation itself discourages fine-tuning. Class actions are intended to aggregate similar claims, not claims that require significant individual treatment. Because it is difficult to obtain certification for class actions, plaintiffs’ attorneys consistently emphasize similarities among claims and downplay differences. Because class counsel have to emphasize simplicity and common legal and factual questions to attain certification, acknowledging complexity and intraclass differences at settlement is awkward. Keeping allocation plans simple avoids embarrassment.

For present purposes, the actual reasons for and the precise extent of damage averaging are immaterial. The important points are that, before *Amchem*, lawyers routinely designed allocation plans in class settlements, and that they and judges decided on pragmatic grounds how precisely to tailor settlement payments. In these respects, law-

⁵⁶ See *Reynolds v. Alabama Dep’t of Transp.*, 996 F. Supp. 1118 (M.D. Ala. 1998) (requiring reclassification of incumbent African-American employees who met qualifications for position of graduate civil engineer).

⁵⁷ See, e.g., *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 294-95 (3d Cir. 1998) (describing settlement that made identical Basic Claim Relief options available to “all persons who owned one or more Prudential [life] insurance policies between January 1, 1982 and December 31, 1995,” an estimated 8 million individuals).

⁵⁸ See *Scott W. Wright, Judge OKs \$4.5 million for tenants, Methane buildup forced sudden evacuation of apartment complex residents*, *Austin Am.-Statesman*, Aug. 6, 1994, at C1, available in 1994 WL 3904022.

⁵⁹ Coffee, *Entrepreneurial Litigation*, *supra* note 53, at 919 n.104.

yers who handled class actions and lawyers who handled consensual group lawsuits performed the same tasks and did so in the same way.

On average, settlement payments are probably less refined in class actions than in consensual group lawsuits, but this should be expected. Many class actions, such as the Texas Double-Rounding Case, involve large numbers of claims that are too small to litigate profitably by other procedural means.⁶⁰ If the desirability of fine-tuning settlement payments depends on the amount of money at stake per claimant, pragmatic lawyers and judges should be content with rougher justice in class actions than in consensual group lawsuits. To the extent that the two kinds of group lawsuits differ in their tendency to yield narrowly tailored settlement payments, the difference is one of degree. It therefore does not necessarily provide a basis for criticizing either class actions or the role class counsel have traditionally played in the settlement allocation process.

Before *Amchem*, lawyers set allocation agendas in all group lawsuits. They proposed allocation plans that voters—their clients (in consensual suits) or a judge (in class actions)—approved or disapproved subject to social-choice rules. The rules differed across the consensual/nonconsensual divide, but the conduct of lawyers did not. As we next discuss, *Amchem* appears to have destroyed this symmetry by forcing a restructuring of the allocation process in class action settlements.

II. WHAT ROLE SHOULD COUNSEL PLAY IN ALLOCATING SETTLEMENT PROCEEDS?

A. Professional Ethics and Adequate Representation

The standard model or mythology of legal professionalism depicts a single client represented by a single lawyer who seeks unwaveringly to advance only the client's interests. Scholars and others who are still enamored by the model or attached to the myth will

⁶⁰ See *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."); Willging et al., *supra* note 2, at 13-14 (reporting median recoveries ranging from \$315 to \$528 in the four districts studied and observing that litigating aggregated claims individually would have been impracticable).

be appalled by the extent of lawyers' involvement in the allocation process in group litigation. To allocate is to decide (or help decide) which client gets what. Because every client is better off with more rather than less, a lawyer who participates in the allocation process necessarily and knowingly sacrifices the interests of one or more clients. Many people believe that this is something a professional lawyer cannot do, and yet some of this country's most prominent and respected plaintiffs' attorneys are involved in settlement allocation decisions every day. The question is therefore squarely posed: What role, if any, may a lawyer for a group properly play in the allocation process?

Amchem poses the same question from a due process perspective. The central issue in the case was whether claims that could not be tried as a class could nonetheless be settled as a class.⁶¹ But there also was a side issue. As mentioned above, the *Amchem* class lumped injured plaintiffs together with persons exposed to asbestos who might become ill in the future. The interests of the two groups differed significantly. Victims with existing injuries wanted generous payments immediately. Exposure-only plaintiffs wanted insurance against the costs of future illnesses, which involved backloading as much of the settlement fund as possible.⁶² The proposal to allocate funds between the two subgroups was developed by a single set of named plaintiffs who collectively represented the entire class.⁶³

The Supreme Court concluded that the failure to provide separate named plaintiffs for the two subgroups worked a denial of due process. Under long-standing precedent, the Due Process Clause permits a representative action to bind an absent plaintiff only if the absent plaintiff is adequately represented.⁶⁴ This is why a class can be certified only when "the named parties 'will fairly and adequately protect the interests of the class.' The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and

⁶¹ Generally speaking, the Supreme Court said no. The Court indicated, but did not explicitly say, that settlement classes must meet the same criteria as trial classes. See *Amchem*, 117 S. Ct. at 2248-49. Professor Silver was the principal author of an amicus curiae brief submitted in *Amchem* urging the Court to take the position it did. See Brief Amici Curiae, supra note 9.

⁶² See *Amchem*, 117 S. Ct. at 2251.

⁶³ See *id.* (discussing absence of structural separations between class members with conflicting interests).

⁶⁴ See *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940).

the class they seek to represent.”⁶⁵ In *Amchem*, the Court determined that adequate representation required that the subgroups be separately represented.⁶⁶

The way the *Amchem* Court framed the inadequate representation point reminds one of the “one client/one lawyer” model of professional ethics. A single group of named plaintiffs represented the entire class. Some had existing injuries. Others were exposure-only plaintiffs. Still, the named plaintiffs formed a single unit, as did the class. There was no established adversarial relationship between the injured named plaintiffs and the exposure-only named plaintiffs that might have fostered hard bargaining over the allocation of the settlement fund, bargaining in which the interests of each subgroup could have been zealously pressed. As the Court put it,

the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants’ liability. . . .

The settling parties . . . achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. . . . “The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.”⁶⁷

Because allocation decisions involve tradeoffs, inadequate representation occurs when these decisions are made by persons whose loyalties are divided. Class members with divergent interests must be represented in the allocation process by persons loyal only to them.⁶⁸

⁶⁵ *Amchem*, 117 S. Ct. at 2250 (quoting Fed. R. Civ. P. 23(a)(4)).

⁶⁶ See *id.* at 2250-51.

⁶⁷ *Id.* at 2251 (quoting *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992), modified on reh’g sub nom. *In re Findley*, 993 F.2d 7 (2d Cir. 1993)).

⁶⁸ Cf. *In re Asbestos Litig.*, 134 F.3d 668, 677 (5th Cir.) (Smith, J., dissenting), cert. granted sub nom. *Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998). According to Fifth Circuit Judge Jerry Smith,

[a] representative must “possess the same interest and suffer the same injury as the class members” and must be aligned in interest such that *no conflicts exist*

One judge read this language in *Amchem* quite strictly. In a lengthy and tightly-argued dissent in *In re Asbestos Litigation*,⁶⁹ Judge Jerry Smith of the Fifth Circuit Court of Appeals toed a strong “no conflicts” line:

A corollary of rule 23(a)(4)'s mandate of unconflicted representation as a “structural assurance” is that *any real conflict, even if minor when compared to interests held in common, will render the representation inadequate*. Thus, *Amchem* did not weigh the myriad common interests within that class against the conflicts, in order to decide whether the conflicts were “*de minimis*” or were somehow overcome by the commonalties.

Rather, the analysis was explicitly focused on *the mere existence of some intraclass conflict*. And the Court specifically stated that the class conflicts were not “made insignificant” by the ample funding provided by the settlement. In accordance with *Amchem*, therefore, we should not care—because the Supreme Court did not—whether having maximum dollars in a settlement fund is in everyone’s interest, or even whether that unifying interest seems to outweigh the singular and disunifying interests among the various *de facto* subclasses.⁷⁰

Judge Smith read *Amchem* as establishing a zero tolerance level for conflicts. Now that the conflicts issue is before the Supreme Court in the appeal in *In re Asbestos Litigation*,⁷¹ we may find out soon whether he is right.

Professor Jay Tidmarsh is also impressed by *Amchem*'s anti-conflict stand, and believes that this aspect of the case has important implications for mass tort class actions. In a study of five settlements, including *In re Asbestos Litigation*, he repeatedly points out that class counsel made allocation decisions that *Amchem* disallows. For example, when discussing the settlement of the heart valve litigation, *Bowling v. Pfizer, Inc.*,⁷² he writes that

between the representative and any “discrete subclasses” within the broader class he purports to represent. *Amchem* demands a “*structural assurance* of fair and adequate representation for the diverse groups and individuals affected.”

Id. (Smith, J., dissenting) (quoting *Amchem*, 117 S. Ct. at 2251) (first emphasis added).

⁶⁹ 134 F.3d 668 (5th Cir.), cert. granted sub nom. *Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998).

⁷⁰ Id. (Smith, J., dissenting) (citations omitted) (first and third emphases added).

⁷¹ See *Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998) (granting petition for writ of certiorari).

⁷² 143 F.R.D. 141 (S.D. Ohio 1992).

[i]rreducible conflicts of interest may have existed . . . with regard to certain aspects of the settlement. Those in immediate need of explanation were unlikely to benefit from the research and development fund, and might well have preferred higher payments for explanation costs. Moreover, although there was, as the court said, "a certain egalitarian fairness" in awarding each member an identical amount from the Consultation Fund, different class members undoubtedly had different emotional reactions to, and different levels of appropriate compensation for, the alleged defect in the [artificial heart] valve. No special representation was provided to these groups.⁷³

Of *In re Asbestos Litigation*, he writes that

[d]ivergent interests among class members existed, yet no subclasses or separate classes were established. Clearly, mass tort settlement class actions are raising difficult ethical issues for counsel, and the way in which one conceives of the lawyer's role and resolves these ethical issues may well determine whether settlement class actions can ever be utilized.⁷⁴

The same problem arose in the proposed breast implant settlement, which, as Professor Tidmarsh observes,

presented the lawyers with a set of serious ethical issues. The case presented numerous problems of simultaneous representation of persons with divergent interests. . . . Given that the total pot was limited, class counsel's decisions to create separate settlement funds for presently injured and presently healthy claimants, and then to negotiate an overall settlement amount, forced class counsel to make an allocational decision about how much money should go into each fund. Obviously, the two sets of claimants had divergent interests, which made it difficult for one set of lawyers to represent both sets.⁷⁵

Like Judge Smith, Professor Tidmarsh seems to believe that *Amchem's* implications for mass tort settlements run deep.

Because conflicts inhere in all class actions, *Amchem's* no-conflicts rule can also easily be applied outside the mass tort realm. Several

⁷³ Jay Tidmarsh, Federal Judicial Ctr., *Mass Tort Settlement Class Actions: Five Case Studies* 43 (1998).

⁷⁴ *Id.* at 74.

⁷⁵ *Id.* at 87.

judges have already made this leap by applying the rule to economic loss cases, and there is nothing to prevent its use in injunctive cases as well. *Barboza v. Ford Consumer Finance Co.*⁷⁶ was a small-claim consumer class action in which the plaintiffs alleged that the defendant wrongfully induced mortgage brokers to send it business. When a classwide settlement offering claimants \$50 in cash or \$250 in credits against future loan costs was proposed, the court declined to certify the class. One of the judge's reasons was that the class definition lumped "persons having diverse interests" into "'a single giant class' rather than . . . 'discrete subclasses.'"⁷⁷ The judge believed that absent plaintiffs should have been divided into subclasses on the basis of the legal theories they asserted and their positions relative to statutes of limitations.⁷⁸

A judge presiding over a securities fraud class action also felt it necessary to warn the named parties about *Amchem*.⁷⁹ After observing that stockholders received various corrective disclosures, the court put the parties on notice that *Amchem* might require separating stockholders into subclasses, depending on when corrective communications were received.⁸⁰ The judge also noted that different ways of limiting the class period could cause additional conflicts, requiring additional subclasses, to emerge.⁸¹

Conflicts requiring subclasses were also thought to be present in *Kane v. United Independent Union Welfare Fund*,⁸² an ERISA case, and *Broussard v. Meineke Discount Muffler Shops*,⁸³ a breach of franchise agreement case. The problem in *Kane* was that current fund members had an interest in preserving the fund's assets but former members did not and would have preferred the largest possible damages award.⁸⁴ The same conflict existed in *Broussard*, where it was punctuated by the fact that a jury had already returned a verdict of nearly \$600 million against Meineke.⁸⁵ Current

⁷⁶ No. Civ.A. 94-12352-GAO, 1998 WL 148832 (D. Mass. Jan. 30, 1998).

⁷⁷ Id. at *6 (quoting *Amchem*).

⁷⁸ See id. at *5-6.

⁷⁹ See *Ravens v. Iftikar*, 174 F.R.D. 651, 674 (N.D. Cal. 1997).

⁸⁰ See id.

⁸¹ See id.

⁸² No. CIV.A. 97-1505, 1997 WL 411208 (E.D. Pa. July 22, 1997).

⁸³ No. 97-1808, 1998 WL 512926 (4th Cir. Aug. 19, 1998).

⁸⁴ See *Kane*, 1997 WL 411208, at *3.

⁸⁵ See *Broussard*, 1998 WL 512926, at *4.

owners of Meineke franchises had an interest in keeping the company afloat; former owners wanted the money no matter what the longer term consequences for Meineke might be.⁸⁶

Kane and *Broussard* demonstrate *Amchem's* potential to revolutionize class action practice in non-tort fields. Class actions against insurance companies, stock issuers, banks, and other publicly held entities usually encompass both current and former interest holders. Whenever a lawsuit creates a risk of insolvency, as many class actions do, *Amchem* may require that current and former interest holders be separated into subclasses and separately represented.

Not all judges have applied *Amchem's* no-conflicts rule to economic loss cases. To the contrary, several have declined.⁸⁷ We do not mean to overstate the danger that *Amchem* will make all class actions more difficult and more expensive to litigate, but we think it impossible to deny that the danger is real.

By focusing on class counsel instead of class representatives, Professor Tidmarsh avoids the artificiality of the discussion of due process in *Amchem*. There the Court identified the failure to provide separate named plaintiffs for opposing subgroups as the problem⁸⁸ and declined to say whether separate counsel was also required. The need for separate counsel is by far the more important concern. Attorneys, not named plaintiffs, control what happens in class actions.⁸⁹

As a practical matter, however, *Amchem* implicitly requires that each subgroup have its own lawyers. Separating subgroups involves putting them in different subclasses, and each subclass must meet all the requirements for certification, including that of zealous rep-

⁸⁶ See *id.* at *5.

⁸⁷ See, e.g., *In re Foundation for a New Era Philanthropy Litig.*, 175 F.R.D. 202, 205 (E.D. Pa. 1997) ("Unlike *Amchem*, the claims here are exclusively for economic injury, as a result of money lost through New Era's alleged operation of a Ponzi scheme.").

⁸⁸ See *Amchem*, 117 S. Ct. at 2251; see also *Asbestos Litig.*, 134 F.3d at 675 (Smith, J., dissenting) ("[I]t is the class representatives who matter: the named plaintiffs, not their lawyers.").

⁸⁹ See Coffee, *Entrepreneurial Litigation*, *supra* note 53, at 899 ("From a policy perspective, the choice is between truth and illusion. We could continue to pretend that the class representative is the true party in interest, or we could recognize the reality of the attorney as entrepreneur.").

resentation by competent attorneys who are loyal to a subgroup's members alone.⁹⁰ Separate subclasses require separate lawyers.⁹¹

This implicit separate counsel requirement contributes to *Amchem*'s status as a landmark case. Shortly after the opinion was issued, Professor Coffee wrote that *Amchem*

brought to a halt the era of sprawling "settlement" class actions that lumped together the very ill, the somewhat ill and the maybe-ill-in-the-future, awarded cash compensation to some class members and nothing to others, and relied on conflicted plaintiffs' counsel to approve all trade-off and allocation decisions within the class.⁹²

The expectation appears to be that a class will bargain as a unit to extract as much money as possible from a defendant and that thereafter camps of like-minded people will form within the class, each with its own champion, and battle over the allocation formula. It is also possible that separate lawyers for each subclass are required from the very start of litigation.

Although they have different starting points, the standard arguments from legal ethics and due process wind up at the same place. Both conclude that it is improper for a lawyer who represents a group of plaintiffs to make allocation decisions because the lawyer must then make tradeoffs between or among plaintiffs. Ethics and due process entitle plaintiffs to representation by agents who, being

⁹⁰ See Fed. R. Civ. P. 23(c)(4)(B); 1 Herbert G. Newberg, *Newberg on Class Actions* § 1120g, at 204-05 (1977).

⁹¹ See Brief of Legal Ethics, Civil Procedure, and Constitutional Law Scholars as *Amici Curiae* in Support of Petitioners, *Ortiz v. Fibreboard Corp.*, No. 97-1704 (U.S. filed Aug. 6, 1998) ("Given the actualities of class action practice, requiring separate named representatives for conflicting subgroups with the class, while allowing one group of lawyers to act on behalf of the whole, would be pointless.").

⁹² John C. Coffee Jr., *After the high court decision in 'Amchem Products Inc. v. Windsor,' can a class action ever be certified only for the purpose of settlement?*, Nat'l L.J., July 21, 1997, at B4. Professor Coffee had criticized extensively both the *Amchem* settlement and proposed amendments to the Federal Rules of Civil Procedure that would have made settlement-only classes easier to certify. See Coffee, *Class Wars*, supra note 20, at 1393-99; Letter from the Steering Committee to Oppose Proposed Rule 23 to the Standing Committee on Rules of Practice and Procedure (May 28, 1996) (jointly sponsored by John C. Coffee, Jr.) (on file with the Virginia Law Review Association); John C. Coffee, Jr., *Class Action 'Reform': Advisory Committee Bombshell*, N.Y. L.J., May 21, 1996, at 1.

unencumbered by such conflicts, have only a single client's interests at heart.

B. The Unreality of the "No Tradeoffs" Approach

Notwithstanding the *Amchem* Court's conclusion that attorneys can and must avoid inter-client conflicts in the class action context, inter-client tradeoffs are an inevitable and accepted part of all group lawsuits and of most lawyers' professional lives. Lawyers make these tradeoffs without even thinking about them. For example, today lawyers everywhere are working on some matters and ignoring others. This is a tradeoff in a world in which most clients want to be served first. It is also a necessary practice management technique used by all lawyers with numerous clients.⁹³ Like everyone else, lawyers have difficulty attending to multiple matters simultaneously. In order to work effectively, lawyers therefore must prioritize projects and work on matters serially. They typically are able to avoid criticism so long as they get to all matters with reasonable dispatch. Scheduling one's time is an accepted, indeed essential, professional practice.

If inter-principal tradeoffs are unavoidable, then rules or doctrines that purport to prohibit them cannot mean what they appear to say.⁹⁴ Lawyers can sometimes advance all clients' interests concurrently. For example, they can work on issues that are common to all plaintiffs' claims, thereby providing joint goods for all members of a group. But even related claims invariably have unique aspects that require individual attention. When devoting their time

⁹³ Conflicts among clients for lawyers' attention are examples of a more general agency problem: an inter-principal competition for services. Lawyers are far from unique in having to make inter-principal tradeoffs. See, e.g., Saul X. Levmore, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents' Rewards*, 36 J.L. & Econ. 503 (1993) (describing inter-principal conflicts in various contexts).

⁹⁴ Judge Smith's *Asbestos Litigation* dissent provides one example of such a prohibition: A representative must "possess the same interest and suffer the same injury as the class members" and must be aligned in interest such that no conflicts exist between the representative and any "discrete subclasses" within the broader class he purports to represent. . . .

A corollary of Rule 23(a)(4)'s mandate of unconflicted representation . . . is that *any* real conflict, even if minor when compared to interests held in common, will render the representation inadequate.

134 F.3d at 677 (Smith, J., dissenting) (quoting *Amchem*, 117 S. Ct. at 2251).

to these unique issues, lawyers subordinate the interests of some clients for the benefit of others.

A lawyer's time and advice may be his stock in trade, but a lawyer's financial resources also matter. Lawyers inevitably ration financial resources in ways that compromise some clients' interests. This is true even in civil rights cases and other class actions that are thought to involve especially homogeneous group members.⁹⁵ Money rationing involves tradeoffs because class members inevitably have different preferences as to how this scarce resource should be spent in advancing group members' claims. Class members with small compensatory claims, such as employees who were recently hired by a defendant at discriminatorily low wages, may be best off if litigation resources are devoted mainly to the pursuit of punitive damages, pay increases, and promotions. This allocation of resources may not appeal to class members with large compensatory claims, such as long-time employees. They may benefit most from efforts to model the impact of wage discrimination on their lifetime income and retirement plans. Other class members may care only about forward-looking injunctive relief. For example, future job applicants are likely to be more interested in the number of new openings than in anything else. Because the relief actually obtained is partly a function of the manner in which class counsel spends money, the litigation budget that counsel draws up also involves tradeoffs.

The force of the point just made is overwhelming, for it shows that the process of maximizing the aggregate value of absent plaintiffs' claims is no less conflict ridden than the process of allocating settlement payments. Every litigation group contains plaintiffs with different attitudes toward risk, with different views on the time-value of money, and with different desires for relief. By pursuing a high-risk/high-reward approach to litigation or a low-risk/low-reward approach, class counsel necessarily decides which absent plaintiffs will be favored. Class counsel does the same thing by deciding to settle for a larger amount tomorrow or a smaller amount today, or by pressing for dollars instead of in-kind relief or symbolic vindication.

⁹⁵ See, e.g., *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247, 253, 255-57 (3d Cir. 1975) (discussing homogeneity of civil rights class action); see also Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103, 148 & n.194 (criticizing *Wetzel*).

Every decision to use time or money for one purpose rather than another, or to adopt one litigation strategy instead of another, necessarily resolves class members' conflicting interests. If *Amchem* really toes a firm "no-conflicts" line, as Judge Smith contends, then it means the end of class actions. To litigate or to prepare to litigate blocks of claims, conflicts among class members must be resolved.

Readers who learned in law school that injunctive classes, declaratory judgment classes, and limited-fund classes are more homogeneous than damages classes will be surprised to hear that all litigation groups are conflict ridden. Some federal judges will be surprised too. Many continue to believe that (b)(1) and (b)(2) classes house fewer and less important conflicts than (b)(3) classes seeking damages. For example, in *Allison v. Citgo Petroleum Corp.*,⁹⁶ a Fifth Circuit panel wrote that

because of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members. The underlying premise of the (b)(2) class—that its members suffer from a common injury properly addressed by class-wide relief—"begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." Thus, as claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases while the need for enhanced procedural safeguards to protect the individual rights of class members increases, thereby making class certification under (b)(2) less appropriate.⁹⁷

Although accurate as a statement of law, the premise that (b)(2) classes are homogeneous is false. A declaratory judgment class may sweep up many absent plaintiffs who would rather not air their complaints, e.g., loyal employees who do not wish to sue an employer, or timid employees who are afraid to do so. Injunctive classes contain members with different litigation priorities, such as employees who, because of different ages, seniority, or life plans, may disagree over whether their employer should be allowed to

⁹⁶ 151 F.3d 402 (5th Cir. 1998).

⁹⁷ *Id.* at 413 (quoting *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)) (citations and footnotes omitted).

settle at all and, if so, on what particular terms. The notion that (b)(2) classes are homogeneous is simply a myth.⁹⁸

The Fifth Circuit's assertion that conflicts are more characteristic of (b)(3) classes than (b)(2) classes is also false. Injunctions differ from damages mainly in that they provide in-kind benefits rather than cash, and this difference is not important when considering conflicts among class members. What matters in the conflicts context is that injunctions are as flexible as cash in terms of which benefits are sought and how those benefits are allocated among group members. A decree entered in an employment discrimination case can emphasize job creation, promotions, vacation time, pregnancy leave, back pay, or retirement benefits. Class members' preferences regarding these benefits and their allocation can conflict every bit as much as their preferences regarding the allocation of a cash settlement. Indeed, (b)(3) class actions may often be more homogeneous than (b)(2) class actions. While it is safe to assume that claimants prefer more money damages to less, many claimants may prefer not to have injunctive relief forced upon them.

A further difficulty with a strict "no tradeoffs" approach is that it quickly leads to the conclusion that every class member must be individually represented on allocation issues. As we explain below in greater detail, plaintiffs' interests in the division of settlement funds always conflict. Each plaintiff prefers apportionments that give him more and others less to those that give him less and others more. This is true even when plaintiffs' claims are identical—when there are no factual or legal differences between claims that would justify unequal allocations. Insofar as conflict is concerned, the extent of claim similarity is irrelevant. The conflict exists whenever and because each claimant prefers more to less.

Because allocation conflicts stem from plaintiffs' preferences, it is impossible to eliminate them by dividing larger groups into smaller ones. In *Amchem*, a decision to form separate subclasses of injured claimants and exposure-only claimants would not have eliminated settlement allocation conflicts *within* the subclasses. Once the total amount available to fund a global settlement had been determined and divided between the subclasses, it would have

⁹⁸ For an extended discussion of this subject, see Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 *Stan. L. Rev.* 1183 (1982).

remained to decide how much each member of each subclass was to receive. Within the subclass of injured claimants, payments for mesothelioma victims, lung cancer victims, and others would have had to be determined. Within the subclass of exposure-only claimants, one would have had to decide whether plaintiffs whose exposure occurred in different states would receive equal payments or payments reflecting the relative value of asbestos claims in different jurisdictions. By deciding these matters, counsel for each subclass would have resolved intra-subclass conflicts, arguably benefiting some subgroup members at the expense of others.⁹⁹ Both the choice to take certain factors into account and the decision to ignore them would have involved the resolution of conflicts.¹⁰⁰

Some judges have wrongly inferred that settlements that treat class members equally do not create or involve allocation conflicts among class members. For example, *Hanlon v. Chrysler Corp.*¹⁰¹ pitted a class of minivan owners against a manufacturer that allegedly mounted defective liftgate latches in its cars. A settlement was proposed that would have required the defendant to make reasonable efforts to correct the defect. In upholding the district court judge's decision to approve the settlement, the court of appeals wrote as follows:

Unlike the class in *Amchem*, this class of minivan owners does not present an allocation dilemma. . . . [E]ach potential plaintiff has the same problem: an allegedly defective rear latchgate which requires repair or commensurate compensation. . . . [T]he prospects for irreparable conflict of interest are minimal in this case because of the relatively small differences in damages and potential remedies. . . .

⁹⁹ The conflict discussed here differs from the intra-subclass conflict identified by Coffee, *Entrepreneurial Litigation*, supra note 53, at 921.

¹⁰⁰ Judge Smith understood this. See *Asbestos Litig.*, 134 F.3d at 678 (Smith, J., dissenting) ("Even if all claimants are treated alike under the settlement—without regard to their status—this still reflects an allocation decision, with the various groups pitted against each other to receive parts of the fund."). Judge Smith also rejected the suggestion, made by Professor Coffee, that an independent claims resolution process be used to allocate payment. See Coffee, Comment, supra note 44, at 1553-54. Judge Smith pointed out that many allocation decisions had been made in reaching such a settlement. See *Asbestos Litig.*, 134 F.3d at 678-79 (Smith, J., dissenting).

¹⁰¹ 150 F.3d 1011 (9th Cir. 1998).

... [T]he proposed settlement does not propose different terms for different class members; on the contrary, treatment of each class member is identical.¹⁰²

The flaw in the court of appeals' reasoning is obvious. That class members have the same problems, assert the same legal theories, or are eligible for the same remedies does not mean that their interests align. Class members' interests always conflict, even when they are identically placed, because every claimant is better off with more rather than less. Every *Hanlon* plaintiff would have preferred a settlement that gave him a new minivan and others nothing to the "latchgates for all" settlement that the court approved. A settlement that treats claimants equally makes each claimant worse off than he or she could have been under a settlement that provided that particular claimant favorable unequal treatment. Equal benefit plans involve allocation decisions no less than unequal benefit plans do.¹⁰³

If the Due Process Clause absolutely prohibits counsel for a group from resolving conflicts among claimants, each class member must be separately represented on the matter of settlement allocation.¹⁰⁴ To us, this conclusion is a *reductio ad absurdum* of the "no tradeoffs" approach. Embracing the conclusion demies plaintiffs

¹⁰² Id. at 1021.

¹⁰³ Other courts have also missed this point. See, e.g., *Lyons v. Scitex Corp.*, 987 F. Supp. 271, 275 (S.D.N.Y. 1997) ("[T]he proposed settlement makes no distinction between the two possible sub-classes in terms of distribution, another critical distinction between this case and *Amchem*.").

¹⁰⁴ The march to create ever more refined subgroups within classes has begun. Already one district court has determined, in an asbestos exposure case, that "for this class properly to be certified, exposure-only and pre-1959 representatives must have been representing the interests of their own subgroup, not the amorphous interest of the class as a whole." Id. at 677. Yet, as that court recognized:

These two structural conflicts are not the only ones, however. For example, the direct claimants—who allegedly suffered injury from direct exposure to asbestos, and would recover under any tort regime—are in opposition to the indirect claimants—who only suffered injuries such as loss of consortium, and whose claims might not be cognizable in some states. . . . Obviously, negotiating the settlement's treatment of indirect claimants will pit these two groups against each other.

Id. at 678; see also *Objection to Certification of Proposed Settlement Class and to Approval of Proposed Settlement* at 3-4, *Bachman v. Equitable Life Assurance Soc'y*, No. 96-1225-CIV-T-24(B) (M.D. Fla. filed July 15, 1998) (arguing that *Amchem* required separation of holders of in-force insurance policies and lapsed policies into separately represented subclasses).

the benefits that make group litigation attractive.¹⁰⁵ It ignores the fact that in the real world, members of litigation groups often view conflict-related risks as a price they are willing to pay to obtain large and certain economic benefits,¹⁰⁶ including economies of scale and the strategic advantage of presenting a united front.¹⁰⁷

It is far from certain that *Amchem* forbids class counsel from allocating settlement payments or from making other decisions that are likely to affect the relative value of class members' claims. The opinion suggests that placing injured and exposure-only plaintiffs in different subclasses led by different named plaintiffs would have satisfied due process requirements.¹⁰⁸ If so, then *Amchem* avoids the *reductio ad absurdum* by taking a middling position on conflicts. The middling position presents its own difficulty, however, requiring a determination of which intra-group conflicts counsel is permitted to incur and help resolve. If counsel for a group can permissibly handle litigation resource and settlement allocation conflicts, which conflicts can counsel not resolve, and why? On the continuum from "no tradeoffs permitted" to "all tradeoffs permitted," where is the stopping point?

We do not see that *Amchem* offers a stopping point. Others may not agree. For instance, in an expert affidavit submitted in a Texas class action, Professor Coffee summarized *Amchem* as follows:

In light of *Amchem Products Inc. v. Windsor* it is clear that the bar has been raised to the certification of many types of class actions. But the underlying factor that is responsible for this increased judicial caution is the prevalence of conflicts of interest in many class actions. Simply put, conflicts can exist between class counsel and class members, between various subcategories of class members (i.e., present claimants versus future claimants), and between class members whose claims have different legal merit because of applicable law. Class members can also

¹⁰⁵ It also ignores important systemic benefits and makes them impossible to obtain. See Shapiro, *supra* note 1, at 933.

¹⁰⁶ See Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 *Fordham L. Rev.* 579, 589 (1992) ("The gains from joint representation are often understood as sufficiently large so that it is efficient to allow the conflict to occur, to mitigate its adverse effects, and to run the irreducible risk that some major dislocation may occur in the future.").

¹⁰⁷ See *id.* at 589-90; Silver & Baker, *supra* note 12, at 744-47.

¹⁰⁸ See *Amchem*, 117 S. Ct. at 2251.

differ widely in terms of the severity of their injuries or the likelihood of causation. All these factors can result in insufficient "cohesiveness" to justify class certification according to *Amchem's* teachings.¹⁰⁹

Coffee's summary suggests that *Amchem* prohibits only certain kinds of conflicts or conflicts that stem from certain sources. On closer inspection, though, the range of conflicts that fits within his typology is incredibly broad. Consider conflicts between "subcategories of class members." Although *Amchem* was limited to allocation conflicts between present and future claimants, conflicts between subcategories hardly stop there. Judge Smith noted additional conflicts in his dissent in *In re Asbestos Litigation*, including conflicts between persons who were exposed to asbestos at different times and who were entitled to the application of different states' laws.¹¹⁰ In truth, the interests of all possible subgroups of plaintiffs divide on the matter of settlement allocation. Left-handed plaintiffs prefer allocations that give them more to allocations that benefit right-handers at their expense. Tax-exempt claimants want to front-load cash payments that tax-paying claimants want to defer. And so on. The number of possible subclasses is indefinitely great, and the number of allocation conflicts is just as large.

A final problem with the "no tradeoffs" approach is that it makes class action settlements and judgments excessively vulnerable to objections and collateral attacks.¹¹¹ Even judgments in economic loss cases may be imperiled. For example, in antitrust cases judges often create large classes that contain diverse plaintiffs. A

¹⁰⁹ Report of John C. Coffee Jr. (Jan. 8, 1998) at 18-19, submitted in *Highlands Ins. Co. v. Texas Dep't of Ins.*, No. 97-08264 (53d Judicial Dist. Travis County, Tex.) and *Travelers Indem. Co. v. Texas Workers Compensation Ins. Facility*, No. 95-15470 (250th Judicial Dist. Travis County, Tex.) (citations omitted).

¹¹⁰ See 134 F.3d at 678-79 (Smith, J., dissenting).

¹¹¹ This should make clear that our concern about the possible "eclipse of the class action" arises not just because *Amchem* "arm[s] defendants with a potent weapon [by which] to resist class certification." Coffee, Comment, *supra* note 44, at 1544. Objections to and collateral attacks upon class settlements can undermine class counsel's incentives even when defendants support certification, as they often do. A settlement is a grand coalition of all claimants, and grand coalitions are easier or harder to build under various rules. See Samuel Issacharoff et al., *Bargaining Impediments and Settlement Behavior*, in *Dispute Resolution: Bridging the Settlement Gap* 51 (David A. Anderson ed., 1996). *Amchem* appears to change the rules in ways that make grand coalitions harder to build and easier to undermine.

single class may include small purchasers and power buyers, current and former distributors or franchisees, or direct and indirect purchasers of goods.¹¹² Judges lump diverse plaintiffs together because they believe that all have the same interest in establishing a defendant's liability. Ronald W. Davis, an experienced antitrust lawyer, has questioned whether the practice can continue after *Amchem*. In a recent article, he rejected the "sweeping assertion" that "only an intraclass conflict as to the existence of liability can ever be sufficient to defeat certification" as being "inconsistent with *Amchem*." He concluded that "where a plaintiff seeks certification of a single, undivided broadly defined antitrust class . . . , *Amchem* may well imply that courts should modify their traditional liberal standard and adopt a more nuanced and cautious stance."¹¹³

On a strict reading of *Amchem*, Davis's observation makes sense. No two class members have identical interests; therefore, no two can be jointly represented in settlement. Because an objector can logically and cheaply raise this complaint in any class action, the practical implications of *Amchem* are truly frightening.¹¹⁴ Unless the Supreme Court softens its strident language, the Court will have opened the door to endless rounds of extortion.¹¹⁵ Attorneys representing objectors will be able to make credible threats to scuttle settlements unless they are paid off.¹¹⁶

In class actions, a standard of zero tolerance for conflicts is impossible to defend or meet. Class counsel must be allowed to incur and resolve many conflicts. Otherwise, they cannot make the

¹¹² See Ronald W. Davis, *Amchem* and Antitrust: Have the Ground Rules for Antitrust Class Actions Changed?, 12-Fall Antitrust 39, 43-44 (1997).

¹¹³ Id. at 44.

¹¹⁴ See, e.g., Objection to Certification of Proposed Settlement Class and to Approval of Proposed Settlement at 3-4, *Bachman v. Equitable Life Assurance Soc'y*, No. 96-1225-CIV-T-24(B) (M.D. Fla. filed July 15, 1998).

¹¹⁵ *Amchem* can also affect the ability of non-parties to attack consent decrees entered in civil rights cases. See *Rutherford v. City of Cleveland*, 137 F.3d 905, 908-11 (6th Cir. 1998) (using *Amchem* to give content to § 108 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n)(1)(B) (1994), which denies a person who was "adequately represented" in a prior legal proceeding the right to challenge certain discriminatory acts, finding a conflict of interests, and holding that non-minority applicants for positions on the police force were free to attack a consent decree between minority officers and the City of Cleveland).

¹¹⁶ The dangers of collateral attacks on class settlements are discussed at length in Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. Rev. 765 (1998).

strategy calls and financial decisions that have to be made for class actions to proceed. Class counsel must also be permitted to resolve allocation-related conflicts. The alternative of having each class member separately represented in settlement is no alternative at all.

*C. Waiving Conflicts in Consensual Group Lawsuits in
Order to Realize Opportunities for Mutual Gain*

Like class actions, voluntary litigation groups also house indefinitely many subgroups and therefore indefinitely many conflicts. Voluntary litigation groups, however, are not subject to *Amchem*. The due process issues examined in *Amchem* apply only to representational actions that may affect nonparties' interests.¹¹⁷ Consequently, lawyers can represent as many clients as they wish in consensual groups, subject only to the constraints of professional responsibility law. That said, the extent to which professional responsibility law allows lawyers to incur and resolve allocation conflicts in consensual groups is also unclear. We explained this above when discussing the aggregate settlement and general conflict rules.¹¹⁸

In this Section we will argue that, with reasonably informed client consent, lawyers representing consensual litigation groups may properly incur and help resolve all conflicts among concurrent clients that, at the time consent is given, are not games of pure conflict.¹¹⁹ As long as concurrent clients have some common interests *ex ante*, they should be permitted to consent to a conflict and ask their lawyer to help resolve it. We will then argue in the following Section that judges should have discretion to waive conflicts when the same condition is met in the class action context.

Games of pure conflict (sometimes called zero-sum games) are interactions in which moves that help one player always harm the other(s).¹²⁰ The matrix below depicts a situation of pure conflict in-

¹¹⁷ See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 40, 42 (1940) (observing that the class or representative suit is an exception to the general rule "that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party," and requiring as a condition for *res judicata* the use of procedures that "fairly insure[] the protection of the interests of absent parties who are to be bound" by class-wide judgments).

¹¹⁸ See *supra* text accompanying notes 10-31.

¹¹⁹ To be clear, we are agnostic as to whether lawyers should be prohibited from helping concurrent clients work through *pure* conflict situations.

¹²⁰ See Russell Hardin, *One For All: The Logic of Group Conflict* 26 (1995).

volving two players. Payoffs are ordinal ($4 > 1$) and are written (Player 1, Player 2).

Figure 1: A Game of Pure Conflict

		Player 2	
		Strategy A	Strategy B
Player 1	Strategy A	1,4	4,1
	Strategy B	3,2	2,3

In this game, there is no opportunity for Player 1 and Player 2 to gain through cooperation. A change from any strategy pair, e.g., (AB), to any other, (AA), (BB), or (BA), makes one player better off and the other worse off.

Other than competitive card games such as poker, one is likely to encounter few games of pure conflict in real life. Most human social and economic interactions are mixed-motive games that afford players opportunities to gain through a coordinated choice of strategies.¹²¹ Even bipolar litigation, often thought of as a zero- or negative-sum interaction, affords such opportunities. Opposing parties can often gain by settling, by agreeing on a pretrial schedule and trial plan, by being courteous and honest, and by making mutual commitments to reveal information.

The matrix in Figure 2 describes the Prisoner's Dilemma, a famous mixed-motive game. In this game, the players' interests conflict in that the strategy pair that is best for each—(BA) for Player 1, (AB) for Player 2—is worst for the other. But there is also a prospect of mutual gain through cooperation. If the players can jointly renounce the individually dominant strategy—Strategy B—

¹²¹ See *id.* at 32-34; Russell Hardin, *Collective Action* 3 (1982); Thomas C. Schelling, *A Strategy of Conflict* 4-6 (1960).

each will wind up better off than if the dominant strategy governs.¹²² The move from (BB) to (AA) makes both players better off.

Figure 2: The Prisoner's Dilemma

		Player 2	
		Strategy A	Strategy B
Player 1	Strategy A	3,3	1,4
	Strategy B	4,1	2,2

In keeping with our observation that most human interactions have the potential to yield mutual gains through cooperation, professional responsibility law prohibits few concurrent client conflicts per se. About the only thing it completely forbids a lawyer from doing is representing clients who are on opposite sides of the same lawsuit.¹²³ Other conflicts can be waived with clients' informed consent, as long as a lawyer reasonably believes that both clients can be represented effectively.¹²⁴

We believe this "reasonable belief" requirement is met whenever a co-client representation presents an opportunity for mutual gain that is identifiable ex ante, and the lawyer understands and can explain what the opportunity is. The informed consent requirement is met when the lawyer explains the opportunity and the risks associated with it in a manner the clients can understand, and enters into an arrangement with them for handling conflicts that meets with their informed approval. The number of possible conflict-resolution schemes is indefinitely large. Clients may choose to

¹²² A dominant strategy is one that a player is better off following no matter what strategy is chosen by an opponent. See Hardin, *supra* note 121, at 150. In the Prisoner's Dilemma, Strategy B is dominant for Player 1 because it yields a higher payoff whether Player 2 chooses Strategy A or Strategy B. For the same reason, Strategy B is also dominant for Player 2.

¹²³ See Model Rules of Professional Conduct Rule 1.7(a) & cmt. 7 (1997).

¹²⁴ See Model Rules of Professional Conduct Rule 1.7 & cmt. 5 (1997).

work things out between themselves. For example, they may tell their lawyer, "Get as much money for us as you can, and we'll figure out how to split it." They may refer disputes to third parties, perhaps agreeing that an arbitrator will handle division of a settlement fund. Or, and this is the rub, they may ask their lawyers for help. This is a weak reading of conflicts law that gives lawyers and clients great freedom to live with conflicts and to decide how they will be addressed.¹²⁵

This account of conflicts law allows clients to waive conflicts arising from the need to allocate litigation resources among competing claimants and to choose joint litigation strategies that involve unavoidable tradeoffs. These activities present obvious opportunities for cooperative gain. For example, all clients stand to benefit when lawyers use scheduling procedures and other efficient management practices that enable them to reduce costs. All clients can also gain from a centrally controlled litigation strategy that forces a defendant to confront a block of claims. Not all clients may gain equally, but in theory all can be better off than if they litigated separately. Therefore, on our approach, conflicts relating to resource allocations and collective litigation strategies should be waivable by members of consensual litigation groups.

This conclusion supports our contention that our approach tracks professional responsibility law in action reasonably well. Lawyers representing groups of clients allocate limited resources among competing needs and select among possible joint litigation strategies every day. They do so with clients' understanding and consent. Sometimes, consent is informed and express. More often, it is implied, as when lawyers set some clients' matters ahead of others, or devote marginally greater resources to some clients' claims than others, without telling anyone what they are doing. The implied consent rests on the ordinary understanding that lawyers, like other service providers, have to set priorities.

¹²⁵ It could reasonably be claimed that our account of lawyers' conflicts conforms more closely to agency law than professional responsibility law. Although the latter is based on the former, professional responsibility law is less flexible and more paternalistic in terms of the duties it imposes. For a longer discussion of this point, see Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 *Duke L.J.* 255, 306-11 (1995).

If professional responsibility law allows lawyers to resolve these inter-client conflicts with client approval, does it also permit them to help allocate settlement proceeds? We showed above that the answer appears to be "yes" as a matter of positive law and legal practice under both the aggregate settlement rule and the general rule governing conflicts.¹²⁶ To us, this is the right result. Group lawsuits often present opportunities for collective gains even when the need to allocate settlement proceeds is considered.

Suppose that Plaintiff 1 and Plaintiff 2 expect to recover \$100 and \$200, respectively, in separate lawsuits, and that a litigation group containing both plaintiffs is expected to yield a joint recovery of \$400. The \$100 surplus may arise because cooperation enables the plaintiffs to take advantage of economies of scale in litigation, because it increases their leverage in settlement negotiations, or for other reasons.¹²⁷ As long as the expected joint recovery is divided in some manner between (\$100, \$300) and (\$200, \$200),¹²⁸ group litigation is predicted to make both plaintiffs better off relative to individual litigation.

There is, however, no guarantee that the expected joint recovery will be allocated in a mutually advantageous way. Any allocation from (\$400, \$0) to (\$0, \$400) is possible, but only those between (\$100, \$300) and (\$200, \$200) will make both plaintiffs better off. Nor will the plaintiffs be indifferent as to where the actual allocation falls within the latter range, assuming the distributions at the extremes are somehow ruled out. Plaintiff 1 will prefer allocations closer to (\$200, \$200) and Plaintiff 2 will prefer allocations closer to (\$100, \$300). A conflict of interests is buried in the cooperative game.

The plaintiffs face a straightforward difficulty: how to handle the allocation problem in a mutually satisfactory way. The number of possible solutions is indefinitely great. The plaintiffs could agree to divide the joint recovery equally, in proportion to each plaintiff's security level (i.e., each plaintiff's expected recovery in individual litigation), or on the basis of some other formula. The plaintiffs could put all possible allocations from (\$400, \$0) to (\$0, \$400) or

¹²⁶ See *supra* text accompanying notes 10-31.

¹²⁷ We identify possible sources of gain through cooperation in Silver & Baker, *supra* note 12, at 744-47. See also Charles Silver, Representative Litigation/Class Actions, in *International Encyclopedia of Law and Economics* (forthcoming 1999).

¹²⁸ (Payoff to Plaintiff 1, Payoff to Plaintiff 2).

from (\$100, \$300) to (\$200, \$200) into a hat and draw one out. They could assign each other a number of lottery tickets and give the entire recovery to whoever wins a drawing held at the end of the case. Or, they could bring in a third party, their lawyer or somebody else, and ask that person to allocate the recovery fairly.

Members of consensual group lawsuits have experimented with many ways of allocating settlement funds. They have tried majority rule,¹²⁹ mathematical formulas and point systems,¹³⁰ arbitration,¹³¹ and client-to-client negotiation.¹³² In our experience, however, these arrangements are rare. It is far more common for plaintiffs to make no special plans and to allow their lawyers to handle the task of apportionment by default. This is somewhat surprising, but, on reflection, not entirely so. Investors in speculative ventures like oil wells and start-up companies usually know in advance or can figure out with precision how large a portion of the equity they own. But a plaintiff usually has no idea what the size of his ownership interest in a litigation group is and, moreover, has no objective way of finding out. Plaintiffs typically do not learn how large their shares are until they receive settlement offers for approval. To the extent that they invest in group litigation without this information, plaintiffs may appear to act irrationally.

It is important to keep in mind, however, that plaintiffs who sue individually also rely heavily, and often primarily, on lawyers for guidance as to the value of their claims. Having little or no idea how much their claims are worth, clients pay their lawyers in part to provide an assessment. Plaintiffs' ignorance does not disappear when they sue in groups, nor does lawyers' ability to supply advice and information. If lawyers are low-cost providers of accurate claim assessments, we would expect lawyers to provide this service in an efficient market. The fact that client groups are marred by conflicts that are not present in single-plaintiff cases need not automatically lead plaintiffs to seek valuation services from a new source.

¹²⁹ See, e.g., *Hayes v. Eagle-Picher Indus.*, 513 F.2d 892 (10th Cir. 1975); *Knisley v. City of Jacksonville*, 497 N.E.2d 883 (Ill. App. Ct. 1986), appeal denied, 505 N.E.2d 353 (Ill. 1987).

¹³⁰ Confidential matter being litigated in Denver.

¹³¹ Settlement Authority document used in a Texas action.

¹³² Used mainly when the number of plaintiffs is small, e.g., a driver and a passenger injured in the same automobile accident.

Therein lies the rub. Lawyers' advice on the value of claims may be less reliable in group settings than it is when a lawyer has only a single client, but it does not follow that there is a more efficient source of this information or that there is a better way to handle allocation decisions than by leaving them in lawyers' hands. The infrequency with which alternatives to lawyers are used in consensual group lawsuits reinforces this point. Lawyers compete for clients in markets, and they often receive clients from other lawyers by referral. If it were economically advantageous for clients to rely upon mathematical allocation formulas and other innovations, it seems likely that some lawyers would have incentives to provide them.¹³³ Clients with high-value cases and referring attorneys with fee interests in high-value cases would have every reason to demand protection against the risk that low-value claims will be overpaid. Clients' persistence in relying on lawyers for valuation assistance strongly suggests that no other arrangement is preferable and that the concomitant inter-client conflict of interests that lawyers for consensual litigation groups face should therefore be waivable.

D. Tolerating Conflicts in Class Actions

In many respects, the account of conflicts in consensual litigation groups offered in the preceding section transfers easily to nonconsensual groups. Inter-client tradeoffs have to be made in all group representations. Litigation resources must be allocated and work priorities assigned even though this means that some clients' preferences are ignored or overridden. Decisions concerning litigation and settlement strategies have to be made even though they expose some plaintiffs to unwanted levels of risk, undesirable delays, or inferior remedies. If class actions are to proceed at all, conflicts must be incurred and tradeoffs must be made.

The question is what role class counsel should play in resolving the multitude of intraclass conflicts. Just because tradeoffs are unavoidable, it does not logically follow that class counsel must or should make any or all of them. Consider settlement allocations.

¹³³ This point also weakens the concern that defendants may wish to manipulate allocation formulas inappropriately. These incentives should exist in all group lawsuits, yet no protections against them are taken in voluntary groups. The failure of the private market to adjust for this risk forces one to question the efficiency of devising means to handle this problem.

They must be made, but they do not have to be made by lawyers. Judges can also allocate settlement funds among class members, as the famous "Agent Orange" case shows.¹³⁴

The task of deciding whether lawyers, judges, or others should handle intraclass conflicts is complicated by the fact that it is impractical to consult absent plaintiffs or to obtain their informed consent in anything approaching an economical or timely way.¹³⁵ A further difficulty is that class members may disagree. Some may be willing to waive certain conflicts but others may not. It is not clear how divided votes should be handled, but the refusal of some group members to consent would certainly complicate matters.

Because it is impractical to handle conflicts in class actions on the basis of client consent, a different strategy is required. We will argue that judges should allow attorneys to incur and help resolve the same conflicts in class actions that they are permitted to handle in consensual group lawsuits in which attorneys routinely serve as both advocates and trustees. Like other trustees, attorneys in charge of consensual group lawsuits balance beneficiaries' competing interests subject to a reasonableness constraint when deciding how assets will be used. We think that class counsel also should be able to resolve conflicts and should enjoy protection from liability akin to what trustees enjoy.

The starting point for analysis is the insight that in class actions, as in consensual group lawsuits, conflicts usually arise in connection with opportunities to realize joint gains. This is clearly true when class actions aggregate claims that are uniformly small, as the Texas Double-Rounding Case did. Unless small-claim plaintiffs act collectively, their claims are worthless; and, if average settlement payments can be taken as a guide, most class actions involve aggregations of mostly small claims.¹³⁶ When claims have economic

¹³⁴ For a discussion of the case, see Peter H. Schuck, *Agent Orange on Trial* (1986).

¹³⁵ Professor Coffee appears to disagree on this point. See Coffee, Comment, *supra* note 44, at 1558-59 (proposing the use of majority consent within subclasses to waive conflicts). If experience can serve as a guide, polling class members will do little but rubber-stamp class counsel's recommendations. Absent plaintiffs already have the right to challenge allocation plans but almost never do. See Willging et al., *supra* note 2, at 178 (reporting objection rates). The cost of participating and the logic of collective action make absent plaintiffs' low rates of communication easy to understand.

¹³⁶ See Willging et al., *supra* note 2, at 13.

value only as part of a class, the dangers associated with intraclass conflicts rightly seem worthy of less concern.

Class actions can also be beneficial when some or all plaintiffs have individually economically viable claims. This can be inferred from the fact that sophisticated plaintiffs with large claims often choose to stay in class actions instead of opting out. For example, companies that purchased retrospectively rated policies of workers compensation insurance were plaintiffs in two recently settled Texas class actions. Some of these companies were large employers that were allegedly overcharged hundreds of thousands or millions of dollars and that were due similarly sizable refunds. Both cases settled as opt-out classes, but in both cases the opt-out rates were low.¹³⁷ When sophisticated businesses with large amounts of money at stake choose to remain in a class, one may reasonably infer that they made an intelligent and informed judgment that this course of action was best for themselves despite any intraclass conflicts of interests confronting class counsel. Rational plaintiffs will simply exit the class when they are better off suing by themselves.¹³⁸

The second step in the argument is the observation that class counsel's job description includes the power to make many binding decisions that require them to take into account absent plaintiffs' competing interests. We have in mind here decisions concerning litigation strategy and resource allocation. The point of the class action is to litigate in a coordinated fashion related claims that would otherwise be litigated separately or not at all. This requires the use of, for example, common pleadings and motions, common discovery and testimony, common trial plans and evidentiary presentations, all of which are crafted, controlled, and financed by attorneys who are duty-bound and have incentives to act for the

¹³⁷ The cases were *Weatherford Roofing Co. v. Employees Nat'l Ins. Co.*, No. 91-05637-F (116th Judicial Dist. Dallas County, Tex.), and *Highlands Ins. Co. v. Texas Dep't of Ins.*, No. 97-08264 (53d Judicial Dist. Travis County, Tex.). Discussion of *Highlands* can be found in *Deals & Suits*, *Texas Lawyer*, June 22, 1998, available in LEXIS, News Library, Txlawr File.

¹³⁸ Professor Coffee has argued that plaintiffs opt out of class actions more often than they should because their attorneys profit from the higher fees that can be charged in individual cases. See Coffee, *Entrepreneurial Litigation*, *supra* note 53, at 909-11. This point, the truth of which we do not dispute, does not undermine our claim, which is that plaintiffs who decline to opt out of a class expect group litigation to be the superior strategy for them.

benefit of the class. So far as we are aware, class counsel's responsibility for these matters is not controversial and never has been. Not even *Amchem* raised any questions about the propriety of having class counsel play this role in a properly defined class. There have been many calls for better methods of monitoring and regulating plaintiffs' attorneys, but no one has suggested forbidding class counsel from making decisions concerning litigation strategy and resource allocation that are binding on all class members.

Nonetheless, allowing class counsel to control the joint litigation effort is incompatible with a strict "no conflicts" reading of the Due Process Clause. By choosing litigation strategies and allocating resources, class counsel routinely makes inter-claimant tradeoffs, as already explained. The policy of allowing class counsel to make these decisions therefore undercuts any deep or principled objection to actions by class counsel that compromise absent plaintiffs' competing interests.

This point takes us a large step toward the conclusion that attorneys who manage class actions are trustees or guardians as much as they are agents or delegates, if not more so. They are appointed without absent plaintiffs' consent; they are not subject to absent plaintiffs' control; and they make binding decisions that balance absent plaintiffs' competing interests.¹³⁹ They also incur fiduciary duties to use their powers primarily for the benefit of those they represent. In each respect, attorneys who run class actions resemble trustees. This suggests that the class counsel's fiduciary duties allow them to make reasonable inter-plaintiff tradeoffs, just as trustees' fiduciary duties permit them to strike reasonable compromises among beneficiaries.

Trustees are fiduciaries. But trustees also regularly balance the competing interests of beneficiaries.¹⁴⁰ For example, they select among possible investment strategies, some of which are better for income-beneficiaries and some of which are better for principal-beneficiaries. When assets are sold, they allocate the proceeds between principal and income, again balancing the interests of the two groups. Trustees determine the timing of disbursements, a

¹³⁹ See, e.g., 72 Tex. Jur. 3d Trusts §§ 9, 58 (1990) (explaining, respectively, how trusts are created and that discretionary decisions by trustees will be overturned only when bad faith is proved).

¹⁴⁰ See Restatement (Third) of Trusts § 227 cmt. c (1992).

matter as to which beneficiaries in different tax positions may have different preferences. They also make disbursements that help some beneficiaries while harming others. A trustee can use trust assets to provide medical care for a surviving spouse even though this costs the remaindermen money. A trustee can help one sibling purchase a home, go to college, or meet a special need even though this leaves less money for other siblings to enjoy. Trustees can make these tradeoffs even though the law requires them to treat beneficiaries impartially.¹⁴¹ Impartiality permits trustees to balance beneficiaries' interests as long as their decisions have reasonable grounds.¹⁴²

By allowing trustees to incur and resolve conflicts among beneficiaries, the law merely acknowledges the reality that tradeoffs are inevitable when many persons have interests in or are affected by the uses to which common assets are put. The legal construction of class counsel's role should reflect the same reality. The law must allow class counsel to subordinate some absent plaintiffs' interests to others' when making decisions that are reasonably calculated to advance the interests of the entire group. Running a group lawsuit in a coordinated way is otherwise impossible.

The inevitability of making tradeoffs puts the question, "Should class counsel be allowed to help allocate settlement proceeds?" in its proper light. The question is not whether due process allows class counsel to resolve conflicts between absent plaintiffs, but rather *which* conflicts counsel is permitted to resolve. It may be uplifting, even inspiring, to hear a judge pronounce that "*any* real conflict, even if minor when compared to interests held in common, will render the representation [of one person by another] inadequate,"¹⁴³ but this is not and cannot be a workable standard of law.¹⁴⁴

¹⁴¹ See *id.* § 183.

¹⁴² See, e.g., *id.* § 183 cmt. a (stating that, if the terms of a trust so specify, a trustee may have discretion to favor one beneficiary over another); *id.* § 187 (discussing generally trustees' discretion, incorporating the rule of Restatement (Second) of Trusts); Tex. Prop. Code Ann. § 113.101 (West 1995) (stating that where the allocation of receipts and expenditures between beneficiaries and remaindermen is not specified by the trust or by state law, the trustee may determine the allocation "in accordance with what is reasonable and equitable"); *id.* § 113.056 (noting that trustees may exercise discretion in the management of the trust "under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise").

¹⁴³ See *Asbestos Litig.*, 134 F.3d at 677 (Smith, J., dissenting).

¹⁴⁴ Nor is it the standard judges have applied when assessing the adequacy of proposed class representatives. "Only a conflict that goes to the very subject matter of

Whether conflicts relating to settlement allocations are so serious as to warrant removing class counsel from the allocation process is a judgment call that should be made with an eye to the plausible alternative participants in that process. It is also a judgment that may vary from case to case. Someone has to allocate settlement proceeds, and the number of candidates for the job is actually quite small. Attorneys acting for the class as a whole or for subclasses can control the process. Third parties, such as judges or court-appointed masters, can be brought in. Steering committees of class members can take the lead. Each procedure has advantages and disadvantages. There is no reason to expect a single arrangement to handle all cases well.

The procedure most often used in class actions combines attorney control of the settlement agenda with class-wide polling and weak judicial review for reasonableness.¹⁴⁵ Class counsel designs an allocation plan while negotiating with a defendant; class members are notified of the plan and allowed to comment on it; then, in light of counsel's recommendation and class members' reactions, a judge decides whether to approve it. This procedure resembles the equitable practice of reviewing controversial actions trustees propose to take. A trustee decides what he or she wants to do and, if a beneficiary strongly objects, obtains a judicial opinion on the permissibility of the proposed action before proceeding.¹⁴⁶ For example, trustees often seek judicial guidance when allocating receipts and expenses between income and principal beneficiaries whose interests conflict.¹⁴⁷

One could attempt to distinguish the roles of class counsel and trustee by pointing out that a trustee's power to balance benefi-

the litigation will defeat a party's claim of representative status." *Dresser Indus. v. Snell*, 847 S.W.2d 367, 373 (Tex. App. 1993) (citing *Adams v. Reagan*, 791 S.W.2d 284, 291 (Tex. App. 1990)).

¹⁴⁵ See, e.g., *Glicker v. Bradford*, 35 F.R.D. 144, 151 (S.D.N.Y. 1964) (observing that a court is not to substitute its business judgment for that of the parties who worked out the settlement).

¹⁴⁶ The leading treatise describes the advisory process as follows:

[C]ourts of equity in the exercise of their jurisdiction over the administration of trusts have been accustomed to give instructions to trustees at their request as to their duties and powers. A trustee is not compelled to act at his peril in the administration of the trust. He need not act first and discover later whether his act was in breach of trust. He is entitled to the instructions of the court as a protection.

IIIA William F. Fratcher, *Scott on Trusts* § 259, at 406-07 (4th ed. 1988).

¹⁴⁷ See *id.* § 259, at 408.

aries' interests derives from a trust instrument and reflects the intent of a settlor. No analogous document or expression of intent guides class counsel's decisionmaking. In this respect, class actions differ from consensual group lawsuits as well. Consensual groups operate on the basis of client consent, which may include express or implied authority to make tradeoffs.

Without meaning to gainsay the importance of consent, we view this argument as a nonstarter. The class action is a regulatory alternative to a voluntary group lawsuit and is available principally in circumstances in which it is impractical for counsel to obtain either plaintiffs' actual authority to litigate or their consent to particular decisions. The issue that must be faced, and faced squarely, is how to run class actions in the absence of client consent. The emerging view, for which Professor Coffee deserves much of the credit, is that class action procedures should be selected in light of their tendency to

induc[e] attorneys to mimic the results that a healthy, functioning market for legal services would produce. "Mimicking the market" as a regulatory strategy requires not that clients be able to bargain in fact but that we be able to manipulate the incentives that the law holds out so as to motivate attorneys to perform as we believe informed clients would want them.¹⁴⁸

This normative view makes sense of many fundamental aspects of class actions: the preference for contingent percentage fee arrange-

¹⁴⁸ Coffee, *Entrepreneurial Litigation*, *supra* note 53, at 878. Because Professor Coffee supports the "mimic-the-market" approach, we are surprised by his characterization of our recommendation as "a radical step—one that truly redefines the role of the lawyer from a faithful agent to a philosopher king." Coffee, *Comment*, *supra* note 44, at 1543. Principals often give agents discretion to use reasonable judgment, especially when agents possess superior knowledge, ability, or expertise, which they usually do. Our aim is to replicate in class actions the range of discretion that clients give lawyers in voluntary group proceedings. To us, Coffee's desire to deny class counsel this discretion reflects a dissatisfaction with mechanisms or arrangements that actually satisfy plaintiffs in real life. His (understandable) fear that class counsel will exploit absent plaintiffs appears to have blinded him to an important fact: Plaintiffs who hire lawyers in markets willingly enter into arrangements that, although predicted to be beneficial, expose plaintiffs to serious risks of exploitation.

Another way to frame the issue is by asking not whether "the law must create incentives for plaintiffs' counsel to individualize" settlement payments, as Coffee contends, see *id.* at 1550, but whether the incentive to individualize payments in class actions must be stronger than it is in consensual group representations. In the latter, the incentive often is weak.

ments over compensation formulas based on hourly rates; the practice of having class counsel advance costs and the requirement that counsel possess the financial ability to bear them; the power of class counsel to control litigation strategy and resource allocation; and the requirement that counsel be competent to handle class litigation. Our proposal to treat class counsel as trustees also meshes well with the “mimic-the-market” approach. Informed clients rely on attorneys to allocate settlement proceeds far more often than they delegate these matters to third parties or handle them themselves.

We do not deny that there are risks to class members when counsel plays this role.¹⁴⁹ Plaintiffs who participate in consensual litigation groups can protect themselves (to an extent) from inappropriate or unacceptable settlement allocations by refusing to settle. Class members can sometimes similarly protect themselves by opting out, but often they cannot. The risk is therefore greater in class actions than in consensual lawsuits that counsel may try to saddle plaintiffs with settlement terms they dislike. Still, the risk is usually of little or no importance to absent plaintiffs. Most class action settlements yield per-plaintiff payments that are small, a few hundred dollars or less.¹⁵⁰ When payments of this size are contemplated, the important question is whether the litigation has maximized the aggregate value of the plaintiffs’ claims, not how the common fund should be divided. For most class members, a change from one allocation formula to another will have little impact on their well-being.¹⁵¹

¹⁴⁹ Because referrals are common on the plaintiffs’ side, we find Coffee’s contrast between “attorneys that [plaintiffs] personally [know] and retain[]” and “attorneys who [are] self-appointed” to prosecute class actions overly stark. Coffee, Comment, *supra* note 44, at 1542. In most voluntary group lawsuits, many plaintiffs are represented by attorneys to whom they were referred. Often, these attorneys are strangers who reside in other states. Competitive forces within referral markets make it likely that good attorneys will be selected to receive cases and that they will represent plaintiffs effectively. Still, plaintiffs typically neither know nor personally retain these attorneys, contrary to Coffee’s assertion.

It is also true that attorneys who are appointed to lead class actions often have large inventories of signed clients and records of success in litigation. It may be, and probably is, true that referral markets outperform judges when it comes to selecting, incentivizing, and monitoring attorneys, but the overlap is considerable. Judges often appoint as lead counsel attorneys whose success in referral markets is clear and give these lawyers incentives that are broadly similar to those that referral markets endorse.

¹⁵⁰ See Willging et al., *supra* note 2, at 13-14.

¹⁵¹ See Shapiro, *supra* note 1, at 924.

When larger payments are at issue, the choice of allocation formulas can be more momentous. This is when the need to monitor the allocation process is greatest. This is also when the monitor must have a sense of justice or fairness, because the object of monitoring is to ensure that absent plaintiffs receive approximately that to which they are entitled. For present purposes, the important point is that neither the justice nor the fairness of an allocation plan depends on who designs it. A plan that entitles each absent plaintiff to the expected value of his or her claim in a class-wide trial can be evaluated without knowing whether it was chosen by an inevitably conflicted attorney, by a steering committee of plaintiffs, or by a court-appointed master.

Because the justice or fairness of an allocation formula depends on its content, compromises are possible that should make attorney-designed allocations more palatable to those who fear that misallocations would often occur if attorneys were left uncontrolled. As a rule, a judge presiding over a fairness hearing must either approve or disapprove a proposed settlement as it stands. A judge cannot rewrite a settlement that, in the judge's opinion, allocates benefits inappropriately.¹⁵² A judge can, however, amend an allocation plan when a settlement agreement confers the power to do so.¹⁵³ A judge can also select the most equitable allocation plan from a menu of proposed plans.¹⁵⁴ Either approach would lessen the fear of attorney-driven or defendant-driven unfairness by giving judges discretion to throw out objectionable terms.

Unfortunately, a rigorous "no tradeoffs" approach seems to rule out both compromises because both require class counsel to suggest or endorse plans that will allocate recoveries among class members whose interests conflict. This further demonstrates the poverty of the strict "no tradeoffs" approach. Even when judges have the final say on allocation, they must and should seek assistance from class

¹⁵² See *Evans v. Jeff D.*, 475 U.S. 717, 727 (1986).

¹⁵³ The settlement proposed in the *Bachman* case, see *Objection to Certification of Proposed Settlement Class and to Approval of Proposed Settlement* at 3-4, *Bachman v. Equitable Life Assurance Soc'y*, No. 96-1225-CIV-T-24(B) (M.D. Fla. filed July 15, 1998), empowered the court to modify the allocation plan for any reason.

¹⁵⁴ See *Newberg & Conte*, *supra* note 19, § 12.09 n.70 (observing that "[t]he allocation of a settlement fund in a multi-class litigation may take place in several ways, such as . . . by court approval of one of several alternate plans of allocation submitted for review").

counsel because counsel has important information about class members' claims. A reading of the Due Process Clause that prevents judges from using this information even when they control allocation plans is simply pointless. It maintains class counsel's purity for its own sake without increasing the likelihood of a fair or just result.

It can be and has been argued that current efforts to monitor class action settlements are ineffective.¹⁵⁵ There may be a good deal of truth to this assertion. The law as written relies mainly on judges to review proposed settlements and to screen out those that are unreasonable, inadequate, or unfair.¹⁵⁶ In practice, however, judges usually approve settlements as presented, rarely ordering changes of any sort. The law as applied is that a settlement will be approved absent a clear showing of abuse.¹⁵⁷

Calls for closer monitoring of class settlements rest on normative views of the resulting allocations. The hope or belief is that if judges pay more careful attention, or if better methods of monitoring are devised, class settlements will allocate benefits more nearly as they should. Unfortunately, those who preach the gospel of monitoring often fail to articulate or develop the allocative ideals on which their hopes are based.¹⁵⁸ We therefore consider next what we believe a good group settlement should look like.

III. WHAT IS A GOOD GROUP SETTLEMENT?

Whether more careful specification of allocation procedures and plans in class actions is desirable turns partly on the likelihood that such measures will lead to allocations that meet standards of fairness or justice. In the end, this is an empirical question, but a considerable amount of theoretical work must be done before empirical study can commence. The theoretical work concerns the normative criteria themselves. What are they? What does a good group settlement look like?

¹⁵⁵ See Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051, 1122-30 (1996).

¹⁵⁶ See *West Virginia v. Chas Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971); Newberg & Conte, *supra* note 19, § 11.41.

¹⁵⁷ See Newberg & Conte, *supra* note 19, § 11.41.

¹⁵⁸ Professor Coffee commits this sin of omission in his comment on this Article. See Coffee, *Comment*, *supra* note 44.

There are many different normative standards that might plausibly be applied to group settlements. For example, a simple substantive standard might require nothing more than equal treatment of similar claims.¹⁵⁹ A more nuanced standard could require that each plaintiff's net share of the settlement reflect the net value of his or her claim in consensual litigation.¹⁶⁰ One could also emphasize procedural justice rather than substantive fairness. In consensual groups, distributive propriety could mean abiding by whatever terms plaintiffs agree to when a joint representation begins.¹⁶¹ In nonconsensual groups, it could mean honoring terms rational plaintiffs would have accepted under suitable bargaining conditions.

Commentators who have discussed group settlement allocation norms tend to be at the extreme ends of a continuum. A few, including Professor Geoffrey C. Hazard, Jr., contend that "there is no obvious basis on which to allocate among multiple claimants the 'cooperative surplus' of settlement that goes to them as a group."¹⁶² He further observes that "the indeterminacy of the fairness of the allocation of the cooperative surplus among the plaintiffs" merely compounds "the indeterminacy of fairness of a settlement as between a defendant and a plaintiff."¹⁶³ Hazard therefore concludes that it is "inescapable that an irreducible measure of trust, under the rubric of 'professional judgment,' must continue to repose in

¹⁵⁹ See, e.g., Koniak, *supra* note 42, at 1093-95 (criticizing on due process grounds dissimilar treatment in proposed *Amchem* settlement of identified and unidentified class members with similar injuries); Menkel-Meadow, *supra* note 20, at 1211 (suggesting as a principle by which to measure the ethicality of group settlements: "[D]oes the settlement treat similarly situated people similarly, but not necessarily identically? Is there horizontal equity?").

¹⁶⁰ See Coffee, *Class Wars*, *supra* note 20, at 1437; Coffee, *Entrepreneurial Litigation*, *supra* note 53, at 924; Koniak, *supra* note 42, at 1075 (criticizing proposed *Amchem* settlement on the ground that class members received less money than plaintiffs with similar injuries who were represented by the same attorneys in non-class litigation).

¹⁶¹ See, e.g., *Hayes v. Eagle-Picher Indus.*, 513 F.2d 892, 894-95 (10th Cir. 1975); *Collins v. Coastline Constr.*, 820 F. Supp. 270, 273 (E.D. La. 1993).

¹⁶² Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. Rev. 1257, 1269 (1995); see also, e.g., *Nicolet Instrument Corp. v. Lindquist & Vennum*, 34 F.3d 453, 455 (7th Cir. 1994) (Posner, C.J.) (observing that one cannot label negotiation results as "right" or "wrong," and that it is therefore difficult to establish attorney malpractice in settlement negotiations); Richard A. Posner, *Economic Analysis of Law* § 21.5, at 608 (5th ed. 1998) ("Settlement negotiations are a classic example of bilateral monopoly.").

¹⁶³ Hazard, *supra* note 162, at 1269.

the lawyer,” and that “negotiating settlements, a key function in our calling, is effectively beyond regulation.”¹⁶⁴

Many more commentators have expressed the view that there exists something approaching a “right answer” to the group settlement allocation question, at least in terms of certain “principles” that should be used to evaluate the appropriateness of actual allocations. The two principles most commonly invoked in this context are “horizontal equity” and “the expected net value of a claim in litigation.”¹⁶⁵

Professor Carrie Menkel-Meadow, for example, has stated that the principle of horizontal equity—“does the settlement treat similarly situated people similarly, but not necessarily identically?”¹⁶⁶—is one that she would include in a list of “principles that could be used to assess a settlement under a regime of increased court scrutiny of such settlements.”¹⁶⁷ Professors Coffee, Susan P. Koniak, and Roger Cramton also invoke notions of horizontal equity when criticizing the *Georgine* settlement (the caption of the case that became *Amchem*).¹⁶⁸ Koniak expresses dismay that the court “did not demand even-handed treatment of identified [“present”] and unidentified [“future”] claimants as an indication of class counsel’s fidelity to the unidentified.”¹⁶⁹ Coffee takes issue with class counsel’s decision to “waive[] compensation for most class members

¹⁶⁴ Id. at 1257. Hazard ultimately concludes that “[t]he settlement process is therefore a black box, structurally impervious to enlightened scrutinization from without.” Id. at 1272.

¹⁶⁵ On this latter point, “individual” and “group” litigation are each sometimes used as the baseline for the “expected net value” calculation.

¹⁶⁶ Menkel-Meadow, *supra* note 20, at 1211.

¹⁶⁷ Id. at 1210. It is interesting that Menkel-Meadow proposes such a list of principles at all, since she observes only a page before that “we use process protections and concerns as a proxy for predicting or measuring what we cannot really evaluate—the quality of a particular settlement against both no settlement at all or other possible settlements.” Id. at 1209.

¹⁶⁸ See *Georgine v. Amchem Prods.*, 157 F.R.D. 246 (E.D. Pa. 1994), order vacated, 83 F.3d 610 (3d Cir. 1996), *aff’d sub nom. Amchem Prods. v. Windsor*, 117 S. Ct. 2231 (1997).

¹⁶⁹ Koniak, *supra* note 42, at 1094. She adds that “[a]s [*In re “Agent Orange” Product Liability Litigation*] makes abundantly clear, the ‘structure’ that guarantees due process—in the absence of subclasses with separate representation or a guardian—is the ‘even-handed treatment of both identified and unidentified . . . claimants.’” Id. at 1103 (citing *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425, 1437 (2d Cir. 1993), cert. denied, 510 U.S. 1140 (1994)).

with non-malignant conditions in return for cash payments to those class members with serious malignant conditions,” contending that “a private attorney, acting as class counsel, seemingly has no entitlement to abandon the interests of one group of clients to benefit another.”¹⁷⁰ Professor Roger Cramton shares this concern about the *Amchem* settlement. Pointing out that “some groups within the class are being treated less favorably than others,” Cramton argues that “[i]t is a due process issue, not merely a fairness concern, whether class counsel adequately represented the class as a whole, and major subgroups within it, in the settlement negotiations.”¹⁷¹

Many commentators have also argued that the settlement process, including the allocation process and its outcomes, should be evaluated from an economic perspective that focuses on the expected value of each plaintiff’s claim at trial.¹⁷² Most notably Professor Lewis A. Kornhauser has observed that a court’s assessment of the “fairness and reasonableness” of a group settlement “should depend

¹⁷⁰ Coffee, *Class Wars*, supra note 20, at 1398.

¹⁷¹ Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 *Cornell L. Rev.* 811, 827-28 (1995).

¹⁷² This economic model of the settlement process originated in George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1 (1984). For other scholarship employing this model, see, e.g., Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 *Hastings L.J.* 479, 479 (1997) (“[C]lass counsel may settle the claims of the class members for ‘too little,’ that is, for less than their expected value at trial.”); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 *Tex. L. Rev.* 77, 78 (1997) (“Priest and Klein predicted that litigants will compare the financial value of a settlement offer to the expected financial value of trial and select the course of action with the highest expected value.”).

The model is not uncontroversial. Professor Hazard, for example, has written:

The economist’s concept of “free market” does not apply to settlements. There is no “market freedom” because, by definition, the parties to settlement negotiations face the immediate alternative of going to trial if they exit the negotiations. Moreover, there is no shared reference point as to the value of the claim, such as “reasonable market price.” Litigation claims have no market in the understood sense of that term. The very object of the negotiations is to arrive at a payment that will substitute for one that might have been arrived at had market conditions actually existed.

Hazard, supra note 162, at 1266. Given these views, it is interesting that Hazard later observes that when negotiating settlements, “experienced lawyers form judgments [as to the values of individual claims] that can converge.” *Id.*; see also Menkel-Meadow, supra note 20, at 1198 (observing that in *Georgine* the special master “evaluated the historical values of settlements of present claims”).

in part on the expected values of the claims of each subclass and in part upon notions of fair division of the costs of litigation.”¹⁷³

In this Part we undertake a critical examination of the rules that govern settlements in consensual group litigation. Such an examination is useful for at least two reasons. First, an existing rule may embody norms of settlement allocation that close scrutiny reveals to be less attractive than some alternatives. Such a finding would call into question the rule itself and, therefore, the role of counsel that it specifies. Second, even if an existing rule is found to embody unproblematic norms of settlement allocation, those norms may be more effectively realized if the rule were amended and counsel’s defined role were changed. It is one thing to identify attractive or uncontroversial normative goals. It is another thing to design a procedure that realizes them adeptly.

A. The Existing Settlement Allocation Norm

As explained above, the aggregate settlement rule governs the conduct of lawyers who represent consensual plaintiff groups. The rule is procedural. A lawyer violates it by failing to disclose to each client “the existence and nature of all the claims . . . involved and . . . the participation of each person in the settlement,”¹⁷⁴ or by failing to obtain the thus-informed consent of each client who is to be bound by the aggregate settlement.¹⁷⁵ A violation of the rule can occur even when a settlement is unobjectionable on substantive grounds, as when, for example, a settlement is both extremely generous and allocated appropriately.

An important feature of the aggregate settlement rule is that it entitles each plaintiff to information about every other plaintiff’s claim and proposed settlement payment. This is in addition to information about his or her own claim and proposed payment to which each plaintiff would be entitled even without the rule.¹⁷⁶ The obvious reason for putting the additional information in plaintiffs’

¹⁷³ Lewis A. Kornhauser, Control of conflicts of interest in class-action suits, 41 *Pub. Choice* 145, 157 (1983).

¹⁷⁴ Model Rules of Professional Conduct Rule 1.8(g) (1997).

¹⁷⁵ See *id.*

¹⁷⁶ See Model Rules of Professional Conduct Rule 1.3 (1997) (duty to communicate); Restatement (Third) of the Law Governing Lawyers § 31 (Proposed Final Draft No. 1, 1996) (same).

hands is to enable them to compare their claims and proposed payments with others' and to decide whether they are satisfied with the settlements they and others are to receive. The disclosure requirement focuses attention on the size of settlement payments relative to one another, suggesting a desire for, or a concern about, horizontal equity (at least as perceived by the plaintiff group members).¹⁷⁷

The consent requirement is also consistent with the suggestion that a desire for horizontal equity underlies the aggregate settlement rule. Plaintiff 1 can block a settlement if she considers her proposed payment too small (or, less probably, too large) compared to the payment proposed for Plaintiff 2, or if she considers Plaintiff 2's proposed payment too large or too small compared to the payment proposed for Plaintiff 3. One may expect plaintiffs to exercise the veto mainly when their own interests are infringed, but in principle they can also block deals that, in their judgment, short-change or overpay others.

Given the intuitive pull of fairness, it is not surprising that a desire for horizontal equity seems to underlie the rule. Still, it is worth noting that horizontal equity seems to matter little or not at all in two commonly invoked models of settlement decisionmaking: the economic and the satisficing models. Under the economic model,¹⁷⁸ the decision to settle a case is made relative to a baseline of a plaintiff's expected net recovery at trial. Plaintiffs can be expected to settle whenever the expected recovery at trial minus expected litigation costs is less than the amount being offered in settlement net

¹⁷⁷ For present purposes, "horizontal equity" includes any normative standard (or set of standards) in light of which a distribution of settlement payments *among* plaintiffs might be evaluated. We shall assume that there are many plausible ways to operationalize horizontal equity. The possibilities include, but are not limited to the following: equal payments to all; payments sized according to the expected net (or gross) value of each plaintiff's claim if tried individually; and payments sized according to the expected net (or gross) value of each plaintiff's claim if tried as part of a group. With horizontal equity as the underlying norm, the rule's function can be understood as ensuring, or increasing the likelihood, that aggregate settlements conform to some normative distributive standard. Put another way, the aim of the rule seemingly is to discourage settlement payment patterns that are normatively *indefensible*.

¹⁷⁸ This is the model briefly discussed *supra* notes 172-173 and accompanying text. See also Robert Cooter & Thomas Ulen, *Law and Economics* 484-87 (1988) (discussing how rational bargainers may still go to trial).

of expected settlement costs. Under the satisficing model,¹⁷⁹ a plaintiff's decision to settle is made relative to a set of criteria or aspirations, each of which must be satisfied at a threshold level. A plaintiff may want to pay medical bills, buy a new car, put children through college, keep a comatose spouse in a nursing home, emerge from debt, or do all these things. An acceptable offer is one that provides enough money (or other relief) to meet the plaintiff's chosen objectives.

Neither the economic model nor the satisficing model generates a strong attachment to horizontal equity. In the case of the former, an economically rational plaintiff will support any settlement that pays him at least the net expected value of his claim at trial, and will oppose all other settlements. An economically rational plaintiff will want information about others' claims and proposed settlement payments only for the purpose of confirming how much his own claim is worth. He will not otherwise care what others' claims are worth or whether they get what they deserve. Nor will a satisficing plaintiff. A satisficer needs to know only what his minimum settlement criteria are and whether they are met. He may be interested to know about other plaintiffs' claims and proposed settlement payments for the purpose of determining whether he set his own settlement aspirations too high or too low, but he will not care about horizontal equity. To the contrary, a satisficer may expect to see a good deal of variation across plaintiffs, reflecting idiosyncratic differences in the subjective criteria plaintiffs use when deciding whether to accept a settlement offer.

By pointing out that neither economically rational nor satisficing plaintiffs need have an inherent interest in horizontal equity, we do not mean to deny that they may care. An economically rational plaintiff can have other-regarding preferences, and a satisficer can include horizontal equity as a criterion for settling his claim. As a factual matter, of course, human beings often care about horizontal equity a great deal. Real plaintiffs are curious, empathetic, and often committed to simple conceptions of fairness. We mean only

¹⁷⁹ On satisficing as a method of decisionmaking, see Herbert A. Simon, *Theories of Decision-Making in Economics and Behavioral Science*, 49 *Am. Econ. Rev.* 253, 262-65 (1959); Herbert A. Simon, *The Role of Expectation in an Adaptive or Behavioristic Model*, in *Expectations, Uncertainty and Business Behavior* 49, 56 (Mary Jean Bowman ed., 1958).

to say that neither the economic nor the satisficing model gives a person who does not already care about horizontal equity a reason to do so.

Nor do we mean to deny that aggregate settlements often conform to patterns that may seem normatively attractive. It is common to tie payment amounts to the perceived size and strength of plaintiffs' claims.¹⁸⁰ It is also common to dole out equal payments, especially when the sums involved are small.¹⁸¹ Again, our point is simply that neither the economic model nor the satisficing model gives one any reason to care about the patterns within a group settlement independently of the sufficiency of each individual's payment.

It should not be surprising that neither the economic model nor the satisficing model supports a concern about horizontal equity. Bargaining is a subjective process that tolerates a good deal of variation from case to case. Plaintiffs with different attitudes toward risk, different levels of wealth, different senses of justice, and different expectations in life may bargain for different settlement payments even though their claims are closely related. If competent counsel represents all such plaintiffs, the bargains struck in separate deals may cluster more closely than they otherwise would.¹⁸² But the width or narrowness of the resulting range is purely accidental insofar as models of decisionmaking are concerned.

B. The Appropriateness of Horizontal Equity as the Governing Norm

By itself, the failure of the economic and satisficing models to generate a strong concern for horizontal equity does not undermine the aggregate settlement rule. It just forces one to look elsewhere for justification of the rule's underlying norm. In this Section, we consider three arguments for horizontal equity that could plausibly explain the rule. The first is that economically rational plaintiffs, at

¹⁸⁰ See, e.g., Silver & Baker, *supra* note 12, at 760-61 (describing a grid-based settlement); Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 Loy. L.A. L. Rev. 395, 403-04 (1998) (same).

¹⁸¹ See, e.g., *Mobil Oil Corp. v. Ellender*, 934 S.W.2d 439 (Tex. 1996), *aff'd in part, rev'd in part*, 968 S.W.2d 917 (Tex. 1998) (awarding small equal payments); Jonathan Harr, *A Civil Action* (1995) (describing litigation that awarded large, equal payments).

¹⁸² See Korobkin & Guthrie, *supra* note 172, at 95-101 (discussing lawyers' relative resistance to framing effects that may influence clients' judgments of the value of claims).

the time of forming litigation groups, would insist upon horizontal equity in the allocation of settlement proceeds. The second is that arrangements that promote horizontal equity in settlement allocations are means of dealing with agency problems that might otherwise cause plaintiffs' attorneys to settle the group's claims for too low an aggregate amount. The third is that arrangements that promote horizontal equity prevent attorneys from negotiating settlement allocations that benefit some group members at the expense of others.

1. The Rational Bargaining Model

One argument in favor of horizontal equity as the norm to govern any settlement allocation process may be that economically rational plaintiffs, when forming litigation groups, would insist upon it. The starting point for this argument is the irrationality of any plaintiff agreeing to terms that entitle him to less than his security level in individual litigation.¹⁸³ Thus, an economically rational plaintiff with a claim worth an expected $\$N$ (net of litigation costs) in an individual lawsuit would be predicted to join with other plaintiffs only if the expected net return was some amount greater than $\$N$. Otherwise, self-interest would impel the plaintiff to litigate alone.

The rational bargaining model of plaintiffs' decisions to join consensual litigation groups has strong appeal.¹⁸⁴ Although plaintiffs may join litigation groups for many reasons, an important one is surely that they hope to make themselves better off. This motivation is most evident when plaintiffs' claims are too small to be litigated profitably one at a time. In this situation, group litigation is the only means of realizing value.¹⁸⁵ The rational bargaining model is also attractive because it mimics the tendency of markets to base equity shares in speculative group undertakings on the value of the assets each investor contributes. Generally speaking, investors

¹⁸³ By a plaintiff's "security level," we mean the expected value of his claim in individual litigation, net of litigation costs. See *supra* text accompanying notes 127-129.

¹⁸⁴ Professor Coffee has endorsed this approach. See *supra* note 148 and accompanying text.

¹⁸⁵ There is also the possibility of threatening an opponent with litigation costs in order to extract a settlement payment for a claim that has a negative expected net value at trial. See Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 *J. Legal Stud.* 1 (1996); Robert G. Bone, *Modeling Frivolous Suits*, 145 *U. Pa. L. Rev.* 520 (1997).

who contribute higher-value assets do so only if they receive larger equity shares than those who contribute lower-value assets. Similarly, one would expect plaintiffs with higher security levels to join a litigation group only if the expected net return were greater than their security levels, and therefore presumably also greater than the expected net return to plaintiffs with lower security levels. Finally, the rational bargaining model preserves a sense of justice. On the assumption that plaintiffs' security levels are a rough measure of just compensation, allocations based on security levels would seem to further justice as well.

The attractiveness of the rational bargaining model as a justification for horizontal equity in the allocation of settlement proceeds diminishes, however, when one considers that plaintiffs who participate in consensual group lawsuits rarely protect their security levels in any explicit way.¹⁸⁶ Usually, they simply rely on their lawyers to treat them "fairly" without articulating what this means. To understand why so little advance planning occurs, it is enough to contemplate the first step in the process: assigning security levels to plaintiffs' claims. In a fraction of the cases, claim values are apparent. For example, in the Texas Double-Rounding Case, every plaintiff's security level was zero.¹⁸⁷ Security levels of zero are not particularly informative when allocating settlement proceeds, however, because all possible allocation plans (except those that tap plaintiffs' bank accounts)¹⁸⁸ are compatible with them: No plaintiff is made worse off by litigating with the group rather than individually no matter how any settlement proceeds are ultimately allocated. When claims have positive value only in group litigation, it is not surprising that plaintiffs' security levels are ignored.

¹⁸⁶ Another difficulty with the rational bargaining model and its focus on each plaintiff's security level concerns its descriptive accuracy: Plaintiffs' security levels rarely come up in conversations with lawyers who handle consensual group cases. We have talked with lawyers many times about settlement allocation methods. They usually claim to work on the basis of what they expect a jury to do in a *group* trial, not on the basis of the net value of each plaintiff's claim in *individual* litigation. For example, a lawyer who believes that a jury will award *X* twice as much as *Y* will demand twice as much for *X*'s claim as for *Y*'s claim in settlement negotiations and, when dividing a lump sum, will allocate twice as much to *X* as to *Y*.

¹⁸⁷ See *supra* notes 45-50 and accompanying text.

¹⁸⁸ See *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996), cert. denied, 117 S. Ct 1569 (1997).

Positive claim values can also be determined with confidence on some occasions. For example, the settlement market in asbestos cases is highly developed, and lawyers frequently have considerable expertise in valuing claims.¹⁸⁹ Even here, however, the data are of limited value because asbestos cases are typically tried and settled in groups. The rational bargaining model requires that one know each plaintiff's security level, not the going rate for grouped claims, and the market in individual asbestos claims is thin. This is especially true of pleural disease and exposure-only cases, which are rarely, if ever, tried or settled one at a time.

For the most part, claims come without price tags and plaintiffs' security levels can reasonably be said to fall anywhere within a broad range of payoffs. Plaintiffs themselves almost never know what their claims are worth, either absolutely or relative to the claims of others. They rely on their lawyers to provide this information. And if plaintiffs are going to trust their lawyers to determine their security levels, they have little reason to try to protect their security levels at the time they agree to participate in the group litigation. Counsel for the group will simply offer a range for each plaintiff's security level that does little to reduce counsel's discretion when allocating settlement proceeds.

Even assuming that the various difficulties attending the assigning of security levels to claims can be resolved, it remains to determine whether the rational bargaining approach generates a strong commitment to horizontal equity. If only security levels are taken into account, the answer is "no". Consider, for example, two plaintiffs, *X* and *Y*, with security levels of \$100,000 and \$150,000, respectively, who stand to recover an expected \$600,000 by litigating together. Because a \$350,000 surplus can be realized if *X* and *Y* join forces, it clearly makes sense for them to do so.¹⁹⁰ Unfortunately, the principle

¹⁸⁹ See, e.g., Coffee, *Class Wars*, *supra* note 20, at 1365 ("In practice . . . mass tort litigation is reduced to battles between repeat players who have litigated and negotiated settlements in similar cases many times in the past."); Rheingold, *supra* note 180, at 407; Ross F. Schmucki, *How to Manage Mass Tort Litigation Inside the Law Department*, Corp. Legal Times, Oct. 1996, at 13, available in WESTLAW, Legalnp Database.

¹⁹⁰ Such a surplus is often created when plaintiffs sue collectively because of four advantages that joint litigation often affords plaintiffs over individual litigation: (1) economies of scale in litigation costs, (2) increased leverage in settlement negotiations, (3) equalization of plaintiffs' and defendants' risks, and (4) conservation of defendants' assets. See Silver & Baker, *supra* note 12, at 744-49.

“To each according to his security level” says nothing about how this surplus should be divided. To make joint litigation attractive to both *X* and *Y*, *X* must receive an ownership interest worth at least \$100,000 (that is, with a net value of at least 16% of the \$600,000 joint venture), and *Y* must receive an interest worth at least \$150,000 (that is, at least 25% of the \$600,000 joint venture). But what should happen to the remaining \$350,000, or 59%? Because any split from (16%, 84%) to (75%, 25%) respects each plaintiff’s security level, the rational bargaining model appears to leave too much up for grabs.

This point is of more than academic interest. Group lawsuits do yield value above and beyond that realized in conventional litigation.¹⁹¹ Moreover, as Coffee has pointed out, litigation groups often aggregate claims that differ greatly in value.¹⁹² Some groups lump claims worth millions together with claims that are not individually viable. The question is therefore squarely framed: How large an ownership interest in a joint enterprise should a person with a security level of $\$P$ receive? Any interest with an expected value greater than $\$P$ would respect such a person’s security level, and would therefore be consistent with the rational bargaining model. A commitment to horizontal equity this flexible is little better than no commitment at all, especially when P equals zero.

For the rational bargaining model to generate a meaningful commitment to horizontal equity, one needs a reason to think that economically rational plaintiffs would agree that any surplus should be divided in a particular way, e.g., in precise proportion to the plaintiffs’ respective security levels. There is little reason to predict such agreement, however. Although rational claimants would prefer group litigation to conventional litigation, economic rationality by itself will not necessarily lead all claimants to settle on the same allocation standard. Indeed, one might expect, for example, that plaintiffs with higher security levels would systematically prefer

¹⁹¹ See Tidmarsh, *supra* note 73, at 99 (“[T]he class-action device [in *In re Factor VIII* or *IX Concentrate Blood Prods. Litig.*, No. 93-C-7452 (N.D. Ill. May 8, 1996)] seems to have brought about a settlement that was unlikely to have been achieved in individual cases. It brought a measure of compensation and closure to thousands of innocent persons who had received very little satisfaction in the tort system.”); Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 *Am. U. L. Rev.* 1429, 1431-32 (1997).

¹⁹² See Coffee, *Entrepreneurial Litigation*, *supra* note 53, at 880, 905-06.

that any surplus be allocated in proportion to each plaintiff's security level, while plaintiffs with lower security levels would systematically prefer that any surplus be divided on a per capita basis.¹⁹³

2. *Monitoring the Total Size of the Settlement*

A second argument in favor of horizontal equity that could plausibly explain the aggregate settlement rule is that institutional arrangements designed to further horizontal equity deter plaintiffs' attorneys from settling claims too cheaply. That is, the real purpose of the rule, which prohibits attorneys from settling blocks of claims without disclosing information about "the existence and nature of all the claims . . . involved and of the participation of each person in the settlement," and without obtaining the informed consent of each client to be bound by the settlement,¹⁹⁴ may be to enable group members to monitor attorney opportunism.

Plaintiffs' attorneys in mass actions are customarily compensated through contingent percentage fees that encourage them to maximize their clients' recoveries.¹⁹⁵ Taken alone, however, this fee arrangement does not prevent plaintiffs' attorneys from engaging in opportunistic behavior. For example, early in the litigation process, before much time or other resources have been invested in a case, a defendant may effectively "bribe" a plaintiffs' attorney *not* to maximize his or her clients' recovery by offering a relatively cheap

¹⁹³ Analogously, one would expect plaintiffs with lower security levels systematically to prefer that any surplus be allocated in a winner-take-all lottery in which each plaintiff had one "ticket," while plaintiffs with higher security levels would prefer that each plaintiff be afforded lottery tickets in proportion to the expected net value of his or her claim in litigation (e.g., that a plaintiff with a \$10,000 claim receive ten times as many "tickets" as a plaintiff with a \$1,000 claim).

¹⁹⁴ Model Rules of Professional Conduct Rule 1.8(g) (1997).

¹⁹⁵ See Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 Cornell L. Rev. 529 (1978) (discussing incentives created by various contingent fee arrangements); see also Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DePaul L. Rev. 347 (1998) (comparing contingent fee compensation in class action litigation with such fee arrangements in individual personal injury cases); Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DePaul L. Rev. 371 (1998) (examining contingent fee contracts as a legal process issue); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. Legal Stud. 503 (1996) (identifying and analyzing the properties of the optimal contingent percentage fee); Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. Legal Stud. 259 (1997) (examining how contingent fees operate in the settlement of litigation).

settlement that would nonetheless pay the attorney a handsome premium on his or her usual effective hourly rate. An attorney may accept the offer, even though it fails to maximize the clients' recovery, because the marginally greater fee to be earned if the offer is declined is too small to induce the attorney to incur the added risk and expense (including opportunity costs) of continued litigation. An offer of this sort is especially likely to succeed when a defendant makes a credible threat to litigate aggressively if the offer is declined.

At first glance, the danger of opportunism by plaintiffs' attorneys would seem greater in mass actions than in conventional lawsuits. The incentive to act opportunistically is a function of the amount to be gained by doing so, and in mass actions there is usually far more at stake than in conventional lawsuits. The aggregation of claims enables a defendant to offer a plaintiffs' attorney a huge premium for settling early and cheaply.¹⁹⁶ Effective hourly rates in the hundreds of thousands of dollars are possible, making such offers especially difficult for counsel to resist. Aggregation may also make a defendant's threat to litigate aggressively even more credible than it ordinarily is by strengthening a defendant's incentive to spend money.¹⁹⁷

It is also true, however, that a substantial deterrent to such attorney opportunism is sometimes present in the mass action context and not in individual litigation. In an area such as asbestos litigation, in which the settlement market is highly developed and a very small number of plaintiffs' attorneys with special expertise and experience handle most cases nationwide,¹⁹⁸ each mass settlement potentially affects the value of claims in future settlements. Thus, if a plaintiffs' firm settles a group of claims against a particular asbestos defendant too cheaply, it sets an unnecessarily low benchmark ("going rate") for the value of claims it may bring

¹⁹⁶ The premium arises from both the economies of scale in negotiation costs and the savings in litigation costs and risks over having multiple plaintiffs in separate lawsuits. See *supra* note 190.

¹⁹⁷ Defendants facing multiple plaintiffs in separate lawsuits have incentives to outspend individual plaintiffs because of the possible collateral effects of litigation. See, e.g., Silver & Baker, *supra* note 12, at 745-49.

¹⁹⁸ See *supra* note 24.

against that defendant in the future.¹⁹⁹ Because asbestos defendants share information, a cheap settlement with one defendant may even set a precedent for negotiations with other defendants. It may therefore be hard for defendants to “bribe” economically rational plaintiffs’ attorneys in some types of mass litigation because the value to the attorneys of a one-time bribe may be less than the long-term cumulative cost of reduced fees in other, similar cases.

Although claimants can in theory discourage opportunism by monitoring their lawyers, any one plaintiff is unlikely to have an incentive to monitor at a level that is efficient for the plaintiff group as a whole. From a group member’s perspective, monitoring is a public good.²⁰⁰ A public good is one that must be made available to all members of a group if it is to be available to any member individually. Monitoring is a public good because all members benefit automatically when any one member attempts to keep the group’s attorney honest and on track. Because no one claimant can internalize the entire benefit of monitoring, none is likely to have an incentive to monitor at a level that is optimal for the group. To the contrary, individual group members, each hoping to enjoy the benefits of another’s labor without bearing any portion of the cost, can be expected rationally to decline to perform monitoring activities that are cost-justified from the perspective of the group. Free-riding of this sort is especially likely to be a problem in large groups that bring together plaintiffs who do not otherwise know or interact with one another.²⁰¹ Inaction due to free-riding and defective incentives creates a serious risk that unchecked attorney opportunism will not only leave group members worse off than they could have been with optimal attorney monitoring, but may even leave them worse off than they would have been suing alone.²⁰²

¹⁹⁹ This concern has repeatedly been expressed to the authors in conversations with lawyers who regularly handle consensual group litigation.

²⁰⁰ A “public good” is distinguished from a “private good” in that

[a] public good is a commodity with two very closely related characteristics: first, consumption of the good by one person does not leave less for any other consumer, a situation sometimes referred to as “non-rivalrous consumption”; and second, the costs of excluding non-paying beneficiaries who consume the good are so high that no private profit-maximizing firm is willing to supply the good.

Cooter & Ulen, *supra* note 178, at 46.

²⁰¹ See Mancur Olson, *The Logic of Collective Action* 33-34, 62-65 (1971).

²⁰² For further elaboration of this point, see Silver & Baker, *supra* note 12, at 750-52, 750 fig.1.

The concern that mass action attorneys may settle claims too cheaply is justifiable. To prevent opportunism, however, it is neither necessary nor necessarily helpful to enable clients to make interpersonal comparisons of the sort that are facilitated by the aggregate settlement rule. To begin, it is far from clear that claimants can monitor attorney opportunism at all, even ignoring free-rider problems. To know whether an attorney is attempting to settle one's claim too cheaply, a claimant needs to know the expected value of his claim at trial. As discussed above, claimants typically depend on attorneys to provide this information. This means that claimants will be monitoring their lawyers mainly on the basis of information provided, perhaps strategically, by the lawyers themselves.

Even if claimants had independent sources of accurate and reliable information about the value of their claims, or could rely on their attorneys to provide this information honestly, the ability to make interpersonal comparisons would not enhance their ability to detect attorney opportunism. To the extent that claimants can monitor attorney opportunism at all, each claimant need only ensure that the net value of his share of a group settlement equals or exceeds the net expected value of his individual claim in litigation in order to prevent opportunism group-wide. Thus, a plaintiff needs to know only the value of his own claim and the dollar amount of his own share of a settlement; he does not need information about the values of other group members' settlement shares. If each plaintiff is satisfied that the amount offered him in settlement equals or exceeds the value of his claim, it is difficult to accuse counsel of settling the group's claims too cheaply.²⁰³

3. Monitoring the Apportionment of the Settlement

A third possible argument in favor of horizontal equity is that insisting on it prevents or discourages plaintiffs' attorneys from giving some group members benefits that others should receive. At first glance, this sort of attorney misbehavior seems a sensible concern. A single aggregate settlement can encompass claims of different

²⁰³ This form of monitoring by claimants in group litigation has the advantage of avoiding the collective action problem discussed *supra* text accompanying notes 200-202. That is, *each* claimant has an incentive to engage in an amount of monitoring that will yield a rational group outcome with no potential free-rider problems.

types and values. For example, asbestos plaintiffs suffering from always-terminal mesothelioma may be lumped together with plaintiffs suffering from much-less-serious pleural disease. Because plaintiffs with different claims are presumptively eligible for different settlement payments, opportunities for plaintiffs' attorneys to move money from one claimant to another naturally arise. Moreover, defendants often condition aggregate settlements on acceptance by a very high percentage of plaintiffs with high-value claims. If more than two or three mesothelioma victims decline a defendant's offer, an entire settlement may collapse.²⁰⁴ This creates an incentive for plaintiffs' attorneys to move money around in ways that may seem inequitable or unjustifiable.

Whether plaintiffs' attorneys have strong incentives to "rob Peter to pay Paul" is open to doubt. Plaintiffs' attorneys are paid on a contingent percentage basis. Their primary incentive is to maximize the size of aggregate settlements: the larger the settlement, the larger the fee. Because the total fee usually increases with the number of plaintiffs who agree to settle,²⁰⁵ and because plaintiffs with low-value claims greatly outnumber those with high-value claims, plaintiffs' attorneys feel some pressure to maximize the number of claimants who accept a particular settlement. This encourages plaintiffs' attorneys to distribute settlement funds broadly within the claimant group instead of concentrating them in a small number of hands. Allocating settlement funds in this way can also be predicted to further a defendant's interest in finality, making defendants an additional plausible source of pressure to maximize the number of claimants who accept a settlement offer.²⁰⁶

Even when the defendants condition settlement offers on high rates of participation by plaintiffs with high-value claims, group counsel may have little incentive to overpay that subgroup of claimants. This would be the case if the relevant claimants did not demand a premium to settle. And, in fact, a claimant has an incentive to hold out for such a premium only when three conditions are met: (1) the claimant can make a credible threat to veto the group settlement; (2) the claimant knows this; and (3) the claimant be-

²⁰⁴ See confidential settlement agreement on file with the authors; Silver & Baker, *supra* note 12, at 765 & n.110; Rheingold, *supra* note 180, at 404-05.

²⁰⁵ See various confidential settlement agreements on file with the authors.

²⁰⁶ See Silver & Baker, *supra* note 12, at 760-63.

believes that his settlement payment will increase if he makes the threat.²⁰⁷ These conditions rarely obtain, however. First, because the possibility of holdouts is obvious, defendants typically demand acceptance rates of less than 100%.²⁰⁸ This denies an individual plaintiff the power unilaterally to block a group-wide deal. Second, plaintiffs' attorneys do not always tell group members the precise acceptance rate required.²⁰⁹ This negates the knowledge condition (number 2 above). Third, plaintiffs with high-value claims tend to be the most risk averse. They are therefore unlikely to prefer the higher risk option of litigation to the vastly lower risk option of accepting a reasonable settlement. This in turn reduces the need for the group's attorneys to overcompensate these plaintiffs in order to ensure that they do not veto the group settlement offer.

Even if one is still concerned that plaintiffs' attorneys may apportion aggregate settlements so as to benefit some group members at the expense of others, the aggregate settlement rule cannot prevent such apportionments. The rule requires disclosure to each group member of "the existence and nature of all the claims . . . involved and . . . the participation of each person in the settlement."²¹⁰ This information enables a plaintiff in an asbestos suit, for example, to verify both that he is receiving the same amount as other group members with the same disease (e.g., mesothelioma, lung

²⁰⁷ That is, when SO_1 = the pending settlement offer to the claimant; SO_2 = the settlement offer the claimant would receive if he threatened not to accept the current offer; and p = the probability that $SO_2 > SO_1$, the claimant must believe that $SO_1 < PV[SO_2 * p]$, where PV is the present value function.

²⁰⁸ See various confidential settlement agreements on file with the authors. But see Silver & Baker, *supra* note 12, at 765 & n.110 (describing agreement in which defendant reserved right to kill the agreement unless 100% of a plaintiff class accepted the deal).

²⁰⁹ The text of the aggregate settlement rule requires only that attorneys for a consensual litigation group disclose to each client "the existence and nature of all the claims . . . involved and of the participation of each person in the settlement." Model Rules of Professional Conduct Rule 1.8(g) (1997). The rule does not explicitly require that counsel inform group members of any other terms of a proposed settlement. Nor has any court to date interpreted the rule to require additional disclosures such as the precise terms, or even the existence, of a settlement walk-away provision.

Of course, counsel for a group might independently *choose* to disclose that a "high" participation rate by the group (or a particular subgroup) is needed for the settlement to be valid, if counsel believed this information would yield a higher acceptance rate. But see Rheingold, *supra* note 180, at 404 (contending that "[c]learly it would be wrong to coerce a client by saying that the whole plan fails unless everyone agrees").

²¹⁰ Model Rules of Professional Conduct Rule 1.8(g) (1997).

cancer, other cancers, pulmonary asbestosis, or pleural disease), and that plaintiffs with serious conditions are receiving more than plaintiffs with mild ones. Plaintiffs may find this information comforting (or, at least, interesting), but it will not enable them to judge whether the *ratio* of payments between disease categories is appropriate.²¹¹ Nor will it enable them to determine whether proposed payments equal or exceed the expected value of those claims at trial.

The information required by the rule may actually affect plaintiffs' judgment adversely by focusing their attention on horizontal equity instead of payment size. The fact that a proposed settlement treats plaintiffs with like claims alike and gives more money to victims with more serious diseases in no way ensures that each plaintiff will receive at least as much as the expected net value of his claim in individual litigation.²¹² An attorney eager to sell a settlement that by this measure is inadequate in the aggregate or that shortchanges a particular subgroup of claimants may emphasize horizontal equity to distract attention from the proposed settlement's defects. For example, an attorney might tell a client, "You're only getting \$5,000 for your lung cancer claim, but you're getting the same as other lung cancer victims and more than victims with asbestosis or pleural disease." By appealing to a client's sense of proportion, an attorney may persuade the client to accept

²¹¹ In order to judge whether the ratio of proposed payments between disease categories is appropriate, one would need to know only the expected value in litigation of claims in the different disease categories. And the disclosure of this information is not mandated by the rule. See *supra* note 177 and accompanying text (discussing information given by the aggregate settlement rule).

²¹² By the same token, it should be noted that so long as plaintiffs with mesothelioma and those with pleural disease each receive no less than the expected value of their claims in litigation, any allocation of the remaining "surplus" is consistent with the economic model. That is, even a highly counterintuitive (and arguably "unjust") allocation formula under which the victims of less serious pleural disease were to receive the entire surplus, resulting in higher payments to them than to mesothelioma sufferers, would be defensible under the economic model. This hypothetical allocation is effectively the same as—and, at bottom, no more controversial than—awarding each plaintiff the expected value of his or her claim in litigation, and declaring the subgroup of plaintiffs with pleural disease to be winners of a winner-takes-the-entire-surplus lottery in which each disease category is given a single "ticket."

an offer that should be rejected because it is less than the expected value of the client's claim in individual litigation.²¹³

The information required by the rule may even cause plaintiffs to reject settlement offers that are generous insofar as they would pay each group member at least as much as the expected net value of his claim in individual litigation. For example, consider a plaintiff suffering from pulmonary asbestosis who would willingly and rightly have authorized his attorney to accept any settlement that would net him \$8,500 or more if told only of the expected net value of his claim in individual litigation. Imagine that this same plaintiff is offered \$9,000 net in an aggregate settlement. There would seem to be no rational reason for him to decline the offer. Under the aggregate settlement rule, however, the group's attorney is required to tell this plaintiff not only that he will receive \$9,000, but also that all other group members suffering from pulmonary asbestosis will net \$9,000 and that all group members suffering from pleural disease will net \$5,000. This additional information may cause the plaintiff to reject the \$9,000 offer. The plaintiff may feel that his case of pulmonary asbestosis is particularly severe and that he should therefore receive more than other (to his mind less deserving) victims of the disease will receive; or he might consider it grossly unfair that his proposed payment is not even twice what

²¹³ A cognitive bias known as the "framing" effect might also cause a client to accept an insufficient offer that is presented in terms of horizontal equity. A significant body of empirical evidence suggests that the structure or "frame" of many decisions causes people to make choices that are suboptimal from the perspective of a rational model. See, e.g., Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 *J. Bus.* S251, S257-60 (1986) [hereinafter, Tversky & Kahneman, *Rational Choice*]; Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *Science* 453, 453-55 (1981) [hereinafter, Tversky & Kahneman, *Framing*]; see also Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 *S. Cal. L. Rev.* 113, 118 (1996); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 *Tex. L. Rev.* 77, 80 (1997).

In particular, characterizing a decision as a loss or a gain has repeatedly been found to affect the decisionmaker's choice. See Tversky & Kahneman, *Rational Choice*, supra, at S257-60; Tversky & Kahneman, *Framing*, supra, at 453-55; Rachlinski, supra, at 118-19. Thus, by presenting a settlement offer in terms of horizontal equity, an attorney eager to sell his client an inadequate settlement may in essence be recasting that offer as a cognitively and psychologically attractive "gain" when it in fact represents a loss relative to the expected value of the client's claim in individual litigation.

group members with pleural disease are to receive.²¹⁴ His attention having been diverted to interpersonal comparisons, the plaintiff may conclude that the proposed \$9,000 payment is too small even though it exceeds the expected value of his claim at trial.

4. The Appropriate Role of Counsel

In its current form, the aggregate settlement rule permits plaintiffs' attorneys to play a central role in allocating a settlement among group members. We believe that the rule is correct in permitting the group's attorneys to play this role. We have shown above that these attorneys have little incentive to apportion an aggregate settlement in order to benefit some group members by providing others less than the expected net values of their claims in individual litigation.²¹⁵ Moreover, the ability of an independent

²¹⁴ A cognitive bias known as the "representative heuristic" might cause a client to decline a generous offer that is presented in terms of horizontal equity.

[R]eliance on the representativeness of an event as an indicator of its probability may introduce two kinds of systematic error into the judgment. First, it may give undue influence to variables that affect the representativeness of an event but not its probability. Second, it may reduce the importance of variables that are crucial to determining the event's probability but are unrelated to the event's representativeness.

Maya Bar-Hillel, Studies of representativeness, *in Judgment under uncertainty* 69, 69 (Daniel Kahneman et al. eds., 1982); see also Daniel Kahneman & Amos Tversky, Subjective probability: A judgment of representativeness, *in Judgment under uncertainty*, supra, at 32 (discussing representativeness); Daniel Kahneman & Amos Tversky, On the psychology of prediction, *in Judgment under uncertainty*, supra, at 48 (same).

In one empirical study of this heuristic, persons about to be married were found to have "relatively accurate, if sometimes optimistic, perceptions of both the likelihood and the effects of divorce in the population at large," but "these same individuals express[ed] thoroughly idealistic expectations about both the longevity of their own marriages and the consequences should they personally be divorced." Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 *Law & Hum. Behav.* 439, 445-46 (1993). One explanation for this seemingly paradoxical pair of findings is that "[t]he young adults surveyed apparently considered themselves to be unrepresentative of the population of people who marry, and therefore systematically concluded that the statistical likelihood of divorce and of its various effects did not apply to them personally." *Id.* at 447.

Thus, when a settlement offer is presented in terms of horizontal equity, the representativeness heuristic suggests that a claimant may decline the offer, no matter how generous, simply because the information provided with the offer implies that the harm suffered by the claimant is considered representative of (i.e., no different than) the harm suffered by other claimants diagnosed with the same disease.

²¹⁵ See supra Section III.B.3.

third party or a "steering committee" of the group members to arrive at a "better" apportionment is far from clear.²¹⁶ Neither of these other parties is likely to have better information than the plaintiffs' attorneys regarding the "fair market value" of each plaintiff's claim.²¹⁷ And a steering committee of group members seems to have an obviously greater incentive than the group's attorneys to apportion a settlement so that some group members receive more than their security levels and others receive less. In addition, delegating the process of allocating the settlement proceeds to a subset of group members merely creates additional allocation problems: How will membership on the steering committee be determined? And how many votes will each committee member have?

We remain puzzled, however, by what vision of a "good settlement," if any, the rule embodies. Our consternation arises partly because the concept of horizontal equity is itself fuzzy.²¹⁸ Many

²¹⁶ Nonetheless, some plaintiffs' attorneys have chosen to delegate some or all of the apportionment process to such persons. See, e.g., Rheingold, *supra* note 180, at 403 (discussing use of "steering committee" and "neutral plaintiff administrator" in settling *Stringfellow Dump Site* cases); *id.* at 406-407 (discussing use of a "neutral person" or "impartial party" in allocating settlement proceeds).

In one case in which the authors served as consultants, plaintiffs' counsel specified in their retention agreement with each client that the group members would choose a steering committee of three to five plaintiffs, and that all group members subsequently would be bound by decisions of the steering committee with regard to the allocation of settlement proceeds. See confidential attorney-client contract on file with the authors. It is far from clear that such an arrangement meets the requirements of the aggregate settlement rule.

²¹⁷ As one commentator has observed, although the delegation of the settlement allocation process to a neutral third party "lends an air of impartiality and probably helps convince claimants that they are getting their fair share," such a person typically "will not know much about the cases . . . Who will educate them? Frequently the plaintiffs' lawyer will." *Id.* at 406-07.

²¹⁸ The difficulties ascribing content to the concept of "horizontal equity" are well known to tax scholars. Professor Louis Kaplow, for example, has observed that horizontal equity is "the command that equals be treated equally," but that it remains "to determine who are the equals who should be treated equally." Louis Kaplow, *A Fundamental Objection to Tax Equity Norms: A Call for Utilitarianism*, 48 *Nat'l Tax J.* 497, 498, 508 (1995).

For example, raising the personal exemption for the blind will treat unequally individuals with the same income but who differ with respect to eyesight. As a matter of equity, one might favor or oppose such a change, but *a horizontal equity index would be superfluous because it begs the question whether eyesight is relevant to the social allocation of resources.*

Id. at 507-08 (emphasis added); see also, e.g., Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 *Nat'l Tax J.* 139 (1989); Richard A. Musgrave,

possible allocations of a given settlement—including equal payments to all claimants, equal payments to all claimants suffering the same disease, and equal payments to all claimants of the same age suffering the same disease—can be said to possess the quality of horizontal equity. To do real work, the concept must be defined with greater specificity.

In addition, the requirements set out in the rule are purely procedural. Even if the notion of horizontal equity could be given specific content, the rule does not require settlements to conform to a particular distributive standard, or even to any of a set of distributive standards that might be defended on normative grounds. The rule allows any possible pattern of payments so long as a group's attorney follows certain procedures when settling. In this sense, the rule does not seem to require anything in the way of horizontal equity at all, nor does it seem to embody any other *substantive* vision of a "good settlement."

Finally, if the rule is intended to limit settlement allocations to those that conform with some notion of horizontal equity, its reliance on claimants as an enforcement mechanism may be misplaced. A particular claimant's approval or disapproval of a proposed settlement may have nothing to do with horizontal equity. A claimant may approve a settlement simply because he is eager to receive a payment, or a claimant may reject a settlement because he prefers winning in court (or, at least, having "his day" in court) to settling on any terms. It is therefore not obvious that the aggregation of plaintiffs' individual decisions will always or even frequently yield a settlement allocation that conforms to a particular notion of horizontal equity.

A second possibility is that the aggregate settlement rule is simply aimed at precluding certain "bad" or unacceptable settlements, not at ensuring that only settlements conforming to any particular vision of horizontal equity proceed. We certainly agree that there is no one right answer to the question "What is a good group settlement?" We also believe that by consensus many possible settlement allocations would qualify as "bad." But if the aim of the

Horizontal Equity, Once More, 43 Nat'l Tax J. 113 (1990); Joseph Stiglitz, Utilitarianism and horizontal equity: The case for random taxation, 18 J. Pub. Econ. 1 (1982); Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982).

rule is simply to avoid uncontroversially bad outcomes, the rule does not seem especially well designed.

In particular, we question the value of the rule's requirement that each plaintiff receive information about every other plaintiff's claim and proposed settlement payment. Knowing that Jane, who appears to have a similar claim, will receive a similar amount and that Joe, who appears to have a dissimilar claim, will receive a dissimilar amount may reassure John that a proposed aggregate settlement treats him "fairly" in some sense. But John's knowledge is of no particular importance unless and until it is shown that it helps him identify and prevent "bad" settlements.

Whether the information that the rule requires to be disclosed has this effect is not clear. John's right to reject settlement offers that pay him "too little" probably suffices on its own to eliminate most settlements that are uncontroversially bad. And even in the absence of the rule, John is likely to have sufficient information to determine whether a settlement offer is too low under either the economic or satisficing models of settlement. Even in the absence of the rule, John's attorney would be expected to provide him information about the expected value of his claim in litigation (the economic model), and John himself would know without any outside assistance whether a particular offer would provide him enough money to meet his subjectively chosen objectives (the satisficing model). John's right to sue his attorney for malpractice makes the likelihood even smaller that uncontroversially bad settlements will occur, but this right too exists independently of the aggregate settlement rule.

Finally, even if there were empirical evidence that the information provided plaintiffs under the rule helps them identify and prevent "bad" settlements, it would remain to balance that benefit against the rule's various costs. In particular, as we have argued elsewhere,²¹⁹ the disclosures required under the rule are invasions of clients' privacy that carry emotional and other costs to the clients that may well exceed any benefits to them of having information about other group members' claims and anticipated settlement payments. In the absence of evidence that any benefits of the rule's disclosure requirements exceed the demonstrable costs, we suggest that those

²¹⁹ See Silver & Baker, *supra* note 12, at 755-60.

disclosure requirements be altered. Group members, we believe, should be entitled only to their attorney's opinion of the expected net value of their own claims at trial.

CONCLUSION

In this Article, we have drawn connections between consensual and nonconsensual litigation groups. Our argument has been that judges should keep the former in mind when managing the latter. In many respects, this is an uncontroversial suggestion. There is widespread agreement, for example, that the nearly exclusive use of contingent percentage compensation arrangements in consensual cases argues strongly for the use of the same fee formula in class actions where judges set fees.²²⁰

In other respects, controversy abounds. There are important differences between consensual group lawsuits and class actions that, unless recognized and appreciated, will make the class action a powerful device for exploiting absent plaintiffs. One important difference is that class actions raise due process concerns because they are settled and tried without absent plaintiffs' consent. But it is far from clear what this difference implies.

We fear that the *Amchem* decision and class action scholars make too much of the difference. They insist on pristine, conflict-free representation for class members even though claimants are often satisfied with conflicted representation when they voluntarily form litigation groups. In this Article, we have asked both whether conflict-free representation is possible at all and, if so, whether it makes sense to demand it for absent class members. We think it is not possible, and we fear that absent plaintiffs' due process rights will be used to their detriment if it is sought, denying them access

²²⁰ See *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) (Posner, C.J.) ("[I]t is not the function of judges in fee litigation to determine . . . the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market . . ."); *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (Easterbrook, J.) ("When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.'"); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 *Colum. L. Rev.* 669 (1986).

to the benefits that make group litigation worthwhile. The best is often the enemy of the good.²²¹

Professor Tidmarsh makes this point eloquently when discussing the settlement of the tainted blood products litigation:

The need to deliver some measure of justice to a long-suffering class was patent. But this substantively appealing settlement did not include certain procedural protections for class members with disparate interests. At base, therefore [the tainted blood products settlement] forces us to consider which set of values is most critical in mass tort settlement class actions: procedural justice or substantive justice.²²²

Class members would often rather have less procedural justice and more substantive justice than the reverse. This was certainly true in the famous case of *Eisen v. Carlisle & Jacquelin*,²²³ where by insisting that millions of class members be sent individual notices by mail, the Supreme Court ensured that a meritorious lawsuit would be abandoned and that class members would get no relief. Any rational claimant would have preferred a check for \$100 in antitrust damages to a right to notice that never was sent.

Professor Coffee's comment suggests that he, too, endorses practical compromises of the sort that *Amchem* seems to rule out. Part of his argument is that conflicts often should be tolerated in class actions, especially when claims are small. This is the sort of pragmatic accommodation of the Due Process Clause to the realities of group litigation that we endorse. *Amchem*'s strict "no tradeoffs" line has the potential to do great harm to the class action. Scholars can continue to make valuable contributions by showing how and when the strident rhetoric against conflicts should be softened.

²²¹ See John Bartlett, *Familiar Quotations* 306 (16th ed. 1992) (quoting Voltaire, *Dictionnaire Philosophique* (1764)).

²²² Tidmarsh, *supra* note 73, at 100.

²²³ 417 U.S. 156 (1974).