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Geoffrey P. Miller

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Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard

Geoffrey P. Miller[1]

Abstract

This paper is an inquiry into the proper standard for dealing with conflicts of interest in class actions. It proposes a simple approach to guide analysis: *a conflict of interest should be deemed impermissible if a reasonable plaintiff, operating under a veil of ignorance as to his or her role in the class, would refuse consent to the arrangement*. The standard proposed here can be termed a "hypothetical consent" principle. It substitutes a thought experiment in which consent is given or withheld under stylized conditions for the actual consent that is required in ordinary litigation. By placing the reasonable plaintiff behind a veil of ignorance as to his or her position in the class, the hypothetical consent idea allows representation to go forward even when some class members will be relatively better off and some worse off as the case develops. This approach can provide useful guidance both for the interpretation of counsel's duties under applicable rules of professional responsibility and also for courts deciding whether to certify class actions or approve class action settlements.

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[1] Stuyvesant P. and William T. III Comfort Professor of Law, New York University. I would like to thank Michael Brody, Edward Brunet, Howard Erichson, Samuel Issacharoff, David Rosenberg and participants at a University of Chicago Legal Forum Conference on Class Action Litigation for helpful comments.

Conflicts of interest pervade class action litigation. Because of the large numbers of claims and the potential for members of the class to be differently situated with respect to particular issues, tensions among class members are common, even ubiquitous.[2] Even more problematic are conflicts between attorneys and clients. Although present in all forms of litigation,[3] attorney-client conflicts are exacerbated in class actions due to the inability of class representatives to monitor counsel.[4] These problems are recognized both by academic commentators[5] and courts.[6] They play a significant role in litigation – most famously, the catastrophic failures of the global asbestos settlements, which were derailed because of conflicts within the class and between class counsel and their clients.[7]

Given the widespread recognition of the importance of conflicts of interest in class action litigation, one might suppose that decision-makers would have ready to hand a workable and well-understood doctrine for assessing these problems. Surprisingly, however, the courts have not articulated coherent principles to guide analysis. Conflicts of interest are principally dealt with on a case-by-case basis, with the trial court's

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[2] See, e.g., *In re Painewebber Limited Partnerships Litigation*, 171 F.R.D. 104, 123-24 (S.D.N.Y. 1997)("[p]otential conflict between class members is often a danger in large class actions.")

[3] For general exposition, see Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 Journal of Legal Studies 189 (1987).

[4] The minimal role of the named plaintiff is stressed in John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 University of Chicago Law Review 877 (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Though Class and Derivative Actions*, 86 Columbia Law Review 669 (1986); Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 University of Chicago Law Review 1 (1991).

[5] See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia Law Review 1343 (1995); Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Nebraska Law Review 646, 651 (1994); Samuel Issacharoff, *Class Action Conflicts*, 30 UC Davis Law Review 805 (1997); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc*., 80 Cornell L. Rev. 1045 (1995).

[6] See, e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Product Liability Litigation,* 55 F.3d 768, 803 (3d Cir. 1995) (analyzing evidence that counsel had failed to pursue class interests with sufficient diligence); *Mendoza v. United States*, 623 F.2d 1338, 1346 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981) ("inherent dangers of conflict" in class action litigation).

intuitions and discretion supplying the standard for decision. Nor have rules of professional responsibility made up for the deficit: ethics rules relating to conflicts of interest are predicated on a notion of client consent that is unworkable in the context of class litigation.[8]

This paper is an inquiry into the proper standard for dealing with conflicts of interest in class actions.[9] I propose a simple approach to guide analysis: *a conflict of interest should be deemed impermissible if a reasonable plaintiff, operating under a veil of ignorance as to his or her role in the class, would refuse consent to the arrangement*. The standard proposed here can be termed a "hypothetical consent" principle. It substitutes a thought experiment in which consent is given or withheld under stylized conditions for the actual consent that is required in ordinary litigation. By placing the reasonable plaintiff behind a veil of ignorance as to his or her position in the class, the hypothetical consent idea allows representation to go forward even when some class members will be relatively better off and some worse off as the case develops. I believe that this approach can provide useful guidance both for the interpretation of counsel's duties under applicable rules of professional responsibility and also for courts deciding whether to certify class actions or approve class action settlements.

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[7] See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

[8] See text accompanying notes xx-xx, infra. For analysis of the conflict of interest rules in ordinary litigation settings as default rules for attorney-client contracts, see Jonathan R. Macey and Geoffrey P. Miller, An Economic Analysis of Conflict of Interest Regulation, 82 Iowa Law Review 965-1005 (1997). A default rule analysis does not work in the case of class action conflicts because it assumes that the parties are capable of bargaining around the rule, something that is impossible for class actions.

[9] There appears to be no systematic theoretical treatment of conflicts of interest in class actions. For analyses of aspects of the topic, see, e.g., Deborah Rhode, *Class Conflicts in Class Actions*, 34 Stanford Law Review 1183 (1982)(addressing conflicts in institutional reform litigation); Gregg H. Curry, *Conflicts of Interest Problems for Lawyers Representing a Class in a Class Action Lawsuit*, 24 Journal of the Legal Profession 397 (2000); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 Cornell Law Review 1159, 1188-1194 (1995); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Northwestern University Law Review 469 (1994).

This paper is structured as follows. Section I demonstrates that standard rules for addressing problems of conflict of interest do not resolve class action issues. Section II describes and justifies the hypothetical consent idea. Section III considers various applications of the hypothetical consent approach to class action conflicts. Section IV contains a brief note on the timing of a court's decision on conflicts.

I. Existing Approaches to Class Action Conflicts

Imagine that an attorney files breach of warranty actions against a manufacturer on behalf of two consumers. Plaintiff A purchased the product within a year, and Plaintiff B purchased the product earlier. The applicable statute of limitations is one year, but a discovery rule applies, under which the statute begins to run only after a plaintiff should have discovered the defect. In such a case, Plaintiffs A and B have a common interest in establishing the elements giving rise to liability. But only Plaintiff B, who purchased the item more than a year ago, faces the additional burden of establishing that because the defect was hidden or latent, she could not reasonably have discovered it until a time less than a year from the filing of the action. The court consolidates the two lawsuits in a single proceeding.

In such a case, the attorney would need to consider the bearing of applicable rules of ethics as they pertain to representation of multiple parties in litigation. If the attorney is practicing in a jurisdiction that has adopted the American Bar Association's Model Rules of Professional Conduct, she will have to comply with Model Rule 1.7(b), which provides, in general, that a lawyer "shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client." It seems probable, in the scenario just described, that the attorney would conclude that her

responsibility to one client would be materially limited by her responsibility to the other. Suppose, for example, that the attorney could introduce testimony that supported the claim that the defect was hidden but also tended to reduce damages. Such testimony could benefit Plaintiff B's statute of limitations argument, but harm Plaintiff A's claim to relief. Thus, it would probably be the course of prudence for the attorney to conclude that the general prohibition of Model Rule 1.7(b) applies. A similar analysis can be carried out under the Model Code of Professional Responsibility. Disciplinary Rule 5-105(A) requires a lawyer to decline proffered employment if it is "likely to involve him in representing differing interests." That this prohibition applies in the scenario just described is indicated by Ethical Consideration 5-15, providing that when multiple clients are involved, a lawyer should "resolve all doubts against the propriety of the representation" and "never represent in litigation" clients with differing interests.

Related problems of conflict of interest would be presented when the attorney seeks to settle the cases.[10] Suppose that the attorney negotiates a settlement of $150,000, out of which Plaintiff A will receive $100,000 and Plaintiff B $50,000. Absent consent by both clients, this settlement would run afoul of the aggregate settlement rule,[11] which generally prohibits attorneys from making a bulk settlement of the claims of multiple clients. The purpose of the rule appears to be to prevent attorneys from trading off the interests of clients without their informed consent.[12] In this sense, the aggregate

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[10] See Comment [7] to the Model Rules, providing that "[a]n impermissible conflict may exist by reason of the fact that there are substantially different possibilities of settlement of the claims or liabilities in question."

[11] See MR 1.8(g); DR 5-106.

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

settlement rule is a form of conflict-of-interest regulation applied to a special and particularly problematic setting.

These difficulties with multiple representation can usually be avoided by obtaining the consent of the client. Under Model Rule 1.7(b), multiple representation can go forward if the lawyer reasonably believes that the representation will not be adversely affected and if "the client consents after consultation." The rule goes on to specify that when undertaking the representation of multiple clients in a single matter, "the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." To similar effect is Disciplinary Rule 5-105(C), which provides that a lawyer "may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." In ordinary litigation, therefore, it would be the course of prudence, and possibly ethically required, for the lawyer to inform each client of her representation of the other client and the potential harm that might flow from the multiple representation, and to obtain the client's informed consent to proceed.

Issues of aggregate settlements can also be overcome by obtaining consent. Model Rule 1.8(g) permits aggregate settlements if "each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." Disciplinary Rule 5-106 also allows aggregate settlements with client consent, but requires the lawyer to include the additional disclosure of the total amount of the settlement. Thus, an attorney wishing to negotiate an aggregate settlement may do so under both the Model Rules and

the Model Code if she provides adequate disclosure to the client and obtains an affirmative manifestation of consent.

Now consider the same scenario in a class action setting. A lawyer brings a class action on behalf of all persons in the state who purchased an allegedly defective product. Half of the class purchased the product within the past year; the other half purchased the product more than a year ago. A one-year statute of limitations applies, but a discovery rule may allow otherwise untimely claims to avoid the bar. Can the lawyer represent the whole class, notwithstanding the fact that some class members face a statute of limitations defense and others do not? Or suppose that the lawyer, in a certified class, negotiates a settlement under which plaintiffs who purchased the defective product within a year will be entitled to $100; those who purchased the product more than a year before the filing of the lawsuit will be entitled to only $50. Does this settlement comport with the aggregate settlement rule?

The difficulty, from the standpoint of class action law, is that the safety valve of client consent is missing, either to authorize the representation of multiple plaintiffs or to justify the settlement. The problem is general: class action litigation is incompatible with client consent.[13] In non-opt-out class actions brought under Rule 23(b)(1) or (b)(2), the notion of consent is fictional. There is no chance for class members to refuse the arrangement. Like it or not, they are clients in the lawsuit and will be bound by the

[13] See, e.g., *Palumbo v. Telecommunications, Inc.*, 157 F.R.D. 129, 133 (D.D.C. 1994) (because unnamed class members cannot waive conflicts, an attorney may face disqualification even if the conflict could be waived in an ordinary litigation setting). This is not to say that class actions are inevitably inconsistent with client consent: if clients were required to opt-in rather than opt-out, consent could be obtained rather readily. Opt-in class actions do exist in limited contexts, such as litigation under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b) and the Fair Labor Standards Act, 29 U.S.C. § 216(b). And they have been recommended for class action settlements generally. **[omission]** However, aside from the limited contexts just mentioned, contemporary class action practice does not require opt-ins, and thus is inconsistent with client consent as that concept is normally understood.

judgment. Even when class members have the right to opt out, in damages actions under Rule 23(b)(3), consent in the usual sense cannot be obtained. The class action notice will rarely include a careful disclosure of the dangers of multiple representation of the sort contemplated in the ethics rules. Even if the notice did contain such a discussion, the options available to class members are different than those contemplated in the rules. The class action client must take affirmative steps to opt out; if she does nothing, she will remain in the class. Under the ethics rules, however, the client must affirmatively manifest agreement in order for consent to be effective; merely doing nothing is insufficient.[14] Similarly, once the class action has been provisionally settled, the notice of settlement (which in a settlement class may coincide with the class action notice), will rarely contain the disclosures required by the aggregate settlement rule. And even if the notice did contain the necessary disclosures, the class member's option is, again, only to reject or accept the settlement, which is not tantamount to an affirmative manifestation of consent to the settlement's terms.[15]

The upshot is that the ordinary ethics rules protecting against conflicts of interest cannot apply in class actions without substantial modification.[16] Consent is the lynchpin

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[14] Professor Menkel-Meadow attempts to reconcile class cases with the ethics rules by arguing that consent can be inferred from silence. See Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 Cornell Law Review 1159, 1193 & n.144 (1995). It is true that clients can manifest consent by a course of conduct, but it would be unusual for a client to be deemed to have consented to a conflict of interest by simply doing nothing. As Professor Menkel-Meadow recognizes, moreover, the idea that consent can be inferred from silence is inconsistent with rules applicable in some states, such as California, that require consent to conflicts to be in writing.

[15] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), does not stand for a different rule. In *Shutts*, the Court held that a state court could constitutionally exercise jurisdiction over absent class members, despite the absence of minimum contacts, because of the procedural safeguards contained in the class action procedure – most importantly, the right to notice and to opt out of the action. Id. at 812. But that notice and opt-out rights may operate as a substitute for consent to a court's jurisdiction is not tantamount to concluding that they can also operate as consent to a conflict of interest on the part of class counsel.

[16] For judicial recognition that conflicts of interest rules cannot be simplistically applied to class actions, *see, e.g.*, *In re Austrian and German Bank Holocaust Litigation*, 2003 WL 23412 *9 (2d Cir.

of these rules, and consent is impossible in class actions, either to waive conflicts or to authorize aggregate settlements.[17] Applied literally, the rules would seriously interfere with the conduct of class action litigation. How, then, are conflicts of interest to be managed, and under what standard?

A partial answer is that review by the *court* substitutes for client consent. Class counsel is expected to bring conflicts to the attention of the trial judge,[18] whose approval substitutes for client consent.[19] As "fiduciaries" for absent plaintiffs,[20] judges in class actions have an affirmative duty to protect the class, not only at key moments in the litigation such as class certification or settlement approval, but always.[21] An important

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2003); *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999); *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir. 1988) ("strict application of rules on attorney conduct that were designed with simpler litigation in mind might make the class-action device unworkable in many cases"); *In re "Agent Orange" Products Liability Litigation*, 800 F.2d 14, 18-19 (2d Cir. 1986) ("the traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation."); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 163 (3d Cir. 1984)(Adams, J. concurring). Academic commentators also acknowledge that class actions present special problems. See, e.g., Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham Law Review 71, 126 (1996)("the conflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying the class action rules"); Brian J. Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct*, 27 Loyola Law Review 1047 (1981)(ethics rules provide inadequate guidance for class actions). **Blue ribbon panels agree. See Third Circuit Task Force Report on the Selection of Class Counsel, 208 F.R.D. 340 (2002) ("the ordinary relationship between lawyer and client cannot be relied on to safeguard the client's interests.")**

[17] See Joshua H. Threadcraft, *The Class Action Settlement: When the Good Can Become the Bad and the Ugly*, 25 Journal of the Legal Profession 227, 229 (2001)(attorneys regularly enter into settlements in class actions that "violate the letter and spirit of the [aggregate settlement] rule"); Carrie Menkel-Meadow, *Ethics and Settlements of Mass Torts: When the Rules Meet the Road*, 80 Cornell L. Rev. 1159, 1189-95 (1995); Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 Loyola L.A. Law Review 395 (1998); Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 South Texas Law Review (2000). One state, North Dakota, has exempted class actions from the rule. See North Dakota Rule of Professional Conduct 1.8(g).

[18] See *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir.1978).

[19] See Carrie Menkel-Meadow, *Ethics and the Settlements Of Mass Torts: When the Rules Meet The Road*, 80 Cornell Law Review 1159, 1189 (1995).

[20] *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 279 (7th Cir. 2002)(describing the role of a trial court reviewing a proposed class action settlement as that of a "fiduciary").

[21] See, e.g., *North American Acceptance v. Arnall, Golden & Gregory*, 593 F.2d 642, 645 (5th Cir. 1979)("[i]f at any time the trial court realizes that class counsel should be disqualified, it is required to take appropriate action.").

part of that process is the court's evaluation whether the representation of the class by the named plaintiff and class counsel is infected by disqualifying conflicts of interest.

The court's role in policing against class action conflicts of interest takes two principal forms.[22] First, courts in class action cases, as in all other cases, have supervisory authority over the conduct of litigation before them, including the power to police against conflicts of interest. Thus, courts in class action cases may be asked to rule on motions to disqualify counsel. Second, the court becomes involved when it rules on motions under the applicable class action rule.[23] Under Federal Rule 23(a)(3), a class may be certified only if the claims or defenses of the representative parties are "typical of the claims or defenses of the class." By requiring similarity in claims and defenses, the rule filters out cases where the representative plaintiff and class counsel have interests that are significantly at odds with the interests of other class members. The commonality and predominance requirements[24] also operate as preliminary screens to ensure overlap in the legal positions of class members, thus further reducing the possibility of intra-class conflicts. Even more important is the requirement that the representative plaintiff (and class counsel) must "fairly and adequately protect the interests of the class."[25] This adequacy-of-representation provision has long been understood as demanding that neither

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[22] Another potential avenue for policing against conflicts is a petition to forfeit the attorneys' fee. See *In re Austrian and German Bank Holocaust Litigation*, 2003 WL 23412 (2nd Cir. 2003). As the result in the *Holocaust Litigation* case demonstrates, however, the probability that a court would require forfeiture of a fee after it has been paid is very low, at least in the absence of serious and previously unknown misconduct.

[23] In policing against conflicts of interest, the class action rule implements values that have a foundation in the Due Process Clause. *See Hansberry v. Lee*, 311 U.S. 32, 43-45 (1940). However, the class action rule may well impose requirements that are stricter than the barebones constitutional protections.

[24] FRCP 23(a)(2) provides that, for a class action to be maintained, there must be "questions of law or fact common to the class." FRCP 23(b)(3) provides that, for a class action to be maintained under that heading, the court must find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

[25] FRCP 23(a)(4).

the representative plaintiff not class counsel have interests that are in fundamental conflict with the interests of other class members.[26]

Judicial review for conflicts of interests re-enters once the action has been settled. Under Rule 23(e), the court must review and approve class action settlements before they can become effective, and in so doing must determine that the proposed compromise is "fair, adequate and reasonable."[27] For a settlement to be "fair," it should not discriminate among class members; for it to be "adequate," tensions within the class or between the class and counsel should not cause the consideration received by the class to be lower than what could otherwise be obtained. Accordingly, class action settlements may be rejected if they are the product of conflicted representation.[28]

While the judicial role in policing against conflicts of interest in class action litigation is thus well-established, the *standards* under which that role is to be exercised are not. Courts declare that a conflict of interest will be disqualifying if it interferes with the vigorous prosecution of the action,[29] or require the trial court to conduct a "rigorous analysis" of whether the requirements of Rule 23 are met.[30] These pronouncements encourage real rather than a pro forma evaluations, but they do little to inform trial courts as to how to assess conflicts of interest. Most cases are addressed on a case-by-case basis, with the decision based primarily on the discretion and intuition of the judge rather

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[26] See, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *In re Fine Paper Antitrust Litigation*, 617 F.2d 922 (3d Cir. 1980). Judicial rulings on these topics have important consequences. If the court finds that the representative plaintiff or class counsel *is* subject to a disqualifying conflict, it will refuse to certify the class. If, on the other hand, the court certifies the class over objections, the certification itself counts as a finding that a disqualifying conflict was not present. Thus, if an objecting party does not appeal the certification, he or she is likely to be held to have waived objection, and therefore cannot succeed in a subsequent motion to disqualify. See, e.g., *Wininger v. SI Management L.P.*, 301 F.3d 1115 (9th Cir. 2002).

[27] See, e.g., *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000).

[28] See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

than on any well-established set of principles. Often, the courts do an excellent job of sensibly protecting the class without unduly burdening the litigation. Yet more clearly articulated standards could help.

II. The Hypothetical Consent Standard

A hypothetical consent standard provides potentially valuable guidance in analyzing conflict of interest problems in class action litigation. Under this standard, a conflict should be deemed impermissible if, but only if, a reasonable plaintiff under a veil of ignorance as to his or her position in the class would refuse consent to the arrangement. Since consent from actual plaintiffs cannot be obtained, the concept of consent requires the creation of a hypothetical plaintiff whose decision process can fairly be attributed to the class members as a whole.

The decision-maker, under this standard, is a "reasonable" plaintiff. This idea is intended to accomplish two objectives. First, it operates to remove idiosyncratic features that might pertain to an individual class member in real life. For example, the reasonable plaintiff is not opposed to or supportive of class action litigation on ideological grounds, has no attitude towards the defendant based on personal history not shared by other class members, and is not unusually risk-averse or risk-preferring relative to the class. Nor is the reasonable plaintiff motivated by a desire to have her "day in court." The potential catharsis of a trial is not part of the reasonable plaintiff's objective function; rather, she is willing to accept a settlement if doing so increases the value of her stake. In filtering out individualized characteristics, the concept of a reasonable plaintiff can be seen as a sort

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[29] See Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Nebraska Law Review 646, 650 (1994).

[30] *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

of "super-typicality" requirement, demanding that the hypothetical decision-maker possess no unusual features not shared with the class in general.

The idea of a reasonable plaintiff implies that the decision-maker is motivated by rational self-interest, defined as a wish to maximize the value of her personal stake. She will not, for example, prefer a lower settlement to a higher one, or a later payout to an earlier one of the same amount. The reasonable plaintiff need not, however, be motivated solely by monetary gain: if the members of the class could be expected to have a non-pecuniary interest in the case – such as, for example, a reason to desire injunctive relief against the defendant – the reasonable plaintiff will share that interest. Similarly, especially in non-opt-out class actions, the reasonable plaintiff may have an autonomy-based interest, grounded in the policies of the first amendment, in not having an attorney purport to speak in her name in making arguments or seeking results with which she disagrees.[31]

Supplementing the reasonable plaintiff idea is the concept of a veil of ignorance as to the decision-maker's position in the class.[32] The veil of ignorance is intended to screen out knowledge of the part of the class to which the decision-maker belongs. This is only a limited screen, in that all other case-related information is available to the decision-maker. For example, while the reasonable plaintiff doesn't know which part of the class she belongs to, she is fully informed of the class segments and of the differences of interests among them. She is aware of claims and legal theories underlying the case,

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[31] See Maximilian A. Grant, *Comment, The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 University of Chicago Law Review 239 (1996). Cf. Wooley v. Maynard, 430 U.S. 705 (1977) (holding that New Hampshire may not require motorists to display state motto "live free or die" on their license plates).

[32] The concept of a veil of ignorance has an important role in philosophical explorations of the conditions for moral and political legitimacy. See generally John Rawls, *A Theory of Justice* (1971)

as well as the nature and extent of class counsel's interest. She understands the dynamics of class action litigation. Thus, she will know that any settlement will be reviewed by the trial court for fairness to the class and that she will have the right to opt out of a (b)(3) class. She also knows what sorts of remedies (if any) are available to cure a conflict of interest if consent is refused. She thus has a basis for assessing the pros and cons of granting or refusing consent to the arrangement.[33]

In applying the hypothetical consent standard, the trial court would take into account all properly available information and, if necessary, hold a hearing at which the parties may present evidence and make arguments. The information presented to the court could indicate the presence of an impermissible conflict in two ways. Some conflicts may be so bad, in themselves, as to establish that a reasonable plaintiff would refuse consent. If, for example, counsel presented a settlement under which the

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(employing a veil of ignorance to establish conditions for legitimate consent to constitutional arrangements).

[33] **Although the concept of the veil of ignorance will ordinarily operate as a thought experiment, it bcomes a reality in some cases. For example, as David Rosenberg has observed, "exposure-only" claimants in mass tort cases are ignorant as to whether or not they will develop a disease (and if so, how serious their condition will be), and thus are positioned to make an unconflicted choice about the best interests of the class. See David Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 Harvard Law Review 831, 970 & n. 79 (2002). The veil of ignorance also appeared** in a recent Seventh Circuit case, *Uhl v. Thoroughbred Technology and Telecommunications, Inc.*, 309 F.3d 978 (7th Cir. 2002). This was a settlement class action brought on behalf of thousands of owners of properties running on either side of a railroad right-of-way, challenging a cable company's claim that it had the right to install conduits for fiber optic cables along the right-of-way. The cables in question would be laid on one side or the other of the tracks, and thus property owners on the side where cable would be laid would have much stronger claims than those on the other side. The problem for the class was that it was impossible to determine in advance of detailed surveys which side of the track the cable company would select at any given point (presumably the cable could pass underneath the tracks if the company decided to switch sides). To address this difficulty, plaintiffs' counsel divided the class into two groups, the "cable side" and the "non-cable side." The settlement provided for different compensation for the two groups. The case was thus settled at a time when the individual class members could not know which group they were in. Only one representative plaintiff served for both groups. The district court concluded that the class representative was appropriate because he was ignorant as to which subgroup he belonged – a "concrete working example of John Rawls' celebrated theory of the 'veil of ignorance.' " Id. at 986. Judge Wood, writing for the Seventh Circuit, affirmed the district court's decision, observing that the representative plaintiff was able to act as an effective advocate for both groups given that he did not know to which he belonged. While the Seventh Circuit did not here adopt the hypothetical consent standard, the spirit of the decision is consistent with the thesis of this article.

defendant provided nothing of value to the class in exchange for a release of liability, and agreed also to pay a hefty fee to class counsel, the court may properly conclude that the reasonable plaintiff would object. In other cases, the evidence of conflict of interest would not be enough to establish that a reasonable plaintiff would refuse consent, but would be enough to raise a "yellow flag" indicating that the arrangements in question should be carefully scrutinized in other respects. For example, if the named plaintiff becomes dissatisfied with class counsel and seeks an order substituting attorneys, this is a circumstance providing the court with a basis to inquire further as to whether class counsel is properly representing the class, but it does not, in itself, justify a court in concluding that the reasonable plaintiff would refuse consent.[34]

If, after conducting the above analysis, the judge concludes that the reasonable plaintiff would not refuse consent to the representation, the case can proceed as before. If, on the other hand, the court concludes that the reasonable plaintiff would refuse consent, the judge would enter an appropriate curative order, such as requiring that the class be divided into separately represented subclasses or (in an appropriate case) disqualifying counsel. Where the conflict involves the size of the attorneys' fee, the court has discretion to set an appropriate fee, either as part of a settlement or incident to a judgment on the merits.

In assessing whether a conflict should be deemed impermissible under the hypothetical consent standard, a court would look to the value of the relief expected for the class as a whole and to the variance of recoveries for different class members from the estimated fair value of their claims. If class members (and therefore the reasonable plaintiff) are risk-neutral, only the first issue is relevant. The reasonable plaintiff's

[34] See notes xx-xx and accompanying text, infra.

objective function will be to maximize the absolute value of her recovery, which implies also maximizing the value of the aggregate recovery (since the reasonable plaintiff is ignorant of her position in the class). Suppose, for example, that in the class action described above, all class members were similarly situated, except that half of them face a potential statute of limitations defense. Suppose further that counsel, acting alone, would negotiate a settlement giving $100 to the more recent purchasers and $50 to earlier purchasers who are subject to the defense. If, however, the two parts of the class were separately represented, the respective recoveries would be $90 and $55.[35] Overall, recovery for the class would also fall.[36] In such a case, earlier purchasers would refuse consent to unitary representation because, by obtaining independent representation, they can each make themselves $5 better off. Yet such a result would reduce the recovery for the class as a whole. When the veil of ignorance is introduced, the reasonable plaintiff estimates her expected recovery as the average recovery for the class -- $75 per class member with a single attorney and $72.5 for each class member with multiple representation. She would agree to the unitary representation.

The court's assessment of the value of the case will often depend on the available options for curing potential conflicts. In some class actions, conflicts can be addressed inexpensively by subclassing or otherwise ensuring that factions in the class receive independent representation. The case just discussed provides an example: the class neatly divides into two groups, those who face a potential statute of limitations defense

[35] The reason for the difference could be that the second attorney, representing the earlier purchasers, fights hard for their interests and thus increases their recovery by $5, albeit at the expense of the newer purchasers whose recovery falls by $10.

[36] The introduction of a second attorney would not necessarily reduce the size of the class recovery, however. For example, adding another attorney into the settlement negotiations may function as a check on the propensity of class counsel to trade off a reduced recovery on the merits for a larger fee. If the second

and those who do not. It might be possible to split the class into separately represented subclasses without adding much extra expense or complexity (at least if the litigation is not far advanced). In other cases, however, the conflict may split the class into multiple factions. In securities fraud class actions, for example, class members may have different interests depending on the time of purchase, resulting in the potential for hundreds of different subgroups.[37] Obviously a curative order requiring separate representation for each would be unworkable. If no less costly method for cure is available, the optimal strategy for the class might be to accept the unitary representation despite the presence of intra-class tensions.

Issues as to variance of return enter when risk-aversion is introduced.[38] If the class (and therefore the reasonable plaintiff) is risk-averse, then the preferable outcome might be to trade off a reduced recovery for the class as a whole in return for a tightening of the probability distribution of individual recoveries. Suppose the same facts as before: with a single attorney, late purchasers get $100 and early purchasers get $50. With separate representation, late purchasers get $90 and early purchasers get $55. Suppose further that an unbiased estimate of the fair value of the claims would be $95 and $55. Although the recovery for the class as a whole is smaller with separate representation, the average gap between the recoveries and the estimated value of the claims is reduced

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attorney would increase the expected recovery for the class, the reasonable plaintiff would prefer this arrangement.

[37] See notes xx-xx and accompanying text, infra.

[38] Concerns about risk aversion and variance of recovery can be discerned beneath the surface of several contemporary debates on class action issues. For example, suggestions that courts should preferentially certify "mature" mass tort litigation can be understood as reflecting the idea that as judges develop experience with categories of litigation, it becomes more feasible to devise a global class action settlement in which recoveries to individual class members are reasonably correlated with the actual strength of their claims. See generally Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. Law Review 659 (1989). Concerns about ensuring a reasonable link between settlement recovery and a reasonable estimate of class members' damages may also be reflected in the Supreme Court's focus in

(from $5 to $2.50). The reasonable plaintiff would prefer separate representation if she valued the reduction in risk more than she disliked the loss in expected recovery.

How is a trial court to assess the risk aversion of the class? Obviously, this cannot be accomplished with precision. But it seems possible to sort classes according to a rough scale. Where average damages are substantial, plaintiffs are likely to be risk averse since they have more to lose as the stakes increase.[39] On the other hand, when the case involves only monetary relief and the average recovery per class member is small (as is often true in consumer class actions), risk aversion may be low because the reasonable plaintiff will not suffer significant harm if the outcome is unfavorable. Where the matters at issue implicate ideological or dignitary concerns – for example, a school desegregation case – risk aversion may be higher than when such concerns are absent. Risk aversion is also likely to be greater when the litigation can (or will) result in an outcome that would affirmatively harm some class members. While people may not care greatly that they do not receive as must as possible in litigation, they are likely to object when they end up worse off than before, especially when other members of the class end up better off.

The tradeoff between recovery and variance is related to the size of the case. In very large cases, the reasonable plaintiff may decline consent to conflicted representation because any loss in expected recovery per plaintiff resulting from the addition of new counsel may be relatively small, while the reduction of risk may be substantial. In small cases, on the other hand, these economies may be absent and the costs of separate

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Amchem on the factual differences among the members of the settlement class. See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

[39] See Warren Schwartz, *Long-Shot Class Actions: Toward a Normative Theory of Uncertainty*, 8 Legal Theory 297, 299 (2002).

representation (or other curative orders) may exceed the benefits in terms of reducing risk.

The hypothetical consent standard is supported by several justifications. First, it emulates the actual consent required in ordinary litigation. Because actual consent is impossible, we can mimic the requirement if we ask whether a reasonable plaintiff under a veil of ignorance as to her position in the class would consent to the arrangement. The hypothetical consent standard aligns class action practice with the requirements applicable in other settings, thus serving the client-protective policies underlying the conflicts rules.

Second, the hypothetical consent standard generates efficient outcomes. Because of the veil of ignorance criterion, the reasonable plaintiff's objective, in the absence of risk-aversion, is to maximize the recovery for the class. When risk-aversion is introduced, the reasonable plaintiff is no longer committed to maximizing class recovery, but still wants to maximize expected utility for the class. Other things equal, a decision standard that maximizes class benefits appears to have a strong claim for adoption.

Third, the hypothetical consent standard does not unduly hamstring class action litigation.[40] If the reasonable plaintiff were informed of her status she would decide only according to her own interests and not take others into account. Obviously this could generate undesirable results. But because the reasonable plaintiff is shielded from knowledge of her position the class, the hypothetical consent standard requires that the

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[40] In this respect, the hypothetical consent idea provides content to Professor Green's intuition that class action conflicts might be treated more leniently than conflicts in other settings. See Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71, 126 (1996).

decision be in the best interest of the class as a whole – and thus would allow representation to go forward even if some individual class members would object.

Finally, the hypothetical consent standard recognizes the reality that most class action litigation is dominated by class counsel rather than by the representative plaintiffs.[41] In ordinary litigation settings, the principal concern is the problem of *client-client* conflicts. The worry is that the attorney's loyalty to one client will compromise her representation of another client. In class actions, on the other hand, the problem of client-client conflicts, while not absent, is reduced because class members – even representative plaintiffs – do not exercise significant control over class counsel's conduct of the litigation. Conflicts among absent class members, or even between the named plaintiff and other members of the class, will not in themselves create severe difficulties. For the same reason, however, concerns about *attorney-client* conflicts of interest are heightened. The hypothetical consent test addresses this reality of class action practice. By removing consideration of the particular circumstances of the reasonable plaintiff vis-à-vis other class members, the test downplays intra-class conflicts. While such conflicts may require judicial correction under the hypothetical consent standard, the veil of ignorance would immunize many from attack. On the other hand, the veil of ignorance does not disguise from the reasonable plaintiff the relationship between counsel's interests and the interests of the class. Thus the reasonable plaintiff will be relatively more concerned about attorney-client conflicts and relatively less concerned about client-client conflicts.

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[41] See Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 University of Chicago Law Review 1, 1 (1991) ("absence of client monitoring" of class counsel); Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Nebraska Law Review 646, 648 (1994) ("steadily diminishing role of the class representative"). This observation my have somewhat less force in litigation under the Private Securities Litigation Reform Act of 1995, Pub. L. No.

III. Application of the Hypothetical Consent Standard

Class action conflicts can be analyzed according to the type of conflict involved.[42] Every class action case presents three relevant parties whose interests must be considered: the representative plaintiff, class counsel, and absent class members. Most conflict of interest situations can be analyzed as falling into one of the six categories that are generated when these parties are placed in bipolar opposition. For each of the categories, the conflict could be either a difference of *opinion* (the parties disagree about the best way to conduct or settle the litigation) or a difference of *interest* (increasing a benefit to one group can reduce the benefit available to the other). The discussion below addresses some of these permutations, organized according to the identities of the parties whose interests or opinions are in conflict.

A. Absent Class Members vs. Absent Class Members

In ordinary litigation, the classic conflict of interest situation is the case in which the interests of one client clash with those of another (present or former) client. The analogy to this problem, in class action cases, is the intra-class conflict where the interests of some class members differ from the interests of ohters. How are these problems analyzed under the hypothetical consent standard?

Several observations are pertinent at the outset. First, because by definition absent class members will not be before the court, the issues are conflicts of interest

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104-67, 109 Stat. 737 (codified in sections of 15 U.S.C. §§ 77, 78), which encourages a more active role for representative plaintiffs.

[42] Because of the complex structure of class action litigation and the wide variety of cases that can be structured as class actions, the number of categories is fairly substantial. And the categories used to describe the conflicts are often not exclusive: a given case can present a variety of different types of conflict. The analysis in each category, moreover, depends on case-specific facts and circumstances. It is not possible, therefore, to provide definite answers as to how the hypothetical consent test would apply in many cases. Nevertheless, it may be useful to set out a typology of conflicts and to offer preliminary thoughts.

rather than of opinion. Other things equal, it would appear that conflicts of interest present more serious problems than conflicts of opinion; to this extent, it might seem appropriate to adopt a relatively strict approach to intra-class conflicts. On the other hand, not all intra-class conflicts are impermissible. For example, most class members presumably wish to receive as much as possible from the case, and thus have an interest in appropriating more for themselves and leaving less for others.[43] If this were a disabling conflict, then class action litigation could not exist. Something more than the wish to obtain more than one's fair share must be present. For a conflict to be impermissible, it must threaten either (or both) of the goals we have attributed to the reasonable plaintiff: maximizing the amount of recovery for the class, and reducing the variance of outcomes relative to a fair estimate of claim value. Intra-class conflicts display a spectrum of severity, depending on how much they impair these objectives.

Spurious Conflicts. Some differences among class members pose no serious threat either to maximizing recovery or to reducing variance, and therefore can be classed as spurious conflicts. The most obvious example is when the class consists of persons who expect to receive different amounts from the case because of differences in their claims, but where the relief is a fair approximation of claim value and where providing relief for one class member has no effect on the relief available to other class members. Differences of this sort are ubiquitous in class actions. But these present no conflict because class counsel is not required to trade off the interest of one plaintiff against the

[43] See, e.g., *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171 175 (7th Cir. 1982)("when a district judge approves a class action settlement . . . he almost always overrides the wishes of some class members for a bigger share of the pie").

interests of others. Not surprisingly, courts do not disqualify counsel in this setting,[44] **and permit counsel a wide degree of latitude in allocating the relief among different class members so long as the approach is rational.[45]** The hypothetical consent standard supports such a result. Nothing here raises questions about counsel's loyalty or desire to maximize recovery for the class. The veil of ignorance condition excludes considerations of a wish for a greater share of the recovery vis-à-vis other class members. Because the reasonable plaintiff does not know her position in the class, she has no reason to refuse consent to the representation.

Also presenting a spurious conflict are cases where different segments of the class have claims requiring different proof, but where the issues on which the proof requirements differ are not inconsistent. For example, in *In Re Regal Communications Corporation Securities Litigation*,[46] counsel sought to represent a class composed of people who had sold the company's stock and people who had sold its debentures. The causes of action available to the debenture holders did not require proof of scienter and permitted rescission. Stock plaintiffs would be required to prove scienter and did not have a rescission remedy. The debenture plaintiffs had no interest in proving scienter, and the stock plaintiffs had no benefit from seeking rescission. Notwithstanding these differences, the trial court had no difficulty concluding that certification was appropriate. This appears to be a correct result under the hypothetical consent standard. There was no evidence that the attorneys had any personal conflict of interest threatening their

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[44] See, e.g., *Schwartz v. Citibank South Dakota, N.A.*, 2002 WL 31269818 (9th Cir. 2002)(differences in damages did not preclude certification); *Petrovic v. Amoco*. 200 F.3d 1140, 1147 (8th Cir. 1999)(same); *Pyke v. Cuomo*, 209 F.R.D. 33, 43 (N.D.N.Y. 2002)(same).

[45] **See *In re Nasdaq Market-Makers Antitrust Litig*., 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000) ("[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' Class Counsel.").**

[46] 1995 U.S. Dist. LEXIS 13492 (E.D. Pa. 1995).

incentive to maximize class recovery. Although counsel had to make different legal arguments and meet different evidentiary burdens for the two class segments, the positions of these groups were not in conflict. Recovery by the debenture sellers on a rescission theory would not threaten the ability of the stock sellers to recover under a damages theory; and proof of scienter by the stock sellers would not harm the debenture holders.

In other cases involving differences in proof, courts reach less defensible results. In *Culver v. City of Milwaukee*,[47] counsel brought a putative class action on behalf of European-American men who claimed to have been discriminated against in hiring by the Milwaukee Police Department. Some members of the class had allegedly been denied the chance to apply for a job at all. Others had managed to apply, but claimed they were rejected because the city had doctored the test results. The court of appeals indicated that these two groups could not be brought together as a single class. The court noted, *inter alia*, that those who had taken the test would be required to prove that the scoring was discriminatory, whereas those who had been denied the right to take the test would not face this hurdle. The hypothetical consent approach would not support this reasoning as a sufficient ground for the reasonable plaintiff to refuse consent. The mere fact that different proof was required to establish the claims of the two sub-groups did not raise serious questions as to counsel's incentives to maximize recovery for the class and accurately allocate the proceeds. Although remediation of the particular conflict would have been relatively easy – divide the class into separately represented subclasses – it is far from clear that such remediation was desirable. It appears that a *difference* in the

[47] 277 F.3d 908 (7th Cir. 2002).

class bemused the court into concluding, incorrectly, that the difference was *disqualifying*.[48]

Another common example of a spurious conflict is the case where some class members will receive damages and others equitable relief, but where the differences in relief are justifiable in light of the legal positions of the parties. An example is *Schwartz v. Citibank (South Dakota)*,[49] a challenge to certain charges assessed by a credit card issuer. Some card members had actually paid the charges while others had merely been exposed to an enhanced potential for being billed. The settlement provided cash relief to persons who had paid the charges and equitable relief to the class as a whole. The Ninth Circuit held that the difference in relief was not disqualifying because all class members had a similar interest in obtaining a change in the bank's polices. This is clearly a correct result under the hypothetical consent theory, since the mere award of different types of relief threatened neither to reduce the size of the overall recovery nor to increase the variance of individual recoveries.

Recoveries with random error. A second category of conflicts are settlements that include an administrable but imperfectly specified schedule of recoveries for class members. An example is found in *Reynolds v. Beneficial National Bank*.[50] Counsel challenged tax refund anticipation loans written by a bank in connection with tax services rendered by H&R Block, the tax preparation firm. The settlement approved by the district court provided for payments of $15 for class members who had taken out two or

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[48] For employment cases with similar analyses, see *General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)(holding that class alleging employment discrimination could not be certified because it included both persons who had not been hired and others who had been hired but claimed discrimination on the job); *Majeske v. City of Chicago*, 740 F. Supp. 1350 (N.D. Ill. 1990)(ordering separate representation of class members who had been permitted to take an oral examination and those who had not).

[49] 2002 WL 31269818 (9th Cir. 2002).

[50] 288 F.3d 277 (7th Cir. 2002).

fewer loans and $30 for class members who had taken out more than two loans. This structure created an "unremarked conflict of interest" because class members would receive no more than $30 whether they had taken out three loans or twenty.[51] The hypothetical consent standard would, in general, support the legitimacy of this sort of settlement. In large-scale litigation with small stakes, it is often desirable to structure relief "off the rack" rather than individually tailor the damages to each class member's claim. This approach can conserve on the administrative costs of the settlement, thus generating value that can be shared with the class. The reasonable plaintiff would have reason to support this approach insofar as it increased the size of the class recovery. At the same time, because the individual stakes are usually small in off-the-rack settlements, risk aversion should not be a significant factor. The reasonable plaintiff would not ordinarily care very much about the possibility that she would be over-compensated or under-compensated by the settlement so long as the possibilities of being in one set or the other were random. Finally, it will be difficult for a court to formulate a curative order when the differences within the class are either continuous or discrete but large in number. In *Reynolds*, for example, it would have been bizarre to create subclasses for each transaction frequency; but without this, it might have been difficult to eliminate the problem. These considerations influenced Judge Posner, in *Reynolds*, to conclude that the intra-class conflict was not a fatal defect of the settlement (although the court rejected the settlement for other reasons).

[51] *Id.* at 282.

Zero-sum cases. Some class actions involves a zero-sum feature, in that what is given to one subset of the class will necessarily be taken away from another.[52] In such cases, the groups share a common interest in establishing liability, but differ sharply in how the proceeds of the litigation will be allocated. Unlike the former cases, where recoveries of class members are not codependent, here an increase in recovery by one segment of the class will reduce the amount obtained by others.

An example arises in securities fraud litigation, where class members are often differently situated with respect to when they purchased or sold the securities in question. Suppose, for example, that an issuing firm drives up its share price by issuing misleading statements to the market. As the truth emerges the stock falls back to (or below) the previous price. A class action for securities fraud is filed on behalf of persons who purchased during the period of price inflation. In this situation there will be conflicts between class members who purchased stock on any day when the price inflation was present and other class members who previously purchased the stock during the class period and who later sold their stock on the day of the other class members' purchases. Those who bought on that day will want to *maximize* the amount of price inflation remaining in the stock, since this will give them the greatest damages.[53] Those who sold stock on a given day will want to *minimize* the amount of price inflation remaining in the stock price on that day, since this will maximize the amount of their losses that can be

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[52] In an abstract sense, all class actions pose some form of zero-sum problem: settlement is always an option when a class action is filed, and settlement will only be possible if is at or below the defendant's reservation price (the highest amount the defendant would pay in settlement). An inevitable aspect of any settlement is the task of allocating the limited proceeds among class members. I reserve the term "zero-sum" for cases involving a more concrete and direct trade-off in recoveries among class segments, under which any increase for one will result in a decrease for another and where the "allocation dilemma" becomes a paramount concern. See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) (distinguishing zero-sum cases).

[53] See, e.g., *In re Gaming Lottery Securities Litigation*, 58 F. Supp. 2d 62 (S.D.N.Y. 1999).

attributed to the defendant's fraud (as opposed to other factors such as general market movements or company-specific changes in price unrelated to the fraud). Most courts refuse to recognize a disabling conflict of interest here on the grounds that the alleged harm is too speculative,[54] not sufficiently substantial,[55] or not disposative because the issue relates to damages rather than liability.[56] However, other courts have raised questions about the certifiability of such cases.[57] Consistently with the majority of the decided cases, the hypothetical consent analysis would not generally view conflicts of this sort as disabling. The reasonable plaintiff has no reason to doubt counsel's incentive to maximize the recovery for the class as a whole. Because the question is one of proof, the facts themselves have a disciplining effect against any propensity of counsel to favor the interests of one group over another. Risk-aversion will also usually be low: although some class members will have made large purchases during the class period, many will be small purchasers with modest stakes. Most large purchasers will be institutional investors with diversified portfolios. And in such cases the court lacks the capacity to craft an effective curative order because of the discrete but multiple conflicts involved.

Generic drug litigation provides another example of a zero-sum conflict. In such cases, both consumers and third-party payers typically seek compensation from the

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[54] See, e.g., *Walsh v. Chittenden Corporation*, 798 F. Supp. 1043 (D. Vermont 1992); *Rosen v. Fidelity Fixed Income Trust*, 169 F.R.D. 295 (E.D.Pa. 1995).

[55] See, e.g., *Jenson v. Continental Financial Corp*., 404 F. Supp. 806 (D. Minn. 1975).

[56] See *In Re: Regal Communications Corporation Securities Litigation*, 1995 U.S. Dist. LEXIS 13492 (E.D. Pa. 1995).

[57] See *In re Seagate Technology II Securities Litigation*, 843 F. Supp. 1341 (N.D. Cal. 1994); *In re California Micro Devices*, 1995 U.S. Dist. LEXIS 11587, 1995 WL 476625 (N.D. Cal. 1995); *In re Clearly Canadian*, 875 F. Supp. 1410, 1422 (N.D. Cal. 1995). One interesting decision in the Northern District of Illinois recognizes that there is a real conflict between buy and sell plaintiffs, but holds that the policies underlying the private cause of action under the securities laws trump the policies underlying the adequacy-of-representation requirement under the federal class action rule. *Ziemack v. Centel Corporation*, 164 F.R.D. 477 (N.D. Ill. 1995).

manufacturer of the brand-name medication.[58] The hypothetical consent approach suggests the following. First, the presence of the two groups of plaintiffs provides no reason to doubt counsel's incentive to maximize recovery for the class as a whole – a consideration that, taken alone, would suggest that the reasonable plaintiff would consent to unitary representation. The relatively small stakes for most consumer class members could indicate that risk-aversion is relatively low, against suggesting that consent would be given. On the other hand, if there is evidence that third party payers might influence class counsel, the possibility of inadequate compensation for consumers could tilt the balance against unitary representation. The key factor would appear to be whether there are indications that class counsel is too closely aligned with the third party payers.

A related zero-sum situation is when class counsel brings both derivative and direct cases based on the same nucleus of operative fact. As counsel for the derivative shareholder, the attorney is charged with obtaining the largest possible recovery for the company, whereas acting as counsel for the class, the attorney's responsibility is to obtain the greatest recovery for the individual plaintiffs. This dual role could divide class members. Plaintiffs who sold their shares would get no benefit from a recovery to the corporation, whereas those who held would benefit because their stock may become more valuable as a result of the payment into the corporate treasury. Plaintiffs who need liquidity would benefit from a class recovery, whereas those who are not liquidity-constrained might be happier with a recovery for the corporation. Plaintiffs who happen to be creditors of the corporation would benefit from a derivative remedy because the amounts recovered would be available to pay the firm's debts; non-creditor plaintiffs

[58] See, e.g., *In Re Warfarin Sodium Antitrust Litigation,* 2002 U.S. Dist. LEXIS 16375 (D.Del. 2002); *In re Synthroid Marketing Litigation*, 188 F.R.D. 295 (N.D. Ill. 1999) (consumer class certification);

would gain no benefit from increasing creditor security. The caselaw on this problem is unsettled: some courts indicate nearly blanket disapproval of representation by a single counsel,[59] others voice concerns but do not preclude the practice,[60] and still others adopt a permissive attitude that allows the representation of both derivative and direct claims unless good reasons to the contrary are shown.[61] The hypothetical consent approach suggests the following. Class counsel has an unconflicted incentive to obtain the greatest possible recovery from the defendants. And plaintiffs would not appear to be risk-averse with respect to error in outcomes. Although a curative order would be relatively straightforward in such cases – a ruling prohibiting the attorney from prosecuting both the direct and derivative actions – disqualifications of counsel always carry costs, and the routine availability of such orders might deter litigation that is beneficial to the class. Thus, unless bankruptcy of the corporate is a significant possibility, the hypothetical consent approach would generally permit counsel to prosecute both class and derivative cases.

Zero-sum problems are also raised when some class members leave and others retain an interest in the subject matter of the litigation. An example is *In re Cendant Corporation Litigation*.[62] The plaintiffs were shareholders who claimed that defendants had given false information to the market that artificially boosted the company's stock

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In re Synthroid Marketing Litigation, 188 F.R.D. 287 (N.D. Ill. 1999) (third party payer class certification).

[59] See, e.g., *Kamerman v. Steinberg*, 113 F.R.D. 511, 515-16 (S.D.N.Y. 1986); *Stull v. Baker*, 410 F.Supp. 1326, 1336-37 (S.D.N.Y. 1976); *Hawk Industries, Inc. v. Bausch & Lomb, Inc.,* 59 F.R.D. 619, 623-24 (S.D.N.Y. 1973).

[60] See *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995)(expressing doubts about the Milberg Weiss firm representing both direct and derivative plaintiffs, but declining to rule because the issue had not be raised below); *Brickman v. Tyco Toys, Inc.*, 731 F.Supp. 1010 (S.D.N.Y. 1990) (requiring analysis of whether conflicts are likely to materialize).

[61] See, e.g., *In re Transocean Tender Offer Securities Litigation*, 455 F.Supp. 999, 1014 (N.D. Ill. 1978); *Bertozzi v. King Louie International, Inc.*, 420 F.Supp. 1166, 1179-80 (D.R.I. 1976).

[62] 264 F.3d 201 (3rd Cir. 2001).

price. The class contained a hidden conflict between plaintiffs who had sold all their stock and wanted only the greatest possible recovery – even to the point of bankrupting the company – and plaintiffs who sold only some of their stock, and whose interest included both a large recovery and a future claim on the income stream of the company. The court hinted that such conflicts, if brought to the attention of the trial court, might require the formation of subclasses to deal with the conflicting interests of the different class members. The scenario presented in the *Cendent* case is only one of many fact situations in which some members of the class leave and others remain. The general pattern can also be found when some members of the class wish to retain an investment and others wish to accept a buy-out offer sweetened by the class action settlement;[63] when some members of a class seeking enhanced pension benefits have already retired and others are current employees whose contributions may increase to cover the settlement costs;[64] when an employment discrimination class includes both present and former employees;[65] when false statements are made by the management of a acquisition target and some class members become shareholders of the acquiring firm;[66] when a class action against an insurance company includes both persons who are insured but no longer paying premiums and persons who are currently paying premiums which may raise to cover the increased costs;[67] or when, in a class action against a franchisor, some franchisees have left the relationship and others have remained.[68] The hypothetical consent approach does not generate general conclusions about these cases. There is no

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63 See *City Partnership Co. v. Atlantic Acquisition Limited Partnership* (1st Cir. 1996).

64 See, e.g., *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 781 (9th Cir. 1986), cert. denied, 476 U.S. 1170 (1986); *Gruby v. Brady*, 838 F. Supp. 820, 826-27 (S.D.N.Y. 1993).

65 See, e.g., *Weigmann v. Glorious Food, Inc*., 169 F.R.D. 280, 286 (S.D.N.Y. 1996).

66 See *Ziemack v. Centel Corporation*, 164 F.R.D. 477 (N.D. Ill. 1995).

67 *Caranci v. Blue Cross and Blue Shield of Rhode Island*, 1999 U.S. Dist. LEXIS 14801 (D.R.I. 1999); *Becher v. Long Island Lighting Co*., 164 F.R.D. 144 (E.D.N.Y. 1996).

reason to suppose that the differences in the class are in themselves a basis to suspect counsel's incentives to litigate the case to maximize overall recovery. This factor would count in favor of the reasonable plaintiff consenting to the representation. On the other hand, the remedial options available to the trial court may count against consent. Because it is easy to distinguish between class members who stay and those who leave, it is usually simple to subdivide the class and require separate representation for the two groups (although the cost of requiring separate representation is not insubstantial and will increase as the case progresses). Risk-aversion is likely to more of a factor in some cases than in others. For example, in the franchise situation, the economic interest of franchisees in their businesses, and the importance of relations with the franchisor for those who remain, could tip the scales in favor of denial of consent because class members are risk-averse against variance in outcomes. In other cases – for example, those involving insurance premiums – risk aversion might not provide a compelling reason for refusing consent. Securities cases such as *Cendent* also appear low on the risk-aversion scale, suggesting doubt about the correctness of the Third Circuit's suggestion that conflicts in such cases should be disqualifying.

Difficult problems with zero-sum cases arise in the context of "public interest" litigation brought on behalf of classes with significant internal differences. In such cases, class counsel may be led by a belief in the value of the cause to ignore differences within the proposed class.[69] The trend in public interest litigation has been towards "super-

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[68] See *Broussard v. Meineke Discount Muffler Shops, Inc*., 155 F.3d 331, 338-39 (4th Cir. 1998).

[69] See Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. Review of Law and Social Change 487, 521 (1999).

classes" containing parties with a broad range of interests and injuries.[70] The hypothetical consent approach suggests the need for caution in such cases. Because the expected relief is primarily injunctive, there is no easy way to determine what relief would maximize value for the class. Plaintiffs' attorneys are typically compensated by a fee-shifting statute that does not provide strong incentives to maximize class recovery.[71] Risk-aversion is likely to be strong because of the fundamental interests involved. And curative orders can be crafted relatively easily because the conflicts in question often divide the class into a small number of factions. The relevant considerations may thus counsel for withholding consent to unitary representation, although each case would need to be evaluated in light of the individual facts and circumstances.

Present versus future claimants. Asbestos litigation has focused attention on the conflict between present claimants – people who have been exposed to a harmful agent and suffered an identifiable impairment of functioning, and future claimants – people who have been exposed to the agent but suffer no present impairment. In *Amchem Products, Inc. v. Windsor*,[72] the Supreme Court seemed to indicate that conflicts of this sort are *per se* disqualifying because of the differing interests in relief: current claimants want large compensation now, while future claimants want a generous, inflation-

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[70] For example, child welfare advocacy groups have begun to file class actions on behalf of children receiving or in need of a broad range of state services. See, e.g., *J.B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999); *Marisol A. v. Guuliani*, 126 F.3d 372 (2d Cir. 1997); *Baby Neal v. Casey*, 43 F.3d 48 (3d Cir. 1994).

[71] Fee-shifting statutes use the "lodestar" method for calculating fees, which is not directly tied to the size of the class recovery (although good results may be used to enhance the lodestar fee). See generally *City of Burlington v. Dague*, 505 U.S. 557 (1992) (discussing lodestar method and appropriate reasons for enhancing the basic fee). In contrast, the percent-of-recovery method, frequently used in antitrust, mass tort, and consumer class actions, ties counsel's remuneration directly to the amount obtained for the class. See Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 Texas Law Review 865 (1992).

[72] 521 U.S. 591 (1997).

protected fund to pay their claims if illness strikes.[73] This view has received support from influential commentators,[74] and has led to a perception that present and future claimants must receive separate representation to satisfy the adequacy-of-representation requirement.[75] However, the argument against including present and future claims in a single class is far from clear-cut. Courts regularly combine such claims without giving the matter a second thought. For example, settlements of class actions for damages often include relief under which the defendant promises not to continue the challenged conduct. In such cases, members of the class who expect to use the defendant's product or services will be, in effect, future as well as present claimants. Their relief, *qua* future claimants, is the defendant's promise to change its behavior. Other members of the class who do not expect to use the defendant's product or services are present claimants only. This situation may be distinguished from that at issue in *Amchem* because the future claimants are before the court as present claimants. But this is not always the case. For example, some consumer class actions provide relief to persons who purchased a potentially defective product but who have experienced no difficulties with its use.[76]

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[73] See id. at 626.

[74] See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia Law Review 1343, 1345 (1995)(separate subclasses for present and future claimants are a "necessary procedural innovation"); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc*., 80 Cornell L. Rev. 1045 (1995); Joshua H. Threadcraft, *The Class Action Settlement: When the Good Can Become the Bad and the Ugly*, 25 Journal of the Legal Profession 227, 232 (2001); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 477-507 (1996).

[75] But see Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 Texas Law Review 1925, 1939 (2002) (expressing skepticism about the value of *Amchem* insofar as it removed the class action mechanism from the "available tools to manage claims resolution and cash flow"); Geoffrey C Hazard, Jr., *The Futures Problem*, 148 University of Pennsylvania Law Review 1901 (2000) (identifying problems for resolution of mass torts in the wake of *Amchem*); George Rutherglen, *Future Claims in Mass Tort Cases: Deterrence, Compensation and Necessity*, 88 Virginia Law Review 1989 (2002) (observing that "fastidious concern with the rights of future claimants might leave most of them worse off than [under] a system of less precise but more effective remedies.").

[76] The recent proposed settlement in the *AIAW Mini-Systems* case provides an example. The claim was brought on behalf of all purchasers of certain audio systems on the ground that the CD player did not

These are pure "futures" claims, but courts have no problem including them with "present" claims of currently injured consumers.

In the absence of special circumstances there is little reason to suppose that class counsel should display any particular preference for present claimants over future claimants. If the attorney's fee is based on a percentage of the total class recovery, counsel will have an incentive to maximize the joint payoff for all class members. It is true that present claimants are people who are experiencing current harm affecting their pocketbooks or physical functioning, whereas future claimants only know they might experience harm in the future: there is a difference between "the holder of a lottery ticket and the winner of the lottery."[77] But if an appropriate estimate is used to calculate the number and extent of future claims, this difference does not create insurmountable tensions within the class.

Critics of combining present and future claims in a single class often present the future claimants as uniquely vulnerable and therefore in need of special protection. The source of this vulnerability is not entirely clear, however. It might be argued that because proper awards for future claimants are difficult to estimate,[78] present claimants may take advantage of this fact to favor their own interests over those of future claimants. But, in the absence of special reasons class counsel might want to favor present over future claimants, there is no reason to suppose that the uncertainty of future claims would lead to their expropriation. Uncertainty could work in the opposite direction, resulting in a

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always operate properly. Although only some class members had experienced problems, the settlement provided relief for all purchasers, even those whose systems were operating properly. See AIWA CD Mini-System Settlement, http://www.minisystemsettlement.com/notice.php3 (visited January 13, 2003).

[77] John C. Coffee, Jr., Class *Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia Law Review 1343, 1433 (1995).

[78] See John C. Coffee, Jr., Class *Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia Law Review 1343, 1430 (1995).

fund that *overcompensates* future claimants vis-à-vis present ones. Perhaps future claimants are more vulnerable because they are not likely to be present in court. But class members do not control class actions. It is attorneys who are present and who control the litigation. Unless the attorney systematically favors present over future claimants, the greater interest that present claimants may take in the litigation may not have much impact. Inflation risk might provide another reason for concern. If the settlement provides for payments as harm manifests and if the income stream is not adjusted for inflation, the settlement may provide inadequate compensation for future claimants. This was one of the features that the Supreme Court found objectionable in *Amchem*.[79] However, although the applicable discount rate is inevitably an issue between present and future claimants, but this is hardly an insoluble conflict. The issue is familiar in legal practice. Trustees are not disabled from acting as fiduciaries for current and future interests, notwithstanding the presence of the same problem.[80] The solution is for the settling parties to adopt a reasonable interest rate – not zero, as was the case in *Amchem* – but some commercially reasonable rate for income streams of analogous characteristics.[81] In short, there appears to be nothing systematic about present versus future claimants that would justify banning unitary representation out of hand.

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[79] See 521 U.S. at 626.

[80] See Uniform Principal and Income Act § 103(b) (providing, in pertinent part, that "a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries.")

[81] While critics of the *Amchem* settlement perceive hostility to future claimants in the failure to adjust future payments for inflation, this decision may have been based on more straightforward considerations. If the future income stream had been discounted for inflation, the gross amounts generated by the settlement would have been reduced, thus increasing the requested fees as a percentage of the total settlement value. By avoiding an inflation adjustment, counsel could make their fee request seem more reasonable. The relevant conflict, in other words, might have been between class counsel and the class as a whole rather than between two subsets of the class. Further, counsel's motivation to exaggerate the value of the settlement does not always work to the disadvantage of future claimants. Since the number and severity of future claims is usually unknown, counsel can assign them a high estimate and thus increase the

The most persuasive reason for rejecting unitary representation in *Amchem* was the claim that counsel was biased in favor of present claimants. The lawyers who negotiated the settlement also had many individual clients. Arguably, they had an interest in favoring their inventory cases over cases that were currently not even filed and as to which they would not necessarily have a claim to an attorneys' fee. It is principally this feature that justifies the result in *Amchem* and the objections in the commentaries.[82] But this is not intrinsic to class actions involving present and future claims.

Application of the hypothetical consent approach to the present/future claimant problem suggests the following. First, if class counsel has an incentive to favor present over future claimants, she may find it advantageous to accept a lower result for the class as a whole in exchange for generous compensation for present claimants. The reasonable plaintiff would have a reason to withhold consent to unitary representation in such a case. Second, risk-aversion can be important in some contexts, most importantly mass tort cases such as *Amchem*. People who became ill from asbestos exposure could suffer devastating health consequences. Members of the class, accordingly, can be presumed to be risk-averse to the possibility that their recoveries will differ significantly from a fair estimate of the strength of their cases. Unitary representation probably enhances the probability of error in compensation, since counsel has an incentive to negotiate for a global settlement that may not include fine-tuned adjustments for differences in individual cases. The risk of inaccurate allocation of the settlement proceeds is increased if class counsel has an incentive to favor present over future claimants. Finally, while the

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estimated class recovery – with the consequence that future claimants who do come forward may receive larger compensation that would be warranted by the objective features of their claims.

[82] See, e.g., Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. Davis Law Review 805 (1997) (recommending a "strong presumption" against certification of any such case).

divide between present and future claimants is not always sharply demarcated, it is at least reasonably capable of identification. Because the class splits naturally into two groups, the conflict of interest could be cured at relatively low cost, especially if it is identified and remediated early. For these reasons, the result in *Amchem* was probably correct although the analysis was muddled. However, in other cases involving present and future claimants, especially small-claim consumer class actions, the factors identified above might lead the reasonable plaintiff to consent to unitary representation.

Uncompensated releases and negative outcomes. Some settlements extinguish claims without obtaining any benefit for the class members. An example is *Berger v. Compaq Computer Corp.*,[83] a recent Fifth Circuit securities fraud case. The defendant had allegedly inflated its financial position. When the truth came out, its stock fell from $9.75 to $6.15. The class included "early" purchasers who paid less than $6.15, and "late" purchasers who paid more. The proposed settlement adopted a recessionary measure of damages. Under this approach, the late purchasers received cash but the early purchasers received nothing. Since early purchasers had paid less than the trading value of the stock after the truth was revealed, rescission would provide no relief because they could cover in the market. At the same time, they would lose the right to litigate their claims individually. An alternative measure of damages, the out-of-pocket approach, would have potentially provided early purchasers with relief, since it would have been based on the difference between what they paid and what the stock was worth at the date of purchase. The choice between the two measures of damages presented a potential intra-class conflict. Although the Fifth Circuit concluded that the conflict was illusory

[83] 257 F.3d 475 (5th Cir. 2001).

under the particular facts of the case,[84] its opinion hinted that such differences could be the basis for challenging a settlement in a different case. The Fifth Circuit's suspicion about settlements that extinguish some claims without compensation is mirrored in other decisions.[85]

A closely related situation arises when the settlement purports to release nonclass claims – claims of some class members that were not included in the class action complaint. The leading case is *National Super Spuds, Inc. v. New York Mercantile Exchange*.[86] The class consisted of persons who purchased potato futures whose contracts had been liquidated during the class period. The settlement, in addition to releasing these claims, also released nonclass claims of class members who had purchased contracts that were *not* liquidated during the class period. The court rejected the settlement on the grounds that it was unfair to the subset of the class whose claims based on unliquidated contracts were being extinguished, but who where receiving compensation solely for the claims they shared with the class. Although *Super Spuds* dealt specifically with nonclass claims, its rationale appears broader. The case seems to stand for the proposition that a court should not approve a class action settlement that releases potentially valuable claims of some class members without compensation, whether or not those claims were contained in the class action complaint.[87]

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[84] The court held that the early purchasers were subject to the limitations of the Private Securities Litigation Reform Act, and thus were limited to recessionary damages.

[85] See, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627 (1997)(criticizing settlement for extinguishing loss-of-consortium and other claims, even if recognized by otherwise-applicable law); *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (noting that proposed nationwide settlement purported to release valuable claims of Texas class members for no consideration).

[86] 660 F.2d 9 (2d Cir. 1981).

[87] See also *In re Auction Houses Antitrust Litigation*, 2002 WL 1758897 (2d Cir. 2002)(criticizing settlement for releasing foreign claims without compensation).

Some cases threaten to inflict harm that goes beyond the uncompensated release of potentially valuable claims. In *Martin v. American Medical Systems, Inc*.,[88] for example, the court refused to certify a products liability class action seeking damages for alleged defects in the defendant's penile implant device. The court observed that while some class members had experienced problems with the device, most had not. The satisfied customers might want to receive replacements as their implants wore out, and might be unable to obtain them if the litigation resulted in the defendant terminating production. The litigation, in other words, threatened an outcome that would be affirmatively harmful to a significant faction of the class. The court concluded that the conflict in the goals of the litigation – dissatisfied customers wanting damages, satisfied customers wanting the device to be available in the future – was sufficiently acute as to preclude certification.

Class litigation can also harm plaintiffs when some benefit from a contract and want to enforce it, while others are harmed by the contract and want to invalidate it. *Hansberry v. Lee*[89] is illustrative. The contract in question was a racially restrictive covenant. Some class members wished to enforce the covenant, thus preventing sales of property to African-Americans; others wished to have the right to sell their property free of the covenant. In earlier litigation brought in the nature of a class action, the court had upheld the validity of the covenant and declared that it ran with the land against all the property owners. The class included all property owners, including those who would benefit from the enforceability of the covenant and those who would benefit if the

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88 1995 U.S. Dist. LEXIS 22169 (S.D. Ind. 1995).

89 311 U.S. 32, 44 (1940).

covenant were nullified.[90] The Court pointed to this conflict as a reason why the dissenting class members were not represented in the prior litigation and therefore could not be bound by the judgment.

As the *Hansberry* case illustrates, the problem of negative outcomes can be acute in actions seeking injunctive or other equitable relief because the outcome may impact class members differently.[91] Consider *Retired Chicago Police Association v. City of Chicago*,[92] a challenge to a change in health care coverage for retired city employees. It turned out that some members of the class had actually benefited from the change, and stood to be harmed if the relief sought in the class action were granted -- a conflict that provided one reason for refusing certification. The problem can also arise in public interest litigation. A leading case is *Fiandaca v. Cunningham*.[93] Public interest attorneys brought actions on behalf of two classes of persons in state institutions: female prison inmates and students at Laconia State School, a home for mentally retarded or physically handicapped individuals. The state offered to settle the prison litigation by establishing a facility at Laconia School, which class counsel rejected on the ground that they did not want to prejudice the interests of their clients in the second case. The First Circuit held that counsel faced a disqualifying conflict because they were forced to trade off the

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90 Id. at 42.

91 See, e.g., *Scardelletti v. Debarr* 265 F.3d 195 (4th Cir. 2001), rev'd on other grounds, 122 S. Ct. 2005 (2002) (challenge to cost-of –living pension plan adjustment which, if successful, would help current workers and hurt retired workers); *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (intra-class conflict between service personnel who objected to supplying DNA samples to the government and others who approved of the policy); *Alton v. Virginia High School League, Inc.*, 184 F.R.D. 574, 579 (W.D. Va. 1999)(plaintiff seeking injunction against rescheduling sports events could not represent the class when a majority of the class approved of the revised schedule and would experience inconvenience if it were changed); *Cox v. USX Corp*., 1990 U.S. Dist. LEXIS 18289 (N.D. Ala. 1990), appeal dismissed sub nom. *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995)(refusing to certify equitable portion of class action challenging collective bargaining agreement when some class members benefited from the agreement and would be harmed by the proposed relief).

92 7 F.3d 584 (7th Cir. 1993).

interests of one set of clients against another. Although the *Fiandaca* case involved separate class actions, the principle of the case would obviously apply if counsel had attempted to represent both groups in a single class.

The hypothetical consent approach supports the results in these uncompensated release or negative outcome cases. When some class members receive no compensation for releasing valuable rights, the reasonable inference is that class counsel has failed to obtain the best possible result for the class as a whole. Similarly, if some class members receive no benefit for releasing valuable claims, it is probable that class counsel have not allocated the benefits of the litigation accurately. Risk aversion is likely to be significant, particularly when the case generates a negative outcome for some class members. While people may be tolerant of risk when the question is how much consideration they will receive from class litigation, they are likely to be more concerned when there is a chance they will wind up worse off. Negative outcome cases also tend to involve dignitary or ideological interests as to which class members may be risk-averse. The weight of these factors suggests that courts should insist on cogent justifications before approving any arrangement involving compensated releases or negative outcomes for a portion of the class.

B. Absent Class Members and Class Counsel

We turn now to another category of conflict in class actions: cases in which the interests of class counsel deviate from those of the class as a whole. These conflicts, like those discussed in the previous section, are conflicts of interest rather than conflicts

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[93] 827 F.2d 825 (1st Cir. 1987).

of opinion. They differ from intra-class conflicts, however, in that they are both all-encompassing and also unavoidable.[94]

Compensation of counsel. As in all litigation, lawyers in class cases have an interest in obtaining a fee. Unless they are strongly motivated by altruistic, ethical or ideological concerns, they prefer to obtain as large a fee as possible. The lawyer's interest in the fee creates a structural conflict with the class.[95] Courts therefore permit class representation to go forward, but monitor counsel to ensure that the lawyer's interest in the fee does not adversely affect the quality of the representation. If the case goes to judgment, the court can scrutinize the reasonableness of the fee when it awards compensation to counsel.

The hypothetical consent approach suggests the following on the matter of fees. In money damages cases, the reasonable plaintiff would prefer that counsel be compensated under the percentage-of-recovery method. Because this method aligns the attorney's interests with those of the class, the percentage approach creates an incentive for counsel to generate the best recovery for the class – an advantage not shared by the lodestar method.[96] However, the reasonable plaintiff will also be aware that the

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[94] The existence of a significant conflict in this area is recognized by many commentators. See, e.g., Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Nebraska Law Review 646, 648 (1994).

[95] At least this is true if the lawyer does not take over the full economic risks and rewards of the case. See Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 University of Chicago Law Review 1 (1991) (discussing possibility of auctioning class cases.)

[96] This benefit of the percentage fee over the lodestar is widely recognized in the literature. See, e.g., 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 Columbia Law Review 669, 724 (1986); Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 University of Chicago Law Review 1 (1991); Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tulane Law Review 1809, 1810-1819 (2000). The percentage method is now overwhelmingly favored in courts, see *Shaw v. Toshiba American Information Systems., Inc.*, 91 F.Supp.2d 942 (E.D.Tex.2000), although many jurisdictions continue to permit the use of the lodestar or generalized

percentage method creates perverse incentives of its own, including premature settlements,[97] excessive focus on monetary relief,[98] collusive settlements,[99] "reverse auctions,"[100] and devices to exaggerate the value received by the class – for example, through the use of inappropriately designed "coupon" settlements[101] or funds that revert to the defendant if unclaimed.[102] To manage these risks, the reasonable plaintiff might in some circumstances prefer lead counsel rights to be auctioned to the qualified attorney willing to take the case for the lowest percentage fee.[103] Given the pervasive concerns about the loyalty of class counsel in the matter of fees, the reasonable plaintiff would

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judicial discretion as alternatives. See Geoffrey P. Miller & Lori S. Singer, *Non-Pecuniary Class Action Settlements*, 60 Law & Contemporary Problems 97 (1997).

97 See Judith Resnik, Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation, 148 University of Pennsylvania Law Review 2119 (2000).

98 See Judith Resnik, Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation, 148 University of Pennsylvania Law Review 2119 (2000).

99 See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia Law Review 1343, 1373-1384 (1995); Susan P. Koniak, *Feasting While the Widow Weaps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1047-48 (1995) (describing alleged collusion in asbestos settlement).

100 The term refers to a process in which the defendant effectively sells the settlement to the low-bidding attorney. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia Law Review 1343, 1354, 1371-73 (1995); Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 Notre Dame Law Review 1377, 1389-91 (2000).

101 On coupon settlements, see Severin Borenstein, *Settling for Coupons: Discount Contracts as Compensation and Punishment in Antitrust Lawsuits*, 30 Journal of Law and Economics 379 (1996); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Litigation*, 49 UCLA Law Review 991 (2002); Geoffrey P. Miller & Lori S. Singer, *Non-Pecuniary Class Action Settlements*, 60 Law & Contemporary Problems 97 (1997); Note, *In-Kind Class Action Settlements*, 109 Harvard Law Review 810 (1996).

102 Geoffrey P. Miller & Lori S. Singer, *Non-Pecuniary Class Action Settlements*, 60 Law & Contemporary Problems 97, 98-99 (1997); *Boeing v. Van Gemert*, 444 U.S. 472 (1980).

103 Lead counsel auctions have recently come under heavy criticism, see Jill Fisch, *Lawyers On The Auction Block: Evaluating The Selection Of Class Counsel By Auction*, 102 Columbia Law Review 650 (2002); Third Circuit Task Force Report on the Selection of Class Counsel, 208 F.R.D. 340 (2002). Criticism of lead counsel auctions is directed most forcibly at the use of this device in litigation under the Private Securities Litigation Reform Act. See *In re Cavanaugh*, 306 F.3d 726 (9th Cir. 2002) (holding that court-mandated lead counsel auctions are not generally permissible in litigation under the PSLRA); *In re Cendant Corporation Litigation*, 264 F.3d 201 (3rd Cir. 2001)(same). However, auctions continue to offer a promising method for selecting counsel in appropriate cases.

want the trial court to conduct a rigorous scrutiny over fee awards sought in any class action settlement.

When fees are determined by the lodestar method – as in some private damages class actions and most all cases brought under statutes with fee-shifting provisions[104] – the conflict between counsel and the class takes a different form. Counsel's pecuniary interest here is to maximize the hours expended on successful cases. Because the fee will be paid by the defendant, such excessive litigation, while inefficient for society, is not necessarily a cost for the class. In fact, if class counsel can present a realistic threat that they will run up the fees, this can benefit the class because it might induce the defendant to offer more in settlement. The lodestar approach is not necessarily beneficial for the class, however. As noted already, it lacks the percentage fee's built-in incentive to maximize class recovery. As long as the attorney gets enough for the class to be considered a "prevailing party" (or persuades the defendant to pay a fee as part of a settlement), counsel will be compensated even if the recovery is less than could have been achieved with more vigorous or competent representation. Moreover, although the risk of collusive settlements is limited by the need for counsel to justify the fee with time sheets or other evidence, several strategies or available under which class counsel can trade off a higher fee for reduced recovery for the class. The defendant may agree to a "clear sailing" provision under which it will not object to a fee award up to a specified amount. Courts are unlikely to exercise strict scrutiny over fee requests that fall within the limits of such an agreement. The defendant and class counsel may also agree to a settlement and then conduct meaningless depositions in order to justify a fee. In light of

[104] A fee-shifting statute authorizes courts to require defendant to pay the attorneys fees of prevailing plaintiffs.

the deficiencies and risks of the lodestar method, the reasonable plaintiff would want the court to exercise scrutiny over lodestar fees that is equally strict as the applicable review in percentage-of-recovery cases.

Public interest litigation presents somewhat different problems. To the extent that public interest attorneys are motivated by financial objectives, they are subject to the fee conflicts as just described. But many public interest attorneys would deny that financial remuneration is their primary objective.[105] The lack of a controlling pecuniary motive does not eliminate the potential for conflict, however. Public interest attorneys receive compensation in the form of the psychic reward that accompanies a feeling of promoting the good of society. This public interest motivation may induce counsel to act out of political or ideological beliefs which can come into conflict with the interests of the class. The reasonable plaintiff will prefer that counsel not seek to further her own political or ideological objectives if the outcome is not optimal for the class. Moreover, because the issues being litigated are often fundamental, the class (and therefore the reasonable plaintiff) is likely to be risk-averse as to outcomes, exacerbating the potential harm of ideological representation. The reasonable plaintiff under the hypothetical consent test would not want to unduly hamper public interest representation, but would want the court to exercise careful review over class counsel's conduct of the litigation in order to ensure that the objectives being sought are truly those of the class.

Collateral Interests of Counsel. Aside from the matter of compensation, there are a variety of other ways in which class counsel's personal interests may come into conflict with the interests of the class. In some cases, for example, counsel represents

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105 **See Third Circuit Task Force Report on the Selection of Class Counsel, 208 F.R.D. 340 (2002) ("the motivating force in these cases is the vindication of principle.")**

parties in parallel litigation**, or has individual retainer agreements with members of the class**. In such a situation, the lawyer's incentives in representing the class may be skewed by her economic interest in the **individual representation**.[106] Attorneys have also sought to act as their own class representative or by have one of their partners or associates do so. Such dual service – as attorney and as named plaintiff – can raise concerns because the attorney's interest, as counsel, in receiving a fee may trump her interest as class representative in obtaining the largest possible recovery.[107] In still other cases, the loyalty of class counsel may be compromised by relationships with the defendant -- for example, if a defendant or potential defendant is a client of the firm[108] or if the defendant retains class counsel for future services.[109] In each of these situations, the hypothetical consent approach would ask whether the arrangement threatens either to reduce the total class recovery to introduce error in the allocation of the proceeds and asks further whether a curative order would be feasible. The generally hostile attitude of courts towards collateral interests by counsel can be understood, within the framework of the hypothetical consent approach, as reflecting concern that the attorney will not act as a good agent for the class coupled with awareness that disqualification of counsel is a feasible remedy under the circumstances of the particular case. In one respect, however,

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106 Courts have sometimes found this situation to be problematic, see, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); **Staton v. Boeing Co., 313 F.3d 447 (9th Cir. 2002);** *Jackshaw Pontiac v. Cleveland Press Publishing Co*., 102 F.R.D. 183 (N.D. Ohio 1984); *Sullivan v. Chase Investment Services*, 79 F.R.D. 246, 258 (N.D. Ca. 1978), although in other cases parallel litigation was not enough to defeat representation. See, e.g., *Sheftelman v. Jones*, 667 F. Supp. 859, 865 (N.D. Ga. 1987); *Anderson v. Bank of the South*, 118 F.R.D. 136, 149 (M.D. Fla. 1987).

107 See generally Keith Fleischman and U. Seth Ottensoser, *Ethical Issues Concerning Non-Federal Question Class Action Litigation*, 635 PLI/Lit 199 (2000). Most courts have disapproved of this practice, in part on conflict of interest grounds. See, e.g., *Zylstra v. Safeway Stores, Inc*. 578 F.2d 102 (5th Cir. 1978); *Turoff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976); *Kramer v. Scientific Control Corp*. 534 F.2d 1085 (3d Cir. 1976), cert. denied, 429 U.S. 830 (1976).

108 See *Guenther v. Pacific Telecom, Inc.*, 123 F.R.D. 341 (D. Or. 1987).

109 See *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234 (9th Cir. 1998).

the judicial response appears difficult to reconcile with the hypothetical consent approach. Given the minimal nature of the representative plaintiff's role, it is not clear that combining the roles of named plaintiff and class counsel would have a discernible negative effect. Judicial repudiation of this practice may reflect an understandable but unrealistic wish to force the square peg of class actions into the round hole of ordinary litigation.

Switching sides. In unusual cases, class counsel can switch sides and challenge a settlement negotiated by other attorneys for the class. Typically, this happens after co-counsel have a falling out and one leaves the consortium. In such a case, counsel's opposition to the settlement may be challenged on the ground that she is in a position of direct conflict with her former client (the class). In *Agent Orange*,[110] the Second Circuit outlined factors for trial courts to consider in this situation. Recognizing that the rules of ethics could not be "mechanically" applied, the court called for a "balancing of the interests of the various groups of class members and of the interest of the public and the court in achieving a just and expeditious resolution of the dispute."[111] The court outlined factors for the trial court to consider in performing such a balancing: the "amount and nature of the information that has been proffered to the attorney, its availability elsewhere, its importance to the question at issue, such as settlement, as well as actual prejudice that may flow from that information."[112] In addition, the Second Circuit directed trial courts to consider "the costs to the class members of requiring that they obtain new counsel, taking into account such factors as the nature and value of the

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[110] *In re "Agent Orange" Product Liability Litigation*, 800 F.2d 14, 18-19 (2d Cir. 1986). *Accord*, *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999).

[111] 800 F.2d at 19.

claim they are presenting, the ease with which they could obtain new counsel, the factual and legal complexity of the litigation, and the time that would be needed for new counsel to familiarize himself with all that has gone before."[113]

The hypothetical consent approach suggests a simpler analysis, but one generally consistent with the Second Circuit's approach. When class counsel switches sides, the conflict presented is often one of opinion rather than interest. The dissenting attorney challenges the proposed settlement because she believes it to be inadequate, not because she represents a subset of the class that is differentially harmed. Conflicts of opinion, while not irrelevant, are generally less troublesome. Even if the attorney purports to represent a group within the class with interests that are adverse to the interests of the class, the dissenting opinion may provide the court with information. While the reasons for the dissenting lawyer's switch may cast doubt on her impartiality, the court will be aware of this fact and can apply an appropriate discount. At the same time, because the dissenting lawyer has previously represented the class, she may be able to provide information that is of real value in assessing the fairness of the settlement. The reasonable plaintiff would generally prefer this information to come out. While a curative order would be simple – the court merely excludes the dissenting attorney – such a remedy would provide little value and could be harmful. Accordingly, the hypothetical consent approach suggests that an attorney who previously acted for the class should ordinarily be allowed to lodge an objection to the settlement.[114]

C. Absent Class Members and Representative Plaintiff

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[112] Id. at 19, citing *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 165 (3d Cir. 1984)(Adams, J. concurring).

[113] Id.

Sometimes it is the representative plaintiff, rather than class counsel, who has interests that deviate from the interests of the class.

Unique characteristics of the representative plaintiff. It is often the case that the proposed representative plaintiff has features that differ from the class as a whole which may place this individual in some degree of tension or conflict with other class members. These problems are dealt with, at the certification phase, through the inquiries as to whether the named plaintiff is "typical" of the class and whether the named plaintiff will "adequately" represent the class. Acting in the ironic role of putative champions for the class, defendants frequently seek to disqualify the named plaintiff on these grounds.

The hypothetical consent requirement would not ordinarily mandate disqualification of representative plaintiffs because of such unique features. It will often be difficult to locate a representative plaintiff who mirrors the class in every respect. Individual features are nearly inevitable in class litigation. If courts routinely disqualified the named plaintiff because of idiosyncratic facts, class action litigation would hardly exist. Because the reasonable plaintiff in the hypothetical consent analysis wants to maximize class recovery, the practical necessity for accepting a less-than-ideal prototype will ordinarily be a salient consideration. Further, because the named plaintiff typically exercises only minimal control over the litigation (at least in large-scale, small-claim cases), unique features of the class representative's personal situation will not ordinarily pose dangers. It is the attorney's interest that counts; and if the attorney is motivated to obtain the largest possible recovery for the class and to ensure that class members receive

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[114] The court could take appropriate action to ensure that the attorney does not disclose privileged information.

a reasonably accurate share of the proceeds, the individual incentives of the representative plaintiff make little difference.[115]

Consistently with this analysis, courts are forgiving of this type of conflict.[116] Occasionally, however, they fall prey to a formalism that generates questionable results. An example is *Morlan v. Universal Guaranty Life Ins. Co.*[117] The putative class representative became insolvent and a trustee was appointed. The court held that the trustee was not a good class representative because taking on the burdens of representing the class was inconsistent with the fiduciary duties owed to creditors. While this opinion identifies a formal conflict between named plaintiff and the class, the court's decision to exclude the representative appears unwarranted. The trustee's loyalty to the creditors was unlikely to impair his adequacy as class representative. The better view is that being a trustee in bankruptcy does not automatically disable a party from acting as class representative.[118]

Disavowal of the Action by Class Members. In some cases, the court becomes aware that absent class members disagree with the class representatives about the strategy or objectives of the litigation. Such dissent can occur at the certification phase, at settlement, or at any other time during the litigation. Particularly in "non-opt out"

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115 The situation may be different in securities fraud cases in light of the heightened role contemplated for the representative plaintiff under the Private Securities Litigation Reform Act.

116 *See, e.g., Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001) (named plaintiff's claims were typical notwithstanding differences with members of the class); *Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 625 (5th Cir. 1999) (typicality test is "not demanding"). The forgiving approach to typicality is not universal, however. Courts occasionally refuse to certify classes when they detect unique defenses not shared by the class or the absence of defenses that can be asserted against the class. See, e.g., *Zenith Laboratories, Inc. v. Carter Wallace*, 530 F.2d 508, 512 (3d Cir. 1976), cert. denied, 429 U.S. 828 (1976).

117 298 F.3d 609 (7th Cir. 2002).

118 See, e.g., *Shamberg v. Ahlstrom*, 111 F.R.D. 689 (D.N.J. 1986); *Clark v. Cameron-Brown Co.*, 72 F.R.D. 48, 54-55 (M.D.N.C. 1976). The permissibility of representation by fiduciaries is assumed under the Private Securities Litigation Reform Act, which encourages institutional investors to act as lead plaintiffs. See Geoffrey P. Miller, *Payment of Expenses in Securities Class Actions: Ethical Dilemmas,*

actions, where class members do not have an exit option, widespread expressions of dissatisfaction among class members may provoke judicial inquiry.

The hypothetical consent approach would not, in general, require curative action even if large numbers of class members dissent. The conflict involved here is one of opinion rather than interest, and accordingly poses a lower threat to the class. However, widespread dissent among class members can indicate possible problems. Dissent could indicate, for example, that class counsel has failed or is likely to fail to obtain the best possible result for the class. Dissatisfaction could also indicate that counsel has litigated the case to favor one group over another – thus increasing the risk that individual recoveries will deviate from a reasonable estimate of claim value. Thus, the reasonable plaintiff would certainly want the court to investigate the causes of the dissent and the arguments put forth by the dissenters' representatives. However, the reasonable plaintiff would not necessarily want to court to do anything as a result of the inquiry. Because differences of opinion over how a case should be handled are to be expected in large-scale litigation,[119] the presence of dissent is not in itself evidence that the case is being mishandled. Moreover, the curative options available to the court are likely to be limited. If the dissent is fomented by an attorney who wishes to wrest the case from lead counsel, the "cure" – which would presumably be to transfer lead counsel rights to dissenters' attorney – might be worse than the disease. Thus, the hypothetical consent approach suggests that the proper role for the court when faced with dissent in the class is to make an inquiry, hold a hearing if necessary, and then evaluate whether taking curative action

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Class Counsel and Congressional Intent (N.Y.U. Center for Law and Business Working Paper No. 02-009) (on file with the author).

would, all things considered, make the class as a whole better off. In the usual case, it is likely that the court would conclude that intra-class dissent, in itself, is not a sufficient basis for change.[120]

D. Class Counsel and Representative Plaintiff

In some cases, the named plaintiff becomes dissatisfied with representation by the class attorney and thereafter objects to a settlement or seeks substitution of counsel. *Lazy Oil Co. v. Witco Corp*.[121] is illustrative. The class consisted of sellers of oil, including producers and investors who purchased for resale. Landers, a producer, originally served as a representative plaintiff but became disaffected with counsel and appeared in court to oppose the settlement and request a subclass. He complained that producers had suffered unique injuries not shared by the investors.[122] How should the court treat this kind of conflict of interest?

The hypothetical consent approach suggests that conflict between class counsel and the representative plaintiff over the conduct of the litigation, without more, should

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[119] See, e.g., *Horton v. Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983); *Wyatt by and through Rawlins v. Poundsto*ne, 169 F.R.D. 155, 162 (M.D. Ala. 1995) ("it would be impossible to obtain and maintain 100% agreement within the class").

[120] The caselaw is in general agreement. See *Cotton v. Hinton*, 559 F.2d 1326, 1333 (5th Cir. 1977) (settlement approved over objection of counsel claiming to represent almost half the class); *Bryan v. Pittsburgh Plate Glass Co*., 494 F.2d 799, 803 (3d Cir.), cert. denied, 419 U.S. 900 (1974) (settlement approved over objections by more than a fifth of the class). However, if dissent is sufficiently vehement, the court may decide to act. See, e.g., *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (class certification not proper when a majority of the class members had rejected the relief sought by the named plaintiffs); *Davis v. Roadway Express, Inc*., 590 F.2d 140, 144 (5th Cir. 1979) ("overwhelming opposition"); *Peterson v. Oklahoma City Housing Authority*, 545 F.2d 1270, 1273 (10th Cir. 1976) (opposition by many class members). But even majority opposition might not be enough to derail a settlement if class members enjoy the right to opt out. *See County of Suffolk v. Long Island Lighting Co*., 907 F.2d 1295 (2d Cir. 1990).

[121] 166 F.3d 581 (3d Cir. 1999).

[122] The trial court, in a decision upheld by the Third Circuit, rejected these requests, concluding that the purported distinction between producers and investors was unsupported by the facts and irrelevant to the class claims, and that Landers' motion for a subclass came too late. Id at 588.

not ordinarily be the basis for disqualification.[123] This is a conflict of opinion rather than interest, and accordingly is less problematic than conflicts reflecting structural fissures in the class. There could be many causes for the named plaintiff's dissatisfaction – personal animus, resentment at not being consulted, influence of dissenting attorneys, demands for compensation, or differences of opinion on substance or strategy. Most of these reasons do not threaten the class. Because of the minimal role typically played by the class representative, there is little danger that differences between the named plaintiff and the class counsel will adversely affect counsel's incentives or ability to obtain the best outcome for the class. Moreover, because the class representative is rarely an attorney and typically knows much less about the case than counsel, the reasonable plaintiff would tend to favor the views of counsel in the event of differences of opinion between the two. Remedial considerations also play a role: by the time disputes between the representative plaintiff and counsel boil over, the case is likely to be well-advanced, making disqualification or replacement of counsel generally undesirable. Nonetheless, since there is a chance, albeit usually a small one, that the representative plaintiff's concerns are genuine and well-founded, the reasonable plaintiff would want the court to hear and consider the complaints if the representative plaintiff becomes dissatisfied enough to bring a disagreement to the court's attention.

E. Class Counsel and Class Counsel

Class actions are frequently litigated by loose affiliations of plaintiffs' firms. To achieve a modicum of order and coherence, the court typically appoints a lead counsel or a steering committee which distributes the work among the plaintiffs' attorneys and

[123] See, e.g., *Maywalt v. Parker & Parsley Petroleum Co*., 155 F.R.D. 494 (S.D.N.Y. 1994), aff'd 67 F.3d 1072 (2d Cir. 1995)(refusing request by four of five representative plaintiffs to remove class counsel).

effectively controls the allocation of the fee.[124] Even if lead counsel is appointed, however, there is nothing to stop an attorney from refusing the join the consortium, or from breaking away and seeking to represent her client individually. The key fissure points are when the lawyers file a motion for appointment of lead counsel – which may split the attorneys into competing camps[125] -- and settlement, when the allocation of the spoils is determined and disappointed attorneys can exercise leverage by holding up payment.[126]

The hypothetical consent would suggest that conflicts between class counsel should only rarely be grounds for upsetting existing arrangements. Such conflicts are likely to reflect factors having nothing to do with the litigation – prior dealings, personal animosities and jealousies, or raw struggles for wealth or power. Some disputes have greater relevance. For example, disagreements over how a case should be litigated, if brought to the attention of the court, may materially assist the trial judge in protecting the class. Challenges to settlements can expose weaknesses or insufficiencies in the compromise. And because the dissenting attorney is presumably familiar with the case, she will be well positioned to provide the court with reliable information. On the other hand, even when disputes among counsel go to matters that would be of concern to the reasonable plaintiff, they will tend to reflect only conflicts of opinion rather than conflicts of interest. Moreover, aside from the settlement context where the court always has the option to reject the proposal, the judge may face difficulties in crafting a curative order even when conflicts between plaintiffs' attorneys threaten to impair class interests.

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[124] See Jill Fisch, *Lawyers On The Auction Block: Evaluating The Selection Of Class Counsel By Auction*, 102 Columbia Law Review 655 (2002).

[125] As happened in *In re Oracle Securities Litigation*, 131 F.R.D. 688, 697 (N.D. Cal. 1990).

F. Representative Plaintiff and Representative Plaintiff

A final category of conflict is the situation where one or more representative plaintiffs break away and "become adverse parties to the remaining class representatives."[127] The borders of this category are indistinct because, when the class representative breaks away, she not only becomes adverse to the other class representatives, but also to others in the class.[128] Typically, also, the apparent dispute between the dissenting plaintiff and the other representative plaintiffs disguises (sometimes only thinly) a dispute between class counsel and class counsel, or between class counsel and an attorney who wishes to become class counsel. Objections to settlements are the classic milieu for this form of conflict.[129] The presence of an objecting plaintiff may raise either (or both) a conflict of opinion or a conflict of interest. The objector may share the characteristics of the class as a whole, and thus possess no cognizable conflict of interest, but may simply object to the settlement on the grounds that it is not adequate. This is a conflict of opinion. In other cases, the objector may claim to represent a structural element of the class that has not been treated fairly in the settlement, thus claiming a conflict of interest as well.

The hypothetical consent approach suggests the following about how courts should deal with objectors. Because the reasonable plaintiff knows the general features of class action litigation, she will understand that objectors come in two flavors. One

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126 This leverage is enhanced by the Supreme Court's recent holding that federal court objectors have the right to appeal settlement approvals. *Devlin v. Scardelletti*, 122 S.Ct. 2005 (2002).

127 *Lazy Oil Co. v. Witco Corp*., 166 F.3d 581, 589 (3d Cir. 1999).

128 As the court observed in *Lazy Oil*, the adversity between the dissenting representative plaintiff and the other representatives also equates to a conflict with the "rest of the class." Id.

129 See, e.g*., Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996) (settlement approved over objections of 26 out of 68 responding class members); *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988) (settlement approved despite objections from 45% of class).

type of objectors act as good faith auditors of the settlement.[130] They provide potentially useful information about the quality of class representation and the value of the relief obtained[131] – information that may not be forthcoming from counsel whose interest at this stage is to promote the settlement. The other type of objectors seek to hold up the settlement in order to obtain a lucrative commission. These are *sokaiya* objectors (named after shadowy figures in Japan who specialize in disrupting shareholders' meetings).[132] If the reasonable plaintiff could sort between these types, there would be no problem: public-spirited objectors would receive a serious hearing and potentially obtain relief for the class and hold-up objectors would be rejected out of hand. The problem is that it is difficult to make this distinction. Objectors do not come into court wearing the black hats of spaghetti western desperados. All objectors describe themselves as public-spirited champions of class interests. Moreover, even if an objector has a pecuniary interest in holding up a settlement, she may still identify a problem that is worthy of judicial consideration. Thus, the reasonable plaintiff would want the court to listen to the objectors, carefully evaluate their arguments, and compensate them with some type of fee if the objector has presented information of real and substantial value. On the other hand, if objector adds little to the court's evaluation, she should ordinarily receive no fee.[133] In light of the ambiguous motivations underlying objections, the court should be cautious

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130 See Robert Gerard and Scott A. Johnson*, The Role of the Objector in Class Action Settlements – A Case Study of the General Motors Truck "Side Saddle" Fuel Tank Litigation*, 31 Loyola of L.A. Law Review 409 (1998); *In re General Motors Corp. Pick-Up Truck Fuel Tank Product Liability Litigation,* 55 F.3d 768, 803 (3d Cir. 1995).

131 See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Though Class and Derivative Actions*, 86 Columbia Law Review 669, 714 n.131 (1986).

132 On *sokaiya* in Japan, see Mark D. West*, The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 Northwestern. University Law Review 1436, 1451-52 (1994).

133 See *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 287 (7th Cir. 2002).

about allowing an objector's arguments to carry the day, but should be prepared to act if the objector's arguments turn out to be well-founded.[134]

IV. Timing Considerations

A final note is in order about the timing of decisions under the hypothetical consent approach. As already noted, courts address the issue of conflicts of interest at two key stages in class action litigation: certification and settlement. Neither of these is an optimal context in which to review the questions.

At the certification stage, the only party objecting to the alleged conflict of interest is likely to be the defendant. The court is unlikely to hear from that source an analysis of the problems that reflects the best interests of the class as a whole. The court, accordingly, lacks the assistance of adversarial analysis in evaluating the question. Further, at the certification stage most conflicts will be potential rather than actual. Because the conflict has not yet become disabling, the court may be tempted to certify the case no the theory that if the potential conflict ripens they can deal with this problem later.[135] But a "certify now, worry later" approach may not provide fully adequate protection for the class, because by the time later comes, the damage may have been done.[136] The representative plaintiff would want the court to conduct a careful and expeditious review of the conflicts issue and certify the class only if the conflict is found

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[134] The results of the hypothetical consent analysis are in general accord with the cases, by might suggest that *bona fide* objectors be given somewhat greater attention than has been the pattern to date. See Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Nebraska Law Review 646, 650 (1994) (objections are "invariably overruled by judges bent on settlement.")

[135] *See, e.g*., *In re: Cardizem Cd Antitrust Litigation*, 200 F.R.D. 297 (E.D. Mich. 2001); *Adames v. Mitsubishi Bank, Ltd*., 133 F.R.D. 82, 88 (E.D.N.Y. 1989)("it often proper to view the class action liberally at the early stages of the litigation since the class can always be modified or divided as issues are later refined for trials"); *Sol S. Turnoff Drug Distributors, Inc. v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*, 51 F.R.D. 227 (E.D. Pa. 1970) (possibility that an intra-class conflict may develop "cannot at this point justify the denial of a class action").

to be manageable. However, the reasonable plaintiff would consent to potential conflicts if the court will have a realistic ability to cure the problem if and when the problem becomes real.

At settlement, the court is likely to face great pressure to approve the deal. And approving the proposal, at this stage, may well be in the best interests of the class, even if the counsel had a disqualifying conflict of interest at the time the compromise was negotiated. The risk here is that unless there is some sanction, counsel would not be sufficiently deterred from taking on conflicting responsibilities or interests to the detriment of the class. In these circumstances, the best approach may be for the court to approve the settlement but to find some means for sanctioning counsel for the conflict, such as requiring counsel to pay reimbursement to the class[137] or awarding the class part of the proposed attorneys' fee.

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[136] See *Southwestern Refining Company, Inc. v. Bernal*, 22 S.W.3d 425 (Tex. 2000) (rejecting strategy of easy certification subject to correction).

[137] See *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1985) (requiring plaintiffs' counsel to reimburse the fund.)