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Bargaining, Class Representation, and Fairness

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I. INTRODUCTION

Twenty-six years ago, Rule 23 of the Federal Rules of Civil Procedure was amended to ease the circumstances under which cases could be treated on a class wide basis.[1] Although the number of docketed class actions has risen and fallen since that time,[2] the class suit continues to loom large in terms of the number of persons whose rights are at issue. Millions of people are represented through class actions.[3]

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[1] For a history of the origins of class litigation and the transition under Rule 23, see STEPHEN YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 220-66 (1987).

[2] The number of class actions filed reached a high of 3654 in 1973. 1987 Class Action Statistics, 11 CLASS ACTION REP. 95 (1988). By 1990, the number of class actions filed had dropped to 922. Judicial Conference of the United States, Reports of the Proceedings of the Judicial Conference of the United States 311 (1990).

[3] By definition, each class action involves the rights of a group of persons so numerous that joinder is impracticable. FED. R. CIV. P. 23(a). In practice, class actions often involve thousands or even millions of class members. Class actions against the Social Security Administration in the 1980s, for example, typically involved the claims of hundreds of thousands of class members. The recent settlement in Stieberger v. Sullivan, 792 F. Supp. 1376, *modified*, 801 F. Supp. 1079 (S.D.N.Y. 1992), for which I was one of the counsel for the plaintiffs, provides for readjudications for a quarter of a million class members. In contrast, individual suits challenging denials of disability reached a height of approximately 50,000 cases pending in court in 1984. *See* Dep't of Health and Human Services,

Despite the prominence of the class action mechanism as a form of representation, there is very little guidance on how class action lawyers should understand the nature of their duty to represent the members of a class. Lawyers representing a class cannot simply rely on the conventional ethical maxim of zealous representation of one's client. This maxim contemplates a single individual who can speak with one voice. The lawyer's role, as developed in the literature on lawyering, is to understand the client's full range of concerns, to hear what the client is saying and not saying, to help the client think through the choices available to her and to help her make an informed decision. Although the ethical rules do not contemplate that clients will be consulted on every decision in the representation, they are rooted in an understanding that the basic priorities will be set by the client, and that these priorities will guide the representation. The model provides that the job of reconciling priorities is left to the client.[4]

Absent a well organized constituency that will act as the client, the class action lawyer faces a completely different situation.[5] The very nature of lawyering requires the class attorney to make decisions at every stage of a case that reflect priorities for the goals of the litigation,[6] and any such set of

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Operational Report of the Office of Hearings and Appeals (Sept. 30, 1985). Consumer antitrust cases can extend to even larger classes. A class action against the manufacturer of Nintendos, for example, included a class of twenty-one million persons. *See* New York v. Nintendo of Am., 775 F. Supp. 676, 681 (S.D.N.Y. 1991).

[4] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980) (the authority to make decisions that affect the merits or may substantially prejudice a client's rights lies with the client).

[5] When the client constituency is organized as a group, the attorney can turn to group processes to identify the goals of the litigation. The attorney's job as lawyer to the group, however, is fraught with its own complications. For an examination of the problems of confidentiality, client counseling, and attorney role raised by group representation, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992).

[6] The ABA's recent analysis of the professional skills and values required for competent legal practice explicates how client goals shape the practice of lawyering. *See* American Bar Association, Report of the Task Force on Law School and the Profession: Narrowing the Gap, *Statement of Fundamental Lawyering Skills and Professional Values* (July 1992) [hereinafter ABA Statement]. The ABA Statement recognizes that the process of goal identification is essential to the skills of problem solving, *id.* ¶ 1.1, and negotiation, *id.* ¶ 7.1. The ABA Statement further recognizes that the client's goals play an important role in shaping factual investigation. *Id.* ¶¶ 4.1, 4.2, 4.5. The suggested process of goal identification, however, is tailored to serving a single client. *Id.* ¶¶ 6.1–6.5. In that context, the primary issues are ones of interviewing and counseling in a manner that allows the client to make meaningful and informed decisions about the objectives of the representation. In the

priorities, of necessity, will affect different members of the class differently. A decision may mean that relief will come later, when some class members may prefer relief sooner; or that relief is in a form that some class members value while others do not; or that the relief will not reach every member of the class; or that an issue of greater concern to some members of the class than others will be dropped from the case. If the lawyer's role is seen as solely that of a private attorney general or otherwise a promoter of public interest values, these differences among the interests of class members would not be so troubling.[7] Both the rules on class certification and those on approval of settlements, however, include a clear directive that class counsel has a duty to represent adequately and fairly the interests of class members.[8] These requirements

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class context, however, the attorney must have some way of reconciling differences among the members of the client class about the objectives of the representation. *See infra* Part II.

[7] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1353–59 (1976). This is not to say that it is easy to specify how the attorney should go about determining what relief will best serve the public interest. Under a public interest model, however, distributional issues within the class are not as problematic because the lawyer is not seen as entrusted with representing the interests of the class as the class members define their interests.

[8] At the class certification stage, the adequacy inquiry is directed both to the attorney and the named plaintiffs. As Professor Stephen Yeazell describes it, the commonality and typicality requirements of Rule 23 can be seen as creating a market test of adequacy. When claims are common and the interests are typical, the named plaintiff can be expected to act in the interests of the class by acting in her own interests. *See* YEAZELL, *supra* note 1, at 250–51. The adequacy of representation requirement addresses adequacy directly by asking whether the attorney will be an adequate representative for the class. *Id.* To the extent that commonality and typicality do not and should not require identity of claims, *see infra* note 48, the protection of class members' interests depends on the fulfillment of the Rule's adequacy of representation requirement. *Id.*

At the settlement phase of a case, the adequacy inquiry merges with the question whether the settlement is fair, adequate, and reasonable. *Id.* Adequacy of representation is also mandated implicitly by the standards for collateral attack on a consent judgment. Inadequate representation provides grounds for collateral attack on a settlement. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 44–45 (1940); Baylor v. United States Dep't of Hous. & Urban Dev., 913 F.2d 223, 225 (5th Cir. 1990).

The adequacy requirement requires attorneys to act in the best interests of the class as a whole, rather than in the best interests of individual members of the class, even if the result is to override the expressed interests of some class members. *See* Parker v. Anderson, 667 F.2d 1204, 1210–11 (5th Cir. 1982). As a result, norms for representation that require undivided loyalty are of little help to attorneys attempting to understand their obligations in the class context. *See* Ellmann, *supra* note 5, at 1118–19; Brian J. Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Model Rules of*

demand a norm of what it means to be an adequate and fair representative in a context of differing class interests and complex distributional judgments. This demand becomes all the more pressing the more expansive one's understanding of the lawyering role and the range of client interests that can guide the representation.[9]

The case law and the literature offer limited guidance about how to think about these distributional questions. Rather than focusing on the substantive dilemmas, the case law and the literature look primarily to institutional arrangements to guard against abusive solutions to distributional issues. There is a general consensus, for example, that courts should monitor class actions to ensure that the class action attorney does not put her own interests over those of the class[10] or those of the named plaintiff ahead of the class.[11] There also

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Professional Conduct, 27 LOY. L. REV. 1047, 1074–78 (1981); *see also In re* "Agent Orange" Product Liability Litigation, 800 F.2d 14 (2d Cir. 1986) (ethical rules must be applied flexibly to the class action context).

[9] *See* Lawrence Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709, 778 (1989) (arguing for an understanding of class clients' interests that extends to social, psychological, and other concerns).

[10] Both commentators and the courts have expressed concern about lawyers placing their own economic interest in a large and certain fee award over the interests of the class. For commentary on fee incentives, see John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*]; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 684–90 (1986) [hereinafter Coffee, *Derivative Actions*]; Kenneth Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 56–61 (1975); Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 395–96 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivitive Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 41–61 (1991). For cases overturning settlements due to attorney-class conflicts, see, *e.g.*, Piambino v. Bailey, 757 F.2d 1112, 1146–47 (11th Cir. 1985); Franks v. Kroger Co., 649 F.2d 1216 (6th Cir. 1981).

Although most of the literature tends to assume that lawyers have a greater interest in settlement than their clients, there is also a problem of lawyers having an incentive not to settle. *See* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1204–10 (1982) (noting the potential for conflict when a settlement provides inadequate compensation for counsel). This problem is compounded by the Supreme Court's decision in Evans v. Jeff D., 475 U.S. 717, 727–30 (1986). *Jeff D.* suggests that attorneys are ethically bound to accept a settlement that is good for the class, even if it requires a complete relinquishment of fees. Attorneys who stand to receive substantial statutory fee awards therefore have an interest in not attempting to negotiate a settlement, since they are

are proposals for presenting intra-class problems to the court at earlier stages of the litigation, so that the court may either create subclasses or provide some other procedure to safeguard the interests of absent class members.[12] There is also a growing literature urging procedures to bring class litigation more in line with the interests of the client population. The law and economics literature has suggested that clients are unable to monitor their attorneys' behavior in the class setting and that fee structures should be altered to better align attorney incentives with the interests of the client class.[13] Other commentators have suggested mechanisms to ensure that attorneys communicate more with their

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always at risk of the opposing party insisting on a fee waiver when the settlement is close to being final.

Commentators have also expressed concern with a more subtle form of conflict, when the attorney has a different view as to the appropriate relief from the class. *Compare* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1119–29 (1988) (arguing that lawyers have an obligation to act on their own understanding of a just outcome) *with* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512–15 (1976) (arguing that class action attorneys should advocate for the relief that client groups prefer, regardless of the attorney's own view of justice) *and* DAVID LUBAN, LAWYERS AND JUSTICE 341–57 (1988) (arguing for attorney deference to client groups in most situations).

[11] *See, e.g.*, Holmes v. Continental Can Co., 706 F.2d 1144, 1148 (11th Cir. 1983); Plummer v. Chemical Bank, 668 F.2d 654, 658–59 (2d Cir. 1982).

[12] *See, e.g.*, Rhode, *supra* note 10, at 1247–62 (proposing that conflicts be brought to the attention of the court); Grosberg, *supra* note 9, at 779 (same); Waid, *supra* note 8, at 1062–63 (proposing that attorneys be required to seek judicial approval of any class redefinition prior to negotiating a settlement); *see also* Stephen Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244, 256–60 (1977) (describing a "town meeting" to determine remedial plan). Despite urging that class counsel inform the court of conflicts, commentators have noted that class counsel have strong incentives not to raise issues of conflict, because of the potential for decertification, segmentation of the class, or intrusion into a smoothly working settlement process. *See* Rhode, *supra* note 10, at 1204–10.

[13] Professor Coffee describes the problem in terms of agency costs, where the class members are the principals who face high costs in monitoring their agent. *See* Coffee, *Entrepreneurial Litigation*, *supra* note 10, at 883–89. The conflict between the interests of the principal and the agent result from the divergence in the factors that signal a good recovery for the class and those that determine the fee award. Most of the literature on the effect of fees addresses the choice between a system in which fees are calculated as a percentage of a common fund and a system that pays reasonable hours and hourly rates on a lodestar method. The percentage fee is seen as promoting early settlement whereas the lodestar is seen as promoting over-litigation. *See, e.g.*, Macey & Miller, *supra* note 10, at 59 (concluding that the percentage fee recovery mechanism better aligns the interests of attorneys with those of their clients, but suggesting that an auction procedure for class claims would be most efficient).

class clients, so that they better understand their goals and interests.[14] Commentators have also proposed mechanisms for greater participation by interested parties, greater supervision and control by the courts, and for independent guardians of class interests.[15] Finally, some commentators have urged that poverty attorneys turn to client groups to guide the litigation.[16]

Common to this literature is an attempt to find an institutional mechanism that will shift the responsibility for resolving distributional questions that arise in class actions. Proposals to alter fee structures, for example, attempt to shift the responsibility for distributional decisions to the market, by addressing distributional issues in terms of how they affect the incentives facing

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[14] Rhode, *supra* note 10, at 1258 (proposing that class attorneys record contacts with the class); LUBAN, *supra* note 10, at 354; Grosberg, *supra* note 9, at 753–74.

[15] *See* YEAZELL, *supra* note 1, at 249–60; MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.44 (1985) [hereinafter COMPLEX LITIGATION]; Rhode, *supra* note 10, at 1242–51; Sylvia R. Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 325–29 (1985) (proposing that a guardian be appointed to represent the interests of the absentee class members); *cf.* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1427–44 (1991) (proposed model for negotiating remedial plans with participation by interested persons and judicial oversight).

[16] Professor Luban argues that even when there is no organized group to serve as the client, it is appropriate to follow the most direct form of representation possible. LUBAN, *supra* note 10, at 349. When clients can be organized in a group, Professor Luban suggests that the group can define the litigation and the group is entitled to make its own mistakes, and, presumably, to make its own distributional judgments. Absent such a client group, he urges that representatives be found who can enlighten lawyers about the interests at stake, but that the attorneys must ultimately exercise their independent judgment. He urges that the independent judgment of attorneys be tempered by: a recognition of uncertainty as to the implications of policies, the amount of sacrifice demanded of the present generation in suits for prospective injunctive relief, and the relatively benign consequences of pursuing a less desirable course of action if it can be reversed in the future. The degree to which this judgment should be shaped by distributional norms is unclear. *See also* Ellmann, *supra* note 5, at 1131 n.82 (urging that attorneys attempt to follow the group representation model even in situations in which it is not possible to meet with the entire group).

Some commentators urge poverty attorneys to work with communities to empower people to work collectively to meet their own needs. *See, e.g.*, Lucie E. White, Goldberg v. Kelly *and the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 884–87 (1990). A by-product of such empowerment strategies can be the creation of organizations that can serve as the client who directs class litigation. Indeed, at one time poor people's organizations played a major role in setting the goals for poverty litigation. *See* Ed Sparer, *Fundamental Human Legal Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 560–64 (1984).

economically motivated attorneys. Proposals for greater reporting to the courts are designed to achieve greater fairness by making judicial intervention more feasible, and by creating a greater incentive for attorneys to pay attention to fairness issues. These mechanisms, however, either depend on prior answers to the question of standards for evaluating distributional fairness in the class action context or simply move the responsibility to make substantive judgments to another institution. To the extent that responsibility can be shifted to the market or the courts, the question becomes what substantive standards should guide market incentives, or should guide the courts. Outside of standards to prevent abusive settlements, this question of substantive fairness is largely unaddressed in the literature.[17]

Ironically, while commentators urge mechanisms that will shift the responsibility for making distributional decisions away from attorneys,[18] the courts place great reliance on attorneys to determine fair ways to represent their class clients. Courts monitor class representation primarily at the class certification and settlement phases of the case.[19] Although the courts have an

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[17] There are a few notable exceptions. Professor Coffee explores issues of distributive fairness with respect to high stakes plaintiffs facing the choice whether to opt out of litigation. Coffee, *Entrepreneurial Litigation*, *supra* note 10. He offers a proposal for altering the incentives for lawyers who are advising clients whether to opt out of a class. This proposal is based on a prior understanding of the appropriate allocation of the costs of representation. *Id.* at 925–30. Professor Coffee's proposal illustrates how a market mechanism can be used to align the interests of attorneys with a prior understanding of distributional fairness. His proposal also illustrates some of the potential limitations of market solutions. The proposal does not address allocation problems among non-opt out class members or in Rule 23(b)(2) cases which do not permit opt outs. Distributional fairness is also considered in Lewis A. Kornhauser, *Control of Conflicts in Class Action Suits*, 41 PUB. CHOICE 145 (1983). Professor Kornhauser shows that an economically motivated attorney can be expected to structure the internal allocation of a settlement for those who cannot feasibly opt out in a way that maximizes the surplus to be divided between the attorney and the defendant. He shows that maximization of the surplus bears no connection to the most minimal fairness criteria, such as ensuring that a class member is not made worse off by the litigation.

[18] Not all commentators would shift responsibility to the courts. Some commentators suggest that the class attorney must play a central role in determining how to best pursue the interest of the class. For example, Professor Grosberg argues that after the attorney gathers detailed information about the interests of the members of the class, the attorney should seek to achieve the best result from the standpoint of the public interest. *See* Grosberg, *supra* note 9, at 732. He does not suggest how the attorney should make this assessment.

[19] There have been proposals for closer judicial monitoring of class actions throughout litigation, and some courts will play a supervisory role throughout a case. *See* Peter H. Schuck, *The Role of the Judge in Settling Complex Cases: The Agent Orange Example*, 53

obligation at both phases to ensure that class counsel are representing class interests adequately and fairly,[20] courts frequently defer to the expertise of the lawyers once the class is certified.[21] They note that the lawyers are closer to the litigation, understand the strengths and weaknesses of the case, and are in a better position to evaluate the risks of litigation.[22] Indeed, courts may require the class lawyer to resolve distributional issues even when the lawyer pleads that there are differences in class interests and requests that the class be divided.[23]

This pattern of efforts to shift responsibility, in which commentators would shift resolution of fairness issues to the courts, and courts would shift them to attorneys,[24] may be rooted in the very complexity of distributional judgments.

U. CHI. L. REV. 337 (1986). When courts engage in such supervision, the problem of mutual abdication of responsibility does not occur. The fundamental distributional dilemmas, however, remain for the court to resolve.

[20] *See supra* note 8.

[21] Many courts have stated they employ a presumption in favor of finding that a settlement is fair and adequate. *See, e.g., In re* "Agent Orange" Product Liability, 597 F. Supp. 740, 759 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *see also Developments in the Law—Class Actions*, *supra* note 7, at 1572–73 (discussing courts that apply a "business judgment" standard in reviewing settlements); Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159, 162 (7th Cir. 1988) (citing Armstrong v. Board of Sch. Directors, 616 F.2d 305, 325 (7th Cir. 1980) (stating that the judge "is entitled to rely heavily on the opinion of competent counsel")); Berenson v. Faneuil Hall Marketplace, 671 F. Supp. 819, 822 (D. Mass. 1987) ("Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair."). In one case, the court went so far as to merge the deferential standards of administrative review with the review of a settlement negotiated by plaintiffs' counsel with an administrative agency. *See* Michigan Hosp. Ass'n v. Babcock, No. 5:89-CV-00070, 1991 U.S. Dist. LEXIS 2058, at *6 (W.D. Mich. Feb. 11, 1991) ("At issue is the distribution of a limited amount of funds. How those funds will be divided is a complicated public policy determination. The court's role in analyzing [objections to the settlement] is limited and 'does not extend to reweighing or rethinking the political and financial concerns.'").

Apart from the courts' express statements of deference, there is the practical reality that courts welcome settlement of litigation, and have no authority over the terms of a settlement other than the power to reject the settlement. *See* Evans v. Jeff D., 475 U.S. 717, 727–30 (1986). My own experience has been that courts leave many fairness issues to attorneys to resolve.

[22] *See, e.g.*, Lelsz v. Kavanaugh, 783 F. Supp. 286, 297 (N.D. Tex. 1991).

[23] Letter from Burt Neuborne, plaintiffs attorney, to the court (Apr. 17, 1985) (requesting certification of two sub-classes for Cullen v. Margiotta, No. 76C2247 (E.D.N.Y. 1976) (on file with the author).

[24] In addition, appellate courts have shifted the bulk of the judicial responsibility to

These issues are complicated and inevitably controversial. But they would clearly benefit from being faced directly rather than being ignored or presumed to be someone else's responsibility.[25]

This Article argues that regardless of how the institutional issue is resolved between class action attorneys, the courts, and other institutions, class representation demands a more careful articulation of how to resolve questions of a just distribution among the members of the class. An understanding of just distribution is needed for all aspects of class representation, but is perhaps most crucial for settlement negotiations. In the settlement context, distributional choices can be very stark. The class lawyer must face squarely the value of different aspects of relief and the extent to which one form of relief may be traded for another. She must also think directly about the degree to which the clients' goals do or do not track the legal framework for judicial resolution of the dispute and the degree to which it is legitimate to depart from that legal framework. She must determine what proposals are off limits because of her obligation to represent adequately both the individual members of the class and the class as a whole.

Part II describes typical dilemmas requiring the reconciliation of class interests that class action attorneys face in negotiating settlements. This section focuses on conflicts within the class rather than those between the attorney and the class for two reasons. First, despite the lack of clarity about what constitutes adequate representation of a class in the context of diverse class interests, class action attorneys are ethically required to advance the best interests of the class.[26] Therefore, there is a need for some understanding of

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review class action settlements to the lower courts. *See, e.g.*, Newman v. Stein, 464 F.2d 689, 692–93 (2d Cir. 1972).

[25] To the extent that institutional pressures limit the judicial role in supervising settlements to determining whether the settlement falls within a range of acceptable solutions, the class action attorney does not have the luxury of assuming that the court will take responsibility for determining that a settlement is the most fair outcome. The situation of the class action lawyer is therefore quite different from issues regarding the review of decisions made by other institutions for compliance with a standard of fairness. In the union setting, for example, some commentators have argued that the controversial nature of theories of fairness is a reason why courts should not impose a duty of fair representation on unions. *See* Meyer G. Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 494–97 (1983). In the absence of a client group that can direct the litigation, or a court that will closely monitor all aspects of a class action settlement, the dilemmas facing the attorney are for the attorney to resolve in the first instance. A rule of deference to another institution provides little help.

[26] *See* Evans v. Jeff D., 475 U.S. 717, 726–29 (1986). The literature on attorney-class conflicts assumes that attorneys will not comply with this obligation, but will instead act in ways that further their interest in attorney's fees. To the extent that attorneys are motivated

what constitutes adequate representation of the class. Second, it is problematic to label decisions made by attorneys as reflecting a conflict between the attorney and the class if there is no clear idea about what choices are best for the class.[27] Part III explores several models of substantive fairness that can guide attorneys with respect to bargaining on behalf of a class.[28] This part argues that attorneys can best serve the interests of class members through a mixed model of fairness that balances the interests of potential class members in obtaining representation for their claims, and obtaining settlements of value, with their interest in the relief they can expect to receive through judicial resolution of their claims. Part IV returns to the dilemmas set forth in the first

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by incentives rather than by their ethical obligations, it may be appropriate to structure fees to reflect underlying concepts of fairness. But again, some understanding of underlying fairness is a prerequisite to formulating appropriate incentives.

[27] For example, Professor Coffee has suggested that an early settlement can be expected based on the attorney's self interest in a quick and cheap settlement, and lack of incentive to invest additional resources that could yield a better result for the class. *See* Coffee, *Derivative Actions*, *supra* note 10, at 686. If some members of the class also have an interest in a quick settlement, however, it is not clear that the attorney's interest in an early settlement can be seen as a conflict with the class. In finding a disparity between attorney and class interests in an early settlement, Professor Coffee implicitly assumes that the proper way to measure class interests is through some sort of average interest, and that no special weight should be given to those members of the class who might have a strong preference for an early recovery. *See also* Dam, *supra* note 10, at 57 (stating that "in a substantial number of class action cases the lawyer will be more prone to settle than would the class" but not explaining how to determine what the class would choose to do if class members disagree).

[28] In order to focus attention on how the attorney should treat the differing interests of class members, this Article proposes models for classes that are fixed groups, rather than more complex classes in which the attorney must take account of the interests of future members of the class. There are many class actions where the central distributional issues involve the claims of a fixed class. Examples include consumer antitrust cases, stockholder cases, cases involving entitlements in which the challenged policies have been revised adequately, and Title VII cases in which challenged policies have been revised adequately. In many of the government benefits cases that I have litigated, the government altered its policy during the course of the litigation, making the prospective aspects of a settlement relatively easy to resolve with the defendant. Settling the retroactive relief portion of the case, however, almost always raised a host of difficult questions involving the reconciliation of class members' interests. When the prospective portions of a settlement are more difficult to resolve, the dilemmas are more complicated because the class action attorney must consider the interests of persons whose claims have not yet arisen, and who are plainly not available to comment on their interests. *See generally* LUBAN, *supra* note 10, at 347–51 (recommending that class counsel take a more active role in determining appropriate relief when the interests of future generations are at stake).

part of the Article and explores the implications of the fairness models for resolving these dilemmas in the context of settlement negotiations.

II. DILEMMAS IN NEGOTIATING CLASS ACTION SETTLEMENTS

In any litigation, the question of whether and on what terms the case may be settled is a constant issue. Under Rule 16 of the Federal Rules of Civil Procedure, parties are asked to consider settlement at the earliest stage of litigation. Judges may, and often do, repeat this request throughout the litigation. Although critics claim that there is an inappropriate institutional bias in favor of settlement, most would agree that it is irresponsible for an attorney to insist on litigating a case that could be settled on favorable terms.[29] For the class action attorney, however, a judgment about what terms are sufficiently favorable, or what interests can be compromised in the interest of settlement, can be agonizing. How should the attorney view settlements that are more favorable for one segment of the class than another? How should the attorney evaluate the importance of early or certain relief for some members of the class? Should the attorney even enter negotiations that will delay a judicial resolution of the suit? Each of these questions raises distributional dilemmas that demand some understanding of what constitutes fairness in class representation.

A starting point in thinking about representational fairness is provided by our understanding of the attorney's obligations in individual cases. At the heart of the standard conception of obligations in individual representation is the value of client-centered decisionmaking.[30] In the negotiation context, the role of the attorney is to understand the underlying interests of the client, to anticipate the interests of the opposing party, and to develop a settlement that is optimal from the standpoint of the client. The ultimate decision whether to accept a settlement lies with the client, who is counseled as to the risks and benefits of the settlement as compared with proceeding with the case.[31]

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[29] The most extreme critics of settlements would oppose settlements that appear very favorable to the parties on the ground that private resolution of public law questions is itself illegitimate. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). For a discussion of the debate about the desirability of settlement, see Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 505-06 (1985).

[30] *See generally* ABA Statement, *supra* note 6, ¶¶ 6.1, 10.1(c).

[31] *Id.* ¶¶ 7.1, 7.3. The law and economics literature posits the same basic model for evaluation of settlement proposals, in which the risks and costs of proceeding with litigation are compared with the value and certainty of the settlement. *See, e.g.*, Richard A. Posner,

The basic judicial model for evaluating the fairness of a class action settlement mirrors this framework. The Manual for Complex Litigation states that the fairness of a settlement turns on a comparison of the "present value of the damages plaintiff would likely recover if successful, appropriately discounted for the risk of not prevailing" with "the amount of the proposed settlement."[32] Although many courts have adopted a more lengthy list of factors to be considered in reviewing a settlement, each reduces largely to a comparison between how well the plaintiffs will fare under the settlement with how well they might be expected to fare in court.[33]

The basic problem in attempting to compare the choice of settlement with the likely result of litigation is that each class member might view the balance struck by a settlement differently. Even if all class members agree that a given settlement is better than proceeding with litigation, they may have very different views as to what would constitute the best settlement. To represent the class, the attorney needs a framework for thinking about the ways in which

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An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUD. 399, 417–29 (1973).

[32] COMPLEX LITIGATION, *supra* note 15, at 242.

[33] Many courts have adopted a nine factor test, drawn from the Second Circuit's decision in City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). The nine factors from *Grinnell* are: (1) the complexity, expense and likely duration of litigation; (2) response of class to the proposed settlement; (3) stage of the proceedings and the amount of discovery completed; (4) likelihood that the plaintiffs could establish liability at trial; (5) likelihood that plaintiffs could establish damages at trial; (6) risk of maintaining a class action through trial; (7) ability of defendants to pay more than the amount offered in the settlement; (8) reasonableness of the settlement weighed against the best possible recovery, from the standpoint of the plaintiffs; (9) reasonableness of the settlement as compared to the possible recovery in light of the risks of litigation. Factors (1), (4), (5), (6), (8) and (9) relate directly to a weighing of the value of the settlement as compared to the likely outcome of litigation. Factor (7) addresses the practical worth of litigation, because it concerns the problem of enforcing a judgment, should the plaintiffs receive a greater award at trial and the judgment not be enforceable. Factor (2) looks to the number of objectors, suggesting an evaluation of whether most class members view the settlement as a good deal. Although many courts list this as a factor, courts tend to approve settlements even in the unusual situation in which a large number of class members comment on a settlement and a large share of those commenting object to the settlement. *See, e.g.*, Reed v. General Motors Corp., 703 F.2d 170, 174–75 (5th Cir. 1983); TBK Partners v. Western Union Corp., 675 F.2d 456, 462 (2d Cir. 1982). Factor (3) addresses the stage of discovery. Some courts have suggested that this factor is designed to assure that there is an adequate basis for the court to compare the settlement with the possible outcome at trial. Variations on this nine-factor test are employed in most circuits. *See, e.g.*, Armstrong v. Board of Sch. Directors, 616 F.2d 305, 314 (7th Cir. 1980); Pettway v. American Cast Iron Pipe, 576 F.2d 1157, 1214–18 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

class members might evaluate settlement possibilities differently.

Before addressing the question of substantive models of fairness in class representation, it is useful to set out in greater depth some dimensions of divergent interests that are at the heart of the intra-class dilemmas in class action settlements, and the way that these divergent interests are manifested in the choices that class counsel face during a negotiation.

A. *Valuation of Forms of Relief*

An essential first step in any negotiation is to assess the interests of one's client and the value that the client places on alternative forms of relief.[34] This assessment serves as the crucial backdrop to brainstorming about ways in which the settlement can be structured to best meet the client's interests, and comparing possible settlements with the client's best alternative to a negotiated agreement. Identification of the client's interests is also crucial to the development of non-zero sum solutions to the dispute. Non-zero sum solutions depend on finding ways of reconceptualizing the dispute so that every gain to one party is not matched by an equivalent loss to the other party.[35]

In the class context, ranking possible outcomes is difficult because members of the client group may place very different value on different forms of relief. Even in a situation in which there are only two forms of possible relief, members of the class may disagree as to which they prefer. The problem is made all the more complex when attorneys seek to think creatively about alternative forms of relief. The greater the range of possible relief, the greater the opportunity for divergences in class members' preferences.

A relatively simple example of this problem is presented by consumer antitrust cases in which the settlement substitutes some in-kind relief for the possibility of money damages after trial.[36] An illustrative case is the settlement of a class action against the manufacturer and distributors of Cuisinarts.[37]

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[34] *See* ABA Statement, *supra* note 6, ¶ 4; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 148–49 (1982); ROGER FISHER & WILLIAM URY, GETTING TO YES 41–83 (1981).

[35] Menkel-Meadow, *supra* note 34, at 783; FISHER & URY, *supra* note 34, at 58–83.

[36] *See* 15 U.S.C. § 15 (1985) (statutory treble damage remedy for antitrust cases); Reiter v. Sonotone Corp., 442 U.S. 330, 344–45 (1978).

[37] The *Cuisinart* lawsuit alleged that there was a scheme of vertical price fixing that violated the antitrust laws. Under the applicable law, the defendant was potentially liable for treble damages in the amount that class members were overcharged. *In re* Cuisinart Food Processor Antitrust Litigation, 38 Fed. R. Serv. 2d (Callaghan) 446 (D. Conn. 1983).

Under the terms of the settlement, persons who had purchased Cuisinarts within a specified time period received discount coupons toward the purchase of more Cuisinart products.[38] The coupons were transferable, but had to be used within 120 days.[39] The settlement can be seen as an effort at a non-zero sum solution. For those class members who valued the coupons, the coupons were probably of greater value to the consumer than they cost the manufacturer. At least in theory, the settlement employed non-zero sum analysis: it identified a way in which the gain to one side was greater than the loss to the other. This analysis rested on an assessment of value.[40]

Criticisms of the *Cuisinart* settlement reported in press accounts and in the court's decision approving the settlement show how the problem of valuation

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[38] Similar in-kind settlements have been reached in other class actions. *See, e.g., In re* General Motors Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1980) (extended warranty); Phemister v. Harcourt Brace Jovanovich, Inc., 1984-2 Trade Cas. (CCH) ¶ 66,234 (N.D. Ill. 1984) (discount coupons); Ohio Pub. Interest Campaign v. Fisher Foods, 546 F. Supp. 1 (N.D. Ohio 1982) (discount coupons). Some courts have rejected coupon remedies on the ground that they have anticompetitive effects. *See, e.g.*, New York v. Dairylea Coop., Inc., 547 F. Supp. 306, 308 (S.D.N.Y. 1982).

[39] The actual damages alleged in the *Cuisinart* case ranged from $32 to $75, depending in part on the expense of the machine that was bought. The plaintiffs sought treble damages under the antitrust law, or damages of $96 to $225 per purchase. The coupons sent to class members allowed them to purchase one item of a value up to $200 at a fifty percent discount. The class members could also purchase more than one item at a fifty percent discount with a maximum aggregate discount of $20. Thus, for class members who planned to buy Cuisinart products and valued the coupons as though they were cash, the coupons were worth between $20 and $100. *In re* Cuisinart Food Processor Antitrust Litigation, 38 Fed. R. Serv. 2d (Callaghan) 446, 450 (D. Conn. 1983).

[40] The settlement can also be viewed as nothing more than a deal between the lawyers and the defendants in which the lawyers agreed to a marketing gimmick in return for their fees. *See* Macey & Miller, *supra* note 10, at 45 n.131 (referring to the *Cuisinart* settlement as "one of the more dubious settlements on record"). Although this may be a fair assessment of the particular agreement in *Cuisinart*, there is reason to think that there is more going on in the selection of non-cash remedies than merely an effort to trade in good claims for attorney fees. State attorneys general are party to many consumer antitrust cases in which coupons and other non-cash remedies are the basis of settlement. *See, e.g.*, New York v. Nintendo of Am., 775 F. Supp. 676 (S.D.N.Y. 1991) (plaintiffs included attorneys general of fifty states and the District of Columbia). Unlike the situation with the entrepreneurial class attorney, the interests of the attorneys general are closely linked to the overall value that the public places on the suit. *See* State v. Levi Strauss & Co., 715 P.2d 564, 578 (Cal. 1986) (Bird, J., concurring) (noting that state attorneys general are concerned with prestige accompanying large consumer suits). It would hardly serve the interests of a state attorney general to be seen as "selling out" the class.

leads to distributional dilemmas in class action negotiations. Some class members complained that the coupons were of no value to them and that they would prefer cash. One consumer was quoted as saying "[e]ven if it were only five dollars, it would be better if people got back the money they were overcharged, instead of getting a coupon."[41] The difference in value to members of the class was attributed to two factors. Some people simply had no interest in buying more Cuisinart products, regardless of the price. Others noted that there were areas of the country where store discounts would be greater than, or close to, the discounts offered by the company through the coupons, making the coupons worthless.[42]

A second criticism of the *Cuisinart* settlement was leveled by class members who complained that it allowed a company that had been sued for an antitrust violation to reach a settlement that would encourage customers to buy more of the company's goods.[43] In essence, these class members argued that punishing the company for its misdeeds was more important to them than the cash value of the relief.[44] Seen as a question of valuation, their criticism can be viewed as a charge that cash value was the wrong metric for comparing different forms of relief. What they valued was not cash equivalents, but ensuring that the defendant was punished, or did not in some way benefit from its own wrong.

An additional issue that was not raised directly in the *Cuisinart* case is the basis of the attorneys' assumptions about what class members would value. In

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[41] Tamar Lewin, *Cuisinart's Deal in Pricing Suit*, N.Y. TIMES, July 20, 1983, at D1.

[42] The court rejected these criticisms. *In re* Cuisinart Food Processor Antitrust Litigation, 38 Fed. Rules Serv. 2d (Callaghan) at 456. The court stated that "[a]lthough the precise dollar benefit to class members depends on the use made of the coupons, each coupon has a potential value of up to $100." *Id.* at 451. The court suggested that the value of the coupons was demonstrated by the fact that some members of the class had submitted proof of claim forms or otherwise had indicated their interest in receiving relief. The court also noted that the parties stated that a cash award was "not possible" in the case and that coupons for discounts were an approved remedy in other cases. It also rejected the idea that the company was benefiting from its own wrong because of evidence that Cuisinart would in fact lose money on the items bought at a discount. *Id.* at 455.

To the extent that the coupons were transferable, they could be seen as equivalent to cash. In practice, however, there is reason to question just how transferable the coupons were. They were only valid for 120 days, could only be used to purchase a limited number of items, and were not of an amount that would be expected to generate a resale market.

[43] Lewin, *supra* note 41.

[44] This criticism can be seen either as an expression of the private attorney general model of class actions, *see* Chayes, *supra* note 7, at 1373, or as an expression of the interests and values of members of the class.

the *Cuisinart* case, there was no evidence that the settlement was based on any assessment of how the class members in fact valued the coupons. The problem of accurate assessments of what the class would want is a central problem in choosing among settlement possibilities. In some cases, it will not be economical to obtain accurate information about the views of the class. Even if surveys of class members can be conducted economically, it may be difficult to obtain meaningful guidance from members of the class through this method.[45]

The problem of differing valuation by class members in the *Cuisinart* case raises classic issues of collective choice. In one sense, it would be inadequate representation for the class lawyer to ignore the possibility of a negotiated settlement based on alternative remedies that are of greater value to the members of the class than the possibility of a cash award after litigation. Finding a way to think of the negotiation as a non-zero sum game—so that the defendant could give the class something of value that is not costly to the defendant—is a generally accepted good negotiation practice. Why should the class be denied such bargaining solutions? In another sense, it can be seen as inadequate representation to get some members of the class less than they could have received from the litigation, discounted by the probability of not prevailing. The person quoted in the New York Times article said that she would have preferred five dollars.[46] Why should she give this up because other members of the class would prefer the coupon? Her claim is made stronger by the fact that the coupon remedy is not one that a court would order, if the plaintiffs were to prevail. Thus, she can claim a legal "legitimacy" to her chosen form of relief. Her argument serves as a reminder that while the coupon solution has non-zero sum qualities if one thinks of the class as a whole negotiating with the defendant, it can leave some members of the class worse off than the "expected" outcome of the litigation.

The general issue of valuation of alternative forms of relief arises in almost

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[45] As Professor Rhode has observed, even the simplest communication to members of a class can be misunderstood. Rhode, *supra* note 10, at 1235–39 (discussing difficulties in obtaining meaningful responses to notices). Furthermore, even if it were possible to gauge class members' reactions to specific questions of what they value, the answers provided would not be the same as those that are gathered through the counseling offered to a single client. As the literature on client counseling makes clear, there is far more involved in a client-centered approach than to simply ask the client a question about her opinion of alternative forms of relief. *See* DAVID BINDER ET AL., LAWYERS AS COUNSELORS (1991); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987). For a discussion of ways that lawyers can apply client-centered counseling techniques to groups that are small enough to meet with the attorney, see Ellmann, *supra* note 5, at 1135–73.

[46] Lewin, *supra* note 41.

any negotiation. In a procedural challenge to a public benefits program, there may be an array of possible procedural remedies available, some of which are less intrusive for the defendant. The defendant's interests in these cases might coincide with the likelihood that the court would order each procedure, but they as easily might not.[47] Indeed, the defendant might be willing to offer some forms of relief that are of value to the class but for which there is no legal claim of entitlement. For example, a government defendant in a procedural challenge might be willing to issue directives that offer a different interpretation of relevant substantive standards, despite the fact that the court would be likely to defer to a wide range of agency interpretations, and would therefore be unlikely to order a different interpretation. From the standpoint of the class members, this could have a greater effect on how their claims get readjudicated than a remedy for the procedures challenged in the lawsuit.[48] In these

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[47] For example, there is some authority holding that there is no due process violation in a policy of providing notices to Social Security claimants only in the English language. *See* Soberal-Perez v. Heckler, 717 F.2d 36, 43 (2d Cir. 1983). Nonetheless, among the many remedies for a defective notice, providing the notice in more than one language is a relatively easy step for the agency. When I have presented my government benefits class with the problem of negotiating the contents of a notice, the students playing the two sides often agree to bilingual notices as part of the ultimate settlement package.

[48] This type of issue is illustrated by the resolution of a case that challenged the procedures followed by the Immigration and Naturalization Service (INS) in evaluating applications for amnesty, under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified primarily in scattered sections of 8, 18 and 28 U.S.C.). In Loe v. Thornburgh, No. 88 Civ. 7383 (S.D.N.Y. filed Oct. 17, 1988), the plaintiffs alleged that the INS was rejecting applications for amnesty in which the applicants relied on affidavit evidence to prove their presence in the country for the requisite time period. The complaint raised statutory and constitutional challenges to the rejection of such affidavits without an investigation or an opportunity to have credibility tested at a hearing. The defendant ultimately agreed to reprocess all of the applicants under a transmittal that was issued during the course of the litigation. This transmittal provided various forms of relief that would have been difficult or impossible to get in court. For example, the transmittal provides that if the affidavits appear credible and verifiable and there is no adverse information, they should be approved without any effort to test credibility. A court judgment may well have allowed the defendant to insist on an oral hearing for all applications that relied on affidavit evidence. The transmittal was also written with a tone that was encouraging of approving applications. A court may well have allowed the defendant to write a transmittal that was less encouraging of approving applications. The transmittal also permitted applicants to submit additional documents and affidavits, even though there was no claim that there had been an inadequate opportunity to make such submissions in the past and the defendant could have insisted that any such submissions were time barred. These aspects of the transmittal made it easier for class members to

situations, the attorney must have some way of thinking about the relationship between possible settlements that are valuable to the class, and the expected judicial outcome in the case.

These problems of valuation are not addressed by the traditional procedural mechanisms of class certification, subclassing, and opt out procedures. Class certification requirements mandate that the named representative share common questions of law or fact with the class and that the named representative be typical of the class. These requirements provide some measure of commonality in the interests and concerns of the class members.[49] They are not designed, however, to address the myriad ways in which class members may place different values on different outcomes.[50] For example, the definition will not state "all persons affected by XYZ policy who prefer cash relief" or "who place high value on an early settlement." Similarly, the class definition will not reflect class members' concern with the justice of the outcome in terms of punishing the defendant or ensuring that the relief is in some way costly for the

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obtain amnesty, although they stopped short of formal hearing rights. The case was also one in which more formal procedures posed problems for many class members. Amnesty applicants, by definition, had been working illegally, and might have had a difficult time getting former employers to appear and testify at a hearing. Proceeding in court also was a risky venture because the federal courts' jurisdiction over such cases was unclear. *Cf.* McNary v. Haitian Refugee Ctr., 498 U.S. 499 (1991) (ruling that federal courts had jurisdiction over class action claims under the Special Agricultural Workers amnesty program). The ultimate settlement of the case, which guaranteed readjudications under the new transmittal, can be seen as treating the package of procedural and substantive provisions in the transmittal as more valuable than gambling on obtaining some of the more formal relief sought in the complaint.

[49] The requirements of commonality and typicality serve as "guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiffs' claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982). Complete identity of claims is plainly not required. *See* Bazemore v. Friday, 478 U.S. 385, 405–06 (1986) (reversing denial of class certification in a case alleging salary discrimination when the defendant state agency had a dominant role over salary decisions for the class, even though counties also played a role in determining salaries); *Falcon*, 457 U.S. at 158–59 (rejecting across the board class certification when the plaintiff had failed to show sufficiently interrelated factual claims); Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (describing claims as "common to the class as a whole," when the same relief was sought for two types of claims, and the court granted the relief as to one set of claims and not as to the other).

[50] In rare cases, class certification will be denied because of a strong statement from members of the class that they disagree over the relief sought in the class action. *See* East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 405 (1977) (vote by members of the class rejecting the relief sought in the class complaint).

defendant. Nor would addressing all of the potential differences in the ways class members value relief be appropriate, given the judicial economy objective underlying the class action rule.

Class definitions also will not address ways in which class members value a form of relief that does not arise from a meritorious legal claim. If the concerns are not cognizable legal claims, a class definition ignores them, even if they might be of greater importance to members of the plaintiff class. In a case concerning procedures regarding a government benefits program, for example, the class may be more concerned with the substantive outcome of applications than with the degree of procedural fairness achieved. This is a particularly important issue in poverty law cases because legal rights are more likely to be procedural than substantive, while clients may be more concerned with substantive outcomes.[51]

Division of a class into subclasses is also a limited solution. Subclassing has all of the problems of class definitions as a method of circumventing the dilemmas of class counsel. It cannot address any interests that would not form a part of a class definition. In addition, as many commentators have observed, subclassing often is not feasible because of the costs associated with separate representation.[52] Relying on subclassing for all of the myriad ways in which class members' interests could potentially differ could add substantial amounts to the cost of the litigation, and serve to bar relief altogether. Furthermore, while separate counsel for subclasses can protect against the sacrificing of the interests of a subclass, they can also act as an inhibitor to relief simply because of the sheer complexity of negotiations among large numbers of persons.[53]

Opt out procedures are also inadequate to resolve the fairness problems raised by differing valuations. Opting out offers class members an either/or choice—they can participate in the class representation or attempt to vindicate their claims on their own. Because independent representation is costly, many class members do not in fact have a choice. If the claims of the class members are too small to justify separate representation or the class members lack the resources to obtain such representation, opting out only protects the technical right to sue. Relief depends instead on remaining in the class.[54] Thus, while opt out mechanisms may provide a veneer of fairness, because the class member can be seen as having chosen to be represented by class counsel,

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[51] *See* Barbara Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367 (August/September 1988).

[52] *See, e.g.*, Rhode, *supra* note 10, at 1228–32.

[53] *See, e.g.*, Coffee, *Entreprenurial Litigation*, *supra* note 10, at 921.

[54] *See* Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U. L. REV. 492, 515 (1982).

significant distributional fairness issues remain.[55] The question raised in a settlement is whether and when it is fair to limit class members to what may be such an illusory alternative, when the relief provided in the settlement is something that the class members do not value.

B. *Strength of Claims*

In addition to determining what the client values, an essential step in designing a negotiation strategy is to assess the strength of the client's case and the probable outcome of continuing to pursue litigation.[56] The litigation alternatives might include, for example, postponing negotiations pending further factual development or motion practice, or proceeding to a judicial resolution of the case on the merits. The attorney analyzes these options so as to be able to counsel the client about the choice between accepting and rejecting a proposed agreement. The alternatives serve as a standard against which a settlement can be measured.

Because a class action does not involve the interests of a single client, the evaluation of alternatives to settlement is quite complex. Although class certification standards provide some assurance of common claims, there are many ways in which the strength of class members' claims, and their interests in pursuing alternatives to settlement, may differ. Class certification standards require that common questions predominate and that the interests of the named plaintiffs be typical; they do not require that the claims and interests of class members be identical.[57] Thus, it is not unusual for there to be some differences within the class as to legal or factual questions. These differences can translate into significant differences in the strength of class members' claims. For example, discovery may show that the factual predicate for relief for one part of the class is not as strong as that for another.[58] Rulings by the courts on

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[55] Furthermore, for many class actions, there is no opt out mechanism. Class action employment discrimination cases and government benefit cases, for example, are routinely certified under Rule 23(b)(2) because the cases are primarily seeking injunctive relief. Retroactive relief in these cases, in the form of back benefits or back pay, is considered equitable. As a result, these cases have no opt out option, despite the substantial monetary interests of the members of the class, and the potential for divergent interests.

[56] *See* FISHER & URY, *supra* note 34, at 101–11; RAIFFA, *supra* note 34, at 14.

[57] *See supra* note 49.

[58] In Meyer v. Macmillan Publishing Co., 39 Empl. Prac. Dec. (CCH) ¶ 36,049 (S.D.N.Y. 1986), for example, the statistical analysis of the defendant's hiring and promotion practices meant that the members of the class who had applied for jobs during a particular time period had weaker claims.

discovery motions or motions for summary judgment may make some claims weaker or much harder to prove.[59] Furthermore, the legal context of the case may change during the litigation, revealing differences in the strength of the claims that were not apparent at the start of the litigation.[60] Although it is theoretically possible to define classes more narrowly, or to redefine classes during the course of litigation, such strict application of class certification requirements would undermine the purpose of Rule 23 in promoting judicial economy and in providing affordable representation for those with small claims.

When there are differences in the strength of claims, some members of the class will be at greater risk in the absence of a settlement than others. If a proposed settlement reflects the relative merits of the claims, it may leave some class members with little to lose by going forward, while others have little to gain. A problem for the class action attorney is how to evaluate the differing interests of class members with respect to both the possible settlement and the alternatives to settlement. If a segment of the class has little to lose by going forward, should that fact prevent a settlement? Alternatively, does it mean that the attorney has an obligation to bargain for a settlement that will look more attractive to that segment of the class?

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[59] The settlement in Stieberger v. Sullivan, 801 F. Supp. 1079 (S.D.N.Y. 1992), for example, followed a detailed summary judgment opinion from the district court. Stieberger v. Sullivan, 738 F. Supp. 716 (S.D.N.Y. 1990). This opinion was not the final word on liability because some aspects of the court's opinion were without prejudice, some allowed for a factual hearing, and all of the district court's rulings were subject to review on appeal. Nonetheless, the summary judgment opinion constituted important information about the relative strength of the claims of the members of the class.

[60] In Women in City Gov't United v. City of New York, 52 Empl. Prac. Dec. (CCH) ¶ 39,571 (S.D.N.Y. 1989), for example, the class action was filed in 1975. Prior to settlement, the Supreme Court issued three decisions relevant to the legal claims in the case. These decisions shaped the relative strength of the claims of different subgroups of the class, and consequently, each group's share in the settlement proceeds. *Id.* Similarly, in Califano v. Yamasaki, 442 U.S. 682 (1979), the class included persons who challenged the finding that they had been overpaid Social Security benefits as well as persons who claimed that although they had been overpaid, they were entitled to be excused from any obligation to repay. Plaintiffs sought to require the provision of hearings for both types of claims. During the pendency of the litigation, the Supreme Court issued its decision in Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976), which set forth a three-factor balancing test for determining the requirements of due process. Under this test, it became more difficult to establish a right to an oral hearing for the group of class members who challenged the fact of overpayment. Nonetheless, the class proceeded as a single class and the Court tailored its relief to the strength of the class members' claims.

An example of a settlement in which class members had claims of different strength is the settlement of *Meyer v. Macmillan Publishing Co.*, an employment sex discrimination action.[61] In *Meyer*, the plaintiffs challenged the hiring and promotion policies of the publishing company. Among other provisions, the settlement provided that monetary relief for the class of persons who applied for employment, but were not employed by the company, would be limited to those who applied during specified time periods. Those who applied at a later date would only receive the benefit of the injunctive portions of the decree, specifying procedures for future hiring. The parties justified this provision on the ground that the statistics in the case did not support a claim of discrimination for the years following the cut-off date. Two class members who applied after the date specified in the settlement objected. For these class members, the settlement had very little value. They had little to lose in objecting to the settlement and risking judicial disapproval of any negotiated agreement. The court rejected these objections on the ground that the division of relief in the settlement reflected the underlying merits of the various claims.

In one sense, the *Meyer* example seems easy. Basing the terms of a settlement on the relative merits of the claims is a well accepted notion of fairness.[62] But the ultimate conclusion that a segment of the class is entitled to very little relief can mean that those same persons are most willing to gamble on scuttling the settlement and going forward in court.[63] Their argument would be that they are at least entitled to a day in court, so long as their claim is not frivolous. The attorney, however, can argue that she has already served this segment of the class well by attempting to prove their case in discovery, but that the case is not strong enough to justify going forward. They are not getting any relief, but they got a chance at relief and are therefore fairly precluded. The question for the attorney is what limits exist on her ability to be the judge

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[61] 39 Empl. Prac. Dec. (CCH) ¶ 36, 049 (S.D.N.Y. 1986).

[62] *See* Coffee, *Entrepreneurial Litigation*, *supra* note 10, at 917 n.100 (suggesting that averaging claims of different strength is unfair).

[63] For an example of a court accepting the idea that groups with lesser claims on the merits should be able to benefit from their leverage as possible spoilers of any agreement, see *In re* Chicken Antitrust Litigation Am. Poultry, 669 F.2d 228 (5th Cir. 1982). In *Chicken Antitrust Litigation*, the court approved a settlement in which the allocation bore little relationship to the strength of the claims of the various classes. The court noted that defendants wanted "total peace" and that therefore participation by every subclass was essential to the settlement. *Id.* at 238. The court suggested that it would be a different case if one of the subclasses had no colorable claim. What is interesting about this case is that once the defendants insisted on "total peace," the groups with insubstantial claims were in a position to hold up the entire settlement. The relative strength of the parties' claims became largely irrelevant to the parties' bargaining strength.

of class members' claims. How weak must the claims be to determine that it is fair to preclude these class members and give them no relief?

In cases in which the facts are not fully developed through discovery, the issue becomes more complicated. In cases involving fact development, it is common for class members to have varying interests in the degree of discovery conducted prior to settlement. For example, in the course of discovery, a smoking gun document can provide strong evidence that an employment practice or government policy existed after a certain date, while the evidence prior to that date is dependent on further depositions or other factual development. Or in a case involving more than one claim, the documents produced early in the litigation can provide strong evidence on one claim, while proof of a second claim will require extensive additional discovery. In either case, the opposing party's interest in settlement will often be tied to closing off the litigation and avoiding the depositions.

C. *Participation in Relief*

In addition to complicating the basic assessment of settlement value and alternatives to settlement, class action negotiations raise some problematic issues that do not arise in bi-polar cases. Two common issues in class action settlements are procedures for alerting class members to the availability of relief and procedures for determining how much relief is accorded to each class member. Both of these issues raise important distributional questions.

All settlements that involve any kind of restitution or money award will include some procedure for members of the class to be notified of their right to come forward for relief. Injunctive settlements may also involve procedures to assure that class members are aware of their rights and able to benefit from the terms of the settlement. Although case law provides some minimum standards for such notices and procedures, their specific content, as negotiated by the parties, can greatly affect the number of class members who actually receive relief. In one case regarding court-ordered relief in a public benefits class action, for example, the plaintiffs presented evidence that the response rate from class members in cases in which the notices were drafted by the plaintiffs was far higher than when the notices were drafted by the government defendant.[64] Similarly, settlements can include a variety of procedures for tracking down class members who do not respond to initial notices, so as to

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[64] Conversation with Mac Sasser, counsel for the plaintiff class in Hyatt v. Sullivan, 899 F.2d 329 (4th Cir. 1990); *see also* Rhode, *supra* note 10, at 1232–37 (discussing the problem of making notices intelligible).

assure that participation in the settlement is as great as possible. The question for the attorney is how much such procedures are worth when compared to other settlement provisions.[65]

Procedural provisions raise a particular tension for an attorney balancing responsibilities to an entire class because the cost of the settlement for the party opposing the class will often depend on the number of persons who will be participating in the settlement. In cases in which there is no fixed fund, procedural provisions that result in fewer participants will reduce the overall cost of the agreement to the defendant. Similarly, in cases in which a fixed fund is allocated among members of a class, procedures leading to fewer participants in the settlement will result in greater relief to those class members who respond to those procedures.[66]

Tensions regarding the inclusiveness of a settlement arise even if the procedure for reaching class members is of no extra cost, or is of lower cost. For example, writing a notice in language that is easier to understand may yield a greater response from class members, and add nothing to the notice costs of a settlement. Costly procedures may also operate to make settlements less inclusive, rather than more inclusive. For example, complex procedures for proving class membership can serve to discourage a response from class members, while at the same time being more expensive to administer. An essential aspect of these procedures, regardless of what they cost, is how much they affect participation in the settlement. This question has clear distributive implications within the class.

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[65] An analogous issue is raised when a settlement places a cap on the number of class members who can receive relief. In the *Nintendo* antitrust settlement, for example, there is a provision limiting the total number of persons entitled to relief to five million. *Notice of Settlement*, N.Y. TIMES, July 21, 1991, § 1, part 2, at 31. This provision assures the defendants of a limitation on the number of persons who will receive relief. Because the settlement automatically provides relief to persons who sent in warranty cards, this limitation applies only to the remaining group. It applies a first-come-first-served approach that potentially will exclude some class members from relief. From the defendant's standpoint, the provision was no doubt considered an important way of controlling costs. From the class counsel's standpoint, however, it raises questions about whether it is fair to exclude the class member who submits a request just after the cap is met. In fact, more than five million of the twenty-three million members of the class submitted requests for relief prior to the approval of the settlement. *See* New York v. Nintendo of Am., 775 F. Supp. 676, 679 (S.D.N.Y. 1991).

[66] *See, e.g.*, *In re* "Agent Orange" Products Liability Litigation, 818 F.2d 145, 171 (2d Cir. 1987), in which increased participation in the fund meant that the average award to class members dropped significantly from what was anticipated when the settlement was first approved.

Another issue that arises in class settlements is the choice of mechanism for gearing the relief to the individual circumstances of the member of the class. These mechanisms have been described as "bureaucratic"[67] methods for providing some measure of tailored relief. They typically involve some broad categories and formulae for dividing the relief among the members of the class.[68] They do not provide the parties with an opportunity to make the kind of particularized factual showing that they would be able to make if they presented their case in court. On the other hand, they may spare members of the class from the difficult hurdle of meeting judicial evidentiary standards.

The issue facing the attorney is not simply whether to adopt such streamlined proof mechanisms, but which proof mechanisms to choose. In some cases, a rule may be employed in a settlement as a conclusive presumption. For example, eligibility for back pay due to a failure to receive a promotion may depend on a specified number of years of tenure, even though the chosen number of years would not be conclusive in an individual case. In this example, there are choices to be made about what number of years should be used in the presumption.

Another type of rule is one that eases the proof necessary to prove an element of damages, or that accepts a sworn statement or an unsworn statement in lieu of more particularized proof.[69] Such mechanisms favor those class members who would have more difficulty meeting more formal standards. As with procedural protections, these provisions can increase the number of class members who receive relief, thereby increasing the cost of the agreement to the other party or reducing average awards. At the same time, a formulaic way of proving damages can exclude particular proof that some class members would present to demonstrate greater than average injuries and limit the ability of those class members to be fully compensated. In choosing among formulae, class counsel inevitably face competing class interests.

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[67] David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice By Collective Means*, 62 IND. L.J. 561, 573 (1987).

[68] In the *Meyer* case, for example, the number of years of employment was used as a proxy for whether the person was in the pool of persons who might have been promoted. Meyer v. Macmillan Publishing Co., 39 Empl. Prac. Dec. (CCH) ¶ 36,049 (S.D.N.Y. 1986). In *Sullivan v. Zebley*, the stipulation and order implementing the Supreme Court's ruling provides for averaging of benefit rates to ease the proof problems of establishing appropriate rates for several different years. Zebley v. Sullivan, No. 83-3314 (E.D. Pa. Mar. 14, 1991) ¶ VIIH.

[69] *See, e.g.*, State v. Levi Strauss & Co., 715 P.2d 564 (Cal. 1986) (allowing class members to submit affidavits attesting to the number of jeans purchased, rather than requiring proof through receipts).

In sum, the question of what settlement is the best settlement may look very different to different members of the class. The value of the settlement package for any one member of the class will be a function of many factors, including the relief provided in the settlement for that class member; the class member's preferences for different forms of relief; the class member's view of the risk of proceeding with litigation; and the class member's view of the value of receiving relief sooner rather than later. These interests must be reconciled in a way that meets the doctrinal standards that the interests of class members be represented adequately and that any settlement be "fair and adequate." The question is what norms for reconciling class interests meet the standards of fairness and adequacy.

III. TOWARD A THEORY OF FAIRNESS

Whoever bears ultimate responsibility for evaluating fairness issues in class action cases needs a framework for approaching and resolving these issues. She needs a process or substantive norm that will help her answer the question of what to do. The court-based standard of review, which asks only whether a settlement is within the scope of acceptable decisions, is simply inadequate for the one who has to decide what course to pursue in settlement negotiations.[70] This section examines several models for resolving the distributional dilemmas that arise in the course of class representation. The inquiry here is not focused on standards that are necessarily enforceable by the courts or by disciplinary procedures. Rather, in the tradition of norms governing attorneys' roles and

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[70] Ultimate responsibility to direct negotiations in a way that is fair to the class could lie with the court, with the attorney for the class, with an independent guardian of class interests, or another actor. In allocating responsibility for fairness judgments, it is difficult to avoid role-mixing by some actor. If the court becomes directly involved in negotiations, there is a danger of role-mixing that can affect the court's ability to evaluate the case from a neutral perspective. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 426–31 (1982). Similarly, if lawyers are required to make distributional judgments based on the strength of class members' claims, they take on a quasi-judicial role that is quite different from that of an advocate.

Because of institutional constraints on the courts' time, and their ability to be familiar with the details of the many cases that come before them, I remain skeptical of claims that class lawyers can escape all responsibility to make decisions about fairness. As Professor Luban says, "if the [class lawyers] cannot abdicate, they must act. Thus theirs is a mandate of necessity. They must decide the interests of the class because the buck has stopped with them." LUBAN, *supra* note 10, at 349; *see also* Simon, *supra* note 10, at 1097–98 (the less reliable the procedures and institutions for the substantive justice of a resolution, the more responsibility the attorney must bear).

judicial decisionmaking, the focus is on the broader question of ways of thinking about what the decisionmaker should do.[71]

The specific dilemmas raised by class representation can be seen as part of a larger debate about theories of fairness. Although each dilemma seems irreconcilable in the framework of a rule of unqualified zealous representation, it can be answered by a substantive theory of what makes a settlement better or worse, more fair or less fair.[72] A substantive theory provides a framework for thinking about which interests get priority, how interests are aggregated, and so forth. Through such a theory, there are answers, at least at a theoretical level, about such questions as how important it is if some members of the class get more value out of the settlement than others or whether there is a baseline that every settlement must meet in order to be acceptable.

Looking to substantive models of fairness does not resolve the dilemmas themselves. It instead moves them to a more abstract level. One must then think about the competing, vigorously defended, theories that may serve as frameworks for thinking about the problems facing the class attorney, and determine which fits best our understanding of the interests of class members in class litigation. This inquiry is both theoretical and practical. For example, it may be of little help to the class attorney to know that it would be fair to apply a welfare maximization rule if there is no way to compute welfare and no common metric for measuring the relative interests of members of the class.

However elusive the goal may be of a common theory for resolving class

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[71] Many of the profession's standards for adequate representation in individual cases are phrased in aspirational terms. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1980). As Professor Rhode has observed, such "[e]xplicit professional obligations, even those unlikely to trigger any formal sanction, often affect behavioral norms simply by sensitizing individuals to the full implications of their conduct." Rhode, *supra* note 10, at 1258; *see also* Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 288 (1982) (suggesting that in some situations related to multiple clients, "the enforcement goal must be subordinated to the goal of articulating standards that allow an honest practitioner to make decisions that he believes are consistent with relevant ethical principles"). Even if enforceable standards are seen as the objective, such standards depend on a conception of what it is that the attorney should do.

[72] The mandate of fairness derives from Rule 23's duty of adequate representation and case law that requires that a settlement be "fair and adequate." But beyond such positive law roots for a fairness framework, theories of fairness are useful because they are concerned with the core problem facing the class action attorney—namely how to arrive at results that have different implications for different members of a group, and yet will still retain respect as just outcomes for the group.

dilemmas, there is value to searching for an understanding of the general framework that best applies to class representation. The class action tool is an essential way by which our legal system attempts to redress economic barriers to justice. It is often only through the class action that persons with smaller claims and persons with limited incomes can gain access to the courts.[73] It is clearly unacceptable either to deny representation to persons who rely on the class action mechanism or to ignore the problems raised in class representation by pretending that our traditional notions of lawyering provide the answers.

One could argue that the best course of representation can only be evaluated in the context of a particular case at a particular time. There are several reasons, however, for rejecting such a case-by-case approach. First, attorneys for class actions will have their own personal perspectives and interests to contend with as they represent their class clients. For example, there may be pressure to "close a deal" or to attempt to establish "good" precedent. In cases handled by private counsel there may be powerful economic motivations for structuring the settlement in a way that enhances a fee recovery. Just as the rule of zealous representation serves as a reminder to attorneys of their duty to serve the client in individual representation, a framework for thinking about how to resolve dilemmas in class actions can make it easier for the class attorney to distance herself from her own perspective and to think about what is required to fulfill an obligation to the class.[74] Furthermore, because the class attorney is entrusted with representing absent class members who did not select the attorney and who may have no practical way of obtaining any other representation, it is deeply troubling to think that the most essential questions, such as whether one looks at the welfare of the group or the positions of the persons in the group, would be subject to no general formulation. In addition, some general conception of how the attorney will resolve class dilemmas is necessary to provide meaningful counseling of the persons who become class representatives. These clients have

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[73] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812–13 (1985).

[74] An overarching concept of fairness can also help to shape proposals that bear on the fee incentives faced by attorneys. Although there has been considerable discussion of ways of shaping fee structures to align the attorney's interests with the class, as a group, there has been less attention in the literature to incentives that would bear on the choice of settlement packages, with different interests among class members. *But see* Coffee, *Entrepreneurial Litigation*, *supra* note 10, at 925–30 (proposal for altering incentives for attorneys advising class members on opting out of a class); Kornhauser, *supra* note 17, at 161–71 (suggesting that fee structures and voting schemes cannot prevent the structuring of relief in ways that maximize the surplus to be divided between counsel and the defendant).

a right to know what principles will guide the representation.[75]

If a consensus could be reached on an overarching model of fairness for class representation, it would offer legitimacy to the decisions that attorneys make on the specific intra-class questions they resolve. Such legitimacy is a general feature of rules for determining fair divisions. For example, when two people agree to draw straws to decide who will receive some object, the resulting division has a claim of legitimacy, even as to the person who loses the draw. Similarly, a majority rule principle can lend legitimacy to a decision with which one would disagree. When members of class actions are not in a position to design their own rules of resolving the dilemmas that arise in their cases, the question is what overarching model is most suited to the intra-class questions that arise in class actions.

There are two basic approaches to theories of fairness. The first is to look at a set of procedures and ask whether they can be expected to yield fair resolutions. The resolutions are defended in terms of their pedigree—that they result from the workings of a fair process—rather than by their substantive content. This approach is how we often think of fairness in a trial or legislative setting. In the class context, such a procedure could be a voting mechanism or a class committee.[76] The second approach is to look at substantive results and ask whether the differences in results for different persons are adequately justified. Under a substantive theory, the question is not simply what process led to the result, but whether the result itself meets articulated standards of fairness.

This Article focuses on substantive models of fairness for several reasons. First, current practice places both attorneys and the courts in the role of making decisions of substantive fairness without providing a framework for understanding fairness choices. Second, many possible procedural mechanisms serve to shift the institutional responsibility to achieve fairness, but leave some actor with the question of determining what is fair. Even a voting mechanism raises the question of fairness for those participating in the vote.[77] Third, the

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[75] *See* Ellmann, *supra* note 5, at 1139–46 (discussing importance of developing an understanding of the terms of representation in group cases at the outset of the representation).

[76] Voting mechanisms are discussed in Kornhauser, *supra* note 17, at 165–67. Class committees were suggested by several colleagues at the Clinical Theory Workshop at Columbia University, where an earlier draft of this article was presented. For an endorsement of the class committee approach, see Ellmann, *supra* note 5, at 1135–75.

[77] As described by Professor Thomas Nagel, the problem of reconciling the interests of the individual with the interests of the collectivity is a problem that each individual faces internally; we are neither wholly focused on the collective interest nor wholly focused on

due process issues raised by class litigation require some understanding of what kind of representation class members receive, especially in cases in which there is no right to opt out.[78] Fourth, procedures can be expected to shape substantive content of decisions, making the line between substantive and procedural concepts fuzzy. Some concept of substantive fairness is therefore essential in shaping fair procedures.[79] Finally, complex procedural mechanisms for requiring the active involvement of class members are unlikely to be suited to many forms of class litigation.[80]

At the core of the substantive fairness problem in class litigation is a tension between the interests of the individual members of the class and those of the class as a whole.[81] As in any problem of collective choice, the fairness

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our own interests. Our own interests include, in part, the interests of others. THOMAS NAGEL, EQUALITY AND PARTIALITY (1991).

[78] It is well established that due process requires representation that is "adequate." *See* Hansberry v. Lee, 311 U.S. 32, 43 (1940).

[79] For example, appointing a committee representing the interests of various subgroups of the class and requiring that committee to reach a consensus, gives each subgroup the power that would be accorded under the individual representation model described *infra* subpart III.A. One's view of whether the results of such a power allocation are appropriate might affect the view of those procedures. The two questions are not identical, however. Many would argue that a procedure that requires consensus allows for group decisionmaking that is not necessarily in the interest of each individual who has the power to stop the consensus. *See, e.g.*, Sturm, *supra* note 15, at 1434–44.

[80] Active involvement of class members is most feasible when the members of the class are relatively mobilized. *See, e.g.*, Bell, *supra* note 10 (arguing for greater reliance on client groups in desegregation cases). In many large class actions, however, client groups are not at all mobilized and the class action may not be so important in the overall scheme of the class members' lives to warrant the kind of time and energy required for complex procedures for class member involvement. *See* Fiss, *supra* note 29, at 1079. Even when the class action is important, it may not be feasible for interested class members to be closely involved in the litigation. In the poverty law context, for example, virtually every benefits lawsuit that has the possibility of providing some improvement in benefit amounts is important to members of the class because of the small incomes upon which poor people survive. At the same time, one might ask whether the class of clients, besieged by the immediate need to cope with issues related to benefits, housing, job insecurity, and the countless ways in which government programs regulate their lives, would have the time to devote to the multitude of lawsuits that hold out a promise of providing them with some modest relief.

[81] These problems are at the core of litigation in which the class is disaggregated and the class mechanism serves primarily to allow for the aggregation of claims. The substantive issues are different and perhaps both simpler and more complicated when the litigation serves to create a community of interest and transform the class from an aggregation of individuals into a group mobilized around a common agenda. In the latter type of litigation,

problem in class actions requires some way of thinking about the relationship between the individual and the entity. The members of the class may depend on the existence of the class for their claims to have any chance at vindication; without a class, the claims of the individuals will often not be sufficient to justify the cost of the litigation.[82] At the same time, the class members are individuals with different views, as outlined in Part II of this Article. A substantive theory of fairness requires a manner for thinking about the resulting relationship between the interests of each individual with those of the other class members who make up the class. One could view the problems raised in class settlement as an unfortunate by-product of the imprecision of subclassing in capturing salient differences in class members' interests. Under this view, the fairness criteria should try to mimic bargaining among the most disaggregated subsets of class members—each of which was composed of a single member of the class. Alternatively, the class could be viewed as an entity in which the interests of each class member must be balanced against those of other members of the class, and no minimum standards of relief are required for any individual class member. Between these extremes, the rules could in some way treat the outcome for each class member as important, without guaranteeing each class member the type of settlement that she could bargain for on her own. This section sketches models of fairness based on these alternative approaches and argues that a mixed approach is most appropriate to the class action context.[83]

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the group may transform the interests of the members of the class so that there may be no meaningful way to think of the interests of the individual apart from the interests of the group as a whole; and the interests of any one class member may depend very much on outcomes for other members of the class. For an exploration of a more group-based way of thinking about class representation, see Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of Rebellious Collaboration*, 77 GEO. L.J. 1603, 1608, 1706, 1714–15 (1989); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88); *see also* Ellmann, *supra* note 5, at 1158–70 (discussing the problems of reconciling obligations to individuals and the group in group representation).

[82] In the case of class actions in which the monetary claims of each class member are small, this is fairly obvious. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (class members "would have no realistic day in court if a class action were not available"). In the case of class actions financed by public interest organizations, there is a similar force at work. Some claims simply will not be litigated if they do not affect a sufficiently large segment of the client population to justify the expenditure of resources. *See* Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1112–13 (1990).

[83] These models are patterned on well-known models of fairness with respect to income distribution issues. They also resonate with the discussions that I have participated in

A. *Individual Representation Model*

One way of understanding the dilemmas that arise in class actions is that they are the consequence of the imprecision of subclassing in reflecting the disparate interests of members of the class. Under this view, if we could only finance representation for all of the possible interests of members of the class, the resulting settlement agreed to by the many individuals or subclasses would be a fair result. Each class member would retain the right that she enjoys in individual litigation to accept a settlement, or reject it and insist on her day in court. The class action attorney's job can then be seen as a duty to attempt to mimic what the system fails to achieve by asking whether there is a subgroup of the class that would have any reason to reject the settlement.[84] By looking at what would happen if representatives for all of the members of the class had to agree on a joint strategy, class counsel can obtain what our legal system ordinarily considers to be "fair" treatment in a settlement.[85]

Asking what would happen if class members could bargain creates some baseline conditions for a settlement. When everyone appears separately in a case, any one person can choose to refuse a settlement or to insist on litigation. Any individual could veto a comprehensive settlement of the case.[86] As a result, the contents of a comprehensive settlement would be determined by negotiation among members of the class. If the settlement is a bad deal for one member of the class, and the defendant insisted on a comprehensive settlement,

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with co-counsel during the settlement of class actions. Starting from the basic standard that a settlement should be a better deal for the class than proceeding with litigation, the question arises whether it must be a better deal for everyone in the class or for most class members.

[84] Commenting on an earlier draft of this Article, Professor Sue Bryant of the City University of New York School of Law suggested that a team of class action lawyers could assign themselves roles to play out this model of fairness. In my own experience, members of a class action litigation team have often included persons with different perspectives on class interests, so that a rule of consensus within the team has operated as a shadow form of the individual representation model.

[85] This model is clearly a stronger protector of the individual interests of class members than is mandated under court decisions. The implications of such a rule on preventing settlements has led courts to expressly hold that the objections of some class members in and of themselves are not grounds for rejecting a settlement. *See, e.g.*, Grant v. Bethlehem Steel Corp., 823 F.2d 20, 23 (2d Cir. 1987). Indeed, some courts have approved settlements over the objections of a majority of the class. *See id.* at 23 (citing cases). The model is used here to highlight the issues raised by thinking about the position of the members of the class.

[86] A model that mimicked all parties bargaining separately would also allow for a partial settlement if the defendant were willing to agree to a partial settlement.

a settlement would not be possible. The question for class counsel is whether a member of the class would exercise that right. Here, class counsel can attempt to mimic some aspects of individual bargaining, but not others. Based on an assessment of the legal claims, class counsel can assess the strength of the class member's case if the case were to proceed with litigation. This provides part of the assessment of whether the settlement is a better deal than the litigated solution. In addition, class counsel can attempt to assess how members of the class would value alternative solutions, so as to estimate whether a settlement is at least as valuable as proceeding with litigation. Although this process is fraught with informational problems, and may be inappropriate when there is an inadequate basis for making such estimates, it allows for the possibility of structuring a settlement that is more advantageous to members of the class than what they might expect to receive through litigation.

Most difficult to mimic is the strategic behavior in which class members might engage, such as threatening to veto a settlement in order to achieve a better deal for themselves. For example, in a bargaining situation, a class member with a weak claim may hold out for disproportionate compensation in exchange for agreeing to the comprehensive settlement.[87] Although such strategic behavior could be expected in actual bargaining, it seems appropriate to leave such behavior out of the ambit of the model, because it does not go directly to the question of whether the settlement may fairly be called a good deal for those class members.

As an example of the individual representation model, consider a simplified version of the *Cuisinart* case.[88] As in *Cuisinart*, the claims of the members of the class are small, and the claims are virtually identical. Aggregation of the claims is essential to the availability of representation. The differences among the members of the class emerges at settlement because they had different ways of valuing the relief offered by the defendant. Suppose, for example, that the defendant floats the idea of a settlement in which members of the plaintiff class would receive coupons towards future purchases of Cuisinart products. Suppose further that the plaintiff class is composed of 300,000 people and that, based on a sample of class members, the plaintiff class attorney discovers that a third were very interested in the coupons—they are definitely planning to purchase more Cuisinart products, and will do so at full price. For this group, the coupons are worth as much as their face value. Another third of the class considers the products to be of some interest, but is not so committed to buying that the coupons are as good as cash. Instead, these class members would value

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[87] *See supra* note 63 (discussing the bargaining implications of the defendant's insisting on "total peace" in *Chicken Antitrust Litigation*).

[88] *See supra* text accompanying notes 36–46.

the coupons at half their face value. For the final third of the class, the coupons are not worth the paper they are printed on.[89] If the case goes forward, it would take time, and the likelihood of success is unclear. The attorney estimates that the "expected" result of going forward (discounting for the probability of losing and the added expenses that would be paid for out of the class members' recovery) is that class members would get $15. The value of several possible settlements to members of the class is set out in the following table, with the groups denoted as A, B, and C:

Settlement Package	*Cash Value: Group A*	*Cash Value: Group B*	*Cash Value: Group C*
$50 Coupon	$50	$25	$0
$30 Coupon	$30	$15	$0
$15 Cash	$15	$15	$15

The attorney faces the following dilemma: a majority of the class would value the coupon remedy more highly than a $15 cash award, so long as the face value of the coupon is over $30. Group C, however, has the equitable claim that if the case were to go forward, its preferred form of remedy is the one that the court would choose. Under the individual representation model, the settlement offer must be rejected, because it leaves Group C worse off than the alternative of going forward with litigation.

The individual representation model would permit a settlement only if the defendant would agree to the cash settlement or if it were possible to restructure the packages so that all members of the class would receive something that was at least as valuable to them as proceeding with litigation. For example, the attorney could seek a settlement that created an option of cash or a coupon.[90] If an option could be devised in which the cash were equal to the expected result of litigation, no class member would be left worse off, and the settlement would meet the minimum criteria of the individual representation

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[89] In the actual settlement, the coupons were only partially transferable, a provision that is mirrored in other settlements. The possibility of a cash value for the coupons is considered below.

[90] It may also be possible to design a scheme that meets the conditions of the individual representation model in which the defendant only supplies coupons. For example, there could be a charge for the coupons for those who wanted the coupons, with the remaining class members receiving a share of the cash proceeds; or the coupons could be auctioned with the proceeds distributed. Such schemes were proposed to me by my colleagues Professors Vicki Been and Marcel Kahan when they commented on earlier versions of this Article.

model.[91]

The appeal of the individual representation model is that it largely preserves for each class member the power to veto a settlement that the class member would retain if represented individually. Furthermore, the model places a priority on the rights that can be vindicated in court, by leaving a judicial resolution of the case as the default option.[92] So long as the members of the class cannot speak with unison, they are promised the relief that flows from judicial resolution. In addition to these guarantees, the individual representation model serves as a check against any abuses in class definition by requiring that every class member receive relief that is at least as valuable as what might be expected through litigation.

The shortcomings of the individual representation model are apparent when its results are viewed from the standpoint of those who seek a settlement of their claims. The model allows one group to veto the settlement, even if many other members of the class are injured by the failure to settle. The model thereby raises the interests of those who prefer to continue litigation above the interests of all of the class members who would benefit from a settlement, even if the claims of the class members who would bar settlement would not have been sufficient to justify independent litigation in the first place. The model allows this result regardless of the strength of the claims of the class members who would stymie the settlement. If it is impossible to restructure the packages in a way that satisfies all members of the class, there is no settlement, and many class members lose out on what would be for them a valuable arrangement.

By making it difficult to reach a settlement of a class action, the individual representation model also increases barriers to class litigation for all potential class members. In deciding whether to finance class litigation,[93] the attorney, class representative, or public interest organization can be expected to make

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[91] The question then becomes whether the defendant would agree to such a scheme. *See supra* text accompanying notes 35–40 (discussing non-zero sum bargaining situations in which the defendant might agree to an option plan).

[92] Thus, if the predicted court outcome were changed so that the expectation was that a court would order coupons, the coupon-preferring class members could veto a coupon that provided them with less than their expected court outcome. The settlement would have to provide a coupon of at least the value predicted through the court resolution.

[93] It is well recognized that, in practice, lawyers or organizations finance class litigation. *See* Coffee, *Derivative Actions*, *supra* note 10, at 685–90; Macey & Miller, *supra* note 10, at 7; Tremblay, *supra* note 82, at 1111–12; *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (noting that class members usually are not financially liable for the costs of class litigation).

some estimate of the projected costs of litigation. To the extent that the veto operates not only to control the terms of a settlement, but also to determine whether any settlement at all is feasible, the projected costs of class litigation would be higher, and the availability of resources to support such suits would be all the lower. Thus, while the individual representation model might appear at first blush to be the most protective of all class members, it creates an institutional environment that is less protective for those who rely on class litigation to vindicate their rights.

A model based on mimicking a situation in which all class members are represented individually is also incomplete. Other than concluding that class members would not litigate when the expected return from litigation is smaller than the expected value of the settlement, given their own way of valuing these alternatives, nothing much can be said about which settlement would be adopted, when each meets the minimum conditions. At a more practical level, application of this model requires either direct information about whether there are class members who would exercise a veto, or some way of approximating how class members would view the settlement. If an approximation of a common metric is possible, however, it can serve to indicate whether the settlement is one to which some class members could reasonably object.

B. *Majority Preference Model*

An alternative approach is to require class attorneys to choose the settlement that is best for a majority of the class. Under this model, no one individual's interests would operate to stop a settlement; instead, the settlement would go forward if it were best for most class members. This solution has the appeal of appearing democratic.[94] Although not expressly adopted as a norm for approving settlements, courts have suggested a similar standard by looking to the number of objectors as part of the standard for whether a settlement should be approved.[95]

Like the individual representation model, the majority preference model involves a weighing of the advantages of the settlement with the risks of going

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[94] The appearance of democratic standards in a majority-rule principle should not be confused with a democratic process. In a democratic process, the process of deliberation and group consideration of issues can allow for a consideration of the interests of other members of the group. Although there is a lively debate on how reliable such processes are in protecting the interests of those who are in the minority on a given matter, there can be little doubt that the process at least allows for a consideration of the interests of other members of the group that is different from that offered by polling members of the group.

[95] *See supra* note 33.

forward with the litigation. But whereas the individual model requires that this balance favor settlement for all members of the class, the majority model requires only that it be best for a majority of the members of the class. Restructuring packages to satisfy all class members—a prominent feature of the individual representation model—would not be valued in the majority model. The majority is thereby free to seek forms of relief that may be valued by many class members but of no value to some class members.

There are a number of reasons, however, why a majority model may not be adequately protective of the rights of potential class members. First, it provides no safeguards for those who are in the minority of the class. Under a majoritarian scheme, it is of no consequence that almost half of the class receives nothing, so long as the remainder of the class prefers the outcome. As Amartya Sen describes the problem, thinking only in terms of how the majority fares under a distribution scheme allows a majority to take away the benefits of the least well off and distribute them among the rest.[96] In the class action context, a rule of asking what is best for a majority of the class allows for "representation" that injures, or provides no relief, to members of a class simply because they constitute a minority of class members.[97]

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[96] Sen explains the problem with a simple majoritarian rule as follows: "Even in ranking just one pair of alternative social states, in which context the problem of intransitivity or cyclicity does not arise, majority rule is a terribly gross method. To illustrate, in the cake division problem, with any given division of the cake, take away half the share of the worst off person and divide the loot among the rest. We have just made a majority 'improvement.' If we are ambitious and want *more* social improvement, we repeat the exercise!" AMARTYA SEN, CHOICE, WELFARE, AND MEASUREMENT 13 (1982).

[97] This is demonstrated formally in Kornhauser, *supra* note 17, at 165–67. Professor Kornhauser considers three voting schemes: majority of subclasses, with each subclass voting equally; majority of subclasses, with the votes weighted by the value of the claims; and a majority of individuals. Whichever scheme is chosen, the proposed settlement will be approved if it improves the position of the majority relative to the expected outcome of litigation for members of that majority group. This means that a settlement can be approved even though it is so unfair that it gives some minority no relief at all. The voting rules do not assure even the most minimal fairness condition of treating class members as well as they would have been treated had they been left to litigate on their own, even assuming they had the resources to litigate on their own.

In addition, as Professor Coffee has observed, a majority approach raises the question of how voting power should be distributed within the class. *See* Coffee, *Entrepreneurial Litigation*, *supra* note 10, at 920. Professor Coffee argues that those with the larger stakes in the litigation should receive more voting power. The size of the class members' claims, however, is not itself an objectively indisputable issue in some cases. The attorney is therefore put in the position of arbitrating the "true" value of claims. *Id.*

In the *Cuisinart* example,[98] the fate of the coupon scheme would depend on whether the coupon was of greater value to the majority of the class than the expected cash award following litigation. In the numerical example, any coupon over $30 would satisfy this test. The minority of class members who receive no cash value would be effectively left out of the settlement.

As this example illustrates, nothing in the majority model requires that the settlement bear any relation to what would happen in court. The settlement can operate to restructure relief in ways that transfer wealth from minority class members to majority class members. When the class members have claims of differing strength, the majority model allows for transfers from class members with stronger claims to those with weaker claims, without requiring any particular justification for the transfer. Suppose, for example, that some of the class members in the *Cuisinart* litigation had purchased two Cuisinarts, and that their expected damages were twice that of the class members who had made a single purchase. If the two-purchase class members were a minority of the class, a majority of class members would do better under a settlement that limited each class member to a single coupon. The only check on such transfers is that the majority of the class value the settlement more highly than continued litigation. To the extent that class members view their potential remedies in court as a kind of presumptive entitlement, such majority power to reshape those entitlements is troubling.

The *Cuisinart* example also illustrates how the majority preference model does not provide a complete standard for determining which of many settlements is the best for the class. A majority preference model only gives a complete answer when the choice facing the class is binary. Where there are many possible options, as is typical in settlement, there may be many ways of constructing a settlement, each of which is satisfactory to a majority of the class when compared to one of the other options. In the *Cuisinart* example, there could well be a majority for a cash settlement of $15 or a one year extension on warranties or $40 coupons. As public choice literature shows, the lawyer's decision as to how to present these choices will determine which one is chosen. Absent some agenda control, there can be constant cycling between "majority" solutions.[99] Agenda control of a sort exists in the attorney's ultimate power to

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[98] *See supra* notes 37–46 and accompanying text.

[99] For example, consider the lawyer's choices in a version of the *Cuisinart* settlement. Suppose that there are three groups of plaintiffs, A, B, and C, and three possible solutions: cash, coupons, and an extended warranty. Group A prefers cash to coupons to warranties. Group B prefers coupons to warranties to cash. Group C prefers warranties to cash to coupons. In a choice between cash and coupons, there would be a majority of A and C for cash. In a choice between coupons and warranties, there would be a majority of A and B

decide which package gets submitted to the class and the court. But if the lawyer is writing the agenda, determining what is best for the majority of the class does not help her pick among the settlement packages that can be pursued with opposing counsel.[100]

C. *Utilitarian Model*

Another approach that balances the interests of the members of the class against each other's interests is a utilitarian concept of fairness, in which the attorney seeks the solution that maximizes the aggregate welfare of the members of the class. Under a utilitarian model, the attorney looks to how much benefit is derived from various settlement possibilities for the members of the group. The best plan is the one that maximizes the overall benefit. A plan that offers a high level of satisfaction for some members of the group, but nothing, or a decrease in satisfaction for other members, would be more desirable under this model than one that offers a small amount for all class members.[101]

Although a utilitarian model might seem far from standard conceptions of class counsel's duty to the members of a class, it cannot be casually discarded. From a probabilistic standpoint, if persons were asked what set of rules would

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for coupons. And in a choice between warranties and cash, there would be a majority of B and C for warranties. The "majority" result depends completely on which choices are presented.

"Cycling" occurs because every coalition of two groups can be broken by the third player. If A and C get together and decide on cash, B is left out. B notices that C prefers warranties to cash and suggests that they get together and insist on warranties. This coalition is itself subject to being broken by A, who notices that B prefers coupons to warranties and suggests a deal based on cash. The principle of majority rule does not provide a way out of this cycle. *See generally* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2–3 (2d ed. 1963). Agenda control, however, can stop the cycle. If someone can control the agenda and decide which choice is put to a vote, there will be a majority that decides the issue. *See, e.g.*, Michael E. Levine & Charles R. Plott, *Agenda Control and its Implications*, 63 VA. L. REV. 561, 561–71 (1977).

[100] In addition to the problem of indeterminacy, a majority model raises problems related to gathering adequate information about the interests and concerns of the class. To apply the model, class counsel must gather information about how many class members value each alternative form of relief and how much they value that relief in comparison to other forms of relief. At a practical level, the attorney faces both the problem of gathering information about class members' views and sorting out strategic misrepresentations of interests.

[101] For a general discussion of utilitarian models and the practical problems that arise from such models, see Freed et al., *supra* note 25, at 513–24.

serve them best (without knowing whether they would be winners or losers in the application of the rule) a utilitarian model offers the highest expected return for risk-neutral class members. What is required in exchange is accepting the possibility of receiving nothing or a loss as a result of the representation.[102]

In a more indirect way, proposals that link the attorney's fees to the overall size of the "take" for the class are based on a crude form of utilitarian model.[103] The best settlement is assumed to be the one that has the largest cash value to the class. Distributions of cash among members of the class are treated as irrelevant.

Perhaps more familiar to those who litigate public benefits or employment cases is the question whether the relief will be worth anything in practice to the members of the class. A settlement that promises real relief in terms of substantive results for some members of the class may look much better than one that will provide all class members with procedural relief that is unlikely to translate into any difference in substantive outcomes.[104]

Applied to the *Cuisinart* example, a utilitarian model asks about the value received by class members, regardless of how large a group of class members receives the relief. In this example, the value of pursuing litigation is $15 for 300,000 class members, or $4.5 million. The value of the $50 coupon is $50 for 100,000 class members, $25 for another 100,000 class members, and zero for the remaining members of the class, or a total of $7.5 million, making the coupon remedy a preferable choice. The coupon remains a better choice under these particular assumptions so long as the face value of the coupon is at least $30.[105]

Like the majority and individual models, the utilitarian calculus looks to whether the value of the settlement is greater than the expected value of proceeding with litigation. The values are measured, however, in the aggregate. It does not matter if the value goes to a single individual or to a majority or to all of the members of the class, so long as the settlement can be said to be worth more than the expected litigated result. The relative strength of

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[102] For most litigation, the potential loss facing a class member is having a claim precluded while obtaining nothing in return.

[103] Thus, objections to the percentage-fee formula are not related to the structure of the resulting settlement, but rather to the problem of overcompensation for the attorneys. *See* Macey & Miller, *supra* note 10, at 59.

[104] *See supra* note 48 (discussing the settlement in *Loe v. Thornburgh*).

[105] The particular numerical results depend on the assumptions about the sizes of the groups in the class and the degree to which they value the coupons. By varying the assumptions, the coupon could be the preferred remedy even in a situation in which the majority of the class is worse off.

class members' claims, or the specific relief that a court would order, is not itself relevant. All that matters is the overall value to class members of the relief they can obtain through the settlement as compared with continued litigation. As with the majority preference model, the potential relief in court has no special priority.

The problems with a utilitarian approach are similar to those faced with a majority preference model. The utilitarian approach places no express value on distributive concerns. Distributive issues arise only to the extent that distributions to one group create more value than distributions to another group.[106] Thus, the utilitarian model allows shifts in value among class members that bear no relationship to the strength of their claims. Most troubling, it allows those with strong claims to receive less than those with weak claims, so long as the aggregate relief is greater for the class. At a more benign level, it creates no counterweight to claim averaging for class members with claims of significantly different value.[107]

Apart from the question of its appeal as a model, a pure utilitarian model is impossible to apply in practice. First, it offers no way of comparing the utility of a plan for one person with the utility for another. Second, the informational demands are daunting, and include the problem of strategic misrepresentation of interests by persons about their "utilities." Utilitarian analysis can provide guidance, however, if it is possible to devise an acceptable common metric to measure the worth of a proposal for members of the class. In the *Cuisinart* case, for instance, cash value is given as the measure of utility. The actual utility for members of the class might vary, however, in ways unrelated to cash value. For example, some class members might attach symbolic importance to requiring the company to refund overcharges. There may also be differences in the life situations of members of the class that leave some far more needy of extra funds than others. In short, there is no abstractly correct way of measuring the value of anything to different people. But there may be

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[106] In utility functions used in standard models, utility is assumed to be a concave function in which the marginal utility of a dollar decreases as the number of dollars increases. The effect of such a model is to place greater value on distributions to persons who have less because those distributions will have a greater effect on utility. If the class is assumed to start from the same position, a concave utility function will prefer more equal distributions.

[107] *See* Coffee, *Entrepreneurial Litigation*, *supra* note 10, at 917 (noting that fee incentives that look solely to the overall take of the class provide no incentive for the establishment of procedures that would "fairly" allocate relief based on the strength of claims). *But see id.* at 919 (suggesting that there is nothing unfair about claim averaging if class members could not afford to litigate their cases independently of the class mechanism).

approximations of a utilitarian calculus, rooted in the core common interests of class members, that could be employed. Cash value could be seen as a fair approximation in a money-damages case such as *Cuisinart*. In a case involving poor persons seeking benefits, the common metric could be likelihood of obtaining benefits for class members. Each such effort to devise a common metric is subject to the criticism that it does not consider all of the interests and concerns of the members of the class, but each also provides some approximation that can guide the choice whether and how to settle a case.

D. *A Mixed Model*

An alternative approach is to construct a mixed model of fairness that builds on the strengths and shortcomings of the other models. Borrowing from the methodology of contractarian justice theory, one may ask how each model would look to persons who are contemplating being represented through a class action. Those persons are not ignorant of how particular rules might affect them—they may know that they have stronger or weaker legal claims—but they also would not know with certainty whether they would be winners or losers under a particular model. They will not know how discovery will develop, how the court will rule on motions, how other members of the class will value possible settlements, or many other factors that could affect how any of the models would play out for them at the settlement stage of the case.

From the standpoint of the class member who does not know how she will fare in the litigation, the individual representation model has the appeal of assuring that the settlement will be worth as much to her as proceeding with litigation. The model also promotes equal treatment of those with equivalent legal claims, by requiring that every class member do at least as well as a minimum defined through a potential court outcome. It also promotes equality of power in the settlement process by providing each class member with an equal right to veto the terms of a settlement that promises anything less than the expected court outcome. But this model also has the powerful downside risk of making settlements difficult to negotiate, and thus making class actions less available to those who depend on such actions to vindicate their claims. It also denies class members a chance at a favorable settlement if there is any class member who would do better taking her chances on a judicial resolution of the case. Thus, from the standpoint of those who depend on the class mechanism for the vindication of their claims, this right to veto comes at a very high price.

The majority and utilitarian models have the attraction of making settlements more flexible and allowing for class members to obtain greater value for their claims than they might receive in court. These models, however, have the downside risk of allowing transfers in value from those class members

with stronger claims to those with weaker claims, ignoring the inherent fairness of outcomes being related in some measure to the strength of class members' claims.

The interests of the class members at the start of the litigation can thus be thought of as both an interest in obtaining value for their claims as well as an interest in retaining their equal right to relief as defined through the expected outcome of the litigation. In a mixed model, the question is how to balance these interests.

In a mixed model, the expected outcome in court can be thought of as a benchmark. Obtaining this relief for every class member serves the interests of equal representation that underlie the individual representation model. The question is then what weight should be accorded to the competing interests protected under the other models—the interest in obtaining additional value for members of the class, even if it comes at a cost to some class members, and the interest in reducing barriers to class litigation by facilitating the settlement process. If these interests are given controlling weight, the judicial benchmark becomes irrelevant. If they are given some weight, the result is a mixed model, in which the value many members of the class are able to derive from moving away from the judicial outcome must be more than what is lost to those who would do better by pursuing litigation in a particular case. The tradeoff facing class counsel is between equality, as measured by providing all class members with individual relief measured by the judicial value of their claims, and value, as measured by the worth to class members of the settlement.

This mixed model is structurally similar to models of distributive justice that prefer equal outcomes, but which recognize that opportunities to obtain greater value may justify deviations from equality.[108] In distributive justice theory, the question is how to structure societal institutions that affect the life chances of persons with respect to basic economic interests.[109] Issues of

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[108] Although structurally similar to distributive justice models, the mixed model does not depend on the rationale that class members acting under a "veil of ignorance" would choose a particular mixed model. The individual representation model might be attractive not because of risk aversion on the part of class members, but because it comes closer to replicating judicial outcomes. There would remain the question of whether replicating judicial outcomes is of such importance that it outweighs all interest in promoting settlements, or obtaining value for litigants through privately-structured agreements.

[109] Professor John Rawls argues that persons who did not know how they would fare under such institutions would agree on a rule by which inequalities were justified only to the extent that the worst-off persons would be better off. JOHN RAWLS, A THEORY OF JUSTICE 150–61 (1971). Critics of Rawls suggest that such an extreme form of risk aversion does not make sense, suggesting that a small risk of being worse off would be worth it if there were a

fundamental societal institutions that structure each person's life chances are obviously different from the questions posed by rules that determine how individuals fare in a class action. The stakes are simply not the same. Nonetheless, the class setting lends itself to the basic structural approach of distributive justice theory, which sees each individual as having to balance her interests in obtaining equal and better outcomes.

Borrowing from the terminology of distributive justice theories, the degree to which the interest in a more valuable settlement may justify deviations from potential judicial relief for some class members can be termed a difference principle. If the difference principle is strong, the additional value must be substantial to justify deviations from equal outcomes. If the difference principle is weak, increased aggregate value may more easily justify settlements that provide some class members with less than they might expect to receive from further litigation. The strength of the difference principle depends on how potential class members view the risk of being the ones who will not fare as well in the litigation.

The practical problems of the fairness models that seek to obtain better value for class members provide a reason for preferring a stronger difference principle. Because it is difficult to know whether a settlement is actually leading to better value for the class, deviations from equal returns on legal claims are more difficult to justify. But this does not mean that class counsel should shy away from all opportunities to obtain better aggregate value in the settlement or to accept settlements that leave some class members with less than their "expected" outcome from litigation. To do so would undermine class members' interests in obtaining value for their claims as well as their interest in reducing barriers to class representation.

The strength of the difference principle might also depend on the nature of the claims. If the members of a class are likely to be participants in a large number of class actions, for example, the group of claims could be seen as a portfolio that spreads the individual risk across class actions and, therefore, supports a more risk-neutral approach to the balancing of individual and collective interests in the context of any one class action. If the members of a class are likely to be participants in only a single action involving important legal claims, a heavier weighing of the legal claims seems appropriate.

An additional issue is whether there are aspects of the fairness models that should be considered to be absolutes, as a matter of due process or fairness.[110]

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strong chance of being better off. These critics posit a range of societal structures, in which a utilitarian model follows from risk neutrality, while Rawls' maximin criterion reflects complete risk aversion. *See, e.g.*, SEN, *supra* note 96, at 135–41.

[110] Absolute requirements have a two-edged effect on bargaining on behalf of the class. An absolute requirement will operate to limit the circumstances under which a

One criterion might be that no class member be hurt by the litigation; that is, that the settlement leave the class member in the same position as if there had never been any class litigation at all. This criterion could be specified as requiring, at a minimum, that a settlement exclude those members of the class who do not receive any relief. This specification, however, is probably too strong. When the claims of a portion of the class are quite weak, and the defendant stands to win a judgment against that portion of the class by proceeding with the case, the defendant might reasonably refuse to agree to the exclusion of their claims from the class settlement. In this situation, making exclusion the minimum criterion could bar settlements that are very much in the interest of a large number of class members.

Instead of seeing the minimum criterion as a uniform result for all claims—such as preserving the technical right to sue—the minimum could be geared to the strength of the class members' claims. Viewed from the standpoint of persons who have to consider the risk of no representation at all, there may be circumstances under which the better set of rules at the start of the litigation includes the possibility of no relief on a set of claims. For example, when there is an effort to prove the claim, and the claim proves to be fairly weak, the defendant might insist on settling those claims as a condition of settlement.[111] Although these class members look worse off at the time of settlement—their claims would be precluded, without their receiving any relief—they are nonetheless better off from the standpoint of the start of the litigation, because there has been an effort to prove their claims. Without the possibility of a settlement that would preclude claims that prove insubstantial, such class members might never receive any representation at all and might, therefore, lose out on the chance of proving that their claims were substantial and receiving relief on those claims.

Applied to the *Cuisinart* example, a mixed model would start from the expected judicial outcome, which, in the example, is $15 per class member. Settlements that deviated from that award would be evaluated as trades between the aggregate value of the settlement and the equality of the treatment of class

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settlement can be reached. At the same time, it can give the attorney negotiating the settlement an opportunity to make a credible commitment during the bargaining process. For a discussion of the bargaining implications of being able to make a credible commitment, see ERIC RASMUSSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 85-88 (1989).

[111] In the case law, claims are often described as either strong or frivolous. One might wonder, however, whether the claims of the persons denied relief in *Meyer*, for example, were truly frivolous, or whether they were instead quite weak in the overall scheme of the case. Meyer v. Macmillan Publishing Co., 39 Empl. Prac. Dec. (CCH) ¶ 36,049 (S.D.N.Y. 1986).

members with equal claims. A trade that simply transferred relief from one class member to another with equal claims, which would be permissible under the majority and utilitarian models, would never be allowed under the mixed model. But settlements would be allowed that restructured relief in ways that were, in the aggregate, much more valuable, but that reduced the relief for some class members. How much extra value would be required to permit such inequality of relief would depend on the strength of the difference principle. Under the minimum criteria of the mixed model, no class member could be made worse off as a result of the litigation. In the *Cuisinart* case, this criterion is met even in an all-coupon settlement, because class members are permitted to opt out of the class.

To summarize, each of the models has two basic features. First is a principle that determines the worst result for any member of the class. Second is a principle that determines how settlements are selected within the range of settlements that meet the conditions for the worst-off member of the class. Some of the models are theoretically determinate in the sense that they promise in the abstract to provide an answer as to which settlement is the most fair; others answer whether a settlement is within the range of acceptable settlements. The models are reflected in the following chart:

Model	*Worst Possible Result*	*Principle for Selecting Plan*	*Theoretically Determinate?*
Individual Representation	expected litigated result	unanimity	No
Majority Preference	preclusion of claims	best for a majority of class members	No
Utilitarian	preclusion of claims	aggregate utility	Yes
Mixed Model	not made worse off by litigation	difference principle	Yes

IV. IMPLICATIONS OF THE FAIRNESS MODELS FOR SETTLEMENT NEGOTIATIONS

The choice of fairness model becomes important in many of the decisions class action lawyers face in negotiating a settlement. This section returns to the dilemmas outlined in Part II and explores three common problems raised in class action negotiations. The first is the degree to which a class action attorney should look for ways to trade the expected relief from litigation for alternative forms of relief. The second issue is the permissibility of exploring settlement

possibilities in which the claims of some class members are excluded from the provisions of the settlement. The third issue is the degree to which the attorney should seek out procedures for ensuring that class members learn of the settlement and are able to participate in obtaining relief. With respect to each of these issues, there are different constraints set forth by each fairness model that affect both whether to engage in a line of negotiation, and how class counsel should direct the negotiations.[112]

A. *Negotiating For Alternative Forms of Relief*

An important question in negotiating settlements is whether to negotiate for forms of relief that vary from the predicted judicial relief in the case. This question is important because it determines the degree to which it is profitable for the parties to explore each other's concerns and interests and has significant implications for whether a settlement will be possible. The question for class counsel is whether to pursue the possibility of such alternative forms of relief. This question is answered differently by the different fairness models.

The simplified *Cuisinart* problem set out in the previous section provides a context for looking at the implications of the fairness models for negotiations over alternative forms of relief. The previous section only explored these questions from the standpoint of the class. Negotiations over a settlement, however, turn not only on how the plaintiffs value the options but also on how the defendant views the cost of each possible settlement. Each fairness model has different implications for how the attorney should direct the negotiations as the attorney discovers information about the defendant's cost structure.

Consider the example set forth in the previous section, in which the defendant offers a coupon scheme to settle the *Cuisinart* case. Under the majority model, the choice between a coupon and pursuing litigation would turn on majority preference. As presented in the example, there would be a majority for a coupon, so long as the coupon were over $30. The attorney's job would be to bargain for the most substantial possible coupon.

In the majority model, it does not matter whether the coupon is a non-zero

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[112] To provide concrete illustrations of the implications of the models, this section uses numerical examples. The precision of the numbers should not be understood as meaning that class counsel would ever face such simple arithmetic choices. In all cases, the first step must be to assess whether it is possible to devise a common metric for measuring what gets distributed to whom. As with any mathematical model, there is always the danger of assuming that "[i]f you can't count it, it doesn't exist." Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1361-62 (1971).

sum solution in which the defendant's cost is lower than the value received by the plaintiff. For example, suppose that the defendant's cost associated with each coupon is 75% of its face value, thereby equaling the average value attributed to the coupon by Groups A and B.[113] From the defendant's standpoint, a settlement package of $30 coupons is equivalent to a $15 cash award.[114] Thus, in the majority model, the majority would accept this coupon remedy, even though it does not reflect non-zero sum gains.

In the individual representation model, however, the value of pursuing the coupon scheme depends on whether the defendant's cost structure is such that joint gains can be derived from the coupon scheme and reallocated to ensure that no class member is left worse off than she would be if the case proceeded to a litigated conclusion. If the coupon scheme simply reallocates value from one set of class members to another, it could not be pursued. But if the coupon were a way of reducing the cost of providing relief to some class members, so as to free up resources to provide relief to other class members, it would be acceptable. Under the individual representation model, the attorney would look for ways in which the coupon remedy could be packaged with other remedies so that no class member would be worse off. In the hypothetical, this can be done by giving class members an option between two remedies.[115]

The feasibility of an option as a remedy will turn on the defendant's cost structure. If the defendant's cost associated with the coupon is lower than the value of the coupon to class members, the coupon option will allow for a settlement that meets the criteria of the individual representation model and is better for all members of the class.

Suppose that the defendant's cost estimates for coupons contain three components: administrative costs, a net cost of the coupon, and some assumption about how many people will actually redeem the coupons. If there is an option, the defendant loses all the savings from assuming that some class members will not use the coupons. At the same time, there may be added administrative costs. For example, suppose that a coupon actually costs the defendant 40% of its face value per redeemed coupon. The defendant's

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[113] As the example is set out in the previous section, Group A values the coupon at face value, and Group B values it at 50% of its value, making the per-coupon value for those who would use the coupons 75% of the face value.

[114] The package of $30 coupons costs $22.50 per coupon for 200,000 redeemed coupons, or $4.5 million. This is the same cost as $15 in cash for each of the 300,000 class members.

[115] Other plans that achieve similar results include creating an adequate market for trading coupons, an auction procedure, or a plan in which some class members would pay for coupons with the proceeds distributed to the remainder of the class. *See supra* note 90.

assessment of the costs of the packages, given the same assumptions that the plaintiffs' attorney has about the interests of the plaintiff class and excluding administrative costs, might look as follows:

Settlement Package	*Cash Value: Group A*	*Cash Value: Group B*	*Cash Value: Group C*	*Defendant's Cost:*[116]
$56.25 Coupon	$56.25	$28.12	$0	200,000 x $22.50 = $4.5 million
$15 Cash	$15	$15	$15	300,000 x $15 = $4.5 million
$37.50 Coupon or $15 Cash	$37.50	$18.75	$15	(200,000 x $15) + (100,000 x $15) = $4.5 million

Under the individual representation model, the attorney would pursue an option plan, ensuring that the cash option was at least $15. Because of the cost savings generated by the non-zero sum aspects of the package, the attorney could look for a higher cash or coupon value to yield a package that was equivalent to the cost the defendant faced in pursuing the litigation. Under this set of assumptions about the defendant's cost structure, the attorney could seek a package of $15 cash or a $37.50 coupon, or of $17 cash or a $35 coupon. The individual representation model does not provide a method for choosing among these packages.

Under the individual representation model, the coupon option may provide a better solution for the class even if there are costs associated with the administration of an option. So long as these costs are smaller than the surplus created by the spread between the defendant's costs and the plaintiff's value, it will be worth it to pay these costs so as to get a better deal for some members of the class than would be provided under a litigated solution. If there are insufficient savings under the defendant's cost structure, however, to pay for the administrative costs of an option plan, the individual representation model suggests that there is no point in pursuing the coupon remedy at all.

Altogether, the individual representation model tells the attorney that, faced with a tradeoff between the amount of the cash option and the face value of the

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[116] In this example, the defendant's cost depends on the number of class members who will use the coupons or the cash, and the cost of those forms of relief, or: *(number of class members using coupons) x (40% of the face value of the coupons) + (number receiving cash) x (amount of the cash award).* Each package is designed to cost the defendant the same amount of money.

coupon, the cash option must be raised to $15. The model further tells the attorney that if there is little chance at a cash option, for example, if the option scheme, or its equivalent, is administratively expensive, there is no point in pursuing the coupon proposal.

Under a very simple utilitarian model, where cash value is used as a measure of utility, the all-coupon plan would be chosen. This plan creates the greatest aggregate cash value for the class for each dollar of cost to the defendant.[117] The transfers among members of the class that result from some getting high value from coupons while others receive what they view as meaningless relief are of no moment.

The message for the negotiator changes if one adopts a more complex utilitarian model where cash is assumed to have a decreasing marginal value. Under such a model, either the option or an all-cash plan might be preferred to an all-coupon plan, depending on the defendant's cost structure and the particular assumptions about the structure of the utility function for the members of the class. To illustrate, a utility function in which utility is the square root of the cash value[118] will yield the conclusion that the option of a $37.50 coupon or $15 in cash is preferable to the $56.25 coupon, but that both are better than the $15 cash award. [119]

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[117] If utility is equal to cash value, $1.00 of coupon cost to the defendant converts to $2.50 in utility to persons in Group A and $1.25 to those in Group B. Each dollar that goes to the cash option, however, only produces a dollar of utility. Thus, for any aggregate cost that the defendant will pay on a settlement, the all-coupon scheme will produce a higher aggregate "utility."

[118] The square root function is often used as an easy example of a utility function where cash has decreasing marginal value.

[119] If utility is set as the square root of cash value, then the utility value of the $56.25 coupon would be 7.5 for persons in Group A; the utility would be 5.3 for those in Group B. For the $37.50 coupon, the utility would be 6.1 for persons in Group A and 4.3 for those in Group B. The $15 cash award would have a utility of 3.9. The total utility of the packages for the 300,000 class members would be 1.28 million "utils" for the $56.25 coupon; 1.43 million for the $37.50 coupon and $15 cash option; and 1.17 million for the $15 cash award. The option package has the highest value.

These results depend on how much of a surplus is created by the non-zero sum qualities of the coupon plan. If the defendant's cost structure meant that coupons cost 20% of their face value, for example, the all-coupon plan would be chosen. Three nearly equivalent packages from the defendant's standpoint would be (1) an option package with a $60 coupon and a $20 cash option, which would cost *(.2)($60)(200,000) + ($20)(100,000) = $4.4 million*; (2) an all-coupon plan with a $110 coupon, which would cost *(.2)($110)(200,000) = $4.4 million*; or (3) the fixed cash award of $15, which would cost $4.5 million. In this example, the all-coupon procedure would yield a somewhat higher

In the mixed model, the starting point is the expected court outcome of $15 of value for every class member. The question then is whether the alternative settlements that can be bargained for with the defendant are preferable in terms of the tradeoff of equal vindication of equal claims and obtaining the best overall value of relief. One alternative is the all-coupon remedy. An all-coupon remedy costing the defendant the same as the $15 cash award is a coupon of $56.25.[120] Another alternative is an option plan with a cash option of $15 and a coupon option of $37.50. The option plan provides a more equal outcome at a loss of some aggregate cash value to the class as a whole. In a mixed model with a strong difference principle, the option plan would be preferred.

If an option plan were impossible—for example, if the administrative costs of the option plan made it infeasible, or if the defendant were unwilling to consider the option plan or a cash award—the models give different directions to class counsel on whether to continue to pursue alternative forms of relief. The defendant may have reasons why it will only consider the coupon plan in settling the case, or it may insist on one of a few non-cash options, each of which presents the problem that it provides a form of relief that is of no value to some class members.[121] In this situation, the simple utilitarian model would allow the attorney to settle for coupons over $30, with the rest of the class receiving nothing, while the individual representation model would preclude a settlement altogether.[122] The mixed model would look to how much was gained for the members of the class who valued coupons and would weigh it against the fact that other class members were left with nothing more than their right to opt out. Whether an all-coupon plan would be permissible would depend on how valuable the coupon appeared and the weight given to equality of outcome.

These examples suggest that the class attorney may have an obligation to pursue creative remedies that exploit non-zero sum thinking under all of the fairness models, but that the degree to which plaintiff representatives should explore such solutions depends on the nature of the defendant's cost structure.

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aggregate utility score than the option, even using the square root function to measure utility.

[120] The $15 cash award settlement costs the defendant $4.5 million. For the same sum, the defendant could pay for 200,000 coupons with a face value of $56.25 and an actual cost to the defendant of 40% of that amount, or $22.50.

[121] For example, the coupon might be seen as less of a concession of wrongdoing, or might present major tax advantages.

[122] The value of the settlement to the class under the simple dollar equal utility model would be *($30)(100,000) + ($15)(100,000)* or $4.5 million, which is equal to the expected value of litigating. Under the more complex utility function, in which utility is the square root of cash value, settlement would be permissible for coupons over $46.

If there is sufficient room for creating a surplus, which can then be distributed to other members of the class, pursuit of the coupon option makes sense in the individual representation model. If there is not a great deal of room for creating and distributing a surplus, such as where the administrative cost of an option is prohibitive, discussions of the coupon plan only make sense in the utilitarian and majority models or in a mixed model that does not employ a strong difference principle.

A less numerical illustration of the interface of non-zero sum bargaining and fairness models is illustrated by the recent settlement of the litigation in *Stieberger v. Sullivan.*[123] In *Stieberger,* plaintiffs challenged the Social Security Administration's system of nonacquiescence in decisions of the courts of appeals.[124] The district court issued a decision on motions for summary judgment, largely finding for the plaintiffs on issues of liability, but requesting further submissions regarding possible remedies.[125] In doing so, the court questioned the feasibility of relief, thereby raising doubts about what relief might be ordered if the case proceeded with litigation. In the settlement, the parties were able to settle for partial monetary relief for groups of class members for whom the court had ruled favorably on liability, thereby avoiding further litigation and limiting further delay in the provision of relief to members of the class.[126]

One of the issues that arose in negotiations concerned the time period for which the agency would re-evaluate disability. Had the case gone forward in

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[123] 801 F. Supp. 1079 (S.D.N.Y. 1992). The author served as one of the counsel for the plaintiffs in the *Stieberger* litigation.

[124] The *Stieberger* litigation challenged intracircuit nonacquiescence, which is the policy or practice of an administrative agency to refuse to follow the governing law of the circuit that will hear cases on review from the decisions of the agency. The litigation focused on the Social Security Administration's failure to instruct adjudicators to abide by circuit case law in adjudicating the claims of New York residents. Stieberger v. Sullivan, 738 F. Supp. 716 (S.D.N.Y. 1990). For a general discussion of the legality of nonacquiescence, see Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies,* 98 YALE L.J. 679 (1989); Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz,* 99 YALE L.J. 801 (1990).

[125] *Stieberger,* 738 F. Supp. at 758–60.

[126] The retroactive relief portion of the settlement provides for readjudication of benefit eligibility for all class members whose cases were decided between October 1981 and October 1985, and for readjudication for those whose cases reached the hearing stage between October 1985 and June 1992. The settlement places a cap of about four and a half years on the number of years of retroactive eligibility. *See Stieberger,* 801 F. Supp. at 1091–92.

court, and if the court had ordered reopenings, it is likely that the court would have ordered that disability be re-evaluated starting at the time of the denial of the class members' claims. The court might have ordered re-evaluation of class members' disability for the entire period since their claims were denied or might have ordered re-evaluations only for the time period covered by the prior denial.[127]

The non-zero sum solution that emerged in the negotiations was to provide that the readjudications generally would focus on the most recent four years of the retroactive period. This solution meant that defendants were spared development of old evidence and the obligation to retrieve files that would be difficult to locate. The solution also had advantages for most class members. As a rule, class members would be advantaged by having the re-evaluation of their disabilities made for more recent years. This is because the agency's standards for evaluating disability explicitly take age into account and because disabilities tend to become more debilitating over time. Class members whose conditions had improved, however, would not be advantaged by looking at more recent years. The settlement took account of those class members by providing that earlier years would be reviewed for those persons who alleged that their conditions had improved.[128] From the standpoint of these class members, this solution was less advantageous than a system that would automatically look at the earlier years;[129] it was clearly better, however, than a solution that did not have an exception for those whose conditions had improved.

The question posed by the fairness models is whether the settlement's focus on the recent years was appropriate and, if so, whether the exception or other measures were required to accommodate the differing interests of the members of the class. From a fairness standpoint, the class can be thought of as including two groups—those who improved and those who did not. Viewed

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[127] Some courts have limited relief in social security cases to a re-evaluation of eligibility during the time period that was considered during the prior application. *See, e.g.*, New York v. Sullivan, 906 F.2d 910, 919 (2d Cir. 1990). Others have ordered that readjudications consider disability during both the time period covered by the prior denial and the period ending with the date of the readjudication. *See, e.g.*, Johnson v. Sullivan, 922 F.2d 346, 356–57 (7th Cir. 1990).

[128] For purposes of this illustration, the terms of the settlement have been somewhat simplified.

[129] A system that looked at the earlier years would have been better for these class members because they would have been spared the evaluation whether the exception applied to their cases. As with any procedural hurdle, these class members would have been better off simply proving their past disability.

solely in terms of the choice of years for evaluating disability, this set of provisions helped one subgroup—those who had deteriorated—more than the other subgroup—those who had improved. Under a majority model, there would be no problem at all with the solution, so long as it benefited most class members. There would be no need for an alternative methodology for those whose conditions had improved. Under the individual representation model, the decision to look at the more recent years would only be permissible if the overall settlement package left class members whose conditions had improved in a better situation than they would have been if the case had proceeded with litigation. This standard might have been met in light of the risks of litigation, but only because of the safeguard that provided class members who had improved with an alternative way of proving their disability for the earlier time periods.[130] Under the mixed model, the imposition of some cost on a segment of the class could be justified by the substantial benefit to the remainder of the class. This trade-off was not only permissible, but perhaps required to obtain the best possible settlement for the class.

B. *Exclusion or Preclusion of Some Claims*

Another issue that frequently arises in class settlements is whether it is legitimate to settle a class action in a way that provides no relief to a portion of the class, either by excluding some class members or claims from the settlement or by providing that those class members will not be entitled to relief.[131] This issue generally arises in a context in which the discovery in the case, or developments in the law since the filing of the case, result in a substantial disparity in the strength of the class members' claims. There may be proof problems that apply to some members of the class, but not others; there may be issues related to the appropriate legal standard that apply only to some members of the class; there may be statute of limitations questions that place greater doubt on the claims of members of the class whose claims arose earlier.

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[130] In the particular context of the *Stieberger* settlement, the provision probably would meet the test of the individual representation model. Although the court might have ordered retrieval of the old records and reopening of all of the old claims, it also might have found that the administrative burden of the relief was too great in the context of that case. At the same time, reduction of the administrative burden through the focus on more recent years was probably crucial to reaching a settlement with the defendant. By making a settlement possible, the provision that required class members who had improved to meet an extra requirement was probably a better deal for these class members than proceeding with litigation. Stieberger v. Sullivan, 801 F. Supp. 1079 (S.D.N.Y. 1992).

[131] *See* text accompanying notes 62–65.

Sometimes these differences in legal claims will provide grounds for subclassing or altering the definition of the class. But the more these issues relate to the proof as it develops during the litigation, the less likely it is that the class definition will circumvent the problem.

Consider the following example: a class action is brought challenging a policy of the Social Security Administration. The proposed class includes persons whose claims arose up to two years prior to the filing of the action. Relief depends on three issues: proving that the practice existed; establishing that the practice was illegal if it existed; and, for those whose claims arose more than sixty days prior to filing, proving that the statute of limitations should be tolled.[132] All class members face the common issue of the legality of the challenged policy. All class members whose claims arose more than sixty days prior to filing face the statute of limitations issue. Based on the documents in the case, only those class members whose claims arose more than one year prior to filing face any problem in proving that the policy existed. These proof issues mean that there are three possible start dates for relief to the class: one that begins 60 days prior to filing; one that extends one year prior to filing; and a third that extends back for two years. The attorney for the class estimates that the probability of success on the merits is 60%; the probability of success on the tolling issue is 80%; and the probability of success on establishing the existence of the practice in the period one to two years prior to the filing date is 50%. The estimated expectation of success for the three groups is as follows:

	Probability of success in proving the practice	*Probability of success in proving illegality*	*Probability of success on tolling*	*Overall expected probability of success*
Group A: within 60 days	1.00	.60	NA	.60
Group B: within one year	1.00	.60	.80	.48
Group C: within two years	.50	.60	.80	.24

The parties begin to discuss settlement. The defendants indicate that they are willing to offer a fairly attractive settlement on the merits of the challenged

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[132] For examples of litigation that raised such issues, see New York v. Sullivan, 906 F.2d 910 (2d Cir. 1990); Hyatt v. Sullivan, 899 F.2d 329 (4th Cir. 1990); Dixon v. Sullivan, 792 F. Supp. 942 (S.D.N.Y. 1992); Stieberger v. Sullivan, 738 F. Supp. 716 (S.D.N.Y. 1990); Hill v. Sullivan, 125 F.R.D. 86 (S.D.N.Y. 1989).

policy. From their perspective, there is an advantage to settling the case and avoiding establishment of precedent on the challenged policy. They are reluctant, however, to agree to open up claims that they view as being untimely. They, therefore, take the position that they will provide relief to those in Group A but are unwilling to extend relief to persons in Groups B and C, whose claims arose more than 60 days prior to the filing date.

What should the plaintiffs' attorney do? One approach is to negotiate to get relief for everyone in the class. If the defendant is truly worried about establishing precedent, or has a strong interest in avoiding costs associated with litigation, this might be an achievable settlement. But what if the defendant is unwilling to agree to such a settlement? How should the plaintiffs' attorney think of her settlement range and her bottom line obligations to the class?

One option is to agree to limit relief to some members of the class but insist on excluding those persons who will not receive relief. The plaintiffs' attorney could have a bottom line that accepts the settlement if it includes Group B and excludes Group C; or could have a bottom line that would accept the settlement as offered by the defendant, so long as it excludes Groups B and C. These solutions would, in effect, serve as opt-out mechanisms that ensure all class members the technical right to sue in a separate proceeding.[133] Again, the fairness models provide different answers as to whether such a solution is acceptable and as to how inclusive the settlement must be for exclusion of some class members' claims to be appropriate. In thinking about a settlement that simply preserves the right to sue for some class members, the plaintiffs' attorney knows that it is unlikely that any class member will be able to get separate representation, especially in time to meet a short statute of limitations. On the other hand, a bottom line that does not permit settlements that exclude some class members might mean giving up a settlement that would offer immediate tangible relief to all of the class members who are included. Rejecting the settlement involves subjecting these class members to at least a 40% risk of losing.

The fairness models provide different guidance for the negotiator. The majority model would require that the settlement be better for a majority of the members of the class than the alternative of proceeding with the litigation. The permissibility of exclusion would, therefore, depend on the number of class members in each group. A settlement that would allow a majority to obtain relief would be acceptable. If each group is composed of one-third of the class, for example, the settlement would only be acceptable if it included two of the

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[133] Excluded class members would also enjoy the benefit of the changed policy on a prospective basis.

groups. If Group A makes up more than half of the class, the majority model would allow a settlement that excludes both Groups B and C.[134]

For a utilitarian analysis, several pieces of information are needed. First, what is the common metric? Is it a question of numbers of people, of dollars that would be paid, or the likelihood of being found eligible for benefits? If there are no important differences within the three groups in their distribution of these characteristics, these questions will not matter. For example, there may be an equal likelihood that a claimant in any of the three groups will be able to prove her eligibility for benefits. If that is the case, it does not matter whether one looks at number of people or number of claims that are likely to win. There may, however, be significant variations in how the three groups break out in terms of different metrics. For example, looking at dollars would result in greater weight being placed on those with earlier claims who have more years of benefits at stake, unless there were reason to think that the earlier claims would be harder to prove.[135]

In addition to the choice of metric, the results of the utilitarian model will depend on the number of people who belong to each group. The larger the size of the group that will be excluded, the greater the aggregate benefit of providing that group with some chance of relief by going forward in court, and the less likely that the settlement will be approved as improving utility.[136]

The individual representation model looks at whether the members of the group would all agree to the settlement. This model would tell the attorney not

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[134] Because the group subject to readjudication often grows with time, the post-filing group will become larger and larger as the case progresses. This group is only limited if the defendant changes the challenged practice prior to a settlement of the entire case.

[135] If the challenged practice took a weaker form in the earlier years, it might have been less likely to result in an erroneous decision on a class member's claim. In this situation, there would be less of an expectation of a different result on readjudication.

[136] For example, suppose that the common metric is simply the number of claims that will be subject to readjudication, that Group A includes 20% of the class, and that Groups B and C each include 40% of the class. To determine the expected value of litigation, these weights must be applied to the expected probability of success for the three subgroups in the Table, *see infra* p.55. The overall expected value of litigation would be *(.2)(.6) + (.4)(.48) + (.4)(.24) = .408*. The value of a settlement limited to Group A is .2; the value of a settlement limited to Groups A and B is .6. Under these assumptions about group size and the number of persons as the common metric, the utilitarian model would reject the settlement that is limited to Group A, but accept one that includes Groups A and B. These results are the same whether or not the persons excluded from relief are also excluded from the settlement, because the utilitarian model would place negligible value on the right to litigate if it were in fact very unlikely that the excluded class members could litigate on their own.

to pursue negotiations unless there was a possibility of getting the defendant to agree to relief for all members of the class. The amount of relief required for each group, however, could depend on the likelihood of success. Thus, a settlement that was more favorable to Group A than to Groups B and C would be permissible; a settlement that excluded any group from relief, however, would not be permissible.

The mixed model would treat the exclusion of the claims of some class members as tolerable if it resulted in sufficient advantage for other members of the class. Exclusion of claims meets the minimum criterion of the mixed model by providing that no class member is technically worse off than she would have been in the absence of the litigation. But in addition to this minimum criterion, the mixed model asks whether the deviations from the expected outcome for the different groups of class members are permissible because of the overall value of the settlement. With respect to this question, the members of the class are in somewhat different positions. Those in Group A have the greatest likelihood of success, making it hardest to justify their exclusion from the class. Those in Group C, in contrast, have a fairly low overall likelihood of success from the litigation. While they would nonetheless be better off with continued litigation than with exclusion from the suit, it would be less difficult to justify their exclusion from relief. Under the mixed model, the question would be whether the overall value obtained for the remaining members of the class through the settlement is adequate to justify denying those in the last group the chance of vindicating their claims through litigation. The mixed model thus differs from all of the other models in its implications for the class action negotiator. Exclusion of class members is neither an easy option, as in the utilitarian and majority models, nor is it off the table, as in the individual representation model. Instead, it remains an option, but one to be undertaken reluctantly and with attention to the relative strength of the claims of class members.

C. *Negotiations Over Procedures for Including Class Members*

Although all persons who are included in a class definition are theoretically parties to the class action lawsuit, the group that will actually receive relief is determined by the quality and extent of the procedures for receiving relief. In a negotiation over a class action settlement, the parties will face a variety of choices about these procedures. These choices include the quality of notices to class members, the degree of follow-up efforts to reach class members who do not respond to a notice, efforts to track down class members who have moved,

and the type of hurdles class members must overcome to share in the relief.[137] Each of these choices can affect the administrative costs of the settlement. Whether the defendant or the plaintiff attorney directly bears these administrative costs, they will affect the total cost of the settlement and can, therefore, be expected to affect the total size of the recovery that reaches the members of the class, as well as the number of class members who share in that recovery.[138] In drafting a settlement, the class action attorney must determine how much weight to place on such procedures and how much to value marginal procedures.[139]

An initial question in considering this problem is whether to think of the class members as knowing that they will be the beneficiaries of the more inclusive procedures. In actual class action negotiations, these issues arise sometimes when the groups are very identifiable, and sometimes when they are not identifiable. For example, a decision to extend the deadline for submitting claims could arise at a time when some members of the class were very aware of the case, and could meet any deadline, while others were less aware of the proceedings. For those who were already situated to participate in relief, extension of the deadline for submitting claims has the effect of reducing their own awards. In other cases, procedures will be considered at a time when the

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[137] Attorney time devoted to efforts to track down class members could also be included in this list of procedures. Fees for such attorney time often come out of the aggregate settlement fund, either directly or indirectly, and are paid for by the entire class.

[138] In cases of a settlement fund that is administered by plaintiff counsel, these amounts are taken directly from the fund. When the defendant bears the administrative costs, as in cases requiring government defendants to readjudicate cases, administrative costs of finding class members may bear on the generosity of other aspects of the settlement. Regardless of who bears these costs, they will affect the overall bargaining calculus of the parties.

[139] Procedures to include class members in relief are related to the issue of adequate notice to class members of the pendency of an action. In Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985), the Supreme Court suggested that direct-mail notice to all class members is constitutionally required in all cases brought under Rule 23(b)(3). *Shutts* has been criticized for requiring an uneconomical level of notice for class actions involving small claims. *See, e.g.*, Macey & Miller, *supra* note 10, at 29–31. The issue raised in the text concerns notice at the conclusion of litigation, which is often the only notice class members receive. *See id.* at 31. Even if courts require the level of notice required in *Shutts*, that notice is far from all the notice efforts one could take to ensure that class members understand their rights under the class action. Many procedures can be added to direct-mail notice, including follow-up mailings, computer cross-checking for addresses, newspaper notice, and so forth. Thus, regardless of the scope of procedures required by the court, the attorney faces the question of whether to seek better notice and better procedures.

groups that will benefit by the procedures are less identifiable. For example, the decision to draft a more comprehensible notice will affect participation, but there is no way to identify those who will benefit by the notice. Similarly, procedures to resolve disputes over class membership will benefit those whose membership is disputed, a group that may be difficult to identify in advance.

If class members are thought of as knowing whether they will be the beneficiaries of the more inclusive procedures, the models give very different directions to the class action negotiator. Consider, for example, the situation in which there is a fixed settlement fund, and the question is whether to extend the deadline to participate in the fund. Suppose that the class is composed of 10,000 people who have equal-sized claims. The parties have settled on a fund of $2 million. The share to each class member will be computed after class members submit their claims and there is an accurate count of how many persons are participating in the settlement. If there are no administrative expenses, participation by 5,000 class members would yield a per-person award of $400. Participation by all 10,000 would yield a per-person award of $200. Part of the class has been actively following the case, has probably put together their documents for claiming membership in the class, and would have little trouble meeting any deadline for submitting claims. Class counsel has reason to believe that there is an additional group of class members who have not been following the case closely, and who would need some amount of time to assess whether they are members of the class and put together necessary documents. The question is whether to choose a longer or shorter time period for submitting claims.

If members of the class know whether they are the ones who will benefit from the longer deadline, the models provide different directions to class counsel. Under a majority model, if the group that can meet a short deadline makes up a majority of the class, it will not benefit from the extension of the deadline. On the contrary, extension of the deadline will reduce the award to these class members, because they will have to share the fund with a larger group. Thus, even if there were no cost for the procedure that extends relief, it would not be adopted. In the individual representation model, those who knew that they would be excluded by the shorter deadline would insist on the extended deadline as a condition of settlement. These class members would insist on the longer deadline no matter how much it cost, because their alternative is to be left out of the settlement. The results of the utilitarian and mixed models, in contrast, depend on the cost of the additional procedures. In a utilitarian model, if there is decreasing marginal utility and the extension is cost-free, the extended deadline would be approved. This model would always adopt the cost-free procedures for expanding the group that receives relief, regardless of whether there was already a majority enjoying relief. If the

extended deadline came at a cost, the results of the model would depend on a comparison of that cost with the marginal value of including additional class members in the relief. The results of the mixed model are similar, except that a greater premium is placed on obtaining equal results for the members of the class who have equally strong claims. While equality is valued through the backdoor of assuming decreasing marginal utility in the utilitarian model, it is an express purpose and objective of the mixed model.

If the class members do not know who will benefit from the procedures, the models come closer together. The individual interest becomes much more indistinguishable from the majority interest or the interest of the collectivity under a utilitarian model. Both the individual and the majority, for example, are potential beneficiaries of procedures to include larger numbers in the relief; both are potential losers with respect to costly procedures to track down class members. How much to spend on procedures that make the settlement more inclusive becomes a matter of risk aversion.

If increased procedural protection is cost-free, all of the fairness models either support the increased procedures or are indifferent to them. In the majority model, all class members are in the same position and a majority will support the cost-free procedures if they are at all risk-averse. Similarly, in the utilitarian model, any utility function in which there is a declining marginal utility for cash will support the more equal distribution. The individual representation model will track these results, because the individual knows nothing about his or her chances of participating that differ from the situation of the rest of the group. Finally, the mixed model will prefer the cost-free procedures that enhance participation, because they improve the equality of the settlement at no aggregate cost.

When the procedures will take away from the funds available to the class, the issue becomes more complicated. The attorney can begin by ranking the various procedures that could enhance class participation rates according to their cost effectiveness in allowing more class members to participate. The question then is how far to go in expending the general fund for the class on enhanced participation in the proceeds of the settlement.

Returning to the earlier example, in which there is a fixed-settlement fund of $2 million with a class of 10,000, suppose that the attorney faces an array of procedures that will affect participation rates in the settlement. Plan A costs $100,000 and will result in a 75% participation rate. Plan B combines plan A with an additional procedure of follow-up notices which will cost another $50,000 and will result in a total participation rate of 80%. Plan C adds a third procedure that would cost another $75,000 and increase the participation rate to 85%. Plan D adds a fourth procedure that costs an additional $125,000 and would increase participation rates to 90%. Assume that courts would not order

the three additional procedures and the attorney must evaluate whether to pursue them. What should the attorney do?

A first step for the attorney is to evaluate the implications of the alternative plans. With Plan A, a class member has a 75% chance of receiving *(1.9 million)/(7,500).*[140] With Plan B, the class member has an 80% chance of receiving *(1.85 million)/(8,000).* With Plan C, the class member has an 85% chance of receiving *(1.775 million)/(8,500).* With Plan D, a class member has a 90% chance of receiving *(1.65 million)/(9,000).* The participation rates, the amount of the award, and the expected return are set forth in the following chart:

Plan	*Participation Rate*	*Amount per Participant*	*Expected Return*
A	.75	$253	$190
B	.80	$231	$185
C	.85	$209	$178
D	.90	$183	$165

The models are somewhat tricky to apply to this example, because the class members would not know whether they would be the beneficiaries of each of these procedures. The class members would know, however, what their own tolerances were for the risk of being excluded from a settlement. Each additional procedure decreases the expected return for members of the class, because each procedure is assumed to have some cost. At the same time, each procedure improves a class member's likelihood of participating in the relief. If a class member is very risk-averse, she would prefer very extensive procedures, even though they reduced her expected return. If she were risk-neutral, she would not benefit from any expenditure on these procedures.

Under a majority model, the degree of procedural protection would depend on the majority's tolerance for the risk of being excluded from the settlement fund. Unlike the operation of the majority model in the other examples, the majority does not act simply to transfer benefits from one group to another. Instead, it sets a standard for a reasonable level of procedural protection that may or may not actually benefit the members of the majority.

The results of the utilitarian model depend on the choice of utility function. If utility is measured simply in dollars, the additional procedures would not be justified, because they would deduct from the dollars that could otherwise be

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[140] For each plan, the payment to a member of a class is determined by subtracting the administrative expenses from the fund and dividing the remaining amount by the number of participants.

devoted to the class. Changing the distribution of the dollars would not make a difference. If the utility function attributes a smaller utility as the number of dollars increases, the result depends on the precise utility function. In this example, if utility is measured by the square root function, Plan C would be chosen.[141]

The individual representation model is less solicitous of expansive procedures, because the risk-averse class members must consider both their interest in promoting settlement and their interest in expansive procedures. As the problem is specified, a court would be unlikely to insist on anything more than Plan A. For those class members who are risk-neutral, this is the best plan, because it gives them the highest expected return. They would, therefore, be worse off under a plan that decreased their expected return so as to increase participation rates and would not favor a settlement that devoted part of the settlement fund to such procedures. Other class members would prefer the additional procedures, with the most risk-averse preferring all of the procedures in Plan D. The very risk-averse class members, however, will also generally prefer settlement, because it reduces the risk associated with litigation. The very risk-averse class members are, therefore, not in a position to veto a settlement that provides reduced risk of litigation together with less-inclusive procedures for obtaining relief. Under the individual representation model, which allows a party to veto a comprehensive settlement, their interests would give way to the right of the risk-neutral class members to insist on the expected value of pursuing litigation. As long as it is reasonable to see some class members as risk-neutral, extra procedural protections beyond what a court would order will never be justified under the individual representation model.[142]

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[141] Using the square root function, in which utility is the square root of the expected return, the utility of each plan would be as follows:

Plan	*Participants*	*Amount*	*Utility*	*Total Utility*
A	7,500	$253	15.9	119,295
B	8,000	$231	15.2	121,589
C	8,500	$209	14.5	122,883
D	9,000	$183	13.5	121,750

[142] If the example were changed so that the expectation was that the court would adopt Plan D, should it rule for the plaintiffs, the problem becomes more complex. Although the risk-averse class members prefer Plan D in terms of methods of notifying class members, their risk aversion will also make them support settlements as compared to litigation. The mixture of issues—whether to settle and on what terms to settle—would make it difficult for

Under the mixed model, the attorney begins by looking at what the court would order. The question then is whether it is possible to achieve a better result in terms of the trade-off between equality goals and the goal of obtaining a good aggregate result for the class. Because the additional procedures serve the objective of a more equal outcome, the question becomes whether they do so at too high a cost. In the example, an additional $125,000 is being spent to yield participation by the last 500 class members, or $250 per class member. The mixed model calls for some judgment about whether these costs are too high to justify the change in participation rates. Once again, the mixed model looks directly at the trade-off between equality and the class members' expected return from the settlement and asks whether the improved chance of participation is adequate compensation for the reduction in the expected return.

V. CONCLUSION

The myriad questions class attorneys face in formulating negotiation plans cannot be answered without some substantive theory of what it means for a settlement to be more fair or less fair. That means that attorneys who represent classes must confront directly the question of what theory they believe best meets their obligation to be fair representatives. They cannot hide behind the idea that traditional notions of client-driven lawyering will provide the answers.

The models of fairness presented in this Article show that the fairness question must be addressed up front in the formulation of a negotiation strategy. Under some conceptions of fairness, remedial packages that depart from predicted judicial solutions will be permissible only to the extent that they can be expected to generate a surplus that can be reallocated to other alternative remedies. Under other conceptions of fairness, in contrast, such packages are highly favored and should be pursued actively by counsel attempting to obtain the best possible settlement for the class. Without a clear conception of what overarching scheme controls fairness, the attorney cannot negotiate intelligently for the best settlement for the class.

This Article argues that the better conception of fairness is one that combines aspects of the individual representation and utilitarian models. Because the class action is a judicially-created institution to remedy legally-defined claims, the class members' expected remedies in court create a benchmark against which a settlement must be judged. At the same time, all

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them to object to a particular settlement. This is an example of how the individual representation model is indeterminate. The less risk-averse class members prefer Plans A and B to litigation, while the more risk-averse class members prefer a settlement with any of the four plans. The individual representation model would tell us that Plans C and D are ruled out, but it does not tell us whether A or B would be the bargained-for plan.

persons who rely on class litigation to pursue their claims depend on a system of settlement rules that will not prove prohibitive to the process of settling class litigation and thereby create a hurdle to the provision of resources to litigate their claims. All class members also share an interest in obtaining settlements that are of real value to the members of the class. The mixed model balances these interests by allowing settlements to go forward in circumstances in which some class members might prefer to take their chances on a litigated outcome of the case. It recognizes that the interests that can divide class members at the time of settlement mask the underlying bond that they share in the availability of the class mechanism to vindicate their claims.

Regardless of which model is considered appropriate, those negotiating class action settlements need to think about what overarching model of fairness they are pursuing as class representatives. The fairness model will determine how different settlements stack up against each other, and will, therefore, determine how attorneys develop and execute their negotiation strategies. Without a framework for evaluating different settlement packages, it is impossible for the class lawyer to know whether to pursue the possibility of settlement and what kind of settlement to seek. It is impossible to assess the value of as basic a tool of negotiation theory as exploring the underlying interests and concerns of the parties, let alone to determine what information to seek about those interests. Although there is, no doubt, debate as to which model best fits our understanding of what it means to be a fair class representative, each model provides some way of approaching the particular dilemmas that appear in the course of litigation. Thinking about which conception class representatives should try to meet can only improve the quality of representation that class members receive.