

# The Problem of Settlement Class Actions

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## ABSTRACT

*This Article argues that class actions should never be certified solely for purposes of settlement. Contrary to the widespread “settlement class action” practice that has emerged in recent decades, contrary to current case law permitting settlement class certification, and contrary to recent proposals that would extend and facilitate settlement class actions, this Article contends that settlement class actions are ill-advised as a matter of litigation policy and illegitimate as a matter of judicial authority. This is not to say that disputes should not be resolved on a classwide basis, or that class actions should not be resolved by negotiated resolutions. Rather, this Article contends that if a dispute is to be resolved on a classwide basis, then the resolution should occur after a court has found the matter suitable for classwide adjudication, regardless of settlement.*

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## INTRODUCTION

In modern class action practice, most class actions are certified not for litigation, but for settlement.<sup>1</sup> Known as “settlement class actions,” such proceedings provide a mechanism for defendants to resolve mass liability exposure without the risk of a class trial. In a settlement class action, prior to class certification, the defendant negotiates an agreement with would-be class counsel. If they reach agreement on terms to resolve claims on a classwide basis, then they move jointly for class certification and approval of the settlement.<sup>2</sup>

This Article inquires into the legitimacy of settlement class actions. It asks whether a class settlement ought ever to be approved if the class has not been certified for litigation, and concludes—contrary to the widespread practice that has emerged over the past two decades—that the answer is no. This is not to say that disputes cannot be resolved on a classwide basis, or that class actions cannot be resolved by negotiated resolutions. Rather, this Article contends that if a dispute is to be resolved on a classwide basis, then the resolution should occur after a court has found the matter suitable for classwide adjudication, regardless of settlement.

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<sup>1</sup> See Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 266 tbl.9 (2010) (in a sample of state and federal court class action settlements, finding that 208 of 368, or fifty-seven percent, were settlement class actions); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 819 (2010) (finding that sixty-eight percent of federal court class action settlements in 2006 and 2007 were settlement class actions); see also HILARY HEHMAN, JUDICIAL COUNCIL OF CAL., FINDINGS OF THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION, 2000–2006: FIRST INTERIM REPORT 11 n.23 (2009) (in a study of California state court class actions, finding that 228 of 289 certified class actions with a disposition, or seventy-nine percent, were “certified as part of the settlement itself”); EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO’S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 11 tbl.9 (2008) (finding, in a pre-2005 sample of federal court diversity class actions, twenty class actions (or fifty-nine percent) certified for purposes of settlement effectuation, four (or twelve percent) certified for purposes of settlement negotiation, and six (or eighteen percent) certified for litigation). Virtually all certified class actions are resolved either as settlement class actions or as litigation class actions that settle, rather than by adjudication. See *id.* at 11 (finding zero certified class actions in the sample that reached any disposition other than settlement).

<sup>2</sup> Settlement class actions—that is, class actions certified solely for settlement—should not be confused with litigation class actions that reach settlement. If a court certifies a class action for purposes of litigation and the parties then reach a negotiated resolution, the result is a class action settlement. Standard class action settlements raise plenty of interesting issues, but they are not the subject of this Article. This Article addresses the more problematic—and more common—phenomenon of settlement class actions.

Part I describes the core problem of settlement class actions—an asymmetric settlement dynamic that disadvantages class members. Whereas the litigation class action works as a tool of plaintiff empowerment, the settlement class action cuts the other way, entrenching power in the defendants. In a settlement class action, the defendant seeks closure on the cheap by taking advantage of the absence of class members and the weak bargaining position of would-be class counsel.

Part I.A spells out the problem of would-be class counsel's inadequate leverage when negotiating on behalf of absent class members. This leverage problem has two components. First, without plenary class certification, the lawyer negotiating a settlement class action lacks the authority to take the class claims to trial. Without this authority, she cannot make the threat that implicitly or explicitly drives every other litigation compromise. Second, the lawyer negotiating a settlement class action faces a defendant who can negotiate instead with other would-be class lawyers. In other words, in a settlement class action, the defendant possesses the power of a monopsonistic purchaser of *res judicata* who can negotiate with whichever would-be class lawyer is willing to strike a deal. The disadvantage to the plaintiffs' lawyer in a settlement class action is even worse than the standard monopsony disadvantage to sellers, because until the lawyer strikes a deal, she does not even have the thing she wishes to sell.

Part I.B shows that courts mischaracterize the leverage problem as a risk of collusion. But this focus on conspiratorial wrongdoing frames the inquiry too narrowly. What is fundamentally problematic about settlement-only classes is not that defendants are likely to make explicit agreements with class counsel to disserve the class. Rather, the problem is that the defendant's interest aligns with the interest of the would-be class lawyer. Both crave a comprehensive resolution, even if it undervalues the claims of absent class members.

Focusing on the power that ultimately binds absent class members to a negotiated settlement, Part II turns to the illegitimacy of settlement class actions as an exercise of judicial authority. Part II.A looks at courts' misleading use of contract terminology to describe class settlements and points out the inadequacy of settlement class actions as a form of adjudication. In a settlement class action, the court neither adjudicates the merits of the dispute nor effectuates a resolution negotiated by an individual with the power of class representation. Because of the asymmetry built into every settlement class negotiation, settlement class actions lack justification as an exercise of judicial power and raise due process concerns about the adequacy of

representation. Part II.B considers the problem of settlement class actions in federal court under the Rules Enabling Act ("REA").<sup>3</sup> Unlike class actions that settle after plenary class certification,<sup>4</sup> settlement-only class actions cannot survive the statutory stricture that the Federal Rules of Civil Procedure not "abridge, enlarge or modify any substantive right."<sup>5</sup> The very act of certifying a settlement class alters the substantive rights and liabilities of the parties.<sup>6</sup> Thus, Parts I and II argue that, as a matter of litigation policy and as a matter of properly construing a procedural rule, class settlement should occur only if the class has been certified for purposes of litigation.

Part III examines recent developments in settlement class actions and suggests that courts and others are moving in the wrong direction by bending the certification requirements of Federal Rule of Civil Procedure 23<sup>7</sup> to facilitate the use of these settlement-only classes. Part III.A looks at two recent Second and Third Circuit decisions that picked up on Supreme Court dicta from *Amchem Products, Inc. v. Windsor*<sup>8</sup> and extended it to disputes unsuitable for class resolution. In *Amchem*, the Supreme Court demanded that any settlement class action meet the class certification requirements of Rule 23,<sup>9</sup> but the Court granted the possibility of ignoring trial manageability when certifying a settlement class.<sup>10</sup> In so ruling, the Supreme Court deviated from the approach taken by the Third Circuit, which would have permitted a settlement class action only if the class could be certified for trial.<sup>11</sup> The Supreme Court's opinion, although presented as a modest "modification" of the Court of Appeals' reasoning,<sup>12</sup> created a narrow opening that courts have since expanded. In *In re American International Group, Inc. Securities Litigation* ("AIG"),<sup>13</sup> the Second Circuit held that a settlement class action could be approved even if the

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<sup>3</sup> Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012).

<sup>4</sup> By "plenary class certification," I mean certification of a class action for purposes of litigation. Such class certification does not, of course, mean that the case will reach a judgment after trial; most certified class actions result in settlement. But plenary class certification means that the court has authorized the representatives to litigate on behalf of the class.

<sup>5</sup> 28 U.S.C. § 2072(b).

<sup>6</sup> See *infra* text accompanying notes 85–92.

<sup>7</sup> FED. R. CIV. P. 23.

<sup>8</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

<sup>9</sup> See FED. R. CIV. P. 23(a)–(b).

<sup>10</sup> *Amchem*, 521 U.S. at 619–20 ("[A] district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." (citation omitted)).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 619.

<sup>13</sup> *In re Am. Int'l Grp., Inc. Sec. Litig. (AIG)*, 689 F.3d 229 (2d Cir. 2012).

fraud-on-the-market doctrine did not apply, which would have rendered the class uncertifiable for trial.<sup>14</sup> In *Sullivan v. DB Investments, Inc.* (“*DeBeers*”),<sup>15</sup> an antitrust case involving the diamond wholesaler DeBeers, the Third Circuit approved a nationwide settlement class action despite state law variations that permitted indirect purchasers to assert claims in some states but not others, an intraclass conflict that likely would have rendered the nationwide class uncertifiable for trial.<sup>16</sup>

The holdings and language of these cases suggest not just a modest consideration of settlement when approving settlement class actions, as *Amchem* condoned, but rather a full-throated endorsement of global resolutions even for disputes otherwise unsuitable for class treatment. The sounder approach would be to permit class settlement only after plenary class certification. Instead, these recent cases extended *Amchem* to permit class settlement in a wider range of disputes that are not only uncertified, but uncertifiable.

Part III.B turns from judicial opinions to rule proposals. The American Law Institute (“ALI”) has proposed facilitating settlement classes by permitting settlement class certification notwithstanding uncertifiability for trial.<sup>17</sup> Similarly, the Advisory Committee on Civil Rules is considering a suggestion that Federal Rule of Civil Procedure 23 be amended to ease settlement class certification.<sup>18</sup> What drives

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<sup>14</sup> *Id.* at 232. The fraud-on-the-market theory allows securities-fraud plaintiffs to invoke a rebuttable presumption of classwide reliance on public, material misrepresentations regarding securities traded in an efficient market. *Id.* at 234 n.3. The district court had rejected the applicability of the fraud-on-the-market presumption to the *AIG* case, but the Second Circuit declined to rule on this question in light of its determination that a settlement class action would be permissible even if the fraud-on-the-market doctrine were inapplicable. See *infra* text accompanying notes 112–20. On the importance of the fraud-on-the-market presumption to class certification, see *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013).

<sup>15</sup> *Sullivan v. DB Invs., Inc. (DeBeers)*, 667 F.3d 273 (3d Cir. 2011) (en banc).

<sup>16</sup> *Id.* at 285, 303–04. The court did not explicitly rule that the state law variations would have made the case uncertifiable for trial, but it acknowledged serious variations and dismissed those concerns as “largely irrelevant to certification of a settlement class.” *Id.* at 304 (internal quotation marks omitted); see *infra* text accompanying notes 121–35. On the importance of state law variations to class certification, see *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589–94 (9th Cir. 2012); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002).

<sup>17</sup> See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.06 & cmt. a (2010); see also *infra* Part III.B.1.

<sup>18</sup> See Civil Rules Advisory Comm., Minutes 32 (Mar. 22–23, 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV03-2012-min.pdf> (listing the following as one of the top five topics on the Rule 23 Subcommittee’s agenda: “Should there be criteria for certifying a settlement class different from the criteria for certifying a litigation class?”); see also *infra* Part III.B.2.

these proposals is an alignment of interests among defendants, judges, and plaintiffs' lawyers, all of whom favor comprehensive—rather than piecemeal—resolutions of disputes.<sup>19</sup> This Article contends that these proposals ought to be rejected, and that the sounder approach is one that permits class settlement only in the shadow of class litigation—that is, only after plenary class certification.

Some will object that a prohibition on settlement class actions will mean the loss of worthwhile mass resolutions. If defendants are willing to pay for the peace that class settlements bring, the argument goes, why not allow courts to effectuate such resolutions? Why should money be left on the table? My response is that if a class action provides the superior means of dispute resolution, then the court should certify it for purposes of litigation; a settlement reached after such certification would not suffer from the structural deficits enumerated in this Article. If the problem is that courts have gone too far in restricting litigation class actions—and there are strong arguments that this is the case<sup>20</sup>—then these arguments should be aimed at the standard for class certification,<sup>21</sup> the enforcement of class waivers in contracts of adhesion,<sup>22</sup> and other obstacles that stand in the way of

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<sup>19</sup> One can understand why each of these three dominant sets of players would prefer comprehensive resolutions. For a defendant, this preference is driven by the desire to limit liability, to prevent escalating litigation costs, and to reassure capital markets by resolving outstanding liability in such a fashion that the remaining risk can be quantified. For the judge, it is about docket control as well as the professional accomplishment of achieving a satisfying resolution to a mass dispute. And for plaintiff's counsel, it is about the potential for substantial fees, as well as the satisfaction of obtaining compensation for one's clients. See Howard Erichson, *Public and Private Law Perspectives: Transcript of Professor Howard Erichson*, 37 SW. U. L. REV. 665, 666–67 (2008). The problem is that claimants themselves may or may not get the full benefit of the comprehensive resolutions that these other players find so satisfying. See *id.* at 667; see also James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1021 (1995) (“Settlement class actions are attractive to judges, defendants, and plaintiffs’ counsel because they serve the interests of all three constituencies. One may fairly suspect that these interests may be served only if the interests of future plaintiffs are devalued.”).

<sup>20</sup> For an extensive discussion of the ways in which courts have restricted class actions, and for suggestions of ways that class certification could sensibly be eased, see generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013). See also Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 639–52 (2012) (discussing judicial enforcement of class action waivers in arbitration agreements).

<sup>21</sup> See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (emphasizing the burden of proof placed on movants for class certification); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550–57 (2011) (raising the bar on Rule 23(a)(2)’s commonality requirement).

<sup>22</sup> See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013) (holding that the Federal Arbitration Act requires enforcement of class action prohibitions in arbitration clauses notwithstanding impingement on vindication of federal rights); *AT&T Mobility LLC v.*

plenary class certification. If more class certifications are needed, then the solution is to certify more classes, not to bypass plenary class certification in favor of a settlement-only process that disfavors class members and encourages exploitation by defendants.

The problem of settlement class actions is hardly new to the literature.<sup>23</sup> It bears examination now because recent court decisions seem to have lost sight of what makes settlement class actions problematic, and because recent reform proposals would push even further in the wrong direction. If this Article discourages further moves toward facilitating settlement class actions, and if it sparks a reexamination of whether settlement-only class certification constitutes a legitimate exercise of judicial authority, then it will have done its job.

## I. THE LEVERAGE PROBLEM

### A. *Selling Something That One Does Not Have*

In a settlement class action, would-be class counsel negotiates to resolve the claims of class members.<sup>24</sup> If the negotiation succeeds, the deal offers peace for the defendant, compensation for class members, and fees for class counsel. If the negotiation fails, class counsel cannot simply take the class claims to trial. By definition, a settlement class action is negotiated at a time when the class has not yet been certified. At the time of the negotiation, the lawyer does not represent the plaintiff class,<sup>25</sup> but rather negotiates from the position of one who

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Concepcion, 131 S. Ct. 1740, 1748 (2011) (holding that the Federal Arbitration Act preempts state law regarding the unconscionability of class action prohibitions in arbitration clauses).

<sup>23</sup> See, e.g., AM. LAW INST., *supra* note 17, § 3.06 reporters' notes; John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1378–82 (1995); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2002–03 (1999); Henderson, *supra* note 19, at 1014; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 388; Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 775 (1998); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1051–85 (1995); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1113–14 (1996); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 898–901 (1995); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 447–76 (1996).

<sup>24</sup> See Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 546 (2006).

<sup>25</sup> On the powerlessness of putative class representatives to bind the class, see *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013). In *Standard Fire*, the Court rejected a precertification stipulation limiting the amount in controversy for purposes of subject matter jurisdiction, because the putative representative's stipulation "d[id] not speak for those he purport[ed] to represent. That is because a plaintiff who files a proposed class action cannot legally

hopes to be granted the franchise. The lawyer becomes an agent for the class only if she reaches agreement with the defendant and succeeds in seeking court approval.

In that sense, a lawyer negotiating a settlement class action is selling something that she does not have. She is offering to sell the defendant peace from the class members' claims even though she does not yet represent the class members and cannot take the class claims to trial. This does not necessarily mean the transaction is a sham, because if the settlement class action succeeds, then indeed the defendant gets the peace that the defendant bargained for. But it does make the negotiation steeply asymmetrical. The asymmetry derives from two related problems—the lack of a credible trial threat and the defendant's monopsony power—each of which deprives the plaintiffs' lawyer of leverage.

First, if a class has not been certified for purposes of litigation, then the would-be class lawyer negotiates from a position of weakness because she cannot threaten to take the class claims to trial.<sup>26</sup> Without the power to take the class claims to trial, the lawyer purporting to negotiate on behalf of absent class members lacks the leverage that is essential on both sides of any litigation compromise. Although she may offer something of value to the defendant, she has no viable alternative to a negotiated agreement,<sup>27</sup> at least not if she wishes to represent the class. The point is not that the plaintiffs' lawyer has zero leverage,<sup>28</sup> but rather that the leverage is low enough to put the plain-

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bind members of the proposed class before the class is certified." *Id.* at 1348–49; *see also* Smith v. Bayer Corp., 131 S. Ct. 2368, 2379–81 (2011) (holding that absent class members, as nonparties, are not bound by a denial of class certification).

<sup>26</sup> *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997).

<sup>27</sup> On the importance of a negotiator's "BATNA," or "Best Alternative to a Negotiated Agreement," *see* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 104 (Bruce Patton ed., Penguin Books 1983) (1981).

<sup>28</sup> First of all, in a settlement class action, the plaintiffs' lawyer is offering the defendant something of real value—classwide *res judicata*—so the defendant may be willing to offer a substantial sum even if there are other plaintiffs' lawyers with whom the defendant could strike a deal. Second, a class settlement binds only if a court finds the settlement "fair, reasonable, and adequate," FED. R. CIV. P. 23(e)(2), so the negotiating parties are wise not to make the deal too cheap, and defendants are apt to put real money on the table notwithstanding their advantage in the negotiation. Third, the lawyer negotiating a settlement class action may represent numerous individual clients, may possess a leadership role in the multidistrict litigation or other consolidated proceedings, and may be well positioned to negotiate on behalf of a consortium of lawyers representing a significant constituency of claimants. Such representation and coordination may allow the lawyer to negotiate from a position of strength regardless of class certification. *See infra* note 147 and accompanying text. These arguments suggest that plaintiffs' counsel can exert some force on defendants when negotiating mass resolutions. But they do not answer whether settlement-only class actions offer a sound way to reach such resolutions. If settlement class



tiffs' lawyer at a systematic disadvantage. The disadvantage is reduced in a case where the class is *certifiable*, but given the uncertainties of class certification and appointment of class counsel, the disadvantage is erased only if the class is actually *certified*.

The Supreme Court acknowledged the leverage problem in *Amchem*, offering the concern as one basis for requiring that settlement class actions meet the class certification requirements of Rule 23(a) and (b):

[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b),<sup>29</sup> and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer . . . .<sup>30</sup>

Had the Court followed the point to its logical conclusion, it would have required litigation class certification as a prerequisite to any class settlement. But the Court stopped short of even the more modest conclusion that any settlement class action should be *certifiable* for litigation purposes. Instead, the Court required that a settlement class action meet the requirements of Rule 23(a) and (b) for class certification, with the qualification that proponents of a settlement class action need not establish trial manageability for purposes of Rule 23(b)(3).<sup>31</sup> This dicta opened the door just enough for lawyers to pursue class settlements in otherwise uncertifiable disputes, and recent cases seem to have pushed that door wide open.<sup>32</sup>

Second, if the class has not been certified and the negotiating lawyer has not been appointed as class counsel,<sup>33</sup> the defendant carries

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actions impose a structural disadvantage on the class because would-be class counsel must reach agreement or be deprived of the franchise, and if they involve an assertion of judicial power that is premised on the presumed legitimacy of the underlying negotiation, then they fail the legitimacy test notwithstanding the existence of some bases for leverage. See *infra* notes 73–81 and accompanying text.

<sup>29</sup> Rule 23(e) governs court approval of the settlement of class actions that are qualified for certification under Rule 23(a) and (b). Subdivisions (a) and (b) focus on whether a proposed class has “sufficient unity so that absent members can fairly be bound by decisions of class representatives.” *Amchem*, 521 U.S. at 621.

<sup>30</sup> *Id.* (citing Coffee, *supra* note 23, at 1379–80). The reviewing court would likewise be “disarmed” because it would “face a bargain proffered for its approval without benefit of adversarial investigation.” *Id.*

<sup>31</sup> See *id.* at 619–20; see also *infra* text accompanying notes 105–06.

<sup>32</sup> See *infra* text accompanying notes 111–35.

<sup>33</sup> See FED. R. CIV. P. 23(g) (addressing appointment of class counsel).

the advantage of monopsony power.<sup>34</sup> That is, there is a single buyer (the defendant) and multiple potential sellers (lawyers willing to represent the class in a settlement class action). The defendant can strike a deal with any of numerous lawyers who would gladly fill the role of settlement class counsel, while any would-be class counsel must negotiate with the same defendant. Thus, the subtext of any settlement class action negotiation is that the would-be class counsel knows that if she does not strike a deal on terms acceptable to the defendant, the defendant can simply walk away and strike a more favorable deal with a different lawyer. This is what John Coffee identified as the “reverse auction” problem.<sup>35</sup> As Coffee put it, “settlement class actions permit defendants to run a reverse auction, seeking the lowest bidder from a large population of plaintiffs’ attorneys.”<sup>36</sup> One need not picture an actual auction, of course. Nor need there be more than one actual bidder. The point is that defendant’s threat of striking a deal with a different class lawyer is implicit, from the start, in the very nature of a settlement class action negotiation.

The settlement class action presents a particularly troubling kind of monopsony problem. There are multiple would-be sellers, but they do not have the thing they wish to sell. Specifically, they are negotiating to sell releases from the class members’ claims, but they do not actually represent the class because no class has yet been certified. None of the would-be class lawyers has been empowered to litigate the class claims.<sup>37</sup> The settlement class action lawyer, negotiating to sell something that she does not yet have, has only one way to get the thing she wishes to sell, and that is by striking a deal.

The federal class action rule contains a device that offers a partial solution to this leverage problem. Under Rule 23(g)(3), a court may designate interim counsel to act on behalf of a putative class prior to

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<sup>34</sup> See Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1081–82 (2013).

<sup>35</sup> John C. Coffee Jr., *The Corruption of the Class Action*, WALL ST. J., Sept. 7, 1994, at A15 [hereinafter Coffee, *Corruption*]; see also Coffee, *supra* note 23, at 1370, 1379.

<sup>36</sup> Coffee, *Corruption*, *supra* note 35; see also Coffee, *supra* note 23, at 1379.

<sup>37</sup> See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 398–99 (1996) (Ginsburg, J., concurring in part and dissenting in part) (highlighting, for consideration on remand, the argument “that the Delaware [class] representatives undervalued the federal claims—claims they could only settle, but never litigate, in a Delaware court”); see also John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 854 (1995) (“The consequence, however, is a profound imbalance that denies even well-meaning plaintiffs’ attorneys any leverage in settlement negotiations. Put simply, plaintiffs’ attorneys in such a setting have only a limited franchise: they can settle, but not fight.”).

class certification.<sup>38</sup> Designation of interim counsel not only resolves uncertainties about moving forward with discovery and motion practice, but it also positions a lawyer or group of lawyers to negotiate on behalf of the putative class.<sup>39</sup> The designation of interim counsel to negotiate a settlement class action thus reduces the risk of reverse auction by specifying who may negotiate on behalf of the putative class.<sup>40</sup> In combination with the Class Action Fairness Act of 2005<sup>41</sup> and multidistrict litigation transfer,<sup>42</sup> which both reduce the likelihood of competing class actions in multiple courts, Rule 23(g) offers a mechanism for consolidating the power of a single representative to negotiate on behalf of a putative class. Designation of interim counsel does nothing, however, to resolve the problem of counsel's uncertain ability to take the class claims to trial. Nor does it completely eliminate the reverse auction problem, unless no other lawyer could step in to represent the class in the event that the defendant's negotiations with interim counsel fail. Although the designation of interim counsel does not end the problems of settlement class actions,<sup>43</sup> it offers a valuable means for courts to reduce the defendant's monopsony power.

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38 FED. R. CIV. P. 23(g)(3) ("The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.").

39 The 2003 Advisory Committee's note makes it clear that, while interim designation may be useful for resolving rivalries and uncertainties, such designation is not a precondition to working on behalf of a putative class:

Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

FED. R. CIV. P. 23(g) advisory committee's note to 2003 amendments.

40 Richard Marcus suggested this advantage of interim designation well before Rule 23 was amended to make the process an explicit part of the rule. See Marcus, *supra* note 23, at 898 ("One difficulty can be avoided if the court at least selects and deputizes class counsel. It has long been recognized that the defendant may otherwise have an opportunity for lawyer-shopping. This problem can be solved if the court's approval is sought before the lawyer purports to bind the class to even a tentative settlement." (footnote omitted)).

41 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.); see 28 U.S.C. § 1332(d) (2012) (expanding federal subject matter jurisdiction over class actions); *id.* § 1453 (facilitating removal of class actions from state court to federal court).

42 See 28 U.S.C. § 1407 (permitting transfer of related actions to a single federal district court for coordinated pretrial proceedings).

43 Note that while Rule 23(g)(3) offers a partial solution to the leverage concerns raised in this Article (addressing the monopsony problem but not the trial problem), it does nothing to resolve the problem with settlement class actions under the Rules Enabling Act. See *infra* text accompanying notes 84–87.

### B. *A Problem of Leverage, Not Collusion*

Judicial opinions on settlement class actions acknowledge that courts must attend to the potential alignment of interest between class counsel and the defendant, but they rarely discuss this in terms of the systematic asymmetry that inheres in class counsel's inability to take the class claims to trial, or in class counsel's vulnerability to being undersold. Instead, courts tend to describe the concern in terms of a risk of *collusion*.<sup>44</sup>

When certifying settlement class actions, judges proudly report that they find "no evidence of collusion."<sup>45</sup> In the settlement class action resolving BP's liability for the Gulf of Mexico oil spill, for example, the district judge declared: "There is no evidence whatsoever of any fraud or collusion in the negotiation of the Settlement. Rather, . . . any suggestion of fraud or collusion is baseless."<sup>46</sup> Similarly, in *DeBeers* the Third Circuit rejected concerns about the fairness of the antitrust settlement class action with a dismissive wave: "No assertion of collusion, fraud, or overreaching is advanced or evidenced in the settlement at issue here."<sup>47</sup> The court's thin view of its role in protecting the class from collusion seemed to be founded on the notion that a settlement class action should be understood as a private contract. "[W]e must remain cognizant," the court noted, "that our 'intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent

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<sup>44</sup> I have been guilty of this as well, referring to the alignment of interests between plaintiffs' counsel and defendants, in both settlement class actions and all-or-nothing aggregate settlements, as a "collusion problem." See Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1020–22 (2010).

<sup>45</sup> See, e.g., *Shames v. Hertz Corp.*, No. 07-CV-2174-MMA(WMC), 2012 WL 5392159, at \*13 (S.D. Cal. Nov. 5, 2012) ("[T]he Court finds no evidence of collusion in the settlement process."); *Gallucci v. Boiron, Inc.*, No. 11cv2039JAH(NLS), 2012 WL 5359485, at \*4 (S.D. Cal. Oct. 31, 2012) ("The Court finds that there is no evidence of collusion in the settlement."); *Milligan v. Toyota Motor Sales, U.S.A., Inc.*, No. C 09–05418 RS, 2012 WL 10277179, at \*4 (N.D. Cal. Jan. 6, 2012) ("There is absolutely no evidence of collusion between the parties in arriving at the proposed settlement."); see also *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 393 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("Addressing the objectors' contention that the proposed settlement was 'collusive,' the Vice Chancellor . . . noted, the '[o]bjectors have offered no evidence of any collusion,' so he declined to reject the settlement on that ground.").

<sup>46</sup> *In re Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex.*, 910 F. Supp. 2d 891, 931 (E.D. La. 2012) (approving economic benefits settlement class action); see also *In re Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex.*, 295 F.R.D. 112, 147 (E.D. La. 2013) (approving medical benefits settlement class action and noting that "[n]o objector has provided evidence of collusion").

<sup>47</sup> *Sullivan v. DB Invs., Inc. (DeBeers)*, 667 F.3d 273, 325 n.58 (3d Cir. 2011) (en banc).

necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.’”<sup>48</sup>

But what exactly do courts expect to find? “Collusion” denotes a secret agreement for a wrongful purpose.<sup>49</sup> Do judges expect to find a nefarious conspiracy between defendants and class counsel? If there were such a conspiracy to disserve the class, then certainly it would be a basis for denying class certification and rejecting a settlement.<sup>50</sup> But as a general matter, collusion so defined is a red herring. The issue that matters in the vast run of settlement class actions is neither collusion nor other forms of bad faith, but rather the structural problem of lack of leverage.<sup>51</sup>

Unfortunately, framing the problem as one of collusion tends to supplant any consideration of leverage as a structural problem. The Federal Judicial Center’s class action pocket guide for judges, for example, conflates the reverse auction problem with collusion. In a sec-

48 *Id.* (quoting *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)); *see also id.* at 336–37 (Scirica, J., concurring) (“The principal danger of collusion lies in the prospect that class counsel, induced by defendants’ offer of attorneys’ fees, will ‘trade away’ the claims of some or all class members for inadequate compensation.”). On the error of turning to contract principles to legitimize class settlements, *see infra* Part II.A.

49 The Oxford English Dictionary defines “collusion” as follows: “Secret agreement or understanding for purposes of trickery or fraud; underhand scheming or working with another; deceit, fraud, trickery.” 3 THE OXFORD ENGLISH DICTIONARY 491 (2d ed. 1989). Others similarly define “collusion” in terms of both secrecy and wrongfulness, and in the legal context, as a secret agreement between purportedly adverse parties: “1. secret agreement for a fraudulent purpose; connivance; conspiracy 2. a secret agreement between opponents at law in order to obtain a judicial decision for some wrongful or improper purpose.” *Collusion Definition*, COLLINS DICTIONARY.COM, <http://www.collinsdictionary.com/dictionary/english/collusive> (last visited May 20, 2014); *see also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (“A secret agreement between two or more parties for a fraudulent, illegal, or deceitful purpose.”); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003) (defining collusion as a “secret agreement or cooperation esp. for an illegal or deceitful purpose”).

50 *See, e.g.,* *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 45 (D. Me. 2005) (“[K]ey provisions of the Amended Settlement Agreement, which were finalized by the parties after the mediation session, combine to form an agreement that appears collusive on its face and in practice. Specifically, the Court remains troubled by the combination of the reverter clause and the clear sailing provision. In concert, the Court believes that these two provisions give rise to inferences that there was a lack of arm’s length negotiations and a lack of zealous advocacy for the Class by Plaintiffs’ counsel.”).

51 John Coffee, articulating the reverse auction concern, recognized that the problem does not depend on bad faith: “Even in the absence of bad faith, suspect settlements result in large measure because of the defendants’ ability to shop for favorable settlement terms, either by contacting multiple plaintiffs’ attorneys or by inducing them to compete against each other.” Coffee, *supra* note 23, at 1354.

tion entitled "Collusion: 'Reverse auctions' and the like,"<sup>52</sup> it offers this definition of the problem: "'Reverse auction' is the label for a defendant's collusive selection of the weakest attorney among a number of plaintiff attorneys who have filed lawsuits dealing with the same subject matter . . . ."<sup>53</sup> It advises that "[d]etermining whether a reverse auction might have occurred requires information about all litigation dealing with the subject of the dispute."<sup>54</sup>

The *Pocket Guide* misses the crucial point about the defendant's lopsided power. The point is not so much that courts should look to see "whether a reverse auction might have occurred," as the pamphlet puts it.<sup>55</sup> Rather, the point is that a reverse auction dynamic is implicit in the negotiation of a settlement class action. One need not look for whether multiple bidders actually participated; one need only know that the first bidder negotiated from a position of weakness because other potential bidders were out there, and the bidder sought to sell something that she did not have unless her bid was accepted.

Some judges understand that the core concern is not collusion in the narrow sense of a conspiracy to disserve the class, but rather the defendant's ability to take advantage of disempowered plaintiffs' counsel. In *Figueroa v. Sharper Image Corp.*,<sup>56</sup> for example, the district court rejected a proposed settlement that was reached prior to class certification. In evaluating the procedural fairness of the settlement, the court quickly moved past the question of "fraud or collusion" and focused instead on the disadvantaged position of plaintiffs' counsel, whose only viable path to hold onto their case was to strike a deal for global peace on terms acceptable to the defendant:

There is no evidence of fraud or collusion between Class Counsel and counsel for Sharper Image. That concern may be quickly disposed of. What cannot be so easily eliminated is the perception, and the undersigned's conviction, that Sharper Image selected counsel confronted with a most precarious position, insisted upon amendments to the pleading to broaden the scope of this litigation to obtain a global peace, and then proceeded to offer and convince Class

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52 BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUDICIAL CTR., *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* 20 (3d ed. 2010).

53 *Id.* at 21 (citing *MANUAL FOR COMPLEX LITIGATION* (FOURTH) § 21.61 (2004)).

54 *Id.*

55 *See id.*

56 *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007).

Counsel to accept highly undesirable terms to settle the case.<sup>57</sup>

The settlement came at a moment in the *Figueroa* litigation when the plaintiffs were vulnerable to a stay or dismissal because their action was undifferentiated from certain related lawsuits.<sup>58</sup> The fact that Sharper Image struck a deal with plaintiffs' counsel for global peace, rather than renew its request to abate or dismiss the lawsuit, signaled to the court that the defendant was taking advantage of counsel for whom a settlement class action was the only viable strategy for staying in the game.<sup>59</sup> "Thus, Plaintiffs' counsel necessarily negotiated from a position of weakness, with the specter of a stay of this case a constant companion."<sup>60</sup> The court in *Figueroa* recognized the dynamics of the negotiation and appropriately looked beyond the narrow question of collusion.

Similarly, in *Dennis v. Kellogg Co.*,<sup>61</sup> the Ninth Circuit considered the risks presented by settlement class actions in broader terms than collusion. Rejecting a settlement that would have provided a questionable cy pres remedy, the court noted the importance of looking beyond explicit collusion:

[W]here . . . class counsel negotiates a settlement agreement before the class is even certified, courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations."<sup>62</sup>

The fundamental problem of settlement class actions is not about the negotiating attorney's competence or good faith (although both are necessary). Rather, the deeper problem is the steep asymmetry of power inherent in the very structure of settlement-only class certification.

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<sup>57</sup> *Id.* at 1321.

<sup>58</sup> *Id.* at 1321–22.

<sup>59</sup> *Id.* at 1322 ("Instead of [a motion to abate or to dismiss] occurring, however, and prior to any decision on class certification, Sharper Image began and pursued negotiations with Plaintiffs' counsel, doing so with sealed filings and proceedings on the eve of a class certification process, abandoning its earlier efforts to have the case stayed. Plaintiffs' counsel were fully aware that a request for a stay might very well be granted . . .").

<sup>60</sup> *Id.*

<sup>61</sup> *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012).

<sup>62</sup> *Id.* at 864 (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011)).

## II. THE ILLEGITIMACY OF SETTLEMENT CLASS CERTIFICATION

### A. *Neither Contract nor Adjudication*

Thus far, this Article has argued that settlement class actions suffer from a problem of asymmetrical leverage, and that the problem is structural. One might ask, so what? Plenty of negotiations are asymmetrical. We do not expect markets to offer perfect fairness, so why should we worry about the fact that a settlement class action gives defendants a structural advantage over the class? The answer is that settlement class actions, unlike other negotiated resolutions, bind solely through the exercise of judicial power. They are not merely (and arguably not even) a market mechanism. Although settlement class actions result from private negotiation, they bind only by the authority of the court. The court, however, does not adjudicate the merits of the dispute, instead ruling only on the rough fairness of a deal that the court presumes reflects market price. A settlement class action entails an exercise of judicial power premised on a proxy negotiation.<sup>63</sup> Thus, much depends upon whether the proxy negotiation deserves a presumption of fairness.

Courts routinely and misleadingly describe class settlements using the language of contract.<sup>64</sup> In the *DeBeers* antitrust case, the Third Circuit put it this way:

It is well established that "settlement agreements are creatures of private contract law." . . . Thus, a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action.<sup>65</sup>

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<sup>63</sup> Richard Marcus has made both of these points, distinguishing settlement class actions from ordinary settlements both because they involve negotiation by proxies and because they achieve resolution by an exercise of judicial power:

Outside the class action area, the policy in favor of settlement usually looks to encouraging the parties themselves to settle, not appointing proxies to negotiate a settlement in their absence. . . . Denying class action status in no way prevents the parties from settling their cases, but they must do it by actual agreement rather than in gross by judicial fiat.

Marcus, *supra* note 23, at 900.

<sup>64</sup> See, e.g., *Smith v. Chase Bank USA, N.A.*, No. 3:11-1055, 2012 WL 1567201, at \*5 (M.D. Tenn. May 2, 2012) ("A class action settlement, like an agreement resolving any other legal claim, is a *private* contract negotiated between the parties." (internal quotation marks omitted)).

<sup>65</sup> *Sullivan v. DB Invs., Inc. (DeBeers)*, 667 F.3d 273, 312 (3d Cir. 2011) (en banc) (quoting *Bauer v. Transitional Sch. Dist. of St. Louis*, 255 F.3d 478, 482 (8th Cir. 2001)). The *DeBeers* Court, treating the settlement class action as if it were a consensual settlement, assumed that the settlement values reflected the likelihood of a favorable outcome if the case were litigated: "[I]n



Concurring Judge Anthony Scirica echoed the same idea: “Settlement of a class action is not an adjudication of the merits of the members’ claims. It is a contract between the parties governed by the requirements of Rule 23[ ] . . . and establishes a contractual obligation as well as a contractual defense against future claims.”<sup>66</sup>

When the court says that a class settlement simply recognizes the parties’ “deliberate decision to bind themselves,” who does it imagine has made this “deliberate decision”? Surely not the class members. In a class action, the absent class members make no such decision. Judge Scirica’s description of a class settlement as “a contract between the parties” is similarly misguided—class action settlements do not work like contracts. Contracts bind because of the voluntary agreement of those who are bound.<sup>67</sup> A class action settlement binds all members of the certified class even though virtually none of the class members have agreed to it.<sup>68</sup> Here, we must distinguish those who

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reaching a private consensual settlement, the ‘parties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlement by considering the likelihood of a plaintiffs’ or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value.’” *Id.* at 325 n.58 (quoting *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)). The court failed to mention, however, the crucial difference between the likelihood of individual verdicts and the likelihood of a class verdict. Of course settlement negotiations occur in the shadow of predictions regarding litigation outcomes, but the key factor distinguishing settlement class actions is that the negotiator—would-be class counsel—lacks the power to take the class claims to trial.

<sup>66</sup> *Id.* at 338 (Scirica, J., concurring).

<sup>67</sup> See *Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006) (“[C]ontractual obligations are entirely voluntary.”); *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 907 (Wis. 2012) (“The underpinning of contract law is that competent parties are permitted to bind themselves to voluntary agreements . . . .”). See generally Aditi Bagchi, *Voluntariness and Contract Interpretation* (2013) (unpublished manuscript), available at [http://www.law.harvard.edu/programs/about/privatelaw/related-content/bagchi\\_voluntariness\\_and\\_contract\\_interpretation.pdf](http://www.law.harvard.edu/programs/about/privatelaw/related-content/bagchi_voluntariness_and_contract_interpretation.pdf) (exploring what it means to describe a contract as voluntary, and the significance of voluntariness for the interpretation of contractual terms).

<sup>68</sup> Under Federal Rule of Civil Procedure 23(c)(2)(B)(v), class members have the opportunity to exclude themselves from a class action certified under Rule 23(b)(3), and this “opt-out” right arguably constitutes tacit agreement. Cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810–14 (1985) (holding the opt-out right, along with other due process protections, sufficient to support personal jurisdiction over absent class members). There is a big difference, however, between actual agreement and a failure to opt out, particularly in light of the typically very low opt-out rates in class actions. See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (explaining empirical finding that less than one percent of class members opt out). It is also worth noting that class action settlements negotiated after class certification ordinarily bind class members without providing any opportunity to opt out because the opt-out period would have passed prior to the settlement. Jeannette Cox, Note, *Information Famine, Due Process, and the Revised Class Action Rule: When Should Courts Provide a Second Opportunity to Opt Out?*, 80 NOTRE DAME L. REV. 377, 378–79 (2004). However, class members retain

agreed from those who did not. The defendant, the would-be class lawyer, and perhaps the named plaintiffs actually agreed to a deal. When defendants attempt to back out of class settlement deals, courts understandably invoke contract principles to hold them to the agreed upon terms; this aspect of binding defendants may explain some of the language of contract that has crept into class action jurisprudence.<sup>69</sup> The invocation of contract principles to prevent backtracking by a party who affirmatively agreed to a settlement, however, is a far cry from the invocation of such principles to bind absentees.<sup>70</sup>

If contract principles cannot explain the binding effect of a class settlement, then what does? Why does the settlement bind the class members? It binds them because the court says so. What binds the class is not the *agreement* between the defendant and the lead plaintiffs or class counsel, but rather the court's *judgment* approving that agreement.<sup>71</sup> The binding effect of a class settlement, in other words,

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the right to opt out of Rule 23(b)(3) class actions that are certified solely for settlement. FED. R. Civ. P. 23(e) advisory committee's note ("The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.").

<sup>69</sup> For example, in *Ehrheart v. Verizon Wireless*, 609 F.3d 590 (3d Cir. 2010), defendant Verizon agreed to a class settlement but then moved to vacate the court's preliminary approval of that settlement when new legislation weakened the plaintiffs' claims. *Id.* at 592. The court of appeals, appropriately invoking contract principles, held that Verizon could not back out of the deal:

The requirement that a district court review and approve a class action settlement before it binds all class members does not affect the binding nature of the parties' underlying agreement. Put another way, judicial approval of a class action settlement is a condition subsequent to the contract and does not affect the legality of the proposed settlement agreement.

*Id.* at 593 (citation omitted); see also *In re Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 2011 WL 3878332, at \*4-5 (E.D. Tenn. Aug. 31, 2011) (expressing sympathy for the argument that the defendant should be bound by the class settlement to which it had agreed, but ultimately granting the defendant's motion to vacate because changed circumstances meant that the class certification requirements were no longer met).

<sup>70</sup> In *Epstein v. MCA, Inc.*, 50 F.3d 644 (9th Cir. 1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), the defendant Matsushita argued that class members were bound by a settlement class action as a matter of contract because the class had given a release. *Id.* at 666. The Ninth Circuit emphatically rejected this argument, noting that "the settlement of a class action is fundamentally different from the settlement of traditional litigation," and that "Matsushita is simply wrong to assert that a 'class' may give a release as part of a settlement." *Id.* at 666-67.

<sup>71</sup> See 1 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 1:6 (5th ed. 2011) ("The mechanics of the binding effect of the class action are straightforward. If a class suit ends in a settlement, the court's approval of that settlement following notice to the class, objections, and a fairness hearing results in a formally entered final judgment."); see also Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90

must be understood as a function of judicial power. But adjudication does not quite describe it either, at least not in the usual sense.<sup>72</sup> Judges approving class settlements emphatically disavow any credit or responsibility for determining the merits of the claims.<sup>73</sup>

This neither-fish-nor-fowl aspect of class settlements should give us pause when thinking about settlement-only class actions. Settlement class actions come into being only by negotiation, but they bind only by the court's judgment. If the court's judgment is not based on adjudication of the underlying claims,<sup>74</sup> then the legitimacy of this exercise of power depends upon the legitimacy of the negotiation out of which the settlement class action is borne. The legitimacy of that negotiation as a basis for binding class members cannot be founded on contract principles, because the class members did not agree to the settlement. Nor can it be founded on agency principles, because the lawyer purportedly negotiating for the class was never appointed by the principals, and was appointed by the court as class counsel only after the negotiation was completed.<sup>75</sup>

Despite the inability of adjudication principles, contract principles, or agency principles to explain the binding effect of settlement

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WASH. U. L. REV. 1015, 1020–25 (2013) (contrasting class settlements, which take effect through judicial action, from nonclass settlements).

<sup>72</sup> On the fuzzy line between adjudication and settlement in the context of class settlements, see Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 *FORDHAM L. REV.* 1117, 1123–24 (2009) (“[A class action settlement] is an adjudication giving effect to a negotiated resolution, and it is a settlement effectuated by the court’s judgment.”).

<sup>73</sup> See, e.g., *Sullivan v. DB Invs., Inc. (DeBeers)*, 667 F.3d 273, 324 (3d Cir. 2011) (en banc) (“[T]he court must ‘guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.’” (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995))); *id.* at 338 (Scirica, J., concurring) (“Settlement of a class action is not an adjudication of the merits of the members’ claims.”); *In re Sea Containers Ltd. Class Action Sec. Litig.*, No. 89-0930(JGP), 1990 WL 99307, at \*11 (D.D.C. July 6, 1990) (“This Court’s Order certifying the Settlement Classes and directing the Settlement Hearing should not be construed or considered in any way as an expression or indication of the Court’s views as to the merits of any claim or defenses asserted by any parties in this litigation. The Court has not determined the merits of any of the issues in this Action.”); see also Owen M. Fiss, *The History of an Idea*, 78 *FORDHAM L. REV.* 1273, 1278 (2009) (distinguishing between adjudication and judicial approval of a class settlement, as “a sharp distinction must be made between a judgment of the court, after trial, as to what justice requires, and a judgment that what the parties had agreed to is reasonable or within the ballpark”).

<sup>74</sup> For an argument that settlement class actions in federal court are unconstitutional by virtue of failing the case-or-controversy requirement of Article III, see generally Redish & Kastanek, *supra* note 24. For a related argument that settlement class actions exceed the legitimate bounds of adjudication, see generally Henderson, *supra* note 19.

<sup>75</sup> On the possibility of court-appointed interim class counsel under Rule 23(g)(3), see *supra* text accompanying notes 38–43.

class actions, perhaps settlement class actions should be defended on policy grounds because they offer a sound way to resolve certain mass disputes. But this argument would require some basis on which to trust the underlying negotiation. Judicial review offers a check against abuses, but it is no substitute for a trustworthy negotiation to begin with.<sup>76</sup>

Judicial evaluation of the fairness of class settlements begins with a presumption of the fairness of arm's length negotiations.<sup>77</sup> The great appeal of negotiated resolutions, in general, is that they offer a market mechanism for determining the value of claims even as the merits of those claims remain in dispute. But settlement class actions cannot provide the market-based comfort required to support this exercise of judicial power. As discussed above, asymmetry is built into the very structure of a settlement class action, both because the class has not been certified for trial and because the monopsony puts would-be class counsel in the untenable position of needing to strike a deal for the class in order to obtain the position of class counsel.<sup>78</sup>

In the end, the settlement class action binds the class only because of the judgment, but there is no sound basis for this exercise of judicial power.<sup>79</sup> It is not an adjudication on the merits. It is not the enforcement of a compromise to which the claimants agreed. It is, instead, a judicially binding restatement of an agreement negotiated between a defendant and would-be class counsel. If the outcome of that negotiation were entitled to a presumption of fairness because it

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<sup>76</sup> For a contrary argument that looks to judicial settlement review and objectors as antidotes to the leverage problem, see Griffith & Lahav, *supra* note 34, at 1121–24.

<sup>77</sup> See, e.g., *Guaman v. Ajna-Bar NYC*, No. 12 Civ. 2987(Df), 2013 WL 445896, at \*4 (S.D.N.Y. Feb. 5, 2013) (“Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.” (alterations in original) (internal quotation marks omitted)); *id.* at \*4 (“A ‘presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.’” (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005))); *Craig v. Rite Aid Corp.*, No. 4:08-cv-2317, 2013 WL 84928, at \*8 (M.D. Pa. Jan. 7, 2013) (“In this context, a ‘presumption of fairness’ applies if the Court finds that settlement negotiations were conducted at arm’s length by experienced counsel, that there was sufficient discovery, and that only a small percentage of class members object.”); *In re Oil Spill by Oil Rig “Deepwater Horizon” in Gulf of Mex.*, 910 F. Supp. 2d 891, 930–31 (E.D. La. 2012) (“Because the public interest strongly favors the voluntary settlement of class actions, there is a strong presumption in favor of finding the settlement fair, reasonable, and adequate.”).

<sup>78</sup> See *supra* text accompanying notes 27–62.

<sup>79</sup> James Henderson expressed this insight even before *Amchem* had made its way up to the Supreme Court: “Settlement class actions are inherently unlawful because they clearly, and one is tempted to say unnecessarily, exceed the legitimate limits of adjudication.” Henderson, *supra* note 19, at 1014.

represented a market valuation of claims under circumstances in which classwide resolution provided a superior means of resolving the dispute, then one could see the argument in favor of judicial enforcement of the resolution. But the structure, and inherent power asymmetry, of settlement class actions renders any such presumption of fairness impossible.

Class certification requires adequate representation.<sup>80</sup> So does the preclusive effect of any class judgment as a matter of due process.<sup>81</sup> Regardless of skill, diligence, and good faith, it is difficult to see how any lawyer or putative class representative negotiating a settlement class action can provide adequate representation in light of the structural shortcomings of the settlement class action form. Settlement class actions present a client-lawyer conflict of interest.<sup>82</sup> The lawyer wishes to reach a deal with the defendant and obtains the class franchise only if she does so, but she lacks the leverage to negotiate adequately on behalf of the class.

### B. *The Rules Enabling Act*

An interpretation of Rule 23 that permits settlement-only class certification presents problems under the REA.<sup>83</sup> Under the REA, no federal rule of civil procedure may “abridge, enlarge or modify any substantive right.”<sup>84</sup> Because a settlement class action offers neither an adjudication on the merits of the class members’ claims nor a compromise by one with the power to pursue those claims to adjudication,

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<sup>80</sup> FED. R. CIV. P. 23(a)(4) (stating requirement that “the representative parties will fairly and adequately protect the interests of the class”).

<sup>81</sup> See *Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008) (considering various factors to determine whether party’s representation of nonparty is “adequate” for purposes of preclusion); *Hansberry v. Lee*, 311 U.S. 32, 42–45 (1940) (holding class action judgment cannot bind absent parties unless they were adequately represented by present parties); see also Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 545 (2012) (“Whatever due process doctrine generally requires, for class actions it requires this: No absent class member can be bound by a class action judgment without adequate representation.”).

<sup>82</sup> For purposes of adequate representation in class actions, client-lawyer conflicts arguably matter more than client-client conflicts. See Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 597.

<sup>83</sup> Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012).

<sup>84</sup> *Id.* § 2072(b). It makes sense to focus on the federal rule because the Class Action Fairness Act of 2005 (“CAFA”) made federal courts the dominant forum for large-scale class actions in the United States. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., *THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1–2* (2008) (finding seventy-two percent increase in class action activity in district courts since CAFA’s enactment).

settlement-only class certification constitutes an impermissible modification of substantive rights via Rule 23.

In this regard, settlement class actions differ fundamentally from litigation class actions, including litigation class actions that end in settlement. The class action rule, to the extent it allows adjudication of substantive rights through representative litigation, does not run afoul of the REA constraint. Class certification transforms the method by which claims may be presented for adjudication, and it transforms how those claims may be settled along the way to such adjudication, but it does not alter the rights to be adjudicated.

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,<sup>85</sup> Justice Scalia's plurality opinion defended the class action rule on the grounds that it "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits."<sup>86</sup> The class action rule "leaves the parties' legal rights and duties intact and the rules of decision unchanged."<sup>87</sup> Although class certification transforms litigation more fundamentally than any other joinder mechanism,<sup>88</sup> the transformation remains procedural (converting standard litigation to representative litigation) rather than substantive (altering rights and duties under applicable substantive law).<sup>89</sup>

If a class action has been certified solely for settlement and not for litigation, however, then it is much harder to explain it as a mere change in process. Unlike a litigation class, the settlement class action does not establish a process in which the class members' legal rights remain intact. Rather, in a settlement class action, the very act of class certification alters the parties' substantive rights and duties by replacing those rights and duties with the terms of the negotiated resolution.<sup>90</sup> This differs from a class settlement reached after plenary

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<sup>85</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

<sup>86</sup> *Id.* at 408 (plurality opinion).

<sup>87</sup> *Id.*

<sup>88</sup> Compare FED. R. CIV. P. 23 (class actions), with FED. R. CIV. P. 13 (counterclaims and crossclaims), FED. R. CIV. P. 14 (third-party claims), FED. R. CIV. P. 18 (permissive joinder of claims), FED. R. CIV. P. 19 (compulsory joinder of parties), FED. R. CIV. P. 20 (permissive joinder of parties), FED. R. CIV. P. 22 (interpleader), and FED. R. CIV. P. 24 (intervention).

<sup>89</sup> *Shady Grove* equates the class action rule with rules of joinder and consolidation, which "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed." *Shady Grove*, 559 U.S. at 408. Although Justice Scalia's opinion ignores the fundamental difference between joinder and representative litigation, and thus underestimates the transformative power of class certification, the opinion's basic defense of class actions under the REA is sound.

<sup>90</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848–49 (1999) (requiring "heightened attention" to certification of settlement-only class action because certification "effectively concludes the proceeding" (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997))).

class certification. In a litigation class action, the act of class certification does not alter the substantive rights of the parties, for the reasons stated in *Shady Grove*.<sup>91</sup> If the parties then reach a settlement, it represents a compromise of judicable class claims; as an REA matter, this resembles the settlement of any other claim whose procedural posture depends on application of the rules of civil procedure.<sup>92</sup> Thus, plenary certification of a class does not alter substantive rights and does not violate the REA, even if the class claims are then resolved through negotiation. But certification of a class solely to accomplish a negotiated resolution (i.e., a settlement class action) presents REA problems because the moment of class certification itself alters the substantive rights of the class members.

As a textual matter, Rule 23(e) states that “[t]he claims, issues, or defenses of a *certified class* may be settled, voluntarily dismissed, or compromised only with the court’s approval.”<sup>93</sup> The words “of a certified class” were added in 2003 to clarify that putative class representatives may settle their individual claims without the judge’s assent.<sup>94</sup> But that language could be read as not merely limiting the circumstances when judicial approval is required, but also defining the circumstances under which classwide settlement is permitted in the first place. Thus, one could interpret the rule to say that a court may approve a class settlement only if the settlement resolves the claims of a *certified class*. The question is whether settlement-only class certification can suffice to meet this requirement, or whether class settlement requires prior plenary class certification. As a matter of litigation policy, as a matter of adequate representation, and as a matter of construing the rule within the strictures of the REA, the latter interpretation should be preferred.

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<sup>91</sup> See *Shady Grove*, 559 U.S. at 407–08 (plurality opinion).

<sup>92</sup> See *id.* at 408.

<sup>93</sup> FED. R. CIV. P. 23(e) (emphasis added).

<sup>94</sup> See FED. R. CIV. P. 23(e) advisory committee’s note to 2003 amendments (“Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)’s reference to dismissal or compromise of ‘a class action.’ That language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.” (citation omitted)).

### III. MOVING IN THE WRONG DIRECTION

#### A. From Amchem to AIG and DeBeers

After the Supreme Court decided *Amchem* and *Ortiz v. Fibreboard Corp.*<sup>95</sup> in the late 1990s, rejecting two asbestos settlement class actions, one might have thought that settlement class actions were on their way out. *Ortiz* largely closed the door to limited fund settlement class actions under Rule 23(b)(1)(B).<sup>96</sup> As far as Rule 23(b)(3) settlement class actions were concerned, the Supreme Court in *Amchem* left the door open but expressed reservations. While declining to rule out the possibility of using the class action device to settle disputes that could not be litigated on a class action basis, the Court emphasized the dangers of settlement class actions and the need for careful scrutiny.<sup>97</sup>

*Amchem* involved a massive deal to resolve asbestos claims for a consortium of defendants.<sup>98</sup> The district court approved the deal after a thorough inquiry into the fairness of the settlement.<sup>99</sup> On appeal, the Third Circuit reversed. In an opinion by Judge Edward Becker, the court held that unless a class action could be certified for trial, it could not be certified for settlement.<sup>100</sup> According to the Third Circuit, the district court had improperly substituted the settlement fairness inquiry of Rule 23(e) for the class certification inquiry of Rule 23(a) and (b).<sup>101</sup> The Third Circuit relied in part on its decision one year earlier in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*,<sup>102</sup> where it considered the then-emerging phenomenon of settlement class actions and announced its rule that a settlement class must satisfy each of the requirements of class certifi-

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<sup>95</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

<sup>96</sup> While the Supreme Court in *Ortiz* did not rule out the possibility of limited fund class actions under Rule 23(b)(1)(B), its rigid requirements—in particular the requirement that the defendant put virtually all of its assets into the settlement—make such class actions unappetizing to defendants as a voluntary means of resolving disputes. See *id.* at 859–61.

<sup>97</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619–21 (1997).

<sup>98</sup> *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

<sup>99</sup> See *id.* at 258 (noting appointment of special master to investigate aspects of fairness of proposed settlement); see also JAY TIDMARSH, FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 50 (1998) (describing fairness hearing that lasted eighteen days over the course of five weeks, with testimony from medical, financial, and legal ethics experts).

<sup>100</sup> *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617–18 (3d Cir. 1996), *aff'd on other grounds sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

<sup>101</sup> *Id.* at 626.

<sup>102</sup> *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).



cation; a determination of a fair settlement was no surrogate for the class certification requirements.<sup>103</sup> Applying this reasoning to the *Amchem* settlement, the court found that the class had to be rejected because it failed the Rule 23(a) requirements of typicality and adequacy of representation, as well as the Rule 23(b)(3) requirements of predominance and superiority.<sup>104</sup>

The Supreme Court, affirming, largely agreed with the Third Circuit's reasoning. The Court added a distinction, however, while simultaneously downplaying that distinction's significance: "We agree with petitioners to this limited extent: Settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect."<sup>105</sup> The Supreme Court made clear that the one way in which settlement bore on the certification of a settlement class action was the question of trial manageability:

Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.<sup>106</sup>

The Supreme Court took pains to emphasize that the requirements of class certification apply to settlement class actions, and that those requirements cannot be ignored in the name of achieving an attractive global resolution. The class certification requirements, the

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<sup>103</sup> Specifically, the Third Circuit explained:

After reflection upon these concerns, we conclude that Rule 23 permits courts to achieve the significant benefits created by settlement classes so long as these courts abide by all of the fundamentals of the Rule. Settlement classes must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the relevant 23(b) requirements, usually (as in this case) the (b)(3) superiority and predominance standards. . . . Additionally, we hold that a finding that the settlement was fair and reasonable does not serve as a surrogate for the class findings, and also that there is no lower standard for the certification of settlement classes than there is for litigation classes. But so long as the four requirements of 23(a) and the appropriate requirement(s) of 23(b) are met, a court may legitimately certify the class under the Rule.

*Id.* at 778.

<sup>104</sup> *Georgine*, 83 F.3d at 618.

<sup>105</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997).

<sup>106</sup> *Id.* at 620. Rule 23(b)(3)(D) names "the likely difficulties in managing a class action" as one of the factors to be considered when certifying a class under Rule 23(b)(3). FED. R. CIV. P. 23(b)(3)(D).

Court stated, “focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.”<sup>107</sup> The Rule 23(a) and (b) class certification safeguards “are not impractical impediments—checks shorn of utility—in the settlement-class context.”<sup>108</sup> Rather, those safeguards protect against appraisals based on a judge’s “gestalt judgment or overarching impression of the settlement’s fairness.”<sup>109</sup>

While the Court’s decision in *Amchem* is not a model of clarity, its basic thrust is an insistence that any settlement class action meet the requirements of class certification as a way to ensure sufficient cohesion to warrant classwide resolution. The Rule 23(e) determination of the fairness of the settlement functions as an independent condition for settlement approval, not as a substitute for the Rule 23(a) and (b) findings that support class certification.

Cautious as the Supreme Court may have intended to be in *Amchem*, it effectively sanctioned the use of settlement-only class certification as a means of resolving mass disputes. Notwithstanding the Court’s emphasis on the importance of the class certification safeguards, the Second and Third Circuits have relied on *Amchem*’s dicta to support the use of settlement-only class certification to resolve disputes that could not be adjudicated through class action litigation. In other words, rather than insist upon plenary class certification before settlement (as this Article argues would be the better approach), these courts have moved in the opposite direction. The Supreme Court had it wrong in *Amchem*; it should have rejected settlement-only class certification. Recent cases have departed from *Amchem*, but unfortunately they have done so by adopting a more permissive stance toward settlement class actions.

*AIG* involved securities fraud claims by investors against American International Group, Inc. (“AIG”) and other defendants, including the General Reinsurance Corporation (“Gen Re”), alleging that AIG and Gen Re entered into a sham reinsurance transaction that artificially inflated AIG’s share price.<sup>110</sup> The plaintiffs moved for class certification, invoking the fraud-on-the-market doctrine to establish

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<sup>107</sup> *Amchem*, 521 U.S. at 621.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*; see also Klonoff, *supra* note 20, at 801–02 (emphasizing *Amchem*’s insistence that class certification requirements be met, and its rejection of the argument that a settlement class can be approved solely on grounds that the settlement is fair); *id.* at 805 (referring to “*Amchem*’s conflation of class settlement with class litigation”).

<sup>110</sup> *In re Am. Int’l Grp., Inc. Sec. Litig. (AIG)*, 689 F.3d 229, 233–34 (2d Cir. 2012).

reliance. The district court denied class certification for claims against the Gen Re defendants, finding that the fraud-on-the-market presumption did not apply, and therefore that individual reliance issues predominated over common issues.<sup>111</sup> By then, however, Gen Re and the lead plaintiffs had reached agreement on a classwide settlement, and they pursued approval of this settlement notwithstanding the district court's ruling on class certification.

Four months after the court's denial of class certification for litigation, the lead plaintiffs and Gen Re jointly moved for preliminary approval of their settlement class action.<sup>112</sup> The district court refused to certify the settlement class, holding that the class failed to meet the predominance requirement of Rule 23(b)(3) because of the inapplicability of the fraud-on-the-market presumption.<sup>113</sup> The court then dismissed the claims against Gen Re.<sup>114</sup> On appeal, both the lead plaintiffs and Gen Re argued that the district court should have certified the settlement class action. The Second Circuit largely agreed and vacated the district court's order.<sup>115</sup>

According to the Second Circuit, certification of a settlement class may be permissible even in the absence of the fraud-on-the-market presumption. The court emphasized the difference between class certification for trial and for settlement, explaining that "[i]n the context of a settlement class, concerns about whether individual issues would create 'intractable management problems' at trial drop out of the predominance analysis because 'the proposal is that there be no

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111 *In re Am. Int'l Grp., Inc. Sec. Litig.*, 265 F.R.D. 157, 175 (S.D.N.Y. 2010) ("Because Lead Plaintiffs have not established or even pled that the Gen Re Defendants made any public misstatement or omission with regard to AIG, the fraud-on-the-market presumption does not apply to claims against these Defendants, and individual issues of reliance predominate over common issues for the claims against the Gen Re Defendants regarding AIG stock. Accordingly, the Court does not certify the class of claims against the Gen Re Defendants."), *vacated and remanded*, 689 F.3d 229 (2d Cir. 2012). On the centrality of the fraud-on-the-market presumption to class certification in securities fraud actions, see generally *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

112 See *In re Am. Int'l Grp., Inc. Sec. Litig.*, 265 F.R.D. at 175; see also *AIG*, 689 F.3d at 236–37 ("[T]hey jointly moved for preliminary approval of the settlement, arguing that even if certification of a litigation class was inappropriate, the court could—and should—nonetheless certify a settlement class. Relying on the Supreme Court's decision in *Amchem*, the Settling Parties argued that the individual reliance issues that led the court to deny class certification would not pose a problem of trial manageability because the very existence of the settlement eliminated the need for a trial." (citation omitted)).

113 *AIG*, 689 F.3d at 237 (citing Dismissal Order at 3–4, *In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 1:04-cv-08141-DAB (S.D.N.Y. Sept. 10, 2010), ECF No. 557).

114 *Id.*

115 *Id.* at 244.

trial.’”<sup>116</sup> The Second Circuit declined to reach the merits of whether the fraud-on-the-market doctrine applied to the claims against Gen Re. As to certification of the settlement class action, however, the Second Circuit held explicitly that certification of a settlement class is permissible even if the absence of the fraud-on-the-market presumption would otherwise render a litigation class uncertifiable:

Even assuming that the district court correctly applied *Stoneridge* [*Investment Partners, LLC v. Scientific-Atlanta, Inc.*<sup>117</sup>—an issue we do not reach—the court erred in holding that a Section 10(b) settlement class must satisfy the fraud-on-the-market presumption in order to demonstrate predominance. In the context of a litigation class, the fraud-on-the-market presumption spares the plaintiff class from the extremely laborious—and often impossible—task of proving at trial that each individual plaintiff was aware of and specifically relied upon the defendant’s false statement.

Therefore, a litigation class’s failure to qualify for [the] *Basic* [*Inc. v. Levinson*<sup>118</sup>] presumption typically renders trial unmanageable, precluding a finding that common issues predominate. By contrast, with a settlement class, the manageability concerns posed by numerous individual questions of reliance disappear.<sup>119</sup>

The court concluded that a settlement class may be certified without the fraud-on-the-market theory:

[A] Section 10(b) settlement class’s failure to satisfy the fraud-on-the-market presumption does not necessarily preclude a finding of predominance. Where a Section 10(b) settlement class would otherwise satisfy the predominance requirement, the fact that the plaintiff class is unable to invoke the presumption, without more, is no obstacle to certification.<sup>120</sup>

In *DeBeers*, the DeBeers diamond antitrust case, the Third Circuit en banc adopted a similar approach, upholding a settlement class

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<sup>116</sup> *Id.* at 240 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

<sup>117</sup> *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 156–58 (2008) (addressing the availability of the fraud-on-the-market doctrine to establish reliance in securities fraud cases).

<sup>118</sup> *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

<sup>119</sup> *AIG*, 689 F.3d at 241 (footnote and citations omitted) (citing *Basic*, 485 U.S. at 242 (“Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones.”)).

<sup>120</sup> *Id.* at 242–43.

action even when the matter would have been unsuitable for classwide adjudication on the merits.<sup>121</sup> Objectors argued that variations in state law rendered the dispute inappropriate for nationwide class treatment. Most of the class members were indirect purchasers<sup>122</sup> whose federal antitrust claims for money damages were barred under *Illinois Brick Co. v. Illinois*.<sup>123</sup> Plaintiffs asserted claims under state law, but the viability of these claims depended upon whether each state permitted antitrust claims by indirect purchasers.<sup>124</sup> A number of states have enacted “*Illinois Brick* repealer” statutes to extend antitrust standing to indirect purchasers, while other states follow the federal approach and deny standing to indirect purchasers.<sup>125</sup> Variations in law often doom motions for nationwide class certification,<sup>126</sup> because significant legal divergences in state law claims can undermine typicality,<sup>127</sup> adequacy,<sup>128</sup> predominance,<sup>129</sup> and superiority.<sup>130</sup>

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121 See *Sullivan v. DB Invs., Inc.*, No. 04-2819 (SRC), 2008 WL 8747721, at \*1–2 (D.N.J. May 22, 2008) (consolidating the following actions already certified for litigation: Order Certifying Plaintiff Class, *Hopkins v. De Beers Centenary AG*, No. CGC-04-432954 (Cal. Super. Ct. Apr. 18, 2005) (certified by the San Francisco Superior Court in California); Certification Order, *Null v. D.B. Invs., Inc.*, No. 05-L-209 (Ill. Cir. Ct. July 22, 2005) (certified by the Madison County Circuit Court in Illinois); *Leider v. Ralfe*, No. 01 Civ. 3137(HB), 2003 WL 22339305 (S.D.N.Y. Oct. 10, 2003) (certified as an injunctive class action by the Southern District of New York); *Anco Indus. Diamond Corp. v. DB Invs., Inc.*, No. 01-4463 (SRC) (D.N.J. Sept. 23, 2003) (certified by the District of New Jersey)). It would be unfair, therefore, to characterize the matter as one in which a settlement class action occurred despite the impossibility of litigation class certification. Nevertheless, the Third Circuit’s en banc decision treated the case as one in which settlement class certification should be upheld even if state law variations would render plenary class certification improper. See *Sullivan v. DB Invs., Inc. (DeBeers)*, 667 F.3d 273, 303 (3d Cir. 2011) (en banc) (“Because we are presented with a settlement class certification, we are not as concerned with formulating some prediction as to how [variances in state law] would play out at trial, for the proposal is that there be no trial.” (alterations in original) (internal quotation marks omitted))).

122 *DeBeers*, 667 F.3d at 289 & n.8 (defining the indirect purchaser class).

123 *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (holding that only direct purchasers have standing to sue for money damages under the Sherman Act).

124 See *DeBeers*, 667 F.3d at 291.

125 See *id.* at 293–94.

126 See *supra* note 16.

127 FED. R. CIV. P. 23(a)(3) (requiring that “the claims or defenses of the representative parties are typical of the claims or defenses of the class”).

128 FED. R. CIV. P. 23(a)(4) (requiring that “the representative parties will fairly and adequately protect the interests of the class”).

129 FED. R. CIV. P. 23(b)(3) (requiring that “the questions of law or fact common to class members predominate over any questions affecting only individual members”). Robert Klonoff notes that the Third Circuit reached its conclusion about settlement class certifiability in the face of state law variations “notwithstanding numerous cases holding, in the trial context, that the existence of multiple state laws defeats predominance as well as manageability.” Klonoff, *supra* note 20, at 804.

130 FED. R. CIV. P. 23(b)(3) (requiring that “a class action is superior to other available

In *DeBeers*, however, the Third Circuit rejected the argument that state law variations rendered the case unsuitable for class treatment. Variations in state law, the court declared, “‘are irrelevant to certification of a settlement class’ since a settlement would eliminate the principal burden of establishing the elements of liability under disparate laws.”<sup>131</sup> The court treated the problem of legal variations as merely a matter of trial manageability, explaining: “The proposed settlement here obviates the difficulties inherent in proving the elements of varied claims at trial or in instructing a jury on varied state laws, and ‘the difference is key.’”<sup>132</sup> In so doing, the court brushed aside the more important question of predominance:

The correct outcome is even clearer for certification of a settlement class because the concern for manageability that is a central tenet in the certification of a litigation class is removed from the equation. Indeed, the class settlement posture of this case largely marginalizes the objectors’ concern that state law variations undermine a finding of predominance.<sup>133</sup>

Throughout the opinion, the court stressed that its decision involved a settlement rather than a process for adjudicating the merits of the antitrust claims. For example, regarding whether class members could show the requisite threat of antitrust injury, the court could not be bothered: “Due to the settlement posture of this case, which controls, we need not concern ourselves with this issue.”<sup>134</sup> Judge Scirica, concurring, agreed that settlement class actions may succeed even in disputes that could not be certified for trial: “[S]ome inquiries essential to litigation class certification are no longer problematic in the settlement context. A key question in a litigation class action is manageability . . . . But the settlement class presents no management problems because the case will not be tried.”<sup>135</sup>

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methods for fairly and efficiently adjudicating the controversy”); see also FED. R. CIV. P. 23(b)(3)(D) (listing, as a factor pertinent to certification, “the likely difficulties in managing a class action”).

<sup>131</sup> *Sullivan v. DB Invs., Inc. (DeBeers)*, 667 F.3d 273, 303 (3d Cir. 2011) (en banc) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004)).

<sup>132</sup> *Id.* at 304 (quoting *Warfarin*, 391 F.3d at 529).

<sup>133</sup> *Id.* at 302–03.

<sup>134</sup> *Id.* at 318.

<sup>135</sup> *Id.* at 335 (Scirica, J., concurring). Judge Scirica also pointed out the importance of close attention to the adequacy of representation in settlement class actions: “Conversely, other inquiries assume heightened importance and heightened scrutiny because of the danger of conflicts of interest, collusion, and unfair allocation.” *Id.* (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

*AIG* and *DeBeers* show what happens when courts hone in on *Amchem*'s dicta on manageability, ignoring the broader concerns about cohesion, leverage, and fairness that animated the Court's decision. Armed with the Supreme Court's modest permission to treat settlement classes slightly differently than litigation classes,<sup>136</sup> these courts approved settlement class actions notwithstanding core issues of class cohesiveness that go to the heart of class certification.<sup>137</sup> In permitting settlement class actions without prior plenary class certification, *Amchem* took the wrong road to begin with. By extending *Amchem* to situations in which certification would ordinarily be compromised—by the inapplicability of the fraud-on-the-market doctrine and significant variations in state consumer laws, respectively—*AIG* and *DeBeers* have gone further astray.

## B. Reform Proposals

Recent reform proposals would amend the class action rule to permit settlement class certification regardless of whether the class could be certified for trial. For the reasons discussed in Parts I and II, such a move would be ill advised.

### 1. Principles of the Law of Aggregate Litigation

In 2010, the American Law Institute ("ALI") adopted a set of principles concerning aggregate litigation, which included a number of proposals to alter existing law. Among the reform proposals is one that would allow settlement class actions to proceed on a lesser showing than required under *Amchem*'s interpretation of Rule 23. Specifically, § 3.06 of the *Principles of the Law of Aggregate Litigation* provides, in relevant part:

(a) In any case in which the parties simultaneously seek certification and approval of the settlement, the case need not satisfy all of the requirements for certification of a class for purposes of litigation, but instead need satisfy only the requirements of subsections (b) and (c)<sup>138</sup> of this Section.

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<sup>136</sup> See *supra* text accompanying notes 105–09.

<sup>137</sup> Alexandra Lahav notes that the approval of these settlement class actions, at a time of tighter certification standards for litigation class actions, "will alter the power dynamics in favor of defendants and undo the symmetry between parties that the class action procedure was intended to achieve." Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1499 (2013).

<sup>138</sup> Section 3.06(c), which concerns the special requirements for mandatory class actions, is not addressed here. See AM. LAW INST., *supra* note 17, § 3.06(c).

(b) . . . a court may approve a settlement class if it finds that the settlement satisfies the criteria of § 3.05 [concerning judicial review of settlement fairness], and it further finds that (1) significant common issues exist, (2) the class is sufficiently numerous to warrant classwide treatment, and (3) the class definition is sufficient to ascertain who is and who is not included in the class. The court need not conclude that common issues predominate over individual issues.<sup>139</sup>

Under this proposal, settlement class actions would require judicial review as under current Rule 23(e),<sup>140</sup> and a showing of numerosity and commonality as under current Rule 23(a).<sup>141</sup> Likewise, the requirement of adequate representation would remain.<sup>142</sup> But the proposal would do away with the Rule 23(b)(3) requirement that common issues predominate over individual issues, and it would eliminate or at least alter the Rule 23(b)(3) requirement that a court find "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."<sup>143</sup> Thus, if adopted, the ALI proposal would not only confirm that a settlement class action need not be certifiable for litigation, but it also would explicitly abolish the predominance requirement for settlement class actions.

The Reporters for the ALI project acknowledge that settlement class actions raise concerns about class counsel's lack of leverage. In the Reporters' Notes, they offer three arguments in response to the leverage problem. First, they point out that the volume of individual claims can create leverage even without class certification: "To begin with, oftentimes in mass-harm cases, the global resolution is driven by the press of individual cases. It may well be that class counsel is able to use the threat of litigation outside the class context to drive a favorable overall settlement."<sup>144</sup> Second, they explain that "it is often not clear during precertification settlement negotiations whether the court would certify the case for litigation purposes. It is often the pos-

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<sup>139</sup> *Id.* § 3.06.

<sup>140</sup> See FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval.").

<sup>141</sup> See FED. R. CIV. P. 23(a)(1) (requiring that the class be "so numerous that joinder of all members is impracticable"); FED. R. CIV. P. 23(a)(2) (requiring that "there are questions of law or fact common to the class").

<sup>142</sup> See AM. LAW INST., *supra* note 17, § 3.05(a)(1) (requiring, as part of judicial review of the fairness of a class settlement, a finding that "the class representatives and class counsel have been and currently are adequately representing the class"); FED. R. CIV. P. 23(a)(4) (requiring adequate representation as a prerequisite for class certification).

<sup>143</sup> FED. R. CIV. P. 23(b)(3).

<sup>144</sup> AM. LAW INST., *supra* note 17, § 3.06 reporters' notes, cmt. a.



sibility—but not certainty—of class certification that drives the parties to settle.”<sup>145</sup> Third, they make the broader point that the requirement of adequate representation resolves the leverage problem presented by settlement class actions. They note that their proposal “requires the court, in any settlement class, to find that the class has been adequately represented.”<sup>146</sup> Each of these arguments deserves a response.

First, as to the significance of individual cases, it is certainly the case that a high volume of individual claims creates leverage. I have written at length elsewhere on the importance of collective representation and lawyer coordination for leveling the field in multi-claimant litigation.<sup>147</sup> But just because the collective representation of numerous individual claimants provides a sound basis on which to negotiate a proposed resolution of those individual claims does not mean that it provides a sound basis on which to negotiate a resolution on behalf of a class whom the lawyer does not yet represent. The question is not whether settlement class actions are sometimes driven by the threat of nonclass litigation. Rather, the question is whether the class resolution offers as accurate a valuation of the claims as would have been achieved had the negotiating lawyer been empowered to pursue the class claims to trial; and if it does not offer as accurate a valuation, then the question is why such an asymmetrically negotiated resolution is entitled to enforcement by judicial edict.

Second, the ALI Reporters assert that the “possibility—but not certainty—of class certification” often “drives the parties to settle.”<sup>148</sup> In my view, the uncertainty of class certification does not support the legitimacy of settlement class actions, but rather cuts against it. True, the risk of class certification denial may drive *would-be class counsel* to agree to a settlement. But that provides no comfort to those who are concerned about settlement class counsel’s disadvantaged bargaining position, providing them valid reason to worry that the lawyer lacks leverage to exact fair value for their claims. Moreover, it mat-

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See Sergio J. Campos & Howard M. Erichson, Debate, *The Future of Mass Torts*, 159 U. PA. L. REV. PENNUMBRA 231, 237–40 (2011), available at <http://www.pennlawreview.com/online/159-U-Pa-L-Rev-PENnumbra-231.pdf> (Howard M. Erichson Rebuttal); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 531–43; Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386–401 (2000).

<sup>148</sup> AM. LAW INST., *supra* note 17, § 3.06 reporters’ notes, cmt. a.

ters whether a dispute is suitable for classwide resolution. Do the claims cohere sufficiently to warrant classwide resolution? Is a class action superior to individual actions for resolving the particular dispute in light of the individual stakes and the significance of individual issues? On questions like these, the improbability of class certification cuts *against* permitting a settlement class action, not in favor as the ALI Reporters suggest.

Third, as to the ALI Reporters' argument that leverage concerns should be subsumed into the general question of whether there is adequate representation, one must ask what it means to find that a class has been adequately represented. The ALI proposal, like current class action law, requires a judicial finding of adequate representation.<sup>149</sup> But it is not clear how a self-appointed negotiator (or, at least, a negotiator not yet authorized to be the agent for the class<sup>150</sup>), who suffers from a structural deficit of leverage by virtue of the very definition of a settlement class action, can ever be found an adequate representative. The question is not whether the lawyer acted in good faith, or whether the lawyer worked competently and diligently. Rather, the question is whether would-be class counsel, lacking power to litigate the class claims, is ever sufficiently well positioned to negotiate a resolution that a court should enforce. The Reporters seem highly confident that "[a] settlement arrived at through a lack of bargaining power would lack indicia of adequacy and would almost certainly be so deficient that it could not satisfy the fairness criteria of § 3.05,"<sup>151</sup> but it is not so clear that inadequately leveraged negotiations would consistently lead to settlement rejections by courts. Evaluating the fairness of class settlements presents a challenge for judges, who rely heavily on the presumption that arm's length negotiations lead to appropriate pricing of claims.<sup>152</sup> The ALI Reporters' explanation of how judicial review answers the structural problem of settlement class actions comes precariously close to conflating leverage and collusion.<sup>153</sup>

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149 Compare *id.* § 3.06(b) (incorporating § 3.05(a)(1), which requires a court to address whether class adequately represented before approving settlement), with FED. R. CIV. P. 23(a)(4) (requiring adequate representation as a prerequisite for class certification).

150 On the possibility of court-appointed interim counsel under Rule 23(g)(3), see *supra* notes 38–43 and accompanying text. Interim appointment without class certification ameliorates certain leverage and agency concerns but leaves others unresolved.

151 AM. LAW INST., *supra* note 17, § 3.06 reporters' notes, cmt. a; see also *id.* § 3.05 (outlining criteria for courts to consider in determining fairness of class settlements).

152 See, e.g., *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116–17 (2d Cir. 2005).

153 See *supra* text accompanying notes 44–62.

## 2. Federal Rule 23

Settlement class actions have also returned to the agenda of the Federal Advisory Committee on Civil Rules (“Advisory Committee”). The Advisory Committee recently asked a subcommittee to consider potential amendments to Federal Rule of Civil Procedure 23, and the subcommittee is considering a suggestion to facilitate settlement class actions.<sup>154</sup> This new proposal harkens back to a rule amendment that was nearly adopted in the 1990s.

In 1996, the Advisory Committee circulated a proposed amendment that would have created a Rule 23(b)(4) category specifically for settlement class actions.<sup>155</sup> It would have allowed a class action to be maintained where “the parties to a settlement request certification under . . . [Rule 23](b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.”<sup>156</sup> The Advisory Committee’s report spelled out its intent to permit negotiated resolution on a classwide basis even if the matter would not be certifiable as a litigation class action:

New . . . [Rule 23](b)(4) authorizes certification of a (b)(3) class for purposes of settlement. It requires that all of the subdivision (a) prerequisites for class certification be met, and that the predominance and superiority requirements of (b)(3) also be met. But it authorizes evaluation of these prerequisites and requirements from the perspective of settlement. A settlement class may be certified even though the same class would not be certified for purposes of litigation. . . . Certification is permitted only on motion by parties to a settlement agreement already reached.<sup>157</sup>

The accompanying Advisory Committee’s note similarly emphasized that the proposed Rule 23(b)(4) would permit certification “for settlement purposes, even though the same class might not be certified for trial.”<sup>158</sup> The amendment was designed, the proposed note explained, to resolve the “newly apparent disagreement” between the courts that permitted settlement-only certification<sup>159</sup> and those

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<sup>154</sup> Advisory Comm. on Civil Rules, Rule 23 Subcomm., Reporter’s Memorandum Regarding Rule 23 app.A.1 at 11 (June 25, 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf>.

<sup>155</sup> See Proposed Rules: Amendments to Federal Rules, 167 F.R.D. 523, 559 (1996).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 537.

<sup>158</sup> *Id.* at 563.

<sup>159</sup> *Id.* (citing *Weinberger v. Kendrick*, 698 F.2d 61, 72–73 (2d Cir. 1982), and *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 170–71, 173–78 (5th Cir. 1979)).

(namely, the Third Circuit) that required litigation class certifiability for any settlement class.<sup>160</sup>

Had the proposed Rule 23(b)(4) been adopted, it would have provided a textual basis for the Second Circuit's 2012 ruling in *AIG* that a settlement class could be approved even if the absence of the fraud-on-the-market presumption would have rendered the matter unsuitable for a litigation class.<sup>161</sup> Even more, it would have shored up the Third Circuit's 2011 ruling in *DeBeers* that a settlement class could be approved even if variations in state law would have interfered with litigation class certification.<sup>162</sup> The Advisory Committee's note to the proposed amendment made it clear that, though a settlement class action would still have to satisfy each requirement of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3), those requirements could play out very differently in the settlement context, explaining:

Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. . . . And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation.<sup>163</sup>

The Rule 23(b)(4) proposal emerged from the Advisory Committee while the *Amchem* litigation was making its way through the courts but before the Supreme Court ruled in that case. After the Supreme Court issued its decision in *Amchem*, the Committee chose not to proceed with the proposal.<sup>164</sup>

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<sup>160</sup> *Id.* (citing *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), and *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995)).

<sup>161</sup> See *In re Am. Int'l Grp., Inc. Sec. Litig. (AIG)*, 689 F.3d 229, 241 (2d Cir. 2012).

<sup>162</sup> See *Sullivan v. DB Invs., Inc. (DeBeers)*, 667 F.3d 273, 303–04 (3d Cir. 2011) (en banc).

<sup>163</sup> Proposed Rules: Amendments to Federal Rules, *supra* note 155, at 563–64.

<sup>164</sup> See Civil Rules Advisory Comm., Minutes (Oct. 6–7, 1997), available at [www.uscourts.gov/uscourts/RulesandPolicies/rules/Minutes/cv10-97.htm](http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Minutes/cv10-97.htm) (“Because the Committee cannot be confident of what the Court intended, cannot be confident whether the published proposal means something else, and cannot be confident of the ways in which an adopted amendment might be interpreted against the background of the Court’s opinion, further work is necessary if Rule 23 is to be amended to address settlement classes.”).

But some issues just won't go away. The Advisory Committee created a new Rule 23 subcommittee to study current trends in class action practice and to consider possible amendments,<sup>165</sup> and one of the topics on the subcommittee's agenda is settlement class actions. According to the notes of the subcommittee, "there has been a suggestion that [the subcommittee] rethink the conclusion in *Amchem* that Rule 23(e)'s criteria are no substitute for anything in Rule 23(a) or (b)."<sup>166</sup> In other words, the suggestion is to permit settlement class actions based on judicial evaluation of the fairness of the resolution even without a judicial determination separately addressing the suitability of classwide treatment. Or, as the Advisory Committee minutes put the question: "Should there be criteria for certifying a settlement class different from the criteria for certifying a litigation class?"<sup>167</sup> It remains to be seen whether this suggestion will evolve into a proposed rule amendment, and if so, whether it will gain any traction. The arguments advanced in this Article counsel against moving in the direction of this latest Rule 23 proposal on settlement class actions. If we are to rethink *Amchem*, we should rethink it in precisely the opposite direction.<sup>168</sup>

### CONCLUSION

The standard critique of *Amchem* is that the Supreme Court was *too cautious* with regard to settlement class actions, placing unnecessary restrictions on the freedom of parties to resolve their disputes by

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165 Comm. on Rules of Practice & Procedure, Report of the Judicial Conference to the Chief Justice of the United States and Members of the Judicial Conference of the United States 26 (Sept. 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2012.pdf>.

166 Advisory Comm. on Civil Rules, *supra* note 154, at 11.

167 Civil Rules Advisory Comm., Minutes 32 (Mar. 22–23, 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV03-2012-min.pdf>.

168 Outside of the United States, some legal systems permit class settlement only if a class has been certified for purposes of litigation. The Chilean class action procedure, for example, permits class settlements with judicial approval but does not allow certification for the purpose of accomplishing a settlement. See Agustín Barroilhet, *Class Actions in Chile*, 18 LAW & BUS. REV. AMERICAS 275, 285, 290 (2012). In the Netherlands, by contrast, money damages class actions are permitted *only* as a settlement vehicle. Under the 2005 Dutch Act on the Collective Settlement of Mass Claims, or *Wet collectieve afwikkeling massaschade*, associational claimant representatives and putative defendants may jointly petition the Amsterdam Court of Appeals to make a negotiated settlement binding on all persons to whom damage was caused. See Deborah R. Hensler, Keynote, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 310–13 (2011); Franziska Weber & Willem H. van Boom, *Dutch Treat: The Dutch Collective Settlement of Mass Damage Act (WCAM 2005)*, 1 CONTRATTO E IMPRESA/EUROPA 69, 69–70 (2011).

negotiation. Samuel Issacharoff has suggested that the *Amchem* decision was “proceduralist” in the worst sense of the word.<sup>169</sup> Elizabeth Cabraser has argued that the asbestos class members in *Amchem* would have been better off with compensation under the settlement rather than preserving their “pristine due process rights.”<sup>170</sup> Robert Klonoff has challenged the ruling on social welfare grounds: “*Amchem*’s conflation of class settlement with class litigation undermines the benefits of avoiding litigation and may result in plaintiffs being unable to pursue socially beneficial settlements.”<sup>171</sup> This Article contends that, as a statement of the law governing settlement class actions, *Amchem* deserves criticism for exactly the opposite reason—the Supreme Court was *not cautious enough*. The Court’s “conflation of class settlement with class litigation,” to use Klonoff’s phrase, was unfortunately incomplete. By permitting settlement class actions without plenary class certification, the Court invited defendants to use the settlement class tool to resolve widespread liability through negotiation with deleveraged would-be class counsel.

It is time to abandon the settlement class action. Notwithstanding the device’s attractiveness to defendants, to plaintiffs’ counsel, and to judges as a means of achieving comprehensive resolutions, it does not withstand scrutiny as a legitimate exercise of judicial authority. There is no sound basis on which a settlement class action, in the absence of litigation class certification, should bind class members. We need to be clear on what a settlement class action is, or more precisely, what it is *not*. It is not a contract, at least not in the sense of an agreement to which the class members are parties. It is not an adjudication on the merits. Rather, it is an act of judicial power premised on a negotiated resolution. But the underlying negotiation has the odd characteristic that the negotiator for the claimants is a prospective agent who has neither been authorized to act on behalf of the claimants nor been granted the power to take their claims to trial. This feature creates an asymmetrical dynamic that negates any argument

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<sup>169</sup> See Samuel Issacharoff, Commentary, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1926 (2002). Issacharoff describes the class action debates of the 1990s in terms of a showdown between “distributionalists” and “proceduralists.” In *Amchem* and *Ortiz*, “to put it mildly, the proceduralists won hands down.” *Id.* at 1927. He goes on to ask rhetorically: “But what did the proceduralists really win?” *Id.*

<sup>170</sup> See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005) (“[T]he multibillion-dollar settlement, rejected by the Supreme Court, was lost forever, and thousands of claimants who would gladly have traded their pristine due process rights for substantial monetary compensation have been consigned to the endless waiting that characterizes asbestos bankruptcies.”).

<sup>171</sup> Klonoff, *supra* note 20, at 805.

that the act of judicial power is justified by a presumption of fair valuation of claims. The problem is not one of collusion or bad faith, but rather a structural problem built into the very definition of a settlement class action.

Lest my argument be construed as a denunciation of classwide resolutions of mass disputes, let me be clear: this Article does *not* contend that there is anything problematic about resolving disputes on a classwide basis.<sup>172</sup> Rather, it argues that *if* a dispute is to be resolved on a classwide basis, then class counsel must be empowered to pursue classwide adjudication rather than only settlement. If a court considers a matter suitable for classwide resolution—as should be the case in many disputes involving similarly situated claimants who cannot pursue their claims effectively on a nonclass basis—then the court should certify the class action. Armed with plenary class certification, class counsel could negotiate without the inherent disadvantage that accompanies the negotiation of a settlement class action under current law.<sup>173</sup> Without plenary class certification, a negotiated resolution cannot legitimately bind the class.

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<sup>172</sup> Samuel Issacharoff correctly asserts that “the Supreme Court’s rendition of the issues in *Amchem* and *Ortiz* has an air of fantasy about it” because “the Court did not meaningfully engage the fact that mass torts are not handled on a one-client/one-lawyer basis and do not conform to any common-law notion of individual representation.” Issacharoff, *supra* note 169, at 1927. The issue in mass disputes, to borrow from Issacharoff, “is not *whether* to proceed in the aggregate, but *how* to properly structure the inevitable aggregation of these cases.” *See id.* This Article suggests not that mass claims should be handled individually rather than collectively, but rather that the settlement class action is not the proper structure for handling the inevitable aggregation of these cases.

<sup>173</sup> For examples of class action settlements reached after litigation class certification, see *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 968 (9th Cir. 2009); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 102–03 (2d Cir. 2005); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1144–45 (8th Cir. 1999).