

Using The Veil of Ignorance to Ensure Justice in Class Actions: A Rawlsian/Economics-of-Decisionmaking Approach to “Adequacy of Representation” after *Stephenson*

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I. INTRODUCTION

In both federal and state practice, judges must certify class actions for the class actions to proceed, and must approve class settlements for those class settlements to have any legal effect.¹ Judges may or may not make explicit findings regarding the adequacy of representation class members received, but even where there are no explicit findings, judicial certification of a class and approval of a class settlement arguably implies a finding of adequacy of representation.² Why then should class members ever be able to challenge the settlement in subsequent actions? Why should they not be bound to the settlement if a court explicitly, or even just implicitly, has held that they were adequately represented in the process that produced the settlement?

To answer that question, we must first unpack the concept of “adequate representation.” Adequacy of representation in the class context cannot mean what it means in non-class litigation – that the lawyer faithfully attend to the client’s interest, advise the client of the various options available to her, and give her the opportunity to make the ultimate decisions about whether to accept or reject a settlement offer.³ In the non-class-action litigation context, the client is actually present, or at least could be if she so chooses. It seems reasonable, therefore, that the law hold her to the choices she made even if those choices result in different

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consequences from those that she anticipated.⁴ In the class action context, the client –the class members or at least almost all of them – are not present; indeed, many class members are never even aware of the existence of the class litigation to which they are, in theory, a party. They are represented only virtually, by means of class representatives. And since class representatives are almost always nominal actors,⁵ the absent class members are in truth represented only by class counsel, acting, typically, with minimal or no real client input.

The absence of the client is most striking in so-called futures class actions, in which some or all class members are defined as those who may become sick in the future as a result of some past exposure, such as exposure to asbestos. In such cases, no one can say for sure who will be or will not be a class member when the class is proposed for certification, when a settlement is submitted for court approval, or perhaps for many years thereafter. Futures class actions are the variant of class action that most dramatically belies the legal construct of client participation in class action decisionmaking.

Because class members are in fact absent, and sometimes (as in futures actions) necessarily absent, it is untenable to tell a class member that, because she “constructively” “agreed” by means of “virtual” representation to a settlement, she must accept no or even negative compensation as the dispositive relief for an otherwise cognizable legal wrong. More generally, fundamental principles of fairness dictate that class members be held to settlements only if the relief provided to them by the settlement is something that a person conceivably could have accepted, before knowing her exact position within the class, in return for ceding

⁴ One can certainly question how present non-class-action clients actually are in some litigation settings. But, at least compared to class members, and most dramatically class members in “futures” classes, the ordinary plaintiff is more capable of meaningful participation in litigation decisionmaking. At the least, the non-class action client, unlike the class action client, must take some volitional action in the litigation – namely, contract to hire his or her lawyer.

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for all time her legal claims for redress. Thus, although the adequacy of representation inquiry certainly entails an examination into the pre-settlement structure of representation and the content of the proceedings, the inquiry also has, or at least should have, something to do with *ex post* substantive outcomes – about what the settlement actually delivers in the way of relief to individual class members. Adequacy or inadequacy of representation, as a practical matter, sometimes unfolds only over time.

From this perspective, the perspective that adequacy of representation in a class action and hence boundedness to a settlement must mean that a person plausibly could have agreed to accept the settlement terms before knowing her position in the class, the Second Circuit's holding in *Dow Chemical v. Stephenson*⁶ and the Vermont Supreme Court's decision in *State of Vermont v. Homeside Lending*⁷ seem unremarkable, even obviously correct. In *Homeside*, the Vermont Supreme Court held that Bank Boston customers whose accounts were *reduced* as a result of a class action settlement with the bank had not been adequately represented, and hence could bring a subsequent challenge to the class action settlement.⁸ In *Stephenson*, the Second Circuit held that veterans exposed to Agent Orange who became ill more than ten years after the 1984 settlement date,⁹ but who received no cash payments from the settlement fund,¹⁰ had

6 273 F.3d 249., *aff'd* without opinion (by a 4-4 vote), 123 S.Ct. 2161 (2003).

7 826 A.2d 997 (Vt. 2003).

8 *Id.* at 1016-17.

9 The class definition in the agent orange litigation was extremely broad, including all exposed military personnel whose exposure occurred between 1961 and 1972, and spouses, parents, and children of the exposed persons who were born before January 1, 1984 and who might suffer derivative injury. 273 F.3d at 252. Thus, read literally, the settlement would treat as a class member a baby born with agent orange-related birth defects on December 31, 1983, even if the effects did not become manifest until after December 31, 1994.

10 The 1984 settlement provided for Dow to pay \$180 million into a settlement fund. Three-quarters of the money was dedicated to cash payments to class members who became ill before 1995. Most of the rest (it is hard to pin down exactly how much) was dedicated to the creation of a medical foundation. Brief for the Petitioners, *Dow v. Stephenson*, 2002 US. Briefs 271, at 9. Nothing in the opinions in the *Stephenson* litigation or the briefs filed in the Supreme Court documents points to any concrete benefits provided by the medical foundation to veterans who became ill after December 31, 1994. Indeed, as far as I know, there is no evidence of concrete benefits provided by the foundation to any class members. Perhaps one could argue that, in 1984, it would have been reasonable to

not been adequately represented, and hence were not barred from bringing a subsequent challenge.¹¹ As explained in this Article, it is unreasonable to suppose that any class member actually would have agreed to a settlement in the Bank Boston litigation that might leave him or her them financially penalized, even if only by a few hundred dollars, or any settlement in the Agent Orange litigation that might have provided him with no relief whatever.

Yet the holdings in *Stephenson* and *Homeside*, allowing subsequent challenges, are far from uncontroversial. The Vermont Supreme Court’s decision was several years in the making¹², which suggests that that court regarded the case as difficult. For its part, the Seventh Circuit affirmed a federal district court’s dismissal of a subsequent challenge to the Bank Boston settlement that had been filed in the Northern District of Illinois before the Vermont state attorney general proceeded with its action in Vermont.¹³ And the Supreme Court in *Stephenson* affirmed the Second Circuit only by a 4 to 4 vote.¹⁴ Moreover, prominent commentators have argued that the result in *Stephenson* is incorrect, and that the American Law Institute should adopt a statement to that effect.¹⁵

This Article’s normative claim – that that a rule allowing subsequent challenges to class action settlements is compelled by our basic intuitions of fairness and justice when class members could not conceivably have agreed to the arrangement had they been present but not known their precise position in the class – builds on the Rawlsian construct of fairness as the

suppose that the foundation would produce concrete, and substantial, benefits for veterans who would become ill after 1994. But I see no support for that view in any of the court filings or opinions.

11. 273 F.3d at 260-61.

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13 *Kamilewicz v. Bank Boston Corp.*, 92 F3d 506 (7th Cir. 1996), rehearing en banc denied, 100 F.2d 1348 (7th Cir. 1996).

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15 For example, a draft Sam Issacharoff and Richard Nagareda have prepared for the ALI , *Aggregate Treatment of Overlapping Common Issues*, specifically disapproves of ex post review of adequacy of representation and hence the affirmance in *Stephenson*, although no justification for this disapproval is offered. See Sec. 2.09, Reporter’s Notes, Comment e (“The ex ante perspective [on the due process right to loyalty] taken in Paragraph (2)(c) is designed to disapprove the temporal perspective used in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), aff’d by equally divided Court, 539 U.S. 111 (2003).”

product of (hypothetical) decisionmaking in an “original position,” behind a “veil of ignorance,” and the economics of human decisionmaking under conditions of uncertainty. This approach suggests that certain types of settlements in both high-individual-stakes/toxic torts/personal injury class actions and small-individual-stakes/consumer fraud class actions should be subject to subsequent challenge.

First, this combined Rawlsian/economics analysis strongly suggests that all class settlements that provide for the possibility that any class members will receive negative relief, as in the Bank Boston litigation, are unfair and should be subject to challenge on adequacy of representation grounds.¹⁶

Second, with regard to high-individual-stakes class actions, the approach also suggests that settlements that create the possibility that some class members will receive no relief always should be subject to subsequent challenges.¹⁷

Third, again in high-individual-stakes class actions, subsequent challenges should be permitted with respect to settlements that provided all class members some relief, but that grossly deviated from a principle of equal payment for equal harms without investing administrative cost savings in the improvement of the position of the most severely-injured such that the most-severely injured receive more than they would have under an equal-compensation-for-equal-injuries formula.¹⁸

Fourth, even in small individual stakes litigation, subsequent challenges should be permitted to settlements that provided for the possibility of providing zero compensation to any class members or that deviated from an equal-compensation-for-equal-injuries approach

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compensating without thereby reaping significant administrative cost savings that are dedicated to increasing the overall compensation pool for class members.¹⁹

The essence of the Rawlsian approach is a thought experiment regarding the ordering of society as a whole. In the thought experiment, Rawls postulates the presence of human beings under certain conditions – “original position” conditions -- and then reflects on what arrangements or rules those individuals would agree to as fair for the distribution of goods and entitlements in the society as a whole. The conditions Rawls sets for his thought experiment – individual decisionmaking, ignorance on the part of each individual as to their morally irrelevant or contingent characteristics beyond the veil, very high stakes for individual welfare and life prospects for the decisionmakers, a generally shared moral sense of the fundamental equality of human beings²⁰ – readily translate from original position (persons deciding on the rules for social ordering as a whole) to the toxic tort/products liability class action original position, in which class members must choose a distribution regime for compensation for possible current and future cases of disabling or even fatal diseases, conditions, or injuries. Thus, if persons in Rawls’ original position adhere to a maximin principle of avoiding worst possible outcomes, and that adherence deserves normative weight, we should expect that class members in toxic tort/products liability cases behind a veil of ignorance will adhere to a maximin approach, and we should accord normative weight to that adherence.

The Article does not rely solely on the extension of the Rawlsian original position thought experiment to the class action context, however. One of the predictions of neoclassical economic theory, as well as a basic finding of behavioral/experimental/empirical economics is risk aversion in human decisionmaking in the absence of an ability to self- or third-party insure

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against bad outcomes. Other findings are an aversion to unequal distributions of wealth and other goods absent some objective justification for inequality, and an aversion to prospective losses (as opposed to gains or foregone gains). These well-established findings, in and of themselves, suggest that settlements of the sort at issue in *Stephenson* and *Homeside* could not have garnered the agreement of class members had they been able to give or deny their consent. In addition, surveys I conducted of first-year law students demonstrate a strong hostility to settlements that entail the risk that a class member might be left without any relief for severe injuries, and a strong predisposition toward settlements that ensure equal outcomes for equally-harmed class members.

The Article also explores two major objections to a rule allowing subsequent challenges to settlements based on the absence of any conceivable agreement behind a class action veil of ignorance. One objection, the chilling effect objection, is that the availability of subsequent challenges will so reduce the attractiveness of settlement for defendants as to ruin the class action settlement as a means of dispute resolution. This objection ignores the poor prospects for any subsequent challenge, even ones that are clearly permissible as a matter of law, and hence grossly overstates the potential effect of subsequent challenges on defendants' willingness to settle.

The essence of the second objection is that subsequent challenges based on adequacy of representation concerns are unnecessary because various proposals to improve class action practice, if adopted, would ensure that courts only approve truly "fair" settlements. The flaw in this non-necessity objection is that it ignores a fundamental, immutable truth of class action practice: neither class counsel nor judges have strong incentives to concern themselves with the justice of the intra-class distribution of settlement funds other than an incentive to ensure that

any class members who are unusually “present” and vocal receive a large enough share to make them quiet. To Professor Marcel Kahan and Linda Silberman’s call for the courts to “Do It Right But Do It Once,”²¹ this Article responds “Try To Do It Right The First Time But If Need Be, Please Do Try Again.”

II. THE SUPREME COURT AND DUE PROCES IN CLASS ACTIONS: LEAVING THINGS UNDECIDED

Before developing the argument for a rule allowing challenges to certain class actions settlements based on the inconceivability of a hypothetical agreement to the settlement by veiled class members, it may be helpful to explain why such an argument, if plausible, could be important in practice. The sort of class action where the argument may be most normatively attractive – class actions involving exposures that have considerable latency periods before illness develops, such that not all persons who will become sick are sick at the time of the first wave(s) of individual cases of sickness – are likely to continue to arise. As science has developed, we have come to understand and detect more subtle causal connections; there is no reason to doubt that this progress will not continue. At the same time, our environment is replete with potentially toxic chemicals, many of which receive no safety testing before widespread use. Similarly, medical practice increasingly relies on mass-marketed drugs, a significant share of which are routinely used for purposes and populations for which they have not been clinically studied prior to general use. Given the combination of better tools for causal detection and tracing and more and more varied environmental and medical exposures, a case presenting the *Stephenson* problem – a class action settlement that appears to have slighted the interest of some exposed but not-yet-ill persons and that is later challenged by those persons once they become ill – seems sure to reach the United States Supreme Court *at some point*.

²¹ Marcel Kahan & Linda Silberman, the Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison, 73 NYU L REV 1193, 1999 (1998).

When such a case does reach the Court, the Court will not be guided by any clear precedent, and hence could be particularly open to normative analyses and perspectives, even if such analyses and perspectives are never explicitly cited. In *Shutts v. Philips Petroleum*, the Court held that a Kansas court committed constitutional error in applying Kansas law to out-of-state plaintiffs because doing so was so contrary to “fairness in this context” given what the out-of-state plaintiffs reasonably could expect.²² The Court found constitutional error as to the substance of the judgment notwithstanding the fact that “*procedural* due process guarantees of notice and adequate representation were met” In so doing, the Court affirmed that there is a constitutional dimension to the guarantee of adequacy of class actions, and suggested that the guarantee is not satisfied by procedural safeguards alone when, despite the presence of such safeguards, the approved settlement, in substance, is grossly unfair to some portion of the class.

In *Ortiz*, the Court rejected a class action settlement that had been approved by a federal district court, in part on the grounds of unfairness in the amounts of allocated compensation as between the injured parties included in the class and those excluded, and as among different groups included within the class. The Court in *Ortiz*, like the Court in *Shutts*, acknowledged the constitutional dimension of adequacy of representation in class actions, and, indeed, quoted from *Shutts* at length.²³ The *Ortiz* opinion emphasized that the “inherent tension between representative suits and the day-in-court ideal” means that class actions, particularly mandatory class actions in which certification and settlement occur simultaneously without any preceding, adversarial litigation, “raise[] . . . the issue of due process. . . .”²⁴ The *Ortiz*’ Court’s reliance on *Shutts* would seem to preclude the argument that *Shutts* is solely a case regarding the limits of *state* courts to affect the rights and interests of out-of-state residents.

²² 472 U.S. at 822 (emphasis added).

²³ 527 U.S. at 847-48.

²⁴ Id. At 846-47.

However, *Shutts* and *Ortiz*, taken together, can plausibly be read very narrowly in terms of the content of the due process guarantee of adequate representation. The opinion in *Shutts* is opaque in its reasoning. The key passage from *Shutts* quoted by the Court in *Ortiz* refers solely to the procedural safeguards provided to class members in the initial proceeding, such as notice, an opportunity to be heard, and opportunity to opt out of the class litigation.²⁵ Moreover, *Ortiz* principally relies on Federal Rule of Civil Procedure 23, not the constitutional guarantee of due process, and could be read as suggesting that separate counsel (and, within the class, separate sub-class status) is the solution to all of the potential conflicts among injured and potentially injured persons that can give rise to distributively unfair settlements, even in the absence of any guarantee that the separate counsel operate separately in fact and not just as a formal matter.²⁶ And *Ortiz* (as well as *Amchem* before it) contains language that suggests its holding is limited to so-called settlement classes – classes in which a court is presented with a settlement for approval the same day that the class action complaint is filed.²⁷

The Supreme Court has had two recent opportunities to address the question whether there is any constitutional guarantee of substantively fair settlement outcomes in class action cases, and if so, what that guarantee means: the Bank Boston case of *Kamilewicz*, and the Agent Orange case of *Stephenson*. But the Court denied certiorari in the first, and affirmed without any opinion (and hence without precedential value) in the second.

III. A Rawlsian Approach to Adequacy of Representation

²⁵ Id. At 848.

²⁶ Discuss how collusion/cooperation among plaintiffs counsel, whereby lead class counsel recruit the counsel for separate subclasses, undermines the value of the procedural safeguard established by *Ortiz*. Examples.

²⁷ See id. At 847 (emphasizing that “in settlement-only class actions the procedural protections built into the Rule [23] to protect the rights of absent class members during litigation are never invoked in an adversarial setting”); *Amchem*, 521 U.S. at 620.

There is no consensus whatever among legal academics as to which reading of *Shutts* and *Ortiz* – the broad, constitutional, substantive-outcome-guarantee reading or the narrow, non-constitutional, procedural-safeguards-only reading – is the more persuasive.

A. Rawls as a Social Contract Theorist

One way to justify the rules for the distribution of wealth or other goods within a legal regime – as in the rules for the distribution of settlement proceeds among current and future class members – would be to ask whether that distribution conforms to some external (external to the class members) conception of the good, irrespective of whether consent was given to the distribution. At least within the Anglo-American philosophical tradition, a dominant conception of the good is aggregate utility maximization.²⁸ From the aggregate utility perspective, the relevant question would be whether the distribution scheme maximizes the net utility of class members, relative to all other possible distributions.

Another dominant strand in the Anglo-American tradition is justification by contract. Justification by contract sometimes is based on actual, that is observed, contracting.. But contractual justifications are also invoked based on hypothetical contracting.

The regime for the distribution of goods in the context of civil litigation relies heavily on actual contracting as a source of justification. If the defendant agrees to pay some amount, and the plaintiff agrees to accept it, the courts are unlikely to second-guess the arrangement. Indeed, in most cases, courts do not even review settlements at all.²⁹ Moreover, all sort of arrangements are considered permissible in settlements that could never be justified as part of a judgment or verdict.³⁰

The social contract strain of political theory – an important strain that encompasses Hobbes and Locke among others³¹ -- has not relied on actual contact or actual consent as a means of justification, but rather on hypothetical contracts. Social contract theory posits thought

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experiments in which “real” human beings are imagined in circumstances that precede the distribution of wealth and goods in society, and then the question is posed as to how such persons would have agreed to as distributive rules. Social contract theory thus does recognize the importance of choice (albeit hypothesized choice) by people (albeit hypothesized people) with recognizable human qualities. But social contract theory (like aggregate utility maximization) arguably does build on some externally-imposed conception of the good in the sense that some sort of conception of the good unavoidably drives the thought experimenter’s precise specifications of the conditions under which the hypothesized people will engage in the hypothesized contracting. Social contract theory thus can be understood as a justificatory theory that is both normative (in that it posits the conditions for contracting that are deemed normatively acceptable) and positive or empirical (in that it entails an empirical claim as to how people actually would behave/contract under those normatively acceptable conditions).

Social contract theory justifies the resort to the hypothetical on the grounds that actual contracting in a developed society cannot generate fair or just rules for distribution inasmuch as everyone in the society has particular, vested interests based on their current distribution of entitlement. Any actual contracting therefore would merely reflect – and hence not in any meaningful way assess – the justice of that distribution. As John Rawls explains, “injustice exists because basic agreements are made too late”³²

As described below, Rawls developed a social contract framework that justifies certain rules of distribution in a society as to both basic rights and the distribution of material resources. Rawls’ framework is both normative and positive, blending claims as to the conditions for just contracting and claims as to what people actually would choose if those hypothetical conditions

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ever obtained or could obtain. A vast literature addresses the Rawlsian framework³³, and my goal here is not to defend or attack it but rather to explore the following question: assuming one puts stock in Rawls' framework as a way of understanding the rules for a just social ordering, can that framework defensibly be extended to the class action context and especially the high-individual-stakes/toxic tort/personal injury class action context? And if so, what insights does that extension of Rawls offer as to the outside or boundary parameters as to what constitutes a fair class action settlement?

B. The Original Position

In *A Theory of Justice*³⁴ and *Justice as Fairness*,³⁵ John Rawls developed a conception of justice – and the just distribution of entitlements within society – by means of resort to “the original position.” In the original position, people do not know what their particular characteristics in society will be –their family background, their class, their race, and so on.³⁶ They also do not have enough information to assess the probabilities as to who they might be or represent beyond the veil³⁷; for example, they lack any way of knowing whether there is a 1% or 20% chance they will be born with a disability. As Rawls notes, the people in the original position, therefore, must make decisions under “uncertainty” in the sense economists typically deploy that term.³⁸

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34 John Rawls, *A Theory of Justice* (Cambridge, MA Harvard U. Press 1971).

35 *Justice as Fairness: A Restatement* (Cambridge, MA Harvard U. Press 2001),

36 *Justice as Fairness*, at 15 (“In the original position, the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons’ race and ethnic group, sex, and various native endowments”).

37 *Justice as Fairness*, at 98 (“Since the maxim in rule takes no account of probabilities, that is, of how likely it is that the circumstances obtain for their respective worst outcomes to be realized, the first condition [of decisionmaking behind the veil of ignorance in the original position] is that the parties have no reliable basis for estimating the probabilities of the possible social circumstances that affect the fundamental interests of the persons they represent.”).

38 *Justice as Fairness*, at 15-18, 106.

According to Rawls, people in the original position will employ a maximin principle – a principle that maximizes their welfare in the event they should be born into the lowest, most disadvantaged rung in the social hierarchy. In Rawls’ language, the maximin rule “tells us to identify the worst outcome of each available alternative and then to adopt the alternative whose worst outcome is better than the worst outcome of all the other alternatives.”³⁹

The sorts of alternatives Rawls is addressing are those that go to the fundamental ordering of society, such as the package of basic civil liberties and level of material sustenance that are or are not guaranteed members of society.⁴⁰ Rawls’s argument is that, behind the veil of ignorance, people would not select a society in which they might be a master or they might be a slave, because they would not want to take the risk that they would be a slave, and because, too, that choice would be inconsistent with a moral sense Rawls attributes to the persons behind the veil: the persons behind the veil, in Rawls language, are “free and moral persons”⁴¹ motivated by “aspirations of free and equal personality.”⁴²

Rawls reasons that people behind the veil might be open to some social inequality but only if they are guaranteed a minimum threshold of civil liberties and material welfare, and only if departures from an egalitarian distribution serve to increase the social “pie” and make even the “lowest” member of society better off than they otherwise would be. Rawls describes this “difference principle” as a “strongly egalitarian conception in the sense that unless there is a distribution that makes both persons better off (limiting ourselves to the two-person case for simplicity), an equal distribution is to be preferred. . . . [I]f the principle is satisfied, everyone

39 Theory of Justice,

40 Theory of Justice,

41 A Kantian Conception of Equality, at 264

42 Some Reasons for the Maximin Criterion, at 230.

is benefited. . . . [E]ach man's position is improved with respect to the initial arrangement of equality.”⁴³

Rawls suggest that there are two conditions that limit his original position/maximin analysis, and that would constrain any efforts to import the analysis into other contexts. First, Rawls maintains that the characteristics shielded from the people behind the veil are morally irrelevant or morally contingent, and it is therefore right that the rules for a just distribution of rights and goods in society should *not* be made based on these shielded characteristics. Indeed, Rawls argues that the moral irrelevance or contingency of these characteristics will be specifically understood even by persons even once they move from behind, to beyond, the veil:

No one had an antecedent claim to be benefited in this way So while natural assets cannot be divided evenly, or directly enjoyed or suffered in common, the results of their productive efforts can be allocated in ways consistent with an initial equality. Those favored by social and natural contingencies regard themselves as already compensated, as it were, by advantages to which n one (including themselves) had a prior claim.⁴⁴

Second, Rawls argues that the claim that the people behind the veil will employ the maximin approach, and hence avoid worst case prospects even at the cost of foregoing the possibility of the most favorable possible outcomes, depends on the fact that the stakes for the people behind the veil are so high. Because they are making very important decisions, decisions that will “affect people’s life prospects,”⁴⁵ decisions with “deep and long-lasting effects on our common life,”⁴⁶ they will not be willing to take a gamble, to take their chances.⁴⁷ “[I]n the original position the parties are to favor those principles compliance with

43 Theory of Justice, 66, 69.

44 John Rawls, A Kantian Conception of Equality, in Samuel Freeman, JOHN RAWLS Collected Papers (Harvard 1999), 263-64.

45 John Rawls, Some Reasons for the Maximin Criterion, in Freeman, *supra* note [], at 229.

46 John Rawls, A Kantian Conception of Equality, in Freeman, *supra*, at 265.

47 John Rawls, Some Reasons for the Maximin Criterion, in Freeman, *supra* note [], at 229.

which should prove more tolerable, whatever their situation in a society turns out to be.”⁴⁸

Rawls suggest that, where the worst case scenario is really not so bad, as where it involves a possible trivial cost or inconvenience, the maximum principle may be inapplicable.⁴⁹

C. From the Original Position to the Class Action Original Position

The class action settlement can be conceptualized as presenting a problem of distributive justice among a society of class counsel and class members, akin to the broader question of societal distributive justice that Rawls is addressing, and hence suitable for original position/veil of ignorance analysis. The class members and their lawyers must distribute class settlement wealth among themselves. Reflecting upon the possibilities for hypothetical agreement behind a class action veil of ignorance may be the best we can do to obtain a rough sense of the outer limits of what is a fair distribution in the class context.⁵⁰

For the Rawlsian framework to be applicable to the class action context, however, two conditions must hold (at least according to Rawls) – the particular characteristics of particular people that are shielded by the veil must be morally contingent or irrelevant, and the decisionmaking behind the veil must be of a very high-stakes sort that implicates or could

48 A Kantian Conception of Equality, at 229.

49 Theory of Justice, at 133 (“Clearly, the maximin rule is not, in general, a suitable guide for choices under uncertainty. But it holds only in situations marked by certain special features.”)

50 Bruce Hay and David Rosenberg also adopt what I would term a Rawlsian approach (they do not use the label, simply referring to their approach as an *ex ante* approach) to address the question of whether prospective litigants, uncertain about the nature of their cases, would choose a compulsory averaging or individualized adjudication means of claim resolution. Bruce Hay & David Rosenberg, *The Individual Justice of Averaging*, Discussion Paper 285, ISSN 1045-6333, 6/2000, Harvard John M. Olin Discussion Paper Series, available at www.law.harvard.edu/programs/olin center, 29. Hay and Rosenberg argue that prospective litigants under certain assumptions would choose the averaging approach, and, on that basis, they argue that norms of justice sometimes would support a court-imposed, compulsory averaging regime. Hay and Rosenberg’s analysis has intuitive appeal, especially in contexts in which individualized assessments of damages (including related litigation costs) would be very high relative to the expected range of payouts. In my view, it is conceivable that veterans behind the veil in 1984 would have opted for a class action settlement that afforded all of them average damages *or* that made some provision for individualized assessment of damages *or* that struck a compromise between averaging and individual assessment. As discussed below, what seems inconceivable is that they would have opted for a class action settlement that might result in some of them receiving nothing at all, which is, in essence, what happened in the Agent Orange settlement.

implicate the life prospects of individuals. The first condition is satisfied in almost all class actions. The second condition, by contrast, is generally satisfied in toxic tort/product liability/personal injury class actions and some employment class actions, but not in most consumer fraud class actions.

It is hard to imagine a class action context in which morally *relevant* characteristic would be veiled from class members in the class action original position. In toxic tort/personal injury cases, one's particular position in the class is typically dependent on the extent of one's (often unknowing) exposure to the hazard and to one's biology/natural susceptibilities, neither of which would seem to be the source of morally significant agency. To return to the Agent Orange exposures at issue in *Stephenson*, imagine two veterans exposed to Agent Orange at the same time and the same place, but due to the first veteran's particular biology, the first does not become ill until twenty years after the exposure while the second become ill just five years after the exposure. Aren't the two veterans' differing natural endowments – the endowments that dictate the length of time between exposure and disease – morally arbitrary?⁵¹ By the same token, it would appear to be “morally arbitrary” that some miners and other workers exposed to asbestos developed lung disease later than others? Or that some just happened to be exposed later – and hence, even with the same latency periods, became sick later or will become sick later – than others?⁵²

The characteristics shielded by the veil in consumer class actions likewise seem morally irrelevant or contingent. In a consumer class action, one's position in the class may depend on when, where, and at what price one bought the product or service at issue, facts that, on their own, would seem to carry no moral weight. For example, in recent consumer fraud actions

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involving telephone service providers in Illinois, the relief proposed in settlements tracked the particular phone service packages used by and dates of service for Illinois residents – particular facts that, on their own, would seem to lack moral significance.⁵³

As to the stakes in the original position decisionmaking, the stakes for victims of toxic torts and personal injuries from dangerous products are likely to be very high, such that the presence or absence, and fullness or non-fullness, of compensation can often have a real impact on the life prospects of particular individuals and/or their survivors. This is the case not only because of the severity of the injuries in absolute terms, but also because (as discussed below), injured persons and/or their survivors lack (and will know behind the veil that, beyond the veil, they lack) insurance to cover the economic costs associated with the substantial injuries.

The second condition – high stakes for individual life prospects – is problematic for consumer fraud class actions, in which perhaps less than one hundred dollars per class member may be at stake. This condition, however, speaks not to the fairness of abstracting away or veiling particular personal information from persons in the original position, but rather to the presumed decisionmaking mindset of persons behind the veil. In other words, it may be reasonable (in Rawlsian terms) to imagine what (for example) class members in the Bank Boston litigation would choose as a compensation rule if the particulars of their losses were hidden from them by a veil of ignorance, but it may not be reasonable to assume that those class members behind the veil would adhere to the maximin principle.

D. The Class Action Original Position

Assuming it is reasonable to extend the original position/veil of ignorance construct to class actions, one important question is what would the class members behind the veil know about the world beyond the veil. Rawls posits that people behind the veil know a great deal

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about people beyond the veil, including “the general facts about human society,” including “the basis of social organization,” “laws of human psychology,” and indeed “whatever general facts affect the choice”⁵⁴ Class members behind the veil would thus understand the range of personal characteristics of class members beyond the veil, including the range of their attitudes toward risk. They would understand the range of injuries or (in the case of “futures” class actions) risks of future injuries the class members beyond the veil face. And they would understand what those injuries would mean, in terms of loss of welfare, to class members and their families.

Because it is relevant to assessing the impact of injuries beyond the veil, veiled class members would also know about the range of insurance (from none to full) held by class members beyond the veil. Two kinds of insurance are sometimes available with respect to the risk of injury: self-insurance, where the person or entity at risk insures against the risk through setting aside reserves cushions and/or through investment portfolio diversification, and third-party insurance, provided either by the government or by a private insurance company. Self-insurance is a viable option only for corporations and very wealthy individuals: because self-insurance is costly, individuals of ordinary means cannot use this strategy to insure against risks, at least major risks.⁵⁵ Since most class actions involve individuals as the class members, and most individual class members can be presumed to lack extraordinary personal wealth, the relevant questions for veiled class members in the class action original position would be: would class members beyond the veil have acquired and maintained third-party insurance with respect to the risk at issue in the class action litigation? Are all or some or any of the class members uninsured? And for those insured, what are the limits of the insurance?

⁵⁴ Theory of Justice, at 119.

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With respect to the United States context, class members behind the veil would understand that the government provides very limited insurance against certain kinds of physical injuries (in the form of Medicaid and social security disability), and no insurance against almost kinds of non-physical injuries or losses. With respect to private or market insurance, class members behind the veil would know that such insurance exists regarding health care, disability, and loss of life, and the amount of such insurance can be varied to some degree. They would also know, however, that individuals are very unlikely to purchase additional health, disability or life insurance to address risks of which they are simply not aware, or of which they are vaguely aware, but which lack salience.⁵⁶

For example, class members behind the veil would understand that smokers in 2004 generally are aware of the risk of lung cancer from smoking, and that those risks are salient to them, given the broad-based public discussions of smoking-related lung cancer and the fact that most smokers know other smokers who have died from lung cancer. But they also would understand that people regularly exposed to second-hand smoke may not be aware of the cancer risks associated with that exposure, given the relatively recent attention to this risk,⁵⁷ and that even if they are aware of the risk in the abstract, the risk might not be salient to them, given that they might well not know of anyone who has been diagnosed with lung cancer whom they identify as someone who had particularly great exposures to second-hand smoke. As a consequence, class members behind the veil, cognizant of the laws of human psychology, would understand that many or perhaps even all people exposed to second-hand smoke would not have purchased and maintained additional insurance in response to that exposure.

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Class members behind the veil also would understand that, once a previously-unrecognized risk manifests itself (if it does) in an actual illness or disability or death, the purchase of additional insurance is no longer a possibility. One cannot buy extra health, disability, or life insurance once one has had (for example) a car accident that leaves one with huge medical expenses, no possibility of employment, and the prospect of imminent death. Indeed, when private insurance providers perceive an individual as subject to large risks of accidents or disease or early death even if the individual does not perceive himself to be so at risk, those providers may refuse to even offer him even the opportunity to purchase additional insurance, or to offer it, if at all, at a price he simply cannot pay.⁵⁸ Insurance is unavailable once one obviously needs it.

Class members behind the veil also would understand the range of expected values of individual lawsuits based on injuries that have been or might be suffered by the class members beyond the veil, and they would understand if there was too much uncertainty regarding the prospects of individual suits to allow even a rough approximation of the range of the expected values. The range of expected values of individual lawsuits would be relevant to the choice of acceptance or rejection of class action settlement offers because, if the class members behind the veil were to reject such offers, one possible alternative course for class members beyond the veil would be to press claims in individual suits. Along the same lines, class members behind the veil would understand that defendants (in most contexts) are concerned solely with the total amount of their payout, and not its distribution among class members, so the settlement process would not end if the class members accepted the aggregate amount of the payout but rejected the proposed distribution among class members.

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What class members would not know is the particulars of the class members they would be or represent beyond the veil. For example, if the range of injuries in a class (in money terms) is \$10,000 to \$100,000, and the range of expected values of individual lawsuits for such injuries is \$5,000 to \$50,000, a class member behind the veil would have no way of knowing whether her injury and individual legal claim beyond the veil fell at the low or high end of the range. Nor would she know anything about the probability that her claim fell at the low or the high end.

E. Maximin Solutions to the Class Action Original Position

Is it possible to estimate what class members behind the veil would decide? Some critics of Rawls have argued that the original position exercise rests on something close to pure speculation,⁵⁹ and the same presumably could be said about a class action original position exercise. With respect to the possible claim that the class action original position exercise requires too much speculation and is indeterminate in its results, however, a helpful distinction can be drawn between outcomes that the class action original position assuredly would produce and those it assuredly would *not* produce. It may be very difficult to say what any hypothesized group of people in the class action original position would decide: there almost certainly are many, many class action settlements in any given class action that are arguably consistent with Rawls' maximin principle.⁶⁰ But it is possible to say what kinds of class action resolutions people behind the class action veil of ignorance would reject as plainly inconsistent with the maximin principle and hence unacceptable.

Consider, in this regard, a class action suit related to a disease linked to a recently-banned drug that upwards of 10,000 people had prescribed for them; about 300 class members

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are already known – that is, already 300 have the drug-related disease – and the best expert estimates are that another 150 will develop the disease over the course of the next ten years, and another 150 will become ill sometime thereafter. There appears to be a range in the severity of the disease in the known individual cases, and experts predict a similar range will exist among future cases.

Now imagine that there a veiled class member who, as such, do not know if she represents a currently sick person or a person who will become sick in the future (and if so, when the person would become sick). What she does know is that the defendant has offered \$10 million dollars to cover the claims of all class members – presents and futures – and that it is reasonable to believe that the defendant could not pay more without facing bankruptcy. The veiled class member – let us call her Mary – is also told the following: under the terms of the proposed deal, currently ill class members would receive all of the \$10 million and the futures would receive nothing.

In practice that would mean that if (say) Mary is a present – is sick now -- the deal would be very good for her beyond the veil. But if she is a future – will become sick later – the deal is terrible. However, assuming for now that individual suits by futures are impractical because individual suits cannot be brought until actual injuries are suffered and the defendant may no longer exist by the time the futures suffer their injuries, Mary may reason that a deal that offered her some possibility of compensation (if she happens to be a present beyond the veil) would be better than no deal at all.

But Mary will understand that the choice is *not* between the proposed class deal or no deal at all, but rather a choice among a range of possible class deals that fall within the constraint that the defendant can pay no more than \$10 million. The defendant, she will

understand, will be indifferent among intraclass allocations as long as the price tag remains the same. And since a recovery of zero, in the event she is a future beyond the veil, is a very poor outcome for Mary, and one that could be avoided by insisting on a different class deal that guarantees some compensation for *both* presents and futures, Mary will reject the proposed class deal.

Mary, however, would not necessarily insist upon a deal that aimed at ensuring absolutely equal treatment for all equally-injured class members. For example, imagine that an equal-payments-for-equal-injuries formula would entail very high administrative costs, say, an estimated \$2 million, and that a same-flat-payment-for-all formula for all presents and futures, regardless of the severity of each particular case, would mean \$2 million less in administrative costs, such that the total pool for compensation would be \$10 million instead of \$8 million. Mary might accept the same-flat-payment-for-all deal even though she might have or develop a particular severe case of the illness beyond the veil because, even so, it could be the case that (due to the administrative cost savings) the same-flat-payment-for-all deal would provide even class members with particularly severe cases with the same or more compensation than the equal-damages-for-equal injury approach. The maximin principle does not tell us how Mary would choose when faced with two regimes for which it may be impossible to assess *ex ante* which has the worst-case scenario, and which therefore is to be avoided.

However, we can say, with confidence, that Mary would have no reason, given her maximin orientation, to accept a regime that departed from an-equal-compensation-for-equal-injuries principles absent savings in administrative costs that would least create the possibility of more compensation for the most severely injured class members. To state the point slightly differently: just as a veiled person in Rawls' original position will opt for a difference principle

whereby deviations from an equal distribution are permitted only when doing so increases the social pie so as to improve the position of the least well-off in absolute terms (as compared to their position under an equal distribution regime), veiled class members in the class action original position will opt for a class action difference principle whereby deviations from the equal- compensation-for-equal-injuries principle are permitted only when at least the possibility exists, *ex ante*, that doing so would improve the position of the most severely-injured in absolute terms, as compared to their position under the equal-compensation-for-equal-injuries regime.

IV. ECONOMIC THEORY OF DECISIONMAKING UNDER UNCERTAINTY AS A BASIS FOR PREDICTIONS OF DECISIONMAKING IN THE CLASS ACTION ORIGINAL POSITION

Even if one accepts the class action original position as a normatively appealing framework within which to consider “fair” choices class members would make if they were in the “right” circumstances to so, then one need not automatically accept Rawls’ maximin principle as the principle by which veiled class members would make their decision. The maximin principle, after all, is simply the principle Rawls asserts veiled person in the original position (and for our purposes, by extension, the class action original position) will employ, and even Rawls (as discussed above) presumably would not extend the maximin principle to low-individual-stakes contexts such as consumer class actions.

There is considerable social science regarding individual decisionmaking under uncertainty, and it makes sense to ask, would the theory and findings of this social science also suggest that veiled class members would reject settlements with negative and zero compensation possibilities, and settlements that departed from an equal damages for equal injuries goal without any administrative cost savings dedicated to person beyond the veil in the

most-severe-injury category? Does the social science suggest differential results for high-individual-stakes and low-individual-stakes class actions, and if so, what differential results?

As a preliminary matter, it is helpful to distinguish between two schools in economics – traditional neoclassical economics, which assumes “selfish,” utility-maximizing “rationality” on the part of individual actors, and behavioral economics, which advances experimentally-based claims that people, in reality, sometimes deviate from the framework of neoclassical economics. Neoclassical economics is fully consistent with the Rawlsian maximin solution in high-stakes class action litigation, such as toxic tort/personal injury litigation. Even in the context of low-stakes litigation, such as consumer fraud litigation, neoclassical economics supports the proposition that veiled class members in the class action original position would reject settlements that entailed the possibility of negative or zero compensation, and/or that deviated from an equal payment for equal injury norm, unless doing was a necessary condition of reaping some significant administrative cost savings for the class as whole.

Behavioral economics provides some basis for going further and predicting that even in small stakes litigation, veiled class members will resist departures from an equal compensation for equal injuries principle even when doing so would entail some significant administrative costs savings for the class as a whole. Behavioral economics also suggest that veiled class members would reject outright any possibility of negative compensation for any class members even if inclusion of that possibility in the settlement somehow would reap substantial administrative cost savings for the class as a whole.

A. Risk Aversion in Neoclassical Economics

Neoclassical economics accepts that, at least in the absence of insurance, individuals are generally risk-averse, and that risk-aversion increases with the magnitude of the stakes at

issue.⁶¹ In the traditional framework, risk aversion applies equally to gains as to losses, and the phenomenon is generally thought to be rooted in the declining marginal utility of wealth.⁶² Although risk neutrality is sometimes assumed for the purposes of facilitating economic modeling, economics accepts the pervasive existence of risk aversion in practice.

Where the stakes for each individual is high, as they are in Rawls original position and the class action original position in the toxic tort/personal injury context, substantial risk-aversion is an assumption that is fully consistent with neoclassical economics. And it would seem to follow that class members behind the veil in (for example) in an Agent-Orange context would follow a maximin principle, and reject settlements with a possibility of negative or no recovery. The maximin principle is, after all, nothing more than a way of capturing the idea of very substantially risk-averse decisionmaking.

Even in small-individual-stakes litigation, where we would expect less risk aversion than in high-individual-stakes litigation, we would not expect class members to accept settlements with negative or zero compensation as a possibility unless doing is necessary to secure a significantly greater overall expected return for the class as a whole. For example, imagine that veiled class members in a consumer fraud action are given the following choice: a settlement package where all class members would be guaranteed \$2, or a settlement package where there would be a 50% chance that a class member would receive nothing and a 50% chance that a class member would receive \$4. Purely risk neutral class members behind a veil would be indifferent to the two options, but even minimally risk averse class members behind the veil would opt for the \$2-for-all option. Now let us assume that there is an administrative cost savings by excluding half the class members from any compensation, but the savings is small, say a \$2000

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in savings, such that the total pool increases from \$100,000 to \$102,000, and the expected return in the all-or-nothing regime would increase from \$2 to \$2.02. With such minimal savings, even minimally risk averse veiled class members are likely to reject taking the gamble they might receive nothing beyond the veil.

In the Bank Boston settlement, which went beyond including a no-compensation possibility by including a negative-compensation possibility (and actuality), there was no argument that doing so somehow increased the total amount available to the class as a whole. Even minimally risk averse class members behind the Bank Boston veil of ignorance would have rejected the settlement package, and instead have opted for an arrangement that entailed the same amount of money for the class but that distributed the money in such a way that negative or zero compensation was not a possibility for any class member.

Similarly, even minimal risk aversion can explain why veiled class members would insist that any departure from equal compensation for equal injuries be justified by administrative cost savings that increase the overall pool of money for all class members, and that could not be otherwise obtained. Unless the compensation pool is increased by administrative cost savings, there is no reason for even minimally risk-averse class members behind the veil to accept the risk that (beyond the veil) they would receive a share of the compensation pool that is disproportionately small relative to the magnitude of their injuries.

B. Inequality Aversion in Behavioral Economics

It has been argued that there is an “equality heuristic” that guides distributive decisionmaking by individuals, that individuals make distributive decisions subject not just self-regarding or self-protective risk aversion but also to inequality aversion.⁶³ For example, when

⁶³ David M. Messick, Equality as a decision heuristic, at 17, in Mellers & Baron, eds., *Psychological Perspectives on Justice* (1993). For other arguments that equity-seeking and inequality aversion drive decisionmaking under

asked to divide a sum of money between another person and themselves, people in experiments sometimes split the pie in half even when it seems they could have kept the whole thing for themselves. As David Messick explains, even when purely equal allocations in experiments are not ultimately produced, “equality” is used “as an initial anchor . . .”⁶⁴

There are two reasons to suppose that inequality aversion would be even more influential in the class action original position than it has proven to be in some of the experiments described in the economics and psychology literatures. First, in those experiments, the normative pull of equality is contraposed to self-interest in wealth maximization, and the results, unsurprisingly are complex and subject to multiple interpretations.⁶⁵ But in the class action original position, class members do not *know* that they would be materially worse off if they were to opt to follow a principle of distributive equality. Hence, it may be, in a sense, easier for the veiled class members to choose to follow an equality principle than for the subjects in the distributive games discussed in the economics and psychology literatures.

Second, the experimental literature suggests that people are more willing to depart from an equality principle in distribution when they can partially blame – make complicit – others for the departure.⁶⁶ Where an individual must accept sole responsibility for a departure from

certain circumstances, see also Matthew Rabin, Incorporating Fairness into Game Theory and Economics, *AM EC REV* Dec. 1993, 83(5), 1281-1302; Martin Dufwenberg & Georg Kirchsteiger, A Theory of Sequential Reciprocity, *GAMES AND ECONOMIC BEHAVIOR*, May 2004, 47 (2), 268-98; Gary E. Bolton & Axel Ockenfels, ERC – A Theory of Equity, Reciprocity, and Competition, *AM EC REV*, March 2000, 90(1), 166-193; Gary Bolton, Bargaining and Dilemma Games: From Laboratory Data Towards Theoretic Synthesis, *EXPERIMENTAL ECONOMICS*, Dec. 1998, 1(3), 257-281; Ernst Fehr & Klaus Schmidt, A Theory of Fairness, Competition and Cooperation, *Q J ECON*, Aug. 99, 114(3), 817-68; Werner Guth et al, The Relevance of Equal Splits in Ultimatum Games, *GAMES & ECONOMIC BEHAVIOR*, Oct. 2001, 37(1), 161-69; [Add Bazerman, psychology/sociology lit cites].

⁶⁴ Messick, *supra*, at 17 – [].

⁶⁵ For a recent discussion of the multiple interpretations that can be made of the experimental data, see Dirk Engelmann & Martin Strobel, Inequality Aversion, Efficiency, and Maximin Preferences in Simple Distribution Experiments, 94 *AMER EC REV* 857 (2004).

⁶⁶ See *id.* at []; Gary Bolton & Rami Zwick, Anonymity versus Punishment in Ultimatum Bargaining, *GAMES AND ECONOMIC BEHAVIOR*, July 1995, 10(1), 95, []. [Also add Charness and Rabin, 2001, Expressed Preferences and Reciprocity in Experimental Games, UCal -Berkeley Working Paper.]

equality, he or she is less likely to agree to the departure. In the Rawlsian original position, as in social contract theory generally, the society emerges only on the basis of a consensus agreement in the pre-social-ordering setting: all of the persons in Rawls' original position must agree to the rules for distribution of rights and goods beyond the veil. In that sense, no single person in the original position can blame – make complicit – others for the selection of a distributive rule that departs from an equality principle. By the same token, a settlement in the class action original position can be accepted only if all the veiled class members agree, and in that sense no single veiled class member can blame – make complicit – others for a settlement that departs from the equality principle.

In sum, in situations where risk aversion alone may be insufficient to predict resistance to a particular kind of settlement risk (as could be argued, for example, with respect to settlements in low stakes litigation where the inclusion of a zero or negative compensation possibility could be perceived, *ex ante*, as a necessary precondition to significantly increasing the total compensation pool available to the class), inequality aversion may provide an adequate basis for making a prediction of resistance to, and rejection of, the settlement risk.

C. Loss Aversion in Behavioral Economics

According to the prospect theory branch of behavioral economics, people regularly value the avoidance of losses more than the securing of gains of the same magnitude. Losses hurt more than gains please, and so people are *risk-seeking* in the avoidance of losses. Prospect theory remains controversial but it has substantial experimental support, and it may explain why a settlement that allows for negative compensation, such as the Bank Boston settlement – a settlement that imposed on class members the risk that they might actually incur a financial loss as a result of their inclusion in the class settlement – seems so wildly counterintuitive. If people

are risk-seeking in the avoidance of losses, even small losses, we do not need the concept of risk aversion to explain why veiled class members in the Bank Boston litigation would resist any settlement that entailed the possibility of actual financial losses for any class members. Indeed, if one combines the risk aversion of neoclassical economics and the loss aversion of the prospect theory school of behavioral economics, it seems plausible to suppose that veiled class members in the Bank Boston litigation would have rejected the possibility of actual financial losses for any class members even if that possibility somehow could be justified as a necessary precondition to significantly increasing the total compensation pool available to the class as a whole.

V. AN EXPERIMENTAL SIMULATION OF THE CLASS ACTION ORIGINAL POSITION

In an experimental simulation of a class action original position involving toxic tort/personal injuries, one can, through surveys, ask people to imagine themselves in the class action original position and then ask them what they believe they would choose under those conditions. At a minimum, this sort of exercise provides a check against the claim that the class action original position thought experiment reflects nothing more than the possibly idiosyncratic intuitions of the particular author of the particular thought experiment. In other words, the surveys described below help to test whether the intuitions that informed the preceding class action original position analysis are generally shared.

The surveys subjects were all year law students at the beginning of their first year of law school. As such, they brought little or no specialized “legal” knowledge to the exercise. Law students are not representative of the general population in some respects (e.g., age), but they certainly are representative in others (e.g., gender breakdown). More important, if the predicted results of the class action original position thought experiment do capture fundamental aspects of human psychology and fundamental intuitions of justice, then those results should be capable of

being produced in experiments even with a group of subjects that is in significant demographic respects unrepresentative of the general population.

Because the goal of the survey experiment was to invoke the conditions of the class action original position, the survey was designed to capture the subjects' comparative reflections regarding different settlement approaches. In the class action original position, veiled class members would be asked (following the Rawlsian reflective equilibrium model for the original position⁶⁷) not simply to say yes or no to particular distributions of settlement wealth but rather to reflect upon the various options and arrive at a reflective equilibrium regarding those options. To encourage reflection along Rawls' reflective equilibrium model, subjects were told that they could review four proposed settlements before rating any of them. Students were asked to rate each proposed settlement on a 1 to 7 scale, with 1 representing the lowest level of acceptability and 7 representing the highest level of acceptability.

By comparing the ratings for each proposed settlement on each survey, we can deduce subjects' rankings of these proposed settlements, as well as the relative magnitude of the differences they perceive among the proposed settlements. We can also observe the distribution of preferences among subjects with respect to the proposed settlements.

As described below, different groups of students were given different surveys. The principal differences among the surveys related to the information provided regarding the issue of causation, and as to whether specific probabilities were provided as to the likelihood that persons exposed to the toxin would fall into one or another sub-group within the class. With each survey, the same pattern obtained: almost all respondents strongly objected to the settlement option that gave no share of the compensation pool to those who would become ill more than ten years after the settlement date, and almost all strongly approved of the settlement option that

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aimed at providing equal compensation to all ill persons regardless of when they did or would become ill. The more evenhanded a proposed settlement was as between those now or soon ill and those who may become ill further in the future, the more favorably respondents rated the settlement. The differences in mean ratings between the less and more even-handed settlements were statistically significant at a very high level of confidence ($p < .005$).

What do these results suggest regarding the settlement in the Agent Orange litigation that was at issue in *Stephenson*? The results suggest that, given various possible options for dividing the pool of money the defendant is willing to pay the class as a whole, the class members behind a veil of ignorance will reject any option that they know, *ex ante*, will lead to some injured class members receiving no compensation. Indeed, the results arguably suggest that veiled class members will opt for a formula or mechanism aimed at providing all class members equal compensation for equal injuries in preference to every other possible option for dividing the total pool of available compensation. In sum, the class action original position will *not* produce the sort of settlement at issue in *Stephenson*.

The results also arguably suggest that, even if veiled class members were provided only with the option of accepting or not accepting a proposed settlement that would preclude some class members from receiving any compensation, they would overwhelmingly reject the proposed settlement: When one group of survey subjects were presented only with a proposed settlement that would provide no compensation for those who may become ill ten or more years after the settlement date, they rated the settlement as highly unacceptable. By contrast, when another group of survey respondents was presented only with a proposed settlement that would provide for equal payments for equal injuries to all class members, the respondents rated the settlement as highly acceptable.

A. Three Principal Surveys: The Plain, Causation-All, and Causation –Futures Surveys

1. Core of Three Principal Surveys

All of the surveys present respondents with a summary of facts that are a variant on those in the Agent Orange litigation that produced the 1984 class settlement. The respondents to the three of the four surveys were told that the chemical tetrabenzene has been associated with the development of lung cancer, and that they are one of one thousand former employees of a computer parts manufacturer whose employees were exposed to tetrabenzene. They are also told that not all exposed former employees will become ill, and that of those that do become ill, some will do so soon, but others may become ill years later. Placing the survey respondents behind the Rawlsian veil, the survey informs the respondents that there is no way for them to assess the probability they will become ill or (if they do) the probabilities as to when they will become ill.

The respondents were asked to rate how likely they would be to accept each of four settlement packages on a seven point scale ranging from definitely unacceptable (1) to definitely acceptable (7). One of the settlement packages tracks that at issue in *Stephenson* – that is, all of the settlement money is allocated to currently ill former employees and those that will become ill within ten years, and those who become ill more than ten years after the settlement receive nothing. As in the settlement at issue in *Stephenson*, the settlement purports to preclude all former employees who have or will become ill from pursuing an individual lawsuit notwithstanding the absence of any allocation of money to those who become ill more than ten years after the settlement. As a shorthand I refer to this package as the 100%/0% package because it allocates 100% of the compensation pool to currently ill persons and persons who will become ill within ten years time.

Another of the settlement packages follows the original, but later abandoned, formula in the 1984 Agent Orange settlement – that is, 90% of the settlement money is allocated to currently ill class members and those who will become ill within ten years, and 10% is reserved for those who may become ill afterward. Again, as shorthand, I refer to this package as the 90%/10% package.

The other two settlement packages are considerably more favorable than either the 100%/0% or 90%/10% packages to those who may become ill more than ten years after the settlement date. According to the terms of one of these packages, a trustee will be appointed with the mission of making, to the extent possible, equal payments to all former employees who become ill. The surveys states that the trustee will do so by maintaining and periodically adjusting a reserve for future cases based on the best available scientific evidence regarding the incidence of the disease, and by including a modest cushion in the reserve to reflect the scientific uncertainties as to the outer limit of latency periods. The relatively flexible trustee mechanism was selected as an instrument for approximating equal payments because a full understanding as to the relative numbers of former employees in the two relevant groups (former employees who become ill between 2004-2014, and those who become ill afterward) will unfold only with time, in the post-settlement-approval period. As shorthand, I refer to this package as 50%/50%.

The remaining settlement package differs from the 50%/50% package only in that its sets a different goal for the trustee – the goal of paying those who become ill between 2004-2014 twice as much as those who become ill afterward. As shorthand, I refer to this package as the 66%/33% package.

Whether the 50%/50% or the 66%/33% packages better approximates a standard of “equal” treatment among the two groups (ill before 2015, ill after 2014) is debatable. From the perspective of formal equality, the 50%/50% package is closer to the equality ideal because it aims at the provision of formally equal payments for formally equal injuries (illness and/or death). But one could certainly argue that persons who become ill or die later (after 2014) have suffered a lesser injury than those who become ill or die earlier (before 2014) because they have had more years of unaffected health. On this substantive equality view, paying twice as much to those who become ill before 2015 than to those who later become ill later could be seen as approximating the goal of equal payments for equal injuries.

It seems reasonable to assume, however, that respondents will generally regard the 50/50 package as treating pre- and post-2014 ill persons more “equally” than the 66/33 package. A significant problem with viewing the 66%/33% package as one that achieves substantive equality is that it is not finely tailored to reflect the number of healthy years enjoyed by the exposed person: for example, under this package, a person exposed in 1990 who become ill in late 2014 receives twice as much as a person exposed in 1990 who becomes ill in early 2015. Perhaps even more important, some accounts of lay, non-expert persons valuations of injuries and death suggest that most people regard an illness or death as in some sense deserving the same compensation whether it is immediate or rather to occur in ten or fifteen years time.⁶⁸ In other words, lay people seem not accept – as a matter of conscious reflection at least – discounting of the compensation value of serious injury and/or death.

Significant experimental literature supports the existence of ordering effects in surveys, such that the placement of an alternative first may produce different results than if it were listed last. To correct for any possible ordering effects in this context, I randomized the order in

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which the four packages -- the 100%/0%, 90%/10%, 66%/33%, and 50%/50% -- were listed on the surveys.

2. Differences Among Three Principal Surveys

Three surveys were administered to roughly equal numbers of beginning law students. I call the three the Plain Survey, the Causation-All Survey, and the Causation-Futures Survey, although they were not so labeled for the survey respondents. The Plain Survey simply included the information already referenced regarding tetrabenzene, without any direct or indirect references to problems of causation that had or might arise in individual, non-class suits based on alleged injuries from exposure to tetrabenzene.

The Causation-All Survey differs from the Plain Survey only in that it included language suggesting that problems of causation generally have arisen and would arise in individual, non-class suits based on alleged injuries from exposure to tetrabenzene: specifically the survey states that, individual suits “so far have failed due to the difficulties of proving causation of injury” and that it “is the consensus in the legal community that any individual suit based on exposure to tetrabenzene is more likely than not to be dismissed on the ground of lack of proof of causation.”

The Causation-Futures Survey differs from the Plain Survey and the Causation-All Survey in that it included language suggesting that problems of causation in individual suits would be particularly acute for those who become ill many years after exposure; specifically, the survey states that “a general consensus exists that proving causation in any given [individual]] case becomes more difficult as the gap in time between exposure and incidence of the disease increases” and offers the example that “on average, causation issues are more

difficult in the case of a lung cancer that develops eleven years after exposure than in the case of one that develops one year after exposure.”

The proposed settlement packages on all three surveys were identical.

One rationale for inclusion of causation information on surveys is that defenders of the Agent Orange settlement at issue in *Stephenson* have emphasized that the (in their view) any individual suits based on Agent Orange exposure would have failed for lack of proof of causation and that, in particular, any individual cases brought after 1994 (compensation cutoff date in the class settlement) would have been impossibly weak on causation grounds.

Assuming these assertions are true or would have been taken as true in 1984 at least, would they have led veiled class members to opt for a settlement that excluded post-1994 cases from compensation? The Causation-All and Causation) Futures surveys are designed to help us answer that question.

Moreover, as discussed below, the Causation-All and Causation-Futures Surveys allow us to test whether veiled class members “rationally” respond to information suggesting that the option of individual suit has lower expected value than they otherwise might be assumed. They also allow us to test for inequality aversion by allowing us to compare rating for one group of “equals” (exposed persons who develop cancer but may have difficulty establishing causation) and ratings for two groups of non-equals (exposed persons who develop cancer but could prove causation with some, but not great, difficulty and exposed persons who develop cancer and could not prove causation or could prove it only with great difficulty).

3. Predictions Regarding Survey Results

Based on both the Rawlsian class action framework and the economics literature regarding risk aversion and inequality aversion, I generated three predictions regarding the

survey results. Each prediction, and the results relevant to each predictions, is discussed in turn.

i. As maximin decisionmakers (Rawls) or highly-risk averse individuals confronting a high-stakes choice under uncertainty (standard economics), respondents on all three surveys will rate the 50%/50% package highest, the 66%/33% package next, the 90%/10% next, and the 100%/0% last, and the differences in ratings will be statistically significant.

The respondents had no basis for assessing whether they are were likely to be in the pre-2015 group of ill person or the post-2014group of ill persons, so, if they were entirely risk neutral, they would have been indifferent to how the money would be distributed as between the two groups so long as the total sum to be distributed was the same. Hence, they would have rated all four settlement packages the same. Risk-averse person, by contrast, would have been more concerned with avoiding the risk of the downside (being a post-2014 ill person under a settlement that pays them nothing or, at best, less than the amount paid to the pre-2015 ill persons) than gaining a possible upside (being a pre-2015 persons and not having to share at all or share equally the compensation pool with post-2014 ill persons).

There is no reason for the preferences of risk averse persons as among various class settlement packages to change simply because they are told that all or some ill persons would face major causation obstacles in individual suits. The existence of such obstacles has no logical bearing on the four variables that are relevant for the risk averse (or for that matter risk neutral) decisionmaker in choosing among settlement packages in this context – the probability that he or she will be a pre-2015 ill person (p), the probability he or she will be a post-2014 ill person (p_1), the relative share of the compensation pool a pre-2015 ill person would receive(s), and the relative share of the compensation pool a post-2014 ill person would receive(s_1). A risk neutral decisonmaker should most strongly prefer the package for which $[(p)(s) + (p_1)(s_1)]$ is greatest, but here all the packages would have the same $[(p)(s) + (p_1)(s_1)]$ value. A

maximin/substantially risk averse should eschew the package that has the lowest value for either [(p)(s)] or [(p1)(s1)], which in this case is the 100/0 package, as that package has a zero value for [p1)(s1)].

The results strongly support this maximin/risk aversion-based prediction. On each of the three surveys, the mean acceptability rating for the 50/50 package was greater than the mean acceptability rating for the 66/33 package ($p < .005$), and the mean acceptability rating for the 66/33 package was greater (again $p < .005$) than the mean rating for the 90/10 package. On all three surveys, the mean acceptability for the 90/10 package is greater than the rating for the 100/0 package. For two of the three surveys, this difference in means is statistically significant at a $p < .005$ level of significance.

The strength of the preference in favor of evenhandedness between pre-2015 ill persons and post-2014 ill persons is highlighted by comparing both the mean and the modes for the 100/0 and 50/50 packages on the three surveys. The means for the 100/0 package on the three surveys ranged from 1.33 to 2.21, whereas the means for the 50/50 package ranged from 5.17 to 5.38. The mode—the most common rating – was 1 for the 100/0 package on two of the three surveys (Plain and Causation-All), and it was 2 on one survey (Causation-Future). The mode was 6 for the 50/50 package on two of the three surveys (Causation-All and Causation-Future), and it was 7 on one of the surveys (Plain). If one takes the range of scores of 4 and above as roughly equivalent to more acceptable than not, and if one pools all three surveys, 116 out of 126 respondents found the 50/50 package to be *more* acceptable than not, whereas 118 of the 126 found the 100/0 package to be *less* acceptable than not.

Figure One below provides the Plain, Causation-All, and Causation-Futures means for the four settlement packages. Figures Two and Three illustrate the distribution of responses for

the three surveys with respect to the most dramatically-different settlement options – the 100.0 option and the 50/50 option.

FIGURE ONE: Means – Three Principal Surveys

	n	Plain Mean	Causation-All	Causation Future
100/0	42	1.33	2.21	2.07
90/10	42	2.57	2.83	3.62
66/33	42	3.55	3.64	4.71
50/50	42	5.29	5.17	5.38

FIGURE TWO: Distribution (100/0) – Three Principal Surveys

	n	1	2	3	4	5	6	7
Plain 100/0	42	30	10	2	0	0	0	0
Causation-All 100/0	42	14	12	11	3	2	0	0
Causation-Futures 100/0	42	12	19	8	2	1	0	0

FIGURE THREE: Distribution (50/50) – Three Principal Surveys

	1	2	3	4	5	6	7
Plain 50/50	0	3	3	5	10	10	11
Causation-All 50/50	0	0	4	11	7	14	6
Causation-Futures 50/50	0	1	2	0	18	19	2

ii. *As rational decisionmakers (whether risk neutral or risk averse), respondents will rate all of the settlement packages, in absolute (and statistically significant) terms, more highly on the Causation-All and Causation-Futures Surveys than on the Plain Survey.*

In weighing the option of proceeding with a class settlement, a rational consideration of any class member is the value of the alternative of an individual suit for any injuries he or she has or may suffer. All else being equal, the more attractive the individual suit option, the less attractive class action settlement will be, and, of course, vice versa. Thus, if respondents were told that the individual suit option is problematic on causation grounds, we might expect them to rate the proposed class action settlements more highly than when they had not been provided with such information. One very substantial caveat in this regard is that we do not know what respondents are assuming about the expected value of individual actions in the absence of being provided specific information about those actions; if respondents in a no-information-regarding-individual-suits survey assume that the prospects for individual suits are poor, then we would not expect to observe any increase in the absolute value of settlement ratings as between the no-information survey and the surveys that provide information regarding problems facing individual suits (here, the Plain Survey as opposed to the Causation-All and Causation-Futures Surveys).

With respect to this prediction, the results are mixed. In absolute terms, the rating for the 100/0 option is significantly higher on both the Causation-All Survey (2.21) and Causation-Futures survey (2.07) than it is on the Plain Survey (1.33), again at a .005 level of significance. The ratings for the 90/10 and 66/33 packages on the Causation-Futures Surveys are significantly higher than the 90/10 and 66/33 ratings on the Plain Survey (again, $p < .005$), but there are no significant differences between the 90/10 and 66/33 ratings on the Causation-All and Plain Surveys, and no significant differences among the 50/50 ratings for all the three surveys. All in all, it is difficult to say much about the effect of the information provided on the Causation-All and Causation-Futures surveys regarding the value of individual suits, at

least in part because we did not include any questions on the Plain Survey to explore respondents' assumptions regarding the value of individual suits in the absence of being given specific information related to the value of the suits. We therefore cannot conclude that what might appear to be respondents' rather limited response to the individual suit information reflects any departure from standard assumptions of rationality.

iii. As inequality averse decisionmakers, respondents will be more receptive to unequal treatment of pre-2015 ill persons and post-2014 ill persons once they have been provided a principled reason for treating the two groups as substantively unequal (that causation of illnesses by tetrabenzene exposure is more doubtful with respect to the post-2014 group), and, as a result, the gaps in mean ratings among the settlement packages will be lesser on the Causation-Futures Survey than on the Causation-All Survey, and the differences among the gaps (in other words, the differences between the differences in means) will be statistically significant.

As already suggested, there is no reason rooted in risk aversion for respondents to rate settlement packages differently relative to one another simply because they are told causation problems in individual suits may be particularly problematic for post-2014 ill persons. That fact has no bearing on the relevant variables in establishing preferences among the packages on a given survey (p, s, p1, s1). Thus, focusing solely on the standard dichotomy between risk neutrality and risk aversion, we would not predict that the relative preferences (either order of settlement in terms of acceptability ratings, or gaps in rating among settlements within the order) will differ significantly as between the Causation-All and Causation-Futures surveys. Thus, any differences of this sort would have to be explained by some factor other than risk aversion, such as inequality aversion.

If we accept the general view that people are averse to unequal treatment of equally situated persons, and likewise open to different treatment of unequally situated persons, then we might be able to predict differences between the responses to the Causation-All and Causation-Futures Surveys. The Causation-All Survey does not include any statement

suggesting that causation of injuries by tetrabenzene is any less likely with respect to the post-2014 ill persons than with respect to the pre-2015 ill persons. By contrast, the Causation-Futures Survey states that causation becomes harder to establish with the passage of time, and respondents could infer that, in fact, injuries can less confidently be assumed to be attributable to tetrabenzene exposure for the post-2014 group than for the pre-2015 group. To the extent this difference between the pre-2015 and post-2014 groups was perceived by respondents as rendering the two groups in some sense *unequally* situated, we would predict that the responses to the Causation-Futures Survey would entail a lesser gap in acceptability rating between the full equality 50/50 package and the less equal 66/33, 90/10, and 100/10 packages.

The actual results provide some support for this prediction. To test this prediction we need to consider the differences between the difference in means for the settlement packages on the Causation-All and on Causation-Futures surveys. The most notable difference between the two surveys concerns the gap between the means for the 50/50 and 66/33 packages. On the Causation-All survey, the 50/50 mean is 5.17, the 66/33 means is 3.64, and hence the difference in means is 1.53. On the Causation-Futures survey, the 50/50 mean is 5.38, the 66/33 means is 4.71, and the difference in means is .67. The difference between the two differences in means is significant at a $p < .025$ level of significance.

At the same, although the gaps on the two surveys between the 50/50 and 66/33 packages are significantly different, the gaps on the two surveys between the 50/50 and the 90/10 packages, as well as between on 50/50 and the 100/0 packages, are not statistically significant. Perhaps, we can conclude that the information on the Causation-Futures Survey helped respondents be more open to a modest departure from full equality (that is, the departure from the 50/50 to the 66/33 packages), but was not enough to provide any justification for the more

dramatic departures from full equality (that is, the departures from the 50/50 packages to the 90/10 or 100/0 packages). This lack of the closing of the gap between the 50/50 package and the 90/10 and 100/10 packages is understandable, arguably, given that the pre-2015 ill persons and post-2014 persons ill persons are, according to the surveys, both ill and ill in the same way (that is, suffering from lung cancer), and the Causation-Futures Survey does not state that causation becomes a dramatic difficulty suddenly in 2015, but rather suggests that all ill persons face causation difficulties, and that the increase in those difficulties is continuous, as more time passes between exposure and illness.

B. The Relaxation of Original Position Conditions in the Specific Probabilities and Snapshots Surveys

In the Plain, Causation-All and Causation-Futures Surveys, we adhered to two conditions of Rawls' original position: (1) that the persons behind the veil have no information regarding the probabilities that people beyond the veil will fall into one category rather than another (e.g., the category of being ill post-2014 as opposed to being ill pre-2015), and (2) the persons behind the veil will have the opportunity to reflect upon a range of distributive rules and arrangements rather than being forced to accept or reject a single option in isolation from any others. This section discusses surveys in which we relaxed the first or second condition, and where, nonetheless, the results were (as before) a marked rejection of the Agent Orange-type, 100/0 settlement package and marked acceptance of the 50/50 package. Relaxation of certain conditions of the Rawlsian original position does not alter the basic conclusion that veiled class members would not choose the kind of settlement that was at issue in *Stephenson*.

The no-aggregate-probabilities condition has been criticized on the ground that, while Rawls does justify denying persons behind the veil of knowledge of their particular characteristics beyond the veil, he does not justify denying them of the overall, aggregate, non-

particular probabilities that people beyond the veil will have one characteristic as opposed to another.⁶⁹ Stated somewhat differently, Rawls does not explain why people behind the veil should not know the odds that any given person beyond the veil (as opposed to themselves in particular) would be a slave rather than a master in a society that allowed slavery. Rawls does hint that the denial of any such odds might be explained as a means of forcing veiled person to take the fate of every person in society seriously – to treat each of the members of society as a Kantian end in and of itself, as in Kant’s Kingdom of Ends,⁷⁰ but Rawls postulates, rather than attempts to persuade us of, the primacy of Kantian ethics.

The condition of multiple choices for comparative consideration makes perfect sense given Rawls’ goal of creating a thought experiment about just conditions for social ordering. Indeed, in the social contract tradition of political theory more broadly, there would seem to be no grounding for the claim that a just social contract could be one where the contracting parties were forced to consider each possible arrangement in isolation, and were prohibited from meaningful reflection, informed by meaningful comparisons.

⁶⁹ David Lyons was among the earliest to voice this critique. According to Lyons in a 1972 essay,

One is of course barred from basing one’s calculations on, say, one owns personal good or bad fortune in the “natural lottery” or on the special conditions of one’s own society; for these are unknown to the parties under the veil of ignorance. But the parties are assumed to have complete knowledge of theory and of the facts that cannot serve special interests. I see no reason why one cannot use such information for calculating the likelihood of one’s having certain natural endowments and the likelihood of one’s society being in a certain broadly defined condition. . . I conclude that, despite the veil of ignorance, the parties in the original position can still calculate to maximize general expectations, which Rawls admits is generally the most natural approach.

David Lyons, *Rawls Versus Utilitarianism*, reprinted in Henry S. Richardson & Paul J. Weithman, *THE PHILOSOPHY OF RAWLS A Collection of Essays* (Harvard 1999), at 9-10.

⁷⁰ There is in this sense a certain circularity in Rawls, as in all social contract theory, and Rawls openly acknowledges this. See *A Kantian Conception of Equality*, at 264, 266 (“The original position was designed so that the conception of justice that resulted [from the original position] would be appropriate. . . . A society that realized [principles such as the difference principle] would attain positive freedom, for the principles reflect the features of persons that determined their selection and so express a conception they give to themselves.”).

When one moves from the Rawlsian original position to experimental versions of the class action original position, however, the case for soliciting snapshot, single option reactions improves. One could argue that, in presenting certain options to the respondents/veiled persons, the experimenter influences the responses by framing them and perhaps implicitly suggesting what the experimenter believes should be the responses. For example, the inclusion of packages that are clearly distinctive in their degree of equality/inequality in distribution distributive could be understood by some respondents as a cue that the experimenter believes that the respondents should find these distinctions meaningful, and hence accord different ratings to the packages

To test the effect of providing veiled persons with specific, aggregate probabilities for the relevant conditions beyond the veil, I administered a survey to 53 beginning law students. I call this survey the Specific Probabilities Survey. The survey provided the same information as the Plain Survey except that it included the statement that an expert had predicted that, among the total number of cases of disease expected to develop as a result of tetrabenzene exposure, three quarters would develop before 2015 and one quarter would develop in 2015 and afterward. Thus, to the extent respondents credited this reported expert opinion, they would have understood that it was twice as likely any given class member beyond the veil would fall within the pre-2015 group as that he or she would fall within the post-2014 group.

The results of the survey suggest that, even when veiled person are given aggregate probabilities that suggest that (beyond the veil) they are likely to be members of the group favored by certain proposed distributive rules, they will still favor a distributive rule that adheres more fully to a principle of equal compensation for equal injuries. The means on the Specific Probabilities Survey followed exactly the same pattern as the means on the Plain Survey: that is, the mean for the 50/50 package, is highest, the 66/33 package comes next, then the 90/10

package, and finally the 100/0 package. The differences between the means for each of the packages in the 50/50, 66/33, 90/10, 100/0 ordering were significant ($p < .005$). As in the Plain Survey, the median and mode rating of the 100/0 package was the lowest possible (1).

FIGURE FOUR: Means – Plain and Specific Probabilities

Package	Plain	Specific Probabilities
100/0	1.33	1.94
90/10	2.57	2.68
66/33	3.55	4.43
50/50	5.29	5.19

FIGURE FIVE: Distribution (100/0)– Plain and Specific Probabilities

	n	1	2	3	4	5	6	7
Plain 100/0	42	30	10	2	0	0	0	0
Specific Probabilities 100/100	53	27	13	5	5	3		

FIGURE SIX: Distribution (50/50) – Plain and Specific Probabilities

	n	1	2	3	4	5	6	7
Plain 50/50	42	0	3	3	5	10	10	11
Specific Probabilities	53	0	0	5	6	19	19	3

Of course, we do not know what respondents would have said had they been told not that exposed persons were twice as likely to be in the potentially favored group than in the potentially disfavored group (post-2014 ill), but that exposed persons were twenty or thirty or even one hundred times as likely to be in the favored group as in the disfavored group. But, to return to

the Agent Orange settlement at issue in *Stephenson*, veiled class member in 1984 could not have been told that there was (for example) a 95% or 99% probability that anyone who will become ill would do so before 1995 because the available information simply did not support making that prediction (or much of any specific prediction). And it seem likely that other cases involving the possibility of death and serious injury from toxic exposures and dangerous products will entail radically incomplete and/or imperfect information at the time of class litigation and settlement.

To test the effect of relaxing the Rawlsian condition of comparative reflection regarding varied options or rules, I administered a survey to 42 beginning law students that was identical to the Plain Survey except that it presented respondents with only one settlement package to review and rate – the 100/0 package. I also administered a survey to a different group of 42 students that was identical to the Plain Survey except that it presented respondents with only the 50/50 package to review and rate. I refer to these two surveys as 100/0 Snapshot and 50/50 Snapshot, respectively.

The two snapshot surveys, taken together, confirm that the preference for evenhanded treatment of the pre-2015 group and post-2014 that was so strongly expressed by respondents to the Plain, Causation-All and Causation-Futures surveys. On the 100/0 snapshot survey, the mean rating for the 100/0 package was 2.09. On the 50/50 snapshot survey, the mean rating for the 50/50 package was 4.90. The difference between the two means is statistically significant ($p < .005$). These results suggest that even without comparative reflection veiled class members overwhelmingly reject an Agent-Orange, 100/0 approach to interclass distribution and overwhelmingly accept a fully equal, 50/50 approach.

It is notable, however, that the results to the snapshot surveys arguably suggest that the preference for an evenhanded approach is strengthened by the opportunity for comparative reflection. On the 100/0 snapshot, the mean for the 100/0 package is higher than on the Plain Survey (2.09, as compared to 1.33). On the 50/50 snapshot, the mean for the 50/50 package is lower than on the Plain Survey (4.90, as compared to 5.29). The difference between the 100/0 mean on the Plain and the 100/0 mean on the snapshot survey is significant ($p < .005$), although the difference between the 50/50 mean on the Plain and the 50/50 mean on the snapshot survey is not.

VI. THE CHILLING EFFECT OBJECTION

Prominent legal academics such Richard Nagareda have argued that departures from finality in the form of subsequent challenges to settlements on inadequacy grounds will chill the settlement process in class litigation.⁷¹ This concern also figured prominently in the Stephenson litigation. According to the defendants in *Stephenson*, for example, allowing subsequent challenges to settlements of the sort at issue in *Stephenson* will lead the courts to become “clogged” with class action litigation that otherwise would have settled. No rational defendant, we are told, will want to settle a class action if it could be reopened years later; instead of settling, defendants will litigate and add to the burden of our already over-burdened courts.⁷²

The suggestion of the critics of subsequent challenges to class action settlements notwithstanding, it is not at all obvious that more, and more vigorous, class action litigation

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72 See, e.g., Brief of Washington As Amicus Curiae In Support of Petitioners, *Dow v. Stephenson*, 2002 U.S. Briefs 271, at 20 (predicting “a decrease in settlement rates” that “will serve only to further clog the nation’s courts”); Brief for Petitioners, *Dow v. Stephenson*, at 39 (arguing that allowing subsequent review will have “pernicious consequences” and that “the threat of such litigation . . . would make it significantly more difficult for parties to settle class action lawsuits”); Kahan & Silberman, *supra* note [], at 779; Allen, 73 NYU L REV at 1159-60.

would be a bad thing, even assuming that the litigation added to congestion in the courts.⁷³

Perhaps we have too many rapid settlements in certified class actions, possibly because of class counsel's inattention to the class members' welfare and the temptation for class counsel to collude with defendants counsel in order to obtain a sure, quick fee. Perhaps the added social benefits of more vigorous litigation would justify an increased social investment in the form of more resources devoted to the courts. The answers to these questions depends in part on one's assessment of the substance of class action cases, and that assessment varies, from highly favorable to the view that virtually all the litigation is frivolous and should be abolished.⁷⁴

But assuming that a lower incidence of speedy class action settlements is a bad thing, what evidence is there to support the prediction that class action settlement will be fewer and/or take more time to achieve if subsequent challenges based on inadequacy of representation are allowed? The available evidence, although hardly definitive, strongly suggests that a rule allowing subsequent challenges to class action settlements will have at most a very modest effect on the incidence or timing of settlement in class actions. Until 1997, when the Ninth Circuit issued its decision in *Epstein v. MCA, Inc.*,⁷⁵ the settled rule in every federal circuit in this country was that any absentee (nonparticipating) class member who was purportedly bound by a class action settlement could maintain suit on the underlying claims in a new action provided that she could show that she had not been adequately represented in the original action.⁷⁶ *Epstein* called that rule into question, certainly in the Ninth Circuit and to a lesser,

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75 179 F.3d 641 (9th Cir. 1999).

76 See e.g., *Wright, Miller & Cooper, Federal Practice and Procedure*, Section 4455, at 484-87 (2002) (describing the *Epstein* approach as a new approach and contrasting it unfavorably with the traditional approach allowing adequacy to be challenged in a collateral proceeding)⁷⁶; *Newberg on Class Actions*, Section 1625, at 16-133, 16-137 (3rd ed. 1992) (explaining that Rule 23 A does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment and that A[d]ue process of law would be

but significant, extent elsewhere.⁷⁷ Yet there is no evidence that the rate of class action settlement increased after 1997, or that settlements took less time to achieve.⁷⁸ Moreover, there is not a single anecdotal account I have been able to locate of defense counsel in a class action refusing to settle or even deferring settlement based on concerns regarding a post-settlement, subsequent challenge.

How can we explain the apparent non- or minimal impact of the pre-1997 rule allowing subsequent challenges based on inadequacy of representation grounds, and of the change in the rule in some jurisdictions? As explored below, the very limited impact of a rule allowing subsequent challenges makes sense given that (1) the risk of a court overturning a class action settlement is extremely low, (2) corporate defendants have readily available means to minimize even that extremely low risk, and (3) corporate defendants will evaluate and react to that minor risk as would risk neutral or perhaps even risk preferring actors. These three factors will be explored in turn.

A. The Risk of Successful Subsequent Challenges Is Extremely Low

Even before 1997, when (again) the unchallenged rule in the federal courts was that subsequent challenges to class actions were permissible, very few subsequent challenges to class action settlements were brought, perhaps fewer than fifty in total.⁷⁹ Plaintiffs lawyers are highly attuned to opportunities for profitable litigation, and the paucity of subsequent challenges may indicate that plaintiffs lawyers did not (and do not) see such suits as profit opportunities. And there is an obvious reason why that would be so: judges have powerful

violated for the class judgment to be held binding unless the court applying *res judicata* could conclude that the class was adequately represented in the first suit.

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⁷⁹ See Woolley, *supra* note [], at [] n.268 (reporting on the findings of a westlaw survey that identified only 44 subsequent challenges); see also Mollie A. Murphy, *The Intersystem Class Settlement: Of Comity, Consent, and Collusion*, 47 U. KAN. L. REV. 413, 469 (1999) (explaining that “[c]ollateral attack has been used relatively sparingly to attack the adequacy of representation”).

incentives *not* to seriously entertain a subsequent challenge and certainly *not* to overturn a court-approved settlement on the grounds that the settlement was the product of inadequate representation. Because plaintiffs lawyers know there is very little chance of securing a favorable ruling from a judge in a subsequent challenge to a class action settlement, and because they are (generally) profit-maximizing entities with other, less risky investments available to them (e.g., initial class actions, individual tort suits), they can be expected to forgo subsequent challenges except when they encounter a class action settlement that seems truly outrageous – so outrageous that, despite his or her strong inclinations to the contrary, a judge might be that moved to seriously entertain the subsequent challenge.⁸⁰

There are several reasons that courts have been reluctant to embrace, and remain reluctant to embrace, subsequent challenges even when, as a matter of formal doctrine, aggrieved class members are permitted to bring such actions. For one thing, there is such a thing as judicial comity: as a matter of normative commitment, judges in one court do not like to criticize judges in another court if they can avoid doing so. A holding that a judge in another court approved a settlement as legally adequate that is in fact inadequate comes close to a holding that is very hard for a judge to make: *the judge in the other court was inadequate*. Judges, especially federal trial and state trial judges, are not accustomed to taking such a stance about a fellow judge.⁸¹

More important, judges' own incentives to avoid burdensome tasks and free up time to meet pressing aspects of their caseload (such as criminal actions) favor their *not* embracing

⁸⁰ Since defendants counsel and corporate defendants know *ex ante* that *ex post* a plaintiff lawyer is very unlikely to ever bring a challenge to any class action settlement they might enter, and that in any event any such challenge would be a decidedly uphill struggle for the plaintiff's counsel, defense counsel and corporate defendants' evaluation of the attractiveness of a class action settlement is not going to be significantly affected by the risk of a subsequent challenge to the settlement.

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challenges to class settlements. When a judge rules that a previous class settlement was based on adequate representation, the judge is done with her work – the case disappears from her docket. If the judge instead rules that the previous class settlement was based on inadequate representation, then the judge must address the substance of the subsequent challenge, and may become entangled in everything from overseeing discovery disputes to summary judgment motions to settlement conferences to squabbles regarding how to administer any new settlement.

Finally, even if the judge would like to entertain a particular subsequent challenge notwithstanding the drain on her resources that it would entail, she must consider the future costs to herself and to her colleagues (whose goodwill she presumably values) if, by doing so, she signals to the world that the court on which she sits is (at least relatively speaking) a good one in which to bring subsequent challenges to class actions. That signal could translate into additional challenges in the court, and that would mean more work for the judge and her colleagues.

B. Corporate Defendants Can Minimize The Risk of Subsequent Challenges

Corporate defendants in class actions can reduce the risk of subsequent challenges to class action settlements by devoting some attention to ensuring a minimal level of intraclass distributive fairness in the settlements which they enter with class counsel. They can make what is (as already explained) a very small risk even smaller.

Intraclass unfairness in class settlements may have a variety of causes. One possible cause is collusion between defense and class counsel whereby defense counsel in effect select class counsel as the winning bidder in a “reverse auction” (an auction for the right to settle with the defendants) on the basis of the class counsel’s willingness to settle some portion of the

class' claims for very little.⁸² In the absence of collusion, class counsel also may favor some portion of the class over the rest of the class because doing so directly or indirectly would generate more fee revenue for them (as in *Amchem*)⁸³, or simply because the favored portion of the class is more "present" and hence more demanding and more capable of objecting to the settlement. Finally, intraclass unfairness sometimes may be due to nothing more than inattention to intraclass distributive issues on the part of either class counsel or defense counsel, coupled with the absence of class members with the awareness, motivation and resources to bring the distributive issues to class counsel's attention.

Whatever the reason for the prospect of intraclass distributive unfairness, defendants can do something to alleviate it. Most obviously, defendants can avoid seeking collusive deals whereby they offer quick settlement to certain class counsel in return for the settlement of potentially costly claims for a modest amounts or even nothing at all. To the extent that intraclass unfairness is not the result of collusion but rather solely of failure of faithful agency on the part of class counsel to some class members, defendants can demand as a precondition to their agreement to settlement that the class counsel demonstrate to them that the proposed settlement treats all the segments of the class with some minimal degree of fairness. In other words, in the interest of minimizing the risk that a subsequent challenge will be brought and (if brought) might succeed, defendants can act as an agent for the absent class members, solving, in some measure, the class counsel-class members agency problem.

In the Bank Boston litigation, for example, defendants could have greatly reduced the chance of a subsequent challenge by simply insisting on the categorical exclusion from the class of anyone who would receive negative or zero relief under the relief formula contained in

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the settlement. Alternatively, defendants could have pushed for an alteration in the relief formula such that all victims of the unlawful escrow practices would receive at least some compensation for their financial losses (however modest). Either way, intraclass distributive fairness would have been enhanced.

Similarly, in the Agent Orange litigation, the defendant could have settled for relief to be provided for persons who became sick on or before December 31, 1994, but left out of the settlement those who might become sick after December 31, 1994. Under such circumstances, veterans who became sick after 1994 would not have been forced to fight the claim that they had implicitly consented to a settlement that gave them nothing; they could sue for relief without facing the obstacle of preclusion. Alternatively, the defendant could have insisted on a settlement that (as in our 90/10, 66/33, and 50/50 packages) reserved money for those who became ill after 1994, and provided less as a result to those who became ill before 1994.⁸⁴

Defendants could even insist that settlements that pose difficult intraclass distributive issues receive a “fairness” check in the form of focus group surveys. Focus groups could be composed of representative class members, where practicable. Where representative focus groups of class members are a practical impossibility, focus groups could be composed of “ordinary” people asked to role play class members behind a veil of ignorance, as in the surveys administered to the law students.⁸⁵

There is no anecdotal evidence I am aware of that defendants currently police class settlements for unfairness in the way I am suggesting, but then again, the risk of subsequent

⁸⁴ In criticizing the result in *Stephenson*, Nagareda argues that the December 31, 1994 cutoff for monetary relief in the Agent Orange class settlement was justified because some sort of cutoff – some line – has to be drawn in any compensation arrangement. According to Nagareda, “[t]he essence of any settlement is to . . . draw lines, to create fissures, to make distinctions not already apparent in the litigation” Contrary to Nagareda’s suggestion, there is nothing essential to the process of settlement that requires that some of the settling parties receive nothing or close to nothing.

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challenges even in the case of gross intraclass unfairness has been and is so minimal that defendants may reasonably conclude that the costs of policing would outweigh its costs. If the risk of subsequent challenges to class action settlements were perceived to increase substantially, we might not see fewer class action settlements and more clogging of our courts, but rather greater intraclass fairness in settlements as a result of greater policing by defense counsel and defendants of proposed settlements.

C. Managerial Risk Neutrality Regarding Long-Term Risks

Notwithstanding the resistance of judges to ruling in favor of plaintiffs in subsequent challenges, and defendants' ability to reduce the risk of subsequent challenges *ex ante* through policing of class settlements for intraclass unfairness, a rule permitting subsequent challenges to class settlements does impose *some* risk upon class action defendants who enter into settlements. That risk, in turn, can be expected to make settlement of any given class action less valuable than it would be otherwise,⁸⁶ but because class counsel presumably would understand that fact, we should expect them to demand slightly less and agree to slightly less in settlement.⁸⁷

⁸⁶ Some commentators suggest that corporate defendants value finality above all, and non-final settlements are just worth a great deal less, solely by virtue of their non-finality, than final ones, irrespective of the magnitude of the risk of re-opening of the settlement. But this argument flies in the face of the fact that corporate defendants enter into settlements all the time that on their face do not entirely and fully and forever eliminate litigation risk in a given category. Settlements vary tremendously in scope: some settlements cover a few kinds of claims, some many, some embrace all potential claimants, others only some potential claimants. No single settlement could ever resolve a corporation's risks of liability for every conceivable claim by every conceivable claimant in any given category of litigation risk. For example, the tobacco settlement entered into by major tobacco companies and the various state attorney generals contained a number of large exclusions and re-opener clauses. Rather than being shocked by residual risk, corporate defendants are accustomed to dealing with it.

⁸⁷ There is an important inconsistency in the arguments advanced against allowing subsequent challenges in cases such as *Stephenson*. On the one hand, opponents of allowing subsequent challenges argue that it was just for Judge Weinstein to have approved a settlement denying relief to veterans who might manifest injury after 1994 because the claims of any such veterans would have been so rife with causation problems as to be (in expected monetary values, calculated in 1984) worthless; thus the denial of relief to such veterans via class action settlement was not, in substance, taking anything of value away from anyone.⁸⁷ At the same time, opponents of allowing subsequent challenges suggest that defendants will offer much less – perhaps much, much less – to settle claims that leave open contingencies, such as, for example, the contingency of lawsuits by veterans who have been

But if defendants were averse to the (slight) risk posed by subsequent challenges, that might lead them to make unreasonable discounting demands on class counsel, and settlement negotiations might unravel as a result. Defendants in most class actions, however, can be assumed to act as risk neutral or perhaps even risk preferring actors, and therefore not to overweigh risks, including very minor risks. As discussed above, actors who are able to self-insure or third-party insure against risks are generally assumed to be risk neutral. Corporate defendants in class actions generally are wealthy enough to self-insure by maintaining a diverse and balanced portfolio of assets and liabilities. For example, Dow Chemical in 1984 could have self-insured against the risk of a successful subsequent challenges to the 1984 settlement by establishing a cash reserve or a reserve of easily liquidated non-cash investments for that purpose.

Dow, and other corporations like it, has investors who “own” the company in the form of shares and whose opinion matters very much to the success of the company, at least to the extent those opinions are reflected to sales and purchases of Dow stock. Investors may indeed pay attention to litigation risks faced by the companies in which they invest. The major actors in the stock market, however, are institutional investors that maintain highly diversified investment portfolios and that can safely be assumed to be risk neutral.⁸⁸

exposed to agent orange and who might become ill after 1994. Critics of the result in *Stephenson* (and more broadly of allowing subsequent review) cannot have it both ways. If in 1984 the claims of the veterans who might become ill after 1994 had little or no real expected value, then Dow, presumably a risk-neutral, economically rational corporate actor, would not have valued a settlement that included such veterans much differently than a settlement that excluded such veterans. On the other hand, if the claims of those veterans who might become ill after 1994 had substantial expected value as of 1984, then Dow presumably paid much more for a settlement including those veterans than it would have paid for a settlement that excluded them. In that case, however, the veterans who became ill before 1994 (and class counsel), in effect, were allocated the settlement value of the claims of the veterans who became ill after 1994. This seems obviously wrong: settlements are not supposed to be vehicles for the non-consensual redistribution of the settlement value of the claims of one group of plaintiffs to another group of plaintiffs.

Of course corporations as such do not make decisions: human beings, acting on behalf of corporations, do. One set of those human beings – the upper level management of the corporations that are or might be sued in class actions -- sometimes are regarded as risk averse because they, unlike institutional shareholders, have much of their capital (their human capital, as well as financial assets) invested in their particular corporate employers. Another group of human beings, management of the insurance companies that provide coverage for corporate defendants, similarly might be expected to be risk-averse with respect to risks posed to the entities in which they have invested much of their human capital, their insurance company employers.

But corporate and insurance company managers' risk aversion, if any, is focused on near-term risk to the company because upper-level managers, at least in last few decades, are highly mobile and do not proceed on the assumption of anything like lifetime employment with their employer. Indeed, a common observation about corporate managers is that they systematically disregard, or at least pay inadequate attention to, risks to corporate performance in the longer term.⁸⁹ Since the risk of a challenge to a subsequent settlement is very often a long term rather than a short term risk – in the Agent Orange litigation, for example, no one was going to challenge the exclusion of those who became ill after 1994 until at least 1995, eleven years after the settlement date – we might expect corporate managers to, if anything, be risk preferring with respect to the risk of subsequent challenges to class action settlements.

VII. NON-NECESSITY OBJECTION

A range of reforms have been proposed to address the problem of perceived unfairness and abuse in class actions, and some have or may soon be been adopted. One response to the argument for allowing subsequent challenges to class action settlements is that such challenges

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are unnecessary given that other mechanisms have or soon will correct any problems with class actions.⁹⁰ However, although many of the adopted and proposed reforms have merit, they do not render unnecessary class members' right to bring subsequent challenges based on inadequacy of representation.

Jurisdictional redundancy is a common feature in our judicial system: appeals, after all, are a form of redundancy, as in the entire process of state and federal habeas. As Robert Cover suggested many years ago, redundancy is arguably an affirmative good when the stakes in human welfare are high, and the possibility of serious error in any given proceeding before any judge or jury is non-trivial.⁹¹ In the class action context, at least in the toxic tort/personal injury context, the stakes are high – what kind of compensation for the most serious sorts of injuries perhaps thousands will (or will not) receive. Moreover, the risk of error – of untenable treatment of at least some class members – is non-trivial, given the significant, and inevitable, class member-class counsel agency problem. The redundancy inherent in subsequent challenges – and there is no doubt there is redundancy in allowing subsequent challenges -- is justified in the class action context at least to the extent of allowing the very limited number of challenges that could meet the test of addressing settlements that veiled class members could not conceivably have accepted.

To date, most reform proposals in the class action context have entailed one of three mechanisms: (1) greater exit rights for class members through enhancements in notice and opt-out procedures, (2) greater competition among plaintiff's lawyers, and hence greater protection of absent class members' interests, and (3) greater formal requirements for judges in certifying class actions and approving settlements. As discussed below, none of these mechanisms,

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however attractive, will ensure intraclass fairness to such a degree as to render unnecessary the check against unfairness provided by subsequent challenges.

A. Exit Through Notice and Opt-Out

In some cases at least, class members currently do receive notice and an opportunity to opt out of class litigation.⁹² In such cases, can the class members' decision *not* to opt out be construed as implicit consent to the terms of the settlement, such that there is no need to resort to discussion of hypothetical, original-position grants of consent?. In my view, the answer, in general, is no.⁹³

For an opt out to qualify as proof of implicit consent to a settlement, the class member would have to receive (1) genuinely comprehensible notice of the existence of the class at a time when the class member could reasonably be expected to understand she falls within the class definition; and (2) genuinely comprehensible notice of the proposed settlement, including sufficient information for her to readily discern what she would receive or not receive depending on plainly-articulated contingencies. In addition, the class member would have to be afforded a reasonable opportunity to opt out of the class after receiving the notice of the proposed settlement.

These conditions were not met in either the Bank Boston or Agent Orange class actions. Indeed, because the Agent Orange litigation included “futures”—those who did not even understand themselves to be injured parties as of 1984, and who therefore did not self-identify

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93 For a contrary view, see Marcel Kahan & Linda Silverman, *Matsushita and Beyond: The Role of the State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 268.

as class members⁹⁴ -- it is hard to even imagine how any of the conditions listed above could have been met in the Agent Orange litigation.

Moreover, the Bank Boston and Agent Orange litigation aside, notice and opt-out procedures, as currently understood and implemented, generally have limited utility for class members. Class action notices, regarding either the proposed certification of a class or proposed adoption of a settlement, are often so convoluted that few lawyers or law professors can understand them.⁹⁵ Some class actions do not afford an opt out right at either the time of certification or proposed settlement, and an opt out at the latter time is not required by Federal Rule 23 for any sort of class action.⁹⁶

Perhaps notice and opt-out procedures could be enhanced, but enhancements will not solve the problem of the absence of meaningful consent in class actions. For one thing, as already suggested, notice and opt out procedures vis-à-vis “futures” are inherently unhelpful because futures do not self-identify and hence cannot be expected to seek out and receive information regarding class action proceedings. As the Second Circuit in *Stephenson* suggested, it is “likely” that “effective” notice can never be provided to persons who have been exposed to a toxin but have not yet suffered from the resulting disease or disability.⁹⁷

⁹⁴ See, e.g., Brief of Appellant Isaacson in *Stephenson v. Dow*, Second Circuit, Jan. 23, 2001, available at 2001 WL 34455606, at 5-6 (explaining that “[b]e cause Isaacson was not aware of any injury until his cancer diagnosis in 1996, he had no reason in the early 1980s to file a lawsuit related to Agent Orange, consult with an attorney, or contact the Veterans Administration regarding his exposure to Agent Orange in Vietnam.”).

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⁹⁶ See Fed. R. Civ. P. 23(h)(1)(3) (providing that for a (b) (3) class action, a court may refuse to approve a settlement “ unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”). It is not obvious why, given the judicial incentives discussed below in Part B, we would expect many judges to demand a second opt-out opportunity for class members as a prerequisite for granting approval to a proposed settlement

⁹⁷ 273 F.3d at 261 n8 (citing *Amchem Products, Inc. v. Windsor*, 521 US 591, 628(1997)). As the Court in *Amchem* explained, “[m]any people in the exposure-only category . . . may not even know of their exposure, or realize the extent of the harm that might occur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out. Family members . . . may themselves fall prey to disease or may ultimately have ripe claims for loss

Serious enhancements in notice and opt-out procedures for “presents” – those currently injured in a visible, tangible sense-- hold somewhat greater promise, but they would entail increased litigation/administrative costs, and are likely to be opposed by plaintiff’s lawyers who would perceive those increased costs as cutting into the pools available for class member recovery and class counsels’ fees. 98 And even if cost objections could be surmounted, the enhanced notice and opt out procedures still would be inadequate basis upon which to presume express or implied consent as to “presents” in those cases in which the proposed class action settlement at issue does not specify particular relief for particular class members or groups of class members, but instead sets up what is, in effect, nothing more than an administrative process for the evaluation and payment of individual claims.99 A standard of meaningful consent, informed consent, requires more than class members’ right to opt out of a proposed settlement whose consequences for them is unknowable at the time they must decide whether to exercise their right.

B. Enhanced Competition Among Lawyers

of consortium. Yet large numbers of people in this category – future spouses and children . . . – could not be alerted to their class membership.” 521 U.S. at 628.

98 There are a number of theoretical objections to the claim that, in the absence of the greater administrative costs they generate, additional opt-out rights could only enhance net social welfare. See, e.g., David Rosenberg, Adding a Second Opt-Out to Rule 23(b) Class Actions: Cost without Benefit, 2003 U. Chi. LEG. F. 19, 27 (arguing that mandatory, no-opt-out class actions would achieve optimal deterrence and insurance); David L. Shapiro, Class Actions: The Class as Party and Client, 73 NOTRE DAME L REV 913, 938 (1998) (questioning whether the decision to allow class treatment of claims in the first place is ever correct in cases of a “clear need for an unconditional right to opt out”).

99 Contrary to Nagareda’s claims, analogizing class settlements to administrative agency regulations does not show why class actions should be protected against subsequent challenges. Quite the contrary is true: class action settlements are (as Nagareda suggests) arguably akin to administrative regulations,99 but administrative law allows affected person and entities to challenge a regulation *twice*: once, in a facial challenge, after the regulation has been promulgated but not applied (which is akin to the time when the settlement is proposed for judicial approval), and a second time, in an as-applied challenge, once the regulation has been applied to the particular affected person or entity bringing suit (which is akin to when the particular class member receives his or her particular relief in accordance with the judicially-approved settlement). In other words, the analogy to administrative law supports a rule permitting subsequent challenges to class settlements based on inadequacy of representation.

Some commentators have argued that judicial review of settlements can be improved by the introduction of more voices into the settlement approval process. For example, Nagareda suggests that competitor plaintiff's law firms should be induced to present critiques of proposed settlements by the promise that, if the settlement is disapproved, these competitor firms will be appointed the new class counsel.¹⁰⁰ But if judges are now taking the course of least resistance in approving settlements without searching review, would they not continue to do so despite the voices of competitor law firms?

It is hard to see how competitor law firms could even mount a strong case that the judge should deviate from the easiest path of approving the settlement before him or her. Competitor law firms generally would lack the information in the possession of class counsel and defendants that they need to make strong arguments¹⁰¹? And competitor law firms' motives could be questioned at least as readily as those of class counsel and defendants. Indeed, given the uphill battle facing competitor firms in scuttling proposed settlements, competitor firms might well regard it as more sensible to take side payments from class counsel in return for withdrawing their challenges to settlements.¹⁰² Proposals such as Nagareda's to bring more lawyers into the class action settlement process thus may do more to change the distribution of

¹⁰⁰ Nagareda, *supra* note [], at 293.

¹⁰¹ See Edward Brunet, *Class Action Objectors: Extortionists, Free Riders, or Fairness Guarantors*, 2003 U.C. Leg. Forum 403, 413-14 (explaining that objectors are "outside the settlement process, and may lack the information needed to effectively evaluate a settlement").

¹⁰² One non-profit-driven group that could significantly improve the quality of judicial review of class action settlements are state attorneys general. Unlike private lawyers, state attorneys general are not presumed to be acting for profit, and cannot (lawfully) take side payments. Because of their status as public officials entrusted with safeguarding the public interest, state AGs' views command respect; judges are quite accustomed to taking what they say very seriously. The principal constraint on state attorneys general as a force to compel more meaningful review of proposed class settlements is resources: their offices have broad agendas, and from either the perspective of a model of political behavior that emphasizes ideological/public interest motivations or one that emphasizes politicians' self-interest in accruing fame/power and winning reelection, investing a great deal of time and money in monitoring proposed class action settlements may not be an attractive course for most state AGs.¹⁰² I have been unable to locate any statistics, but my impression from lawyers in class action practice is that state AGs appear as objectors or otherwise seek to provide input in very few class actions.

wealth among plaintiffs lawyers than it would to ensure better representation for absent class members.

The fact is that once class counsel and defendants have reached a settlement deal, it is difficult to motivate anyone with resources and capacity to challenge that deal. Class counsel and the defendants will have control of all the relevant information, and they have every reason to obscure, if they can do so lawfully, any information that might undermine their deal with each other. In an adversary system of litigation, agreement between the legally-recognized plaintiffs and the legally-recognized defendants marks the end of the litigation.

For their part, judges are not well-positioned to ferret out information both class counsel and defendants do not wish to disclose or (if already disclosed) highlight. Despite the foray of some trial judges into complex institutional litigation and the use of special masters, most trial judges do not have the resources, temperament or training to seek out information on their own. In our legal system, judges primarily rely on the parties before them to develop opposing views and factual support. When the parties (for all practical purposes, class counsel and defendants) agree, a very natural response for a trial judge (typically burdened by a heavy caseload, and acculturated to the view that settlement is a good in itself) is to approve the settlement without much delay, and to treat objectors and (even more so) potential competitor law firms as simply troublemakers.¹⁰³ And, assuming there is anyone with the resources and standing to appeal, appellate courts are constrained by the record on appeal, which, for the reasons just stated, may

¹⁰³ There appears to be very broad agreement among commentators that judges have powerful incentives to approve class action settlements. See Susan Koniak & George Cohen, *Under Cloak of Settlement*, 82 U VA L REV 1051,1122-1132 (1996).(discussing “Blind, Not Merely Blindfolded, Judges,” and arguing that judges have a “strong predisposition toward settlements” that stems from judicial self-interest) Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, [] (2000); John C. Coffee, *Class Wars*, 95 COLUM L. REV. 1343, 1348 (1995); Samuel Issacharoff, *Class Action Conflicts*, 30 UC David L Rev. 805, 822 (1997).

contain no hard information which would support overruling the trial court's approval of the class settlement.

Judges, of course, vary a great deal from one another, and there are examples of judges who have scrutinized class settlements for adequacy, and have rejected proposed settlements or (in the case of appellate judges) set aside approvals of settlements. But for an *ex post* check (in the form of a right to subsequent challenges based on inadequacy of representation) to be socially desirable (on net), what matters is not that some judges will engage in a searching inquiry of the adequacy of representation when presented with a class settlement, but rather that some will not, and that the benefits (in terms here, primarily of fairness and justice) exceed the costs of subsequent challenges that may correct the failures that do occur in the initial review of class settlements.¹⁰⁴

Moreover, there is reason to suspect that judges are sometimes “chosen” for class action litigation because they are known to be predisposed to approve class settlements without much scrutiny. At least under current law, plaintiffs' lawyers have quite broad discretion to choose the courts where they will bring class actions, particularly nationwide class actions. It stands to reason – and anecdotal evidence suggests – that lawyers select courts in which some or all of the sitting judges are known to be sympathetic to approving class action settlements. Madison County, Illinois is a famous example of this phenomenon.¹⁰⁵

The Supreme Court's recent opinions in *Amchem Products, Inc. v. Windsor*¹⁰⁶ and *Ortiz v. Fibreboard Corp.*¹⁰⁷, may have reinforced the ability of lawyers to select federal

104 See Ashby Jones, A Class Act?, *American Lawyer and Corporate Counsel* (10/8/2003), available at www.law.com (reporting that “in the past three years alone . . . federal district and appellate courts have shot down parts of or entire class action settlements in California, Florida, Illinois, Maine, Missouri, Pennsylvania, Tennessee, and Washington state.”).

105 See Lester Brickman, Anatomy of a Madison County (Illinois) Class action: A Study of Pathology, *Civil Justice Report No. 6*, August 2002, Manhattan Institute for Policy Research, available at www.manhattan-institute.org.

106 521 U.S. 591 (1997).

judges who are predisposed to lax-review of proposed settlements. *Amchem* and *Ortiz*'s broad language regarding the importance of adequacy of representation and the threat of collusion between class counsel and defendants¹⁰⁸ provide support, if often only indirect or atmospheric support, for intense-scrutiny judges – judges more predisposed to invest and engage in tough scrutiny in class action cases, and hence to seriously question proposed class certifications and to deny certification. At the same time, *Amchem* and *Ortiz*'s fairly narrow, fact-specific, and arguably formalistic holdings¹⁰⁹ certainly allow lax-scrutiny judges -- judges more predisposed to engage in lax scrutiny in class action cases --to carry on as before *Amchem* and *Ortiz*, and to readily grant class certification. As a result, when certification is granted, the judge is likely to be a lax-scrutiny judge, or at least that is more likely to be true after *Amchem* and *Ortiz* than it was before. When certification is denied, class counsel is free to try with another judge in another court, since denial of certification has no preclusive effect.¹¹⁰ *Amchem* and *Ortiz*, translated into the realities of class action practice, thus may have reduced

107 527 U.S. 815 (1999).

108 See, e.g., *Ortiz*, 527 U.S. at 528 (emphasizing the due process concerns implicated by aggregate actions and the due process rationales underlying and giving force to the adequacy of representation requirement) and *id.* at 852 (expressing skepticism that class counsel can be expected to negotiate the best possible deal for all class members “given the potential for gigantic fees” that might be lost if no settlement can be reached).

109 *Amchem* and *Ortiz*'s holdings plausibly could be read as pertaining only to the construction of Fed. R. Civ. P. 23, and not the federal constitution, in which case the cases would be inapplicable to state class actions. See, e.g., *Amchem*, 521 U.S. at 527 (“This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil procedure of a class-action certification sought to achieve global settlement of current and future-related asbestos claims.”). In addition, the cases could be read as limited to their facts – settlement class actions in which there are separate subclasses and counsel for presents and futures – and as requiring only that, in the future, the procedural formalities of separate subclasses and counsel for presents and futures be observed. See *Ortiz*, 527 U.S. at 856 (describing the holding in *Amchem* to be that “a class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23©(4)(B), with separate representation . . .”).

110 Except perhaps in the Seventh Circuit following *In re Bridgestone/Firestone, Inc. Tires Prods. Liability Litig.*, 333 F.3d 763 (7th Cir. 2003), in which the court held that a previous court order reversing certification had preclusive effect in federal and state courts. A strong case can be made that *Bridgestone* cannot be squared with applicable Supreme Court precedents and generally-accepted principles of the law of judgments. See Recent Cases, Civil Procedure, 117 HARV. L. REV. 2031 (2004) (criticizing the Seventh Circuit's approach as “unwisely stak[ing] the viability of a class action on the outcome of a ruling that by its nature is tentative and subject to discretion”).

the risk to class counsel that a class action will be certified but then a proposed settlement rejected by the court as inadequate.¹¹¹

C. More Extensive Formal Findings By Judges

Even in the absence of increased competition among lawyers and increased information presented to judges, the legal system could prompt judges to do more by requiring that they make very specific findings related to adequacy before granting certification or approving a settlement. The most recent revision to Rule 23 takes this approach, requiring that class action settlements be approved “after a hearing” and “on finding that the settlement . . . is fair, reasonable, and adequate.”¹¹² There are proposals for the Rule to require even more – for example, a reasoned explanation in support of the settlement, akin to an administrative agency’s explanation and record in support of an administrative rulemaking.¹¹³

The problem with formal findings and reasoned explanations is that they are easy for the lawyers to produce for the judge (either literally or in effect), and they lack any meaning unless there is someone in the process with the resources, information, incentives, and ability to command to judicial attention to critically evaluate the proffered findings and reasoned explanations. Certainly almost all terrible settlements could readily be justified with superficially-appealing, apparently “reasoned” explanations.¹¹⁴ And, as discussed above, it is far from obvious that people equipped to challenge findings and explanations are currently involved in class action litigation, or that they would be even if Nagareda’s counsel-replacement proposal became law. Formal findings may help discipline and advance the

¹¹¹ My analysis here is admittedly highly speculative: to give the analysis more substance one would want to know at least four things – the rate of denial of class certification, pre-Amchem/Ortiz and post, and the rate of denial of approval of class settlements, pre-Amchem/Ortiz and post. As far as I know, however, there are no studies estimating those rates. This analysis is also inapplicable to so-called settlement classes, for which certification and approval of settlement are sought at the same time.

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¹¹³ Nagareda, *supra* note [], at 357-59.

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functioning of adversary litigation with genuinely present parties, but they cannot negate the effects of two features of most class actions – the absence of almost all or all class members and, once class counsel and defendants strike a deal, the absence of genuine adversity between class counsel and defendants.

VIII.CONCLUSION

In sum, subsequent review based on adequacy of representation concerns, as in *Stephenson*, comports with our basic intuitions of fairness – intuitions that the Rawlsian original position, translated into the class action original position, powerfully captures. Both Rawlsian-style thought and real experiments can help us identify those kinds of settlements that class members, veiled from morally arbitrary information regarding their particular positions beyond the veil, could not conceivably have accepted, such as settlements that offer no relief to some members of the class notwithstanding the fact that they, like those class members who do receive significant relief, have suffered severe injuries. Allowing subsequent challenges to such settlements will not undermine the class action as a dispute resolution mechanism, and such review is justified notwithstanding (wholly admirable) efforts to improve initial judicial review of class action settlements. The number of subsequent review cases will (as in the past) be relatively few, and the number of cases in which a court is willing to hold for the plaintiffs in a subsequent review challenge will be even fewer. Indeed, the biggest problem with subsequent review is not that it be too disruptive to the status quo – in some form, it is part of the status quo, and has been for decades – but that is not disruptive enough, not powerful enough to ensure intraclass fairness.