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CONFLICTS, CONSENT, AND ALLOCATION AFTER *AMCHEM PRODUCTS*—OR, WHY ATTORNEYS STILL NEED CONSENT TO GIVE AWAY THEIR CLIENTS' MONEY¹

John C. Coffee, Jr.*

INTRODUCTION

If it was the goal of Silver and Baker to write a provocative article, they have succeeded. They ask probing questions; they are appropriately scornful of superficial answers; and they seek to relate their view of legal ethics to what they perceive to be the prevailing standards in the legal marketplace. All this is good. They also usefully focus on an underappreciated dichotomy: the ethical rules governing aggregated settlements in consensual litigation versus the rules applicable in aggregated nonconsensual litigation (i.e., class actions). Essentially, they argue that the rules in both contexts should be the same or very similar, the nonconsensual context of class actions does not distinguish it sharply from consensual litigation, and the role of consent has been overstated in both contexts.

It is only the third of these propositions that is truly heretical. Today, the conventional wisdom draws a sharp distinction between these two contexts: When consent is given by each client, the attorney who represents multiple clients in consensual litigation can make allocative decisions, but otherwise the attorney cannot represent clients with conflicting interests in either context (i.e., consensual or nonconsensual litigation).¹ In reality, Silver and Baker want to reduce the role of consent in both contexts, downsizing the required disclosure in the consensual context and permitting the plaintiffs' attorney in nonconsensual litigation to allocate the settlement among the class members as the attorney deems just. At the outset, these proposals raise a core question of accountability: Why should society wish to restrict individual autonomy and substitute a paternalistic regime under which attorneys (or courts) make allocative decisions among clients? As believers in free markets, Silver and Baker do not normally start from the premise that attorneys (or courts) better understand the interests of their clients than do the clients

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¹ See Model Rules of Professional Conduct Rule 1.8(g) (1997). For an important decision enforcing this rule, see *Hayes v. Eagle-Picher Indus.*, 513 F.2d 892 (10th Cir. 1975). It should be noted that *Hayes* is equivocal as to whether this rule (or its underlying principles) applies in class actions, noting instead that "it is essential that the final settlement be subject to the client's ratification *particularly in a non-class action*." *Id.* at 895 (emphasis added).

themselves. Why then do they think that client autonomy should be subordinated, and conflicts of interest ignored, in this context?

Their formal answer is, as I understand it, that clients are content to authorize attorneys to make these decisions for them in contexts that are so closely related to the class action context that the latter should not stand apart as a special case. Even if this were true (and I consider it at best a very partial truth), clients have still only so authorized attorneys that they personally knew and retained to make such decisions. It is a major leap to move from these examples to the conclusion that rational clients would similarly authorize attorneys who were self-appointed and subject to more severe conflicts of interest. To be sure, Silver and Baker tend to doubt that the conflict of interests problem is serious at the allocation stage. I disagree and find the lack of institutional detail included in their description of this world of nonconsensual litigation to be symptomatic. Although their article certainly shows that its authors have had real-world experience (and I have been involved on the same side as Silver in many of the cases that he cites), it presents only a slim and stylized account of the allocation process in class actions. Based on this account, Silver and Baker argue that because plaintiffs' attorneys are not beset by significant conflicts of interest at the allocation stage, courts should defer to their allocative decisions as presumptively reasonable. I think the reverse is true: The problem of conflicts may well be worse at the allocation stage than at the earlier settlement negotiation stage because plaintiffs' attorneys have little economic incentive to make a "fair" allocation, whereas they generally have a strong economic incentive to maximize the size of the settlement fund. Thus, to the extent that one distinguishes the settlement stage (at which the adversaries negotiate the size of the settlement fund) from the allocation stage (at which the individual rights of class members are determined in that fund), I would find the need for controls to prevent collusion to be even greater at the latter stage. In contrast, Silver and Baker (who recognize the need for controls at the first stage) argue for what I will term a rule of "benign neglect" at the second (or "allocation") stage. In effect, they say: Let the plaintiffs' attorney do what the attorney thinks best in allocating the settlement fund, because the attorney is disinterested; thus, let's eliminate any need for client consent at this stage by deeming such an attorney as in effect a court-appointed trustee, equipped with more or less the same powers to allocate the settlement that a settlor can grant to a trustee over the trust estate.² This is a prescription for paternalism on a massive scale, in effect for a wholly novel system of conscription of clients by

² Specifically, Silver and Baker ask courts to accept their "conclusion that attorneys who manage class actions are trustees or guardians as much as they are agents or delegates." Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 Va. L. Rev. 1465, 1509 (1998).

class action that reverses the usual principal/agent relationship between attorney and client and substitutes instead a rule that says the attorney knows best.

Before we take such a radical step—one that truly redefines the role of the lawyer from a faithful agent to a philosopher king empowered to allocate the settlement among the class as the attorney deems just—it might well be asked whether judicial neglect of the allocation process would in fact be benign, or malignant. Does the available evidence suggest that the market can adequately monitor such a newly empowered attorney as philosopher king? That will be the focus of Part I of my response.

Before proceeding further, however, I should indicate my suspicion that the real reason that Silver and Baker argue for a rule of benign neglect is that they fear that the survival of the class action depends upon it. With some justification, they are concerned that the Supreme Court's decision in *Amchem Products v. Windsor*³ threatens to fragment the class action in a manner that will undercut its feasibility. In my judgment, their concerns are overstated. Although defense counsel will predictably attempt to use *Amchem Products* to fragment the class action into an unwieldy and balkanized coalition of contending subclasses, this outcome is not inevitable. Feasible answers to *Amchem Products*'s problems are possible.

Part II of my response will attempt to map some of these alternatives, but at the outset it is useful to define the problem. Let us assume, at least for the moment, that *Amchem Products* means that an attorney can neither represent a class whose members have conflicting interests nor make discretionary allocations of the settlement fund that favor the interests of some class members over those of other class members. Class members rarely have identical interests or entitlements. In a nationwide class action, the legal strength of the claims of individual class members will vary with a myriad of facts, including location (whether the individual class member resides in a jurisdiction whose prevailing law gives the class member relatively strong or relatively weak legal rights), time (whether the class member is potentially subject to statute of limitations defenses), severity of injury, reliance, vulnerability to special defenses, or eligibility for punitive damages. Clearest of all is the line between present and future claimants (i.e., between those who have a currently compensable injury versus those with only the possibility of an injury in the future). If even minor differences in the legal merit or damage claims of class members will require the use of subclasses with separate counsel for each subclass, subclasses will proliferate, and the point will quickly be reached at which each class member will need his or her own attorney. By this point (if not well before), the utility of the class action will have ended. Perhaps this explains why Silver and Baker struggle so hard to defend conflicted lawyers'

³ 117 S. Ct. 2231 (1997).

making allocation decisions: namely, they fear that the alternative is the eclipse of the class action. But even if a candid recognition of the reality of intraclass tensions does arm defendants with a potent weapon to resist class certification, the answer is not to repress this reality. If intraclass conflicts are as inevitable as death and taxes and if allocations must somehow be made, the relevant and proper inquiry must be how to make them at the minimum cost to prevailing conceptions of fairness. Part II of this response will therefore evaluate some of the possible alternatives.

Part III will return to the issue of consent. Silver and Baker compare the organization of the class action to other forms of collective organization. Their article opens by looking to the analogy of the business corporation. They use this analogy to suggest that the lawyer/managers of the class action should have the same broad discretion in determining how to allocate any surplus that the organization generates that managers of business organizations have. Assuming for the moment that class actions do often generate a surplus over what their same class members could obtain in individual actions, this corporate analogy still does not truly imply that managers should therefore have a broad "business judgment rule" authority to allocate this surplus in a non-pro rata fashion. Rather, analogies to business organizations suggest that the managers must normally be disciplined by market mechanisms before judicial controls can be relaxed. Absent such controls, deference is unjustified. Effective market mechanisms are hard to detect in the class action context, where, as the facts of *Amchem Products* demonstrate, opportunism reigns.

I. PLAINTIFFS' ATTORNEY CONFLICTS AT THE ALLOCATION STAGE

As Silver and Baker imply, the standard story about attorney opportunism in class actions focuses on the settlement negotiation stage. There, tacit collusion can easily take the form of an exchange of a low settlement in return for a high attorney's fee. For example, if the expected value of the litigation to the plaintiff class were \$12 million and the likely judicial fee award were \$3 million, the parties might instead agree—to their mutual but corrupt benefit—to a \$6 million settlement with a separate \$4 million fee award to be paid by defendants, thus saving defendants \$2 million (the difference between \$12 and \$10 million) and gaining the plaintiffs' attorneys an additional \$1 million. For this settlement to pass judicial muster, however, it might be necessary to dress it up by cosmetically inflating the apparent value of the recovery to the class. This can be done by a variety of techniques: for example, the use of discount coupons or other nonpecuniary relief, which would be given a high value based on the testimony of expert witnesses, or the use of reversionary settlements under which the defendant recovers any money not claimed by class members.

The implicit premise to Silver and Baker's proposed rule of benign neglect is that similar conflicts do not arise at the allocation stage. Yet, in fact, equivalent conflicts are evident at this latter allocation stage that match, and may overshadow, those at the settlement negotiation stage. These conflicts arise for three quite distinct reasons. First, the plaintiffs' attorney's own self-interest may lead the attorney to favor one subgroup within the class over another. Second, even if the plaintiffs' attorney is neutral as to the various subgroups within the class, the attorney still has no incentive to resist an allocation plan favored by the defendant, who often has an interest in preferring one subgroup within the class over another. Third, although neither plaintiff nor defendant has a strong incentive to distort the settlement's allocation, neither wishes to expend resources to fine-tune or individualize the settlement's allocation; hence, the logical result is "damage averaging" under which unequals are treated equally. Each category merits a separate examination.

A. The Plaintiffs' Attorney's Self-Interest in Biased Allocations

The most obvious fracture line within mass tort class actions is between present and future claimants.⁴ Less obvious is the connection between this fault line and the attorney's own economic motivation. Assume in a typical mass tort case that a \$100 million lump-sum settlement fund has been agreed to by the defendants. Because defendants will receive a complete release as part of the settlement, this fund must cover both present claimants (who have current injuries) and future claimants (who will develop injuries over the next forty years but who are not currently specifically identifiable, as only a small percentage of those exposed to the product or drug at issue will develop compensable injuries). Under the settlement, all claimants will have to prove their claims before a claims administrator in an arbitration-like proceeding.

How will the plaintiffs' attorneys wish to divide this fund? If they seek to protect the interests of the future claimants, they will impose tight limits on per claimant recoveries in order to protect the fund's solvency; thus, awards for pain and suffering or punitive damages would be limited to assure the retention of adequate funds to compensate future claimants. Logical as this pattern would be, it is infrequently observed. Instead, trust funds in mass tort cases have regularly been exhausted within years of their creation.⁵ Why?

⁴ I have discussed this line, and the associated conflicts, at length elsewhere. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1373 (1995).

⁵ The best known example of a mass tort trust fund becoming insolvent is that of the Johns-Manville Settlement Trust. See *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 485-87 (E. & S.D.N.Y. 1995), *aff'd in part, dismissed in part, and vacated in part*, 78 F.3d 764 (2d Cir. 1996). Another example is National Gypsum Co., which emerged from an asbestos-related bankruptcy in 1993, but by 1994 its settlement trust held insufficient assets to meet claims. See Martha Brannigan, *National Gypsum Makes an Unlikely Takeover Target*:

One reason is that plaintiffs' attorneys do not want to limit the recovery by present claimants because often these attorneys will represent these same present claimants on a contingent fee basis (thereby typically obtaining one-third or more of the recovery received by these claimants as their contingent fee). If plaintiffs' attorneys can look forward to one-third of the recovery received by present claimants, they predictably have little interest in protecting the fund for future claimants. Not only are they unlikely to represent those future claimants twenty, thirty, or even forty years later, but any fees expected at such point will be trivialized by the time value of money. Hence, the common incentive for both present claimants and their attorneys is to take the money and run—and let the trust fund fail.

Worse yet, plaintiffs' attorneys in the class action can actually structure the settlement to give themselves a privileged position in representing individual claimants against the trust fund. This happened in *Amchem Products*,⁶ and the availability of this tactic intensifies the plaintiffs' attorney's desire to favor present claimants over future claimants.

Nor is this problem limited to mass tort cases (although it is most acute there). One can realistically imagine a variety of contexts in which a plaintiffs' attorney has special relationships with some members of the class that would logically lead the attorney to bias the distribution of the settlement fund. For example, suppose in an employment discrimination class action, the class includes both unionized and non-union employees, and the class attorneys have been previously retained by the union. Under these circumstances, they might prefer a settlement that gave class members an arbitration-like hearing before a panel composed of, or including a majority of, union arbitrators. Under such a system, the results might well deviate from those under individual actions (if, indeed, individual actions were feasible).

B. Defendants' Self-Interest

Although other examples could be given of plaintiffs' attorneys' own self-interests' biasing the allocation, the more important point is that even when plaintiffs' attorneys are neutral, defendants are not. A class may often consist of the defendants' customers, shareholders, suppliers, or employees, and the defendant is seldom neutral among class members. Understandably, it has its favorites and its enemies. For example, in a class action involving its customers, it may wish to favor its large or long-standing customers over first-time or small customers. Thus, it will wish to structure the settlement to favor the interests of these class members over those of other class members.

Wallboard Maker May Be Unglamorous, But It's Called a 'Money Machine,' Wall St. J., Mar. 6, 1995, at B4.

⁶ See Susan P. Koniak, Feasting While the Widow Weeps: *Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995).

An illustration of these intraclass tensions is provided by the Third Circuit's important 1995 decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*.⁷ There, in a product liability class action alleging defects in the design and construction of the side-saddle gas tanks on General Motors pick-up trucks (which allegedly exploded on moderate impact), the settlement provided for a \$1,000 discount coupon that could be used to purchase a new GM pick-up truck. According to the Third Circuit, however, the settlement imposed "substantial impediments to fleet owners' using these certificates."⁸ Basically, a short redemption period (i.e., fifteen months) implied that "state and local government fleet owners would not be able to redeem all of their certificates (by buying new vehicles)" because many of these fleet owners owned 1,000 or more GM trucks and would face budgetary constraints that would preclude replacing their fleets within that period.⁹ Also, the court said that "[t]he fleet owners will never enjoy the benefits of the settlement terms, such as the intra-household transfer option, intended specifically for the benefit of individual owners."¹⁰ Clearly, plaintiffs' counsel had little interest in discriminating between individual and fleet owners, but it also had little interest in resisting a defendant that did. To generalize, it seems predictable that defendants' biases will flow through to shape the allocation process.

Similar cases can easily be imagined in other class action contexts. Imagine an employment discrimination class action brought on behalf of various categories of employees in which the defendant employer cares much more about preserving its freedom and discretion in hiring executives than in hiring clerical workers. Thus, a settlement agreement might restrict the use of some discriminatory hiring criteria (those most applicable to secretarial or clerical jobs), but not those that uniquely apply to the category of workers about whom management was most concerned. Again, as much as in a case involving an exclusively monetary recovery, this is an allocation decision in the sense that the aggregate relief to the entire class could be substantial, but still not benefit some subcategory of class members. It is simply too easy in this context for plaintiffs' attorneys to adopt "the-end-justifies-the-means" types of rationalizations and subordinate the interests of some discrete minority to the common good of the class. The only answer that will protect this subcategory is subclassing and separate counsel—precisely the answer that Professors Silver and Baker reject in favor of letting attorneys make allocative decisions.

⁷ 55 F.3d 768 (3d Cir.), cert. denied, 516 U.S. 824 (1995).

⁸ Id. at 801.

⁹ Id. at 781.

¹⁰ Id. at 801.

Defendants' desire to influence the structure of the settlement most frequently manifests itself in a very common and recurring pattern: the push for a global settlement. Inevitably, plaintiffs' counsel today define their proposed class narrowly—because only a narrowly defined class has a realistic chance at certification in light of recent adverse case law, which has substantially raised the bar for class certification.¹¹ But once defendants decide to settle, they understandably want to achieve global peace, and they typically need to expand the size of the class to do so. Thus, if the class action was brought on behalf of a tightly defined group of consumers or employees, the defendants predictably will want to expand the settlement to cover (and thus release the potential claims of) all consumers or employees. This predictable last-minute expansion of the settlement's scope produces an intraclass tension between the "core plaintiffs" and the "peripheral plaintiffs." The latter are those class members brought within the class by its last-minute expansion on the eve of settlement. Typically, there has been little discovery relating to their claims, and the plaintiffs' attorneys may not want to reduce the value of the settlement to the core plaintiffs, their original clients, by allocating much of the settlement fund to these peripheral plaintiffs. The latter thus become "second class" class members.

A good example of the inexorable pressures to expand the scope of the settlement comes from the recent "vanishing premiums" cases that have been brought against many of the major life insurance companies. In these cases, plaintiffs' counsel necessarily drafted narrow complaints, alleging that fraudulent representations were made to consumers that their premiums would decline (or "vanish") over the life of their policy because of the expected high earnings. When interest rates dropped in the 1980s, earnings declined, and the projected decrease in premiums did not materialize. Typically, plaintiffs also sued on some other standard theories of liability: "churning" and alleged fraudulent misrepresentations about life insurance as a desirable investment product. Still, to keep the class actions certifiable, the theories of liability were kept narrow. In the largest of these actions against The Prudential Life Insurance Company of America,¹² the parties sparred for roughly a year. Then, in quick succession, a second amended complaint was filed, followed three days later by a settlement agreement.¹³ According to objectors to the settlement, the settlement agreement expanded the class definition "to release

¹¹ Even before *Amchem Products*, some important appellate decisions had raised the standard for certification. See *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Med. Sys.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293 (7th Cir.), cert. denied, 516 U.S. 867 (1995).

¹² See *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 962 F. Supp. 450 (D.N.J. 1997), *aff'd in part, vacated in part*, 148 F.3d 283 (3d Cir. 1998).

¹³ See *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 294 (3d Cir. 1998).

nearly 8 million additional policyholders not included in the class pled only 3 days earlier.”¹⁴ Later, when the Stipulation of Settlement was executed in 1997, a further expansion occurred when a new fourth and “miscellaneous” category of claims was added, called simply “Other,” which category broadly covered *any* other improper sales or servicing practice.¹⁵ As a result, the release issued in connection with the settlement covered any “miscellaneous” improper sales practice perpetrated with respect to any of Prudential’s over eight million policyholders. Although objectors challenged this last-minute expansion of the class, the Third Circuit upheld the practice, noting that releases commonly cover unpleaded claims.¹⁶ There may indeed be such a common tendency for the release to be broader than the complaint, but, if so, this tendency evidences the regular expansion of class actions to include an underrepresented group whose claims were never originally asserted by the plaintiffs’ attorneys (but whose rights are being released to induce the defendants to settle).

Predictably, the upshot of this pattern is that plaintiffs’ counsel, who starts out representing a tightly defined class (i.e., the “core plaintiffs”), necessarily faces a moment when the attorney’s ability to secure the best possible recovery for that class is conditioned upon his willingness to represent another subgroup (i.e., the “peripheral plaintiffs”) whose circumstances the attorney does not well understand. Typically, this expansion of the class will occur at the end of the settlement negotiations, after discovery has concluded. Thus, the plaintiffs’ counsel is apt to be poorly informed about the legal merit of the peripheral plaintiffs’ claims or their possible negotiating leverage. Nor, at the psychological level, has counsel ever identified with the representation of these new clients, who are essentially imposed on him by the defendant.

In short, while Silver and Baker describe the allocation process as one in which a professional makes a just and equitable distribution of the settlement, the reality may be that it is more a process by which an attorney seeking to represent only one group (the core plaintiffs) finds it expedient to compromise the interests of another group that he has never truly sought to represent (the peripheral plaintiffs). Nothing in these dynamics gives one confidence that the outcome will be fair to all or that it merits judicial deference.

C. Rational Apathy and Damage Averaging

A third reason why the allocation of the settlement may not be “fair” (however that term is defined) is that plaintiffs’ counsel has little incentive to expend the time or effort, or to incur the costs, necessary to effect a “fair”

¹⁴ Id. at 325.

¹⁵ See *In re Prudential Ins.*, 962 F. Supp. at 489.

¹⁶ See *In re Prudential Ins.*, 148 F.3d at 325-26 & n.82 (citing other cases).

allocation. In contrast, plaintiffs' counsel does have a strong incentive to maximize the settlement fund, because under the prevailing "percentage of the recovery" formula that most federal courts use in determining the fee award, a larger fund means a larger fee award.¹⁷ No similar incentive presently aligns the interests of counsel with a fair allocation of the fund.

Accordingly, plaintiffs' counsel's incentive is to minimize its investment of time and effort on allocation issues. The simplest means to this end is "damage averaging," namely the deliberate award of the same amount to all members of a class or subclass, even though this technique forces the holders of high-value claims to subsidize the holders of low-value claims.

To be sure, lethargy is no more than a weak force. Thus, plaintiffs' attorneys will avoid a uniform allocation to the extent that it is so glaring as to displease the court or even offend their own sense of justice. Still, the real point is that the natural tendency of plaintiffs' attorneys will be to resist individualization and prefer a low-cost, uniform—and hence under-individualized—allocation scheme. To resist this bias, the law must create incentives for plaintiffs' counsel to individualize, as discussed below.

II. IMPLEMENTING *AMCHEM PRODUCTS*: HOW TO EVADE OR IMPLEMENT ITS HOLDING

Silver and Baker's starting point is to ask whether class actions can survive *Amchem Products*. This is a valid question, but so also is its polar alternative: Will *Amchem Products* truly make any significant difference? Simple realism dictates that we must recognize that established patterns may well persist, even in the face of the Supreme Court's hostility. The participants in major class actions are typically repeat players who have interacted frequently in the past, and they are thus well-positioned to find adaptive responses to *Amchem Products* that minimize its effect. As a result, two countervailing policy questions must be faced: First, what can be done to counter predictable evasions of *Amchem Products*'s core requirement that discrete subgroups within the class must receive adequate representation? Second, what lines can be drawn to ensure that these new requirements do not so overburden the class action as to cause its practical demise? Starting with the first of these questions, this Part will ask whether there are legal rules that could make *Amchem Products* largely self enforcing. This inquiry necessarily takes us beyond the closed world of legal doctrine and into the world of incentives.

¹⁷ For the empirical finding that federal courts today tend to use the "percentage of recovery" method more than the lodestar formula, see Thomas E. Willging et al., *Federal Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 69-74* (1996).

A. *Amchem Products as a Possibly Symbolic
Victory: Can It Be Enforced?*

Relationships within the plaintiffs' bar are usually close, as the major players have typically worked together repeatedly. Thus, even if separate counsel are appointed for subclasses, the prospect remains that the various counsel so appointed will not necessarily compete to achieve the best result for their subclass; rather, they may quietly collude. Given these incentives to go along and not resist, the results may be closely similar to those that would occur if the same firm represented both subclasses. In short, had class counsel in *Amchem Products* correctly anticipated the Supreme Court, the two firms that represented the class members in *Amchem Products* might simply have divided the class into two categories of future claimants (i.e., the "near"—those eligible for immediate compensation—and the "far"—those who will not receive compensation until the more distant future), and each taken one of these two subclasses. Having done so, the two firms could have proceeded to negotiate exactly the same allocation of the settlement. Seemingly, this remains possible tomorrow. If so, the decision may mean little.

There is, however, an obvious answer to this incentive to collude: Base the attorney's fees on the success (or failure) of the subclass. Today, at the outset of the case, plaintiffs' counsel typically agree to form an *ad hoc* law firm and allocate among themselves whatever aggregate fee the court eventually awards them. For example, when the plaintiffs' team organizes, an individual plaintiffs' firm may agree with the other plaintiffs' counsel that it will receive twenty percent of the aggregate fee award (or that lead counsel will determine its respective share, either in its discretion or based on some formula). Although this approach is standard, it undercuts any incentive to represent the interests of one's subclass or group, because the various counsel are now economically indifferent to their subclasses' relative success. If instead fee awards were based on the success (or failure) of the subclass, then the plaintiffs' counsel team would have every incentive to compete. To illustrate, imagine a settlement fund of \$100 million and two subclasses: present and future claimants. Today, if one law firm represents the future claimants and accepts a paltry share of this settlement fund (amounting to, say, ten percent or less), it could still receive half (or more) of the aggregate fee award by contract with the other counsel.

But what would be the incentives if the fee award had to be allocated based on their clients' relative success? Suppose judicial rules on fee awards said that counsel for the future claimants should receive its fee award based principally on the recovery by the future claimants, and similarly counsel for the present claimants was limited to a reasonable share of the recovery awarded to the present claimants. Obviously, the relationship between these

two teams of counsel would become more adversarial, in part because the fee award would now look more like a zero-sum game.

A solution this simple does have its equitable problems. For example, a particular plaintiffs' counsel may have played the critical role in establishing the defendant's liability, but the subclass that the counsel represents may receive only a modest share of the overall settlement (because possibly only a limited number of individuals fall within that subclass). On these facts, it would seem a misallocation of the fee award to hold each attorney to a percentage of the subclass's recovery. Of course, this may be only a transitional problem, because over time, the better attorneys would insist on representing the larger subclasses. Still, this example shows the plausible justifications for some relaxation of any rigid rule limiting the attorney's fee award to a percentage of the subclass's recovery. But various compromises are possible. For example, half the fee award could be based on a percentage of the subclass's recovery and half on the aggregate class recovery. Or, counsel could be assured a minimum fee award based on the lodestar fee formula, which essentially multiplies the hours worked by the attorney's normal hourly rate, but any higher fee award based on percentage of the recovery fee formula would have to be justified by the size of the recovery received by the subclass. In any event, the goal of this Comment is not to devise an optimal fee formula, but to illustrate how these problems can be sensibly addressed.

B. Amchem Products as a Barrier to Effective Class Litigation

The rival perspective on *Amchem Products* is that taken by Silver and Baker: namely, that *Amchem Products*'s insistence on an absence of conflicts between the class representative and any "discrete subclasses"¹⁸ within the broader class that the class representative purports to represent will result in an overly fragmented class whose interests cannot be effectively represented. As they note, Judge Jerry Smith has already read *Amchem Products* (albeit in a dissent) to mean "that any real conflict, even if minor when compared to interests held in common, will render the representation inadequate."¹⁹

If even "minor" conflicts require subclassing, it is easy to see how even a comparatively simple class action might require a dozen or more separate counsel and subclasses. Residents of different states might need different counsel to the extent that different legal rules in their respective jurisdictions give them different claim strengths. Similarly, persons injured at different times might have different claim strengths based either on intervening legal events (e.g., new statutes, the arguable expiration of statutes of limitations,

¹⁸ See *Amchem Prods.*, 117 S. Ct. at 2251.

¹⁹ In re Asbestos Litig., 134 F.3d 668, 677 (5th Cir.) (Smith, J., dissenting) (second emphasis added), cert. granted sub nom. *Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998).

or, in fraud-based cases, additional statements or conduct by the defendants). Finally, subclasses might be required for different categories of injury. Worse yet, the number of necessary subclasses increases exponentially with the number of factors that need to be recognized. For example, if the recognized subclasses of injuries within the class are increased from two to three, the result is not to add simply an additional category, but to multiply the existing categories by this new number. For example, if there were already three different jurisdictional categories (each with a different legal rule applicable to the class's claims) and two different time periods, the decision to recognize three categories of injuries means that three legal rules might have to be multiplied times two temporal groups times three injury subcategories so as to produce eighteen subclasses.²⁰ Arguably, the result is to balkanize the class into an unmanageable assortment of small subclasses that cannot easily act in concert.

To acknowledge the possibility of this problem is not, however, to accept it as an accurate prediction of the future under *Amchem Products*. First, large class actions often have a dozen or more plaintiff law firms representing the class, and such a structure could represent a form of efficient diversification (particularly given the small size of many plaintiff law firms). Second, it is far from clear that *Amchem Products* will be extended so as to require subclasses (or, in any event, separate counsel) for every material difference among class members.²¹ Finally, even if this proves to be the ultimate outcome where the settlement fund is to be allocated by counsel, there are other obvious ways to outflank *Amchem Products*'s apparent requirement for separate subclasses: Allocate the settlement fund through the use of an independent claims resolution process which effectively assigns all allocative decisions to someone other than class counsel. For example, imagine a settlement fund of \$100 million that does not provide for any allocation formula by which to treat different cases differently. Instead, all class members are simply instructed to present their claims to the claims administrator who will decide the appropriate compensatory award. Under these circumstances, it can be argued that there are no internal conflicts within the class that require separate representation because no internal negotiation or tradeoffs have been made by class counsel. In effect, the rights and entitlements of all class members are determined separately in an individualized, post-settlement hearing process, and hence a single counsel can represent this unconflicted class.

²⁰ This is because within each geographical or temporal category, there will be persons experiencing each of these three categories of injuries.

²¹ A very different straw in the still young wind is the Third Circuit's recent decision in the Prudential "vanishing premium" litigation. See *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) (affirming class settlement).

Will this approach work? So far, it has worked (by a two-to-one vote) in the Fifth Circuit.²² The Supreme Court may yet reverse that decision,²³ but, whatever the ultimate outcome is in that problematic case, the use of a post-settlement claims resolution process seems likely to pass judicial muster in other, less controversial contexts. Still, there are some glaring problems with this type of settlement, which essentially substitutes a post-settlement individualization for the class allocation stage. First, it ignores the basic conflict between present and future claimants; inevitably, future claimants need to restrict large payouts to present claimants in the short-term in order to preserve the long-term solvency of the fund. Second, at least on a public policy level, such a process inherently denies class members any information about what they will receive as of the time that the settlement is approved; instead, they are forced to buy the proverbial "pig in a poke," and await the subsequent claims resolution process.

Despite these problems, claims resolution processes may well come to enjoy an increased popularity as a technique for side-stepping the allocation stage, which under *Amchem Products* arguably makes separate counsel necessary. In class actions not involving future claimants (such as most consumer, securities, or commercial fraud class actions), the claims resolution approach does seem viable (if often very costly). Indeed, to the extent that this technique may permit single counsel to represent the entire class, *Amchem Products* seemingly creates an unfortunate incentive to employ this technique in order to avoid intraclass allocations of the settlement (and, perhaps more importantly, the obligation to share the fee award with the counsel for these other subclasses).

Still, there are clearly cases in which a post-settlement claims resolution process would be disproportionately costly. Imagine a class action covering a million or more class members, but involving damages per claimant between \$1 and \$100 each. A claims resolution process, even based on informal procedures, would spend more on the allocation process per claimant than the average claimant stood to receive. In these cases, it is clear that both subclassing and a post-settlement claims resolution process are poorly designed procedural answers for this context. At least from a policy perspective, the variation among the individual recoveries that class members will receive is too small to justify such costly procedures.

In short, this seems the paradigmatic type of case that Silver and Baker have in mind when they say that class counsel should be able to allocate the

²² See *In re Asbestos Litig.*, 134 F.3d 668. But see the powerful dissent of Circuit Judge Smith, *id.* at 670 (Smith, J., dissenting).

²³ See *Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998). There are several grounds on which the Court granted review of the Fifth Circuit's decision, but the Court may well limit its analysis to the conflict between present and future claimants.

recovery. But if an exception should be created from *Amchem Products* for this type of case, how should it be defined?

The defining characteristic of this type of class action is that the individual claims of the class members have a negative net expected value. That is, although the claims may have legal merit, it is not economically feasible to assert them on an individual basis because the costs of litigation will exceed any recovery. This context probably includes most securities and antitrust class actions; indeed, data compiled by the Federal Judicial Center shows that the median level of the average recovery per class member in the class actions they studied over a two-year period averaged between \$315 and \$528.20.²⁴ On this basis, the average claim in a class action today is not individually viable. Even if some class members have large claims in this class, they are likely to opt out and file individual "tag along" actions.

Although such negative net expected value cases may constitute the majority of contemporary class actions, they are very different than the fact pattern that *Amchem Products* presented to the Supreme Court. *Amchem Products* was closer to the paradigm of a "large claimant" class action. In asbestos litigation, based on a decade or more of individual litigation, claims had well-established market values; class members with claims for lung cancer or mesothelioma clearly possessed individually viable legal claims.²⁵ The *Amchem Products* class, however, was also characterized by extraordinary variance between the value of these claims and those claims held by persons with only asymptomatic conditions (typically, pleural scars on their lungs).²⁶ These latter claims had value only in the context of a class action that aggregated small claims into a large collective claim.

The point then is that *Amchem Products*'s strictures about the need for the class representative to "possess the same interest and suffer the same injury as the class members"²⁷ occurred in the context of a case where many (but not all) class members possessed independently viable claims. The Court's statements need not be read to mean that a class representative cannot represent persons holding claims of differing legal strength or value *where none of these claims had a positive expected value* (absent a class action). For example, imagine a class action brought on fraud grounds claiming that the defendant overstated the capability of its product. Hypothetically, individuals may have claims ranging from \$1 to \$100; some may have bought before (and others after) certain allegedly false statements were released to the public; they may

²⁴ See Willging et al., *supra* note 17, at 13.

²⁵ In fact, in his dissent in *In re Asbestos Litigation*, Judge Smith found that mesothelioma cases "had averaged tort recoveries in the millions." 134 F.3d at 679 n.26 (Smith, J., dissenting).

²⁶ See *Amchem Prods.*, 117 S. Ct. at 2240.

²⁷ *Id.* at 2251 (quoting *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977)).

also reside in different jurisdictions that recognize different legal theories. Nonetheless, these differences are immaterial because the essential fact is that no individual claim is economically viable on its own.

When then should subclassing be required? In the foregoing setting, there might be a distinctive subgroup that did hold claims having positive expected value (independent of the class action). In such a case, these claims would require a separate class representative, but the other claims—varied and polyglot as they might be—should not be deemed materially different where they all shared the key characteristic of having a negative net expected value on an individual basis.

Does this mean that plaintiffs' counsel should have discretion to choose among these negative expected value claimants, allocating a recovery to some and nothing to others? Of course not! In the case of negative expected value claims, the default rule should be equality.²⁸ Either all should receive an equal or proportional award—or, alternatively, subclassing or some other acceptable procedure (such as a claims resolution allocation procedure that does not involve the plaintiffs' counsel) should be used.

This gloss on *Amchem Products* (i.e., that separate representation is not required of claims that are not individually viable, but that such claims should receive an "equal" share of the recovery) steers a middle course that both avoids the procedural trap of an overly fragmented class action, which Silver and Baker properly fear, and also constrains class counsel so that its role remains that of a faithful agent rather than philosopher king (as Silver and Baker in effect propose). Most of all, this gloss domesticates *Amchem Products* and denies defendants the ability to use it as a weapon to deny class certification in most class actions. To be sure, it cannot yet be said that courts will accept this interpretation, but it is a far safer and saner rule than the "benign neglect" rule that Silver and Baker propose.

III. IS CONSENT IRRELEVANT?

The basic claim made by Professors Silver and Baker is that consent is just not that important. After all, they say, we observe multiple clients in consensual litigation often authorizing lawyers to make allocative decisions for them. Perhaps we do (although conspicuously little data is cited on this point).²⁹

²⁸ The normative case for equality has been made by Bruce Hay and David Rosenberg, who argue that, particularly in the absence of complete information about relative claim strength, risk-averse class members would prefer a rule of damage averaging. See Bruce Hay & David Rosenberg, *The Individual Justice of Damage Averaging* (Working Paper 1997) (on file with author). Although these assumptions do not apply realistically to all class actions, they certainly fit the "small claimant" class action here under construction.

²⁹ *Hayes v. Eagle-Picher Industries* is at least proof that majority rule agreements have been written (even though that decision invalidated one). See 513 F.2d 892 (10th Cir. 1975).

But what does this prove? When clients authorize attorneys to make allocative decisions that trade off their interests against those of other clients, these cases tend to fall into one of three categories. First, the client trusts the attorney because of some preexisting, nonlegal relationship (i.e., they are relatives, neighbors, or long-time friends). Second, the client trusts the attorney because of a prior, existing or expected future legal relationship between them (i.e., the attorney has long been the client's agent and has proven loyal in the past or the client knows that the attorney wants future business from the client). Third, the client trusts the attorney because the expected allocation formula is implicitly understood by all (for example, equality or some common percentage of the losses). Whatever the specific reason, clients authorize attorneys, as their agents, to make allocation decisions because they trust them.

In many other cases, however, clients do not authorize attorneys to make allocation decisions, particularly when the attorney is conflicted. In my experience, sophisticated corporate clients may even attempt to restrict the attorney from representing other clients with whom they perceive a potential future conflict.

This inconsistent pattern makes it very difficult to respond to Silver and Baker's claim that because we *sometimes* observe clients authorizing attorneys to make allocation decisions we should generally authorize them to do so. The simple truth is sometimes we observe this, but probably more often we observe the opposite. In any event, trust is the precondition to consent.

In lieu of consent (whether based on trust or anything else), Silver and Baker wish to substitute judicial approval. This is a major invasion of personal autonomy. It is simply not clear to me why they think personal consent is any less important with regard to surrendering one's rights in a lawsuit (at least when the stakes are significant) than with regard to other fundamental decisions: marriage, divorce, adoption, or consent to euthanasia. Should a self-appointed attorney have the right to make these fundamental decisions for the client—with, of course, judicial approval? The logical answer is no. The comparative advantage of judges is at resolving contested facts, not discerning the "true" preferences of the client.

Nonetheless, Silver and Baker seem to imply that a justification for dispensing with consent can be found by analogy in the broad discretion that shareholders delegate to managers in the case of the business corporation. Of course, there are obvious differences: Shareholders choose to invest in the corporation and probably limit their investments, as diversified investors, to what they can afford to lose. In contrast, in *Amchem Products*, many of the disabled and dying class members had the bulk of their worldly assets at stake

because their legal rights to compensation constituted the principal assets that they and their families possessed.³⁰

Even aside from this point, the analogy to the business corporation supports the Silver and Baker proposal less than they perceive. American corporate law does give managers great discretion to make ordinary business decisions, but this is subject to two major limitations. First, when the directors are conflicted and still act to favor their self-interests, they must prove the "entire fairness" of their conduct.³¹ Second, certain fundamental decisions must still be approved by the shareholders as a check on managerial opportunism.³² Among these fundamental decisions are the sale of the business, liquidation, merger, and charter amendments.

This analogy then suggests that class counsel might be able to make "ordinary" litigation decisions, but fundamental ones (such as approval of the settlement) should require class member approval. Of course, current class action law does not require a class member vote, but the real thrust of the line of analysis posed by Silver and Baker leads one to ask: Why not? Again, the practical answer probably is because class members are rationally indifferent in most cases. But this is likely to be true only within the boundaries earlier discussed: the "negative expected value class action." Outside this context, class members may care—and deeply.

In this light, consent may supply an alternative route out of the trap that Silver and Baker see *Amchem Products* creating. In the large class action where *Amchem Products* seemingly requires numerous subclasses and special counsel, consent by a majority of the class members in each subclass to an allocation plan may be an alternative to separate counsel. Technically, *Amchem Products* focuses only on the class representative, not the counsel. Although this may seem like a difference without a distinction (because all agree that class counsel, not the class representative, is today the real decision-maker), it is comparatively easy to appoint class representatives for each subclass, but less so to appoint separate counsel for each subclass. Suppose then a separate representative is appointed for each subclass, but one counsel represents several subclasses. Can such a seemingly conflicted counsel provide constitutionally adequate representation? This is the question that I believe Silver and Baker should have asked. One plausible answer may be that majority consent by each subclass (after appropriate disclosure) can waive the conflict (at least where the minority had an earlier and effective opportunity

³⁰ For a detailed discussion of the high stakes to some of the class members in *Amchem Products*, see Koniak, *supra* note 6.

³¹ For a recent reiteration of this standard Delaware rule, see *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

³² See Jesse H. Choper et al., *Cases and Materials on Corporations* 533-34 (4th ed. 1995).

to opt out).³³ Today, existing ethical standards, which Professors Silver and Baker have criticized, may not permit such an outcome.³⁴ Still, *Amchem Products* is concerned ultimately with the constitutional minimum for purposes of the Due Process Clause, not with the current prevailing rule of legal ethics, which can be more easily changed. To raise this possibility of majority ratification by each subclass is not to endorse it in all settings (majority ratification does not work well in the case of future claimants where there is no existing constituency to vote). But this qualification only need mean that separate counsel would remain necessary for the future claimants when the class includes them, while the other subclasses might share a common counsel. Such a compromise, reducing the minimal number of class counsel to two, makes sense. In any event, the point is again that there is a variety of feasible alternatives by which *Amchem Products* might be implemented. Demands for its reversal are premature.

CONCLUSION

Silver and Baker title their paper: *I Cut, You Choose*. This is a misnomer as applied to allocations in class actions. Today, class counsel shuffles, cuts, and deals. *Amchem Products* will in time require fairer rules, but the inquiry has only begun as how to best implement its holdings and its philosophy. If *Amchem Products* seems in some cases to demand too much, the best ways to retract its overreach are either by (1) creating an exception for the negative expected value class action, or (2) accepting ratification by subclasses (after disclosure and a right to opt out) as a substitute for unconflicted representation.

³³ This issue again returns us to the question of whether *Hayes v. Eagle-Picher Industries* should apply to class actions. See *supra* note 1.

³⁴ See Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733 (1997).