FUNDING IRRATIONALITY

ADAM S. ZIMMERMAN†

ABSTRACT

This Article challenges the conventional wisdom that claimants in class action settlement funds and other settlement funds make independent and rational settlement decisions. Cognitive psychologists and behavioral economists have long examined the way people make judgments and choices. Such studies show that decisionmakers routinely change their minds based on their view of the status quo, the timing of the decision, and the presence of seemingly irrelevant choices. Because of these cognitive biases, people will buy things they do not want, save too little for retirement, and make risky choices about their health and well-being based on the timing, context, and framing of the decision.

Applying findings from cognitive psychology, I argue that people will make the same kinds of irrational decisions about their settlement options in a large settlement fund. As a result, cognitive biases threaten to undermine many of the stated purposes of large settlement funds—to provide claimants with access, efficiency, and equity superior to what they could obtain in traditional litigation.

Accordingly, "fund designers"—judges, lawmakers, and special masters—should adjust settlement procedures to account for cognitive bias. I call this process "funding irrationality"—identifying and, in some cases, capitalizing on people's cognitive biases in large

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† Acting Assistant Professor, New York University School of Law. From 2001 to 2003, the author was the Deputy Special Master to the United States September 11 Victim Compensation Fund. I owe deep thanks to the insightful comments of Judge Jack B. Weinstein, Kenneth R. Feinberg, Geoffrey R. Miller, Richard A. Epstein, Oren Bar-Gill, Samuel Issacharoff, Richard Nagareda, Jennifer H. Arlen, Oscar Chase, Nancy Morawetz, Miriam H. Baer, Adrienne J. Lockie, Kaimipono Wenger, Elizabeth Nevins, David Jaros, and all of the members of the NYU Lawyering Scholarship Colloquium. I also owe a special debt to my wife for her insightful edits and endless patience with this project. The errors, of course, are all my own.

settlement funds by altering the context, timing, and sequence of their settlement options. Fund designers, however, should avoid reforms that unduly eliminate settlement options, or that impose excessive administrative costs. Rather, the benefits of any reform—preventing avoidable harm to irrational claimants—must outweigh the potential costs, including the value of client autonomy, the chance of error, and the burden on the courts and public administrators.

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INTRODUCTION

Why will over 90 percent of the plaintiffs who join class action settlements never claim their awards?[1] Why do claimants accept small, predetermined cash payments from large settlement funds when individual evaluations offer more money? Why did more than half of the families affected by the September 11 attacks wait two years to file with the September 11 Victim Compensation Fund, forgoing, on average, $100,000 in lost interest?[2]

There are rational explanations for each question. People may be too indifferent to answer a class action notice. Participants may not want to spend time or money to ask for individual hearings or examinations. And victims of the September 11 attacks may have been too overwhelmed to gather information or too grief-stricken to file early.[3] But assume these decisions were not entirely rational. Suppose each decision was irrationally affected by the structure, timing, and combination of legal options made available by each settlement fund. Do large settlement funds capitalize on participants' less than rational choices? If not, should they?

This Article addresses a topic that has not been explored in the literature concerning class action settlements and public compensation funds. For over forty years, commentators have challenged large settlement funds on many different grounds. Among

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1. Over 95 percent of plaintiffs join class action settlements—that is, they do not affirmatively opt out of the class—after receiving notice of the class action. But a similar percentage will never claim their awards. *Compare* 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, 1546 (2004) (finding that "on average, less than 1 percent of class members opt-out" and "[t]he median percentage of class members opting out . . . is a mere 0.1 percent"), *with, e.g.*, DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 427–30 (2000) (finding that class action plaintiffs claimed awards with "considerable variation," from less than 1 percent or 5 percent in some cases, but as much as 100 percent participation in settlements that automatically reimburse claimants).

2. Although average deceased-victim awards from the fund were approximately $2.1 million, nearly 70 percent of victims' families filed claims in the last few months of a two-year filing period. *See* 1 KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 110 tbl.12, 112 tbl.14 (2004).

3. *See, e.g.*, Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 672 (2003) ("Many potential claimants delayed filing claims so as to obtain more information about the size of the awards from the Fund and the possibilities for tort recovery."); Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 457, 458–59 (2003) (observing that the delay in filings was due to grief and trauma); David W. Chen, *Applicants Rush to Meet Deadline for Sept. 11 Fund*, N.Y. TIMES, Dec. 23, 2003, at A1.

other things, critics charge that large settlements ignore the economic interests of claimants not represented by attorneys;[4] lack sufficient process, fairness, or transparency;[5] and deny victims psychological benefits associated with actively participating in the litigation process.[6] Although this Article does not quarrel with these conclusions, much of this literature also assumes that claimants to such funds make rational decisions.[7] That is, many begin with the premise that participants weigh settlement options based on their own values and preferences.

This assumption conflicts with years of cognitive psychological evidence showing that people do not make rational decisions.[8] Since the early 1970s, cognitive psychologists and behavioral economists have examined the way people make judgments and choices.[9] Such studies have long shown that decisionmakers routinely change their minds based on their view of the status quo, the timing of the decision, and the presence of seemingly irrelevant choices.[10] As it turns out, when it comes to decisions, context means everything.

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4. *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 406–17 (2000) (explaining the obstacles to representative and participatory class membership); *see also infra* Part I.D.

5. *See, e.g.*, Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 293 (2003) ("[T]he law of class actions should demand from class counsel and their settling defense counterparts a reasoned explanation for the choices they have made in the settlement agreement as well as for their rejection of relevant alternative approaches."); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1616 (2007) (arguing that modern procedural due process in class actions is insufficient to protect the class members' right to litigate autonomously); *see also infra* Part I.D.

6. *See* Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. 199, 204 (1990) ("[H]aving one's day in court often leads to a more satisfactory claiming experience than does a swift procedure in which litigants are minimally involved."); *see also infra* Part I.D.

7. For a description of the literature and definition of "rationality," see *infra* Part I.C–D.

8. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 227–30 (1973) [hereinafter Tversky & Kahneman, *Availability*]; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1130 (1974) [hereinafter Tversky & Kahneman, *Judgment Under Uncertainty*].

9. *See, e.g.*, Daniel Kahneman, *Preface* to CHOICES, VALUES, AND FRAMES, at ix, ix–xi (Daniel Kahneman & Amos Tversky eds., 2000) (discussing history of Kahneman and Tversky's decisionmaking theory); *see also* Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1169–70 (2003) (discussing the history of decisionmaking theory in cognitive psychology); Paul Slovic, Baruch Fischoff & Sarah Lichtenstein, *Behavioral Decision Theory*, 28 ANN. REV. PSYCHOL. 1, 1–2 (1977) (same).

10. *See infra* Part II.

Take, for example, the uncanny effects of decoy options—options that no one ever chooses but that make the alternative more appealing—on physical attraction.[11] In a survey of 600 students, a behavioral economist asked subjects to rate the looks of two men. When asked to choose between the photographs of two equally attractive candidates—call one "George Clooney," and the other, "Brad Pitt"—subjects were equally divided, 50 percent and 50 percent. When another group of subjects was asked to choose between the two initial candidates and a third candidate, a photo-shopped and deformed version of George Clooney, however, 75 percent chose the unspoiled version of George Clooney and 25 percent chose Brad Pitt.[12] Although no one selected the third deformed option, the seemingly irrelevant introduction of an ugly version of George Clooney led 50 percent more students to believe that the original George Clooney was better looking than Brad Pitt.[13]

Behavioral economists have examined seemingly irrational decisions, or cognitive biases, in other legal contexts—including jury verdicts, boilerplate consumer contracts, and individual settlement behavior.[14] Few, however, have explored these effects in the context of a group settlement like a class action.[15] Ironically, cognitive bias

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11. *See* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 10–15 (2008).

12. *Id.* at 11–14.

13. This decoy effect captures situations when the same option is evaluated more favorably in the presence of comparable (but inferior) options than in the absence of such options. *See id.* at 9–10; *see also infra* Part II.B.2.

14. *See, e.g.*, Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601, 607–38 (2003) [hereinafter Guthrie, *Panacea*] (analyzing cognitive biases in negotiation and individual settlements); Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 290–303 (1996) (observing cognitive bias in jury verdicts); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1226–27 (2003) (observing that many terms in standard form contract provisions will be "non-salient" to buyers because of cognitive biases designed to reduce effort in decisionmaking); *see also* Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1120–55 (2003) (describing the application of cognitive psychology to a wide variety of legal doctrines, including tort, contract, property, antitrust law, and professional ethics).

15. There are some exceptions. For example, Francis McGovern briefly notes that "cognitive dissonance" may play a role in claimants' perception of a large settlement fund. Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1384 (2005); *see also id.* at 1383 n.68 (noting that observers of a large fund would be more or less satisfied with the settlement awards based on "the well-known psychological phenomenon of reference points"—when reference points for an award are high based on an expectation of tort-like compensation, claimants may be less satisfied with "welfare-like" low and uniform payments). Richard Nagareda speculates that cognitive bias may influence

may sway individuals in large settlements even more than in other settings because such parties often have little independent settlement experience.[16] To that end, this Article makes two unique claims.

First, cognitive bias likely affects claimants in large settlement funds. Because of cognitive bias, claimants may settle based on the introduction of less desirable options, join funds they do not like and never claim their awards, or lose money while they put off decisions to file claims. As a result, cognitive bias threatens to undermine many of the stated goals of large settlement funds—to provide more access, efficiency, and equity to claimants than traditional litigation.[17]

Second, large funds should adopt procedures that account for cognitive biases to increase the well-being[18] of as many claimants as possible, without limiting the choices of other claimants to the fund. That is, they should "fund irrationality."

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plaintiffs' counsel's case selection. He suggests that class counsel choose cases when juries are more likely to return high verdicts because they are affected by "hindsight bias," and thus are unsympathetic to the defendants' tortious conduct in light of the resulting injury. *See* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 31–33 (2007). David Dana partially relies on concepts from cognitive psychology to justify more expansive rights for plaintiffs to bring new challenges to class settlements. *See* David A. Dana, *Adequacy of Representation After* Stephenson*: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279, 284–85 (2006). No study appears to have systematically examined the effect of cognitive bias on claimants' selection of options in large settlements.

16. Parties are less susceptible to cognitive bias when there are opportunities to learn from experience, when parties have access to third-party expertise (like lawyers), and when parties are not insulated from the consequences of their decisions. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 13–29 (2007); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 124–29 (1997) (observing that the presence of legal counsel—who may be experienced, repeat players—can mitigate potential biases in decisionmaking in settlement); *cf.* Jennifer Arlen, Comment, *The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1784–85 (1998) ("[P]eople advised by third parties—for example, by lawyers—are less prone to underestimate certain risks."). Because claimants to large settlements are generally unassisted laypersons, large settlement funds are particularly compelling settings for examining the adverse impact of cognitive bias.

17. *See infra* Part I.A–B.

18. This Article borrows from Louis Kaplow and Steven Shavell's comprehensive definition of well-being. Well-being includes everything that a person may value absent the presence of cognitive bias—"personally held notions of fulfillment," "sympathetic feelings for others," "harms to his or her person," "costs and inconveniences," and "taste[s] for a notion of fairness." LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 18, 21 (2002); *see also id.* at 23 n.14 ("[W]ell-being . . . [is] an actual rather than an external and conceptual state of existence and . . . referring to [individual] well-being . . . suggests that the actual individual in question . . . is the direct object of concern.").

Part I of this Article briefly describes the purpose and structure of class action settlements and public settlement funds. Both kinds of settlement funds offer eligible parties interested in a group settlement many different options—whether to settle; when to settle; how much to settle for; and sometimes, what settlement process to follow. Cognitive scientists have long studied how people make such decisions. Academic commentary about public and private settlements has focused on other concerns, however, like ways to improve how judges and attorneys serve the interests of potential claimants.[19] Much of this scholarship assumes that parties decide to litigate or settle based on rational calculations that maximize clear and stable interests.[20]

As Part II explains, however, studies in cognitive psychology have long shown that people are irrationally influenced by the context in which they make decisions. Three "cognitive biases" are examined as relevant to large settlement funds—status quo bias (biases that discourage action),[21] contrast bias (biases that encourage favorable comparisons),[22] and time-inconsistent bias (biases affected by the time of the decision).[23] Such cognitive biases have been found to influence

19. *See infra* Part I.D.

20. *See infra* Part I.C–D.

21. *See infra* Part II.B.1; *see also, e.g.*, Colin F. Camerer, *Prospect Theory in the Wild: Evidence from the Field*, *in* CHOICES, VALUES, AND FRAMES, *supra* note 8, at 288, 294 (describing the effect of default insurance rules on insurance decisions in New Jersey and Pennsylvania); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 7–11 (1988) (describing people's exaggerated preference for the status quo and coining the term "status quo bias").

22. *See infra* Part II.B.2; *see also, e.g.*, Eldar Shafir, Itamar Simonson & Amos Tversky, *Reason-Based Choice*, *in* CHOICES, VALUES, AND FRAMES, *supra* note 8, at 597, 603 (explaining that an individual faced with a choice of two similar options will commonly look for attributes that make it possible to compare the options); Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281, 282 (1992) ("In deciding whether or not to select a particular option, people commonly compare it with other alternatives that are currently available as well as with relevant alternatives that have been encountered in the past.").

23. *See infra* Part II.B.3; *see also, e.g.*, Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103, 118–20 (1999) [hereinafter O'Donoghue & Rabin, *Now or Later*] (explaining a bias in decisionmaking in favor of the present); Ted O'Donoghue & Matthew Rabin, *Procrastination in Preparing for Retirement*, *in* BEHAVIORAL DIMENSIONS OF RETIREMENT ECONOMICS 125, 150 (Henry J. Aaron ed., 1999) [hereinafter O'Donoghue & Rabin, *Procrastination*] ("[P]eople [planning for retirement] are very sensitive to short-term incentives.").

many kinds of decisions,[24] particularly in the area of consumer behavior.[25]

Part II then examines how such biases may affect large settlement funds. Large settlements routinely resemble and employ large scale marketing campaigns,[26] and it is not a stretch to assume that many uncounseled claimants to a large settlement will behave like consumers.[27] As a result, cognitive bias may frustrate many of the

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24. For example, Williams-Sonoma sold more bread-makers priced at $275 only after it introduced an even larger model that sold for $400. ARIELY, *supra* note 11, at 14–15; Itamar Simonson, *Get Closer to Your Customers by Understanding How They Make Choices*, 35 CAL. MGMT. REV. 68, 70 (1993); *see also* Simone Moran & Joachim Meyer, *Using Context Effects to Increase a Leader's Advantage: What Set of Alternatives Should Be Included in the Comparison Set?*, 23 INT'L. J. RES. MARKETING 141, 142 (2006) (stating that a seller can offer an expensive version of a product that "is not expected to sell, but should raise the attractiveness of" the less-expensive version). Or, consider this related example: More people will buy Apple's newest $199 iPhone if it is sold for a limited time or in exclusive locations. *Cf.* Ravi Dhar & Stephen M. Nowlis, *The Effect of Time Pressure on Consumer Choice Deferral*, 25 J. CONSUMER RES. 369, 373 (1999) (demonstrating that limiting the availability of a product reduces the likelihood that a consumer will defer the choice to purchase that product).

25. Commentators dispute the extent to which consumers can overcome such biases through reflection, experience, and the assistance of others. *Compare, e.g.*, Richard A. Epstein, Exchange, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 803, 809 (2008) (recognizing cognitive psychology as a "major new theoretical approach to law and economics" but arguing that "consumers and their advisors, as well as . . . competitive sellers . . . close [the] information gap" through learning), *with* Oren Bar-Gill, Exchange, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV 749, 751, 753–54 (2008) (arguing that the effects of cognitive bias are evidenced when "sellers strategically respond to consumer misperception by redesigning their products, contracts, and pricing schemes" and calling for appropriate legal intervention). Notably, settlement fund claimants are even more likely to be swayed by bias because, unlike repeat purchasers who can learn from experience, claimants rarely get new chances to improve their settlement decisions.

26. *See* R. Michael Hoefges & Kent M. Lancaster, *The Critical Role of Advertising Media Planning in Federal Rule 23 Class Action Notice*, 19 J. PUB. POL'Y & MARKETING 201, 201 (2000) (observing that federal judges frequently use mass media advertising in class actions to meet legal notice requirements). Indeed, some commentators have likened the class action settlement process to large business transactions. *See, e.g.*, William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 419 (2001) (characterizing class action settlements as large business transactions that exchange bundles of legal rights for money).

27. Participants in large settlements are especially vulnerable to biases that have been well documented in studies of consumer behavior. Just like businesses, settlement funds rely on advertising to notify potential participants, and many funds offer the kinds of settlement options that would appear in a generic commercial advertisement for consumers. *See* FED. R. CIV. P. 23(c), 23(e); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.312 (2004) (identifying the following as permissible methods of settlement notice: sent by mail; printed in major dailies; and advertised on television, radio, and the internet). Judge Barbara Rothstein, Chair of the Federal Judicial Center, describes the Center's marketing-like efforts to make such notices more readable, "[w]ith help from linguists, communications specialists, and focus groups." BARBARA J. ROTHSTEIN & THOMAS F. WILLGING, FED. JUDICIAL CTR., MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 19 (2005); *see also id.* at 25 (observing the need to

objectives of a large settlement fund. For example, many believe that the right to opt out of a large settlement is necessary to ensure that a settlement is fair.[28] Because people irrationally stick with the status quo, however, claimants rarely will take steps to opt out of a settlement, even when they otherwise may win substantial awards.[29] Moreover, many large settlements offer claimants multiple settlement options to accommodate the different interests of participants. Just as in the case of the ugly George Clooney, however, fund designers may push claimants to choose undesirable cash settlements over other more advantageous options by introducing a third, relatively inferior option, like a coupon with a lower cash value.[30] Finally, a lengthy period before a filing deadline may actually encourage procrastination, resulting in higher administrative costs and lost interest to claimants with high-value claims.[31]

Accordingly, Part III argues that, in some situations, judges and lawmakers should alter the default rules, timing, and sequence of options to account for cognitive biases.[32] To ensure that participants retain a voice in the final settlement, however, fund designers should avoid reforms that eliminate settlement options. "Funding irrationality" means designing settlement funds in ways that help unrepresented claimants make better decisions for themselves and the efficient operation of the fund, without unduly limiting the choices of other claimants. Commentators have advocated policies that take advantage of bias to promote welfare in other areas of law—calling the approach "libertarian paternalism."[33] They compare

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grab the reader and noting that "[a] picture of asbestos insulation products may trigger an association in the reader's mind"). Similarly, the Administrative Procedure Act, which governs many public compensation funds, requires widespread notice of formal adjudication. *See* Administrative Procedure Act, 5 U.S.C. § 554(b) (2006).

28. *See infra* Part I.C–D.

29. *See* Eisenberg & Miller, *supra* note 1, at 1548–50 (comparing opt-out rates for small, negative-value consumer claims with large mass tort claims).

30. *See* Shafir et al., *supra* note 22, at 600.

31. *See infra* Part II.B.3.

32. *See infra* Part I.A–B.

33. *See, e.g.*, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 4–6 (2008); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1162 (2003); *see also, e.g.*, Colin F. Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1211–14 (2003) (describing a similar approach that would influence irrational decisionmakers through law but that would not penalize rational actors); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006) (advocating a legal policy concept

libertarian paternalism to the design of a health-conscious cafeteria: If people would choose to eat healthier food placed at the beginning of the line, one could improve eating habits and preserve options for all of those with a sweet-tooth by simply placing the salad bar near the front door.[34] Funding irrationality applies a similar form of libertarian paternalism to account for the operation of cognitive biases in large settlement funds.

Part III then addresses possible objections to funding irrationality including the argument that fund designers suffer from their own biases, the concern that such procedures may limit claimants' rights to control their own litigation, and the fact that funding irrationality risks replacing one set of biases with new biases that would create even less desirable outcomes. Although these are valid concerns, bias in settlement funds is inevitable regardless of fund design. At a minimum, fund designers can understand how bias affects claimants, and adjust rules so that cognitive bias does not undermine the benefits of large settlement funds.

I. CLASS ACTION AND PUBLIC SETTLEMENT FUNDS

Class action settlements and public settlement funds are two of the most prominent forms of claim resolution in the United States.[35] Few studies have compared the substantive and procedural options made available in large settlement funds, in part because they are creatures of private negotiations or special legislation.[36] Accordingly, this Part briefly surveys common goals and settlement options in large funds and shows how the design of large funds incorrectly assumes that claimants will make some settlement decisions rationally. This

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that reduces bias in rational decisionmaking and does not insulate decisionmakers from their choices).

34. *See* THALER & SUNSTEIN, *supra* note 33, at 1–5.

35. The most recent data on pending federal class action filings was released in September 2004 by the Administrative Office of the United States Courts. It shows that over 5,179 class action claims were pending in federal court as of September 2004. *See* LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR 400 tbl.X-4 (2004), *available at* http://www.uscourts.gov/judbus2004/appendices/x4.pdf.

36. *See* Deborah R. Hensler, *Alternative Courts? Litigation-Induced Claims Resolution Facilities*, 57 STAN. L. REV. 1429, 1433 (2005) (finding a "dizzying array" of fund designs, and observing that there has been no "systematic data collection" regarding the variety of fund designs, the reasons why fund designers have adopted some designs over others, or the "outcomes for claimants and funders of different design decisions").

Part then demonstrates that the scholarly commentary on large settlements rests on the same faulty assumption.

A. Class Action Settlement Funds

Class actions allow a representative, with the assistance of counsel, to assert or defend claims on behalf of other persons who share a common interest.[37] Since the 1966 Amendments to the rules governing class actions in federal court, judges have increasingly certified "settlement only class actions," simultaneously approving both a class action and a massive settlement on behalf of its members.[38] When representative parties agree to settle on behalf of the class, the court can certify the class for settlement so long as the settlement is "fair, reasonable, and adequate."[39] Generally, absent members of the class are entitled to both reasonable notice of the class action and a chance to exclude themselves from—or opt out of—the class.[40] Three identifiable policies behind class actions—access, efficiency, and equity[41]—provide a background for understanding the structure of class action settlements.

Large private settlements provide more *access* to the legal system by enabling the resolution of claims that otherwise would not be brought in individual litigation. Class certification is thought to enable litigation when damages are too small for individuals to justify the high costs of retaining counsel.[42] In cases involving large damages, the

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37. *See* FED. R. CIV. P. 23(a).

38. *See, e.g.*, HENSLER ET AL., *supra* note 1, at 22–25; THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61–62 (1996) (noting the large number of settlement class actions in the districts studied).

39. FED. R. CIV. P. 23(e)(2). Although the rule does not include more specific factors to determine that a settlement is fair, federal courts have developed a common set of factors, which include: (1) likelihood of recovery, or likelihood of success; (2) amount and nature of discovery or evidence; (3) settlement terms and conditions; (4) recommendation and experience of counsel; (5) future expense and likely duration of litigation; (6) recommendation of neutral parties, if any; (7) the number of objectors and the nature of objections; and (8) the presence of good faith and the absence of collusion. *See* 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11:43 (4th ed. 2002).

40. FED. R. CIV. P. 23(c)(2).

41. *See, e.g.*, *id.* 23(b)(3) advisory committee's note (observing that Rule 23(b)(3) "encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness").

42. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth

class action device may also provide more access by granting plaintiffs the same economies of scale as well-financed defendants.[43] In both cases, access theoretically serves an important democratic function, allowing groups of individuals to collectively petition and redress widespread harm. Class action settlements thus provide participants opportunities for "transformative exchanges about . . . social and moral values."[44]

Class action settlements are also theoretically more *efficient* than traditional litigation. Class actions eliminate the time and expense associated with traditional one-on-one litigation, which otherwise involves months or years of the "same witnesses, exhibits and issues from trial to trial."[45] And large settlements efficiently deter bad actors by holding large corporate defendants accountable for wide and diffuse harms that are too costly to be prosecuted through individual litigation.[46] In other words, class action settlements provide an opportunity to fulfill the compensatory goals of the tort system "more consistently and completely," and create a "deterrent effect" that equals the "magnitude of the harm."[47]

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someone's (usually an attorney's) labor." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

43. *See* David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 27–30 (arguing for aggregative procedures to allow plaintiffs' counsel to make an optimal investment in the litigation); David Rosenberg, *Mass Tort Class Actions*: *What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 397–400 (2000) [hereinafter Rosenberg, *Mass Tort Class Actions*] (explaining how aggregating classable claims creates economies of scale favorable to plaintiffs).

44. Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 382 (1996) (summarizing democratic theories involving access to litigation).

45. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (quoting lower court opinion) (granting certification of a class action involving asbestos). *See generally* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 135–36 (1995) (noting that economies of scale reduce discovery and expert fees); William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 837–38 (1995) (explaining how class actions are seen as a remedy to duplicative litigation activity).

46. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People*, 30 CARDOZO L. REV. 1, 174 (2008) (observing that the procedural benefits include a substantial reduction in costs of "discovery, retention of experts, legal research and legal fees"); *see also* THOMAS E. WILLGING, FED. JUDICIAL CTR., APPENDIX C: MASS TORTS PROBLEMS AND PROPOSALS: A REPORT TO THE MASS TORTS WORKING GROUP 20 (1999) (observing that grouping claims provides "an opportunity to correct more systematically the harms that products have caused, [and] to meet more consistently and completely the compensation goals of the tort system"); Rosenberg, *Mass Tort Class Actions*, *supra* note 43, at 393–94.

47. WILLGING, *supra* note 46, at 20.

Finally, class action settlements are theoretically more *equitable* because they provide for more remedies to more claimants than traditional litigation. A class action settlement seeks to maximize recovery and provides procedures to ensure that the settlement award reflects the individual claims and interests of the members of the class action.[48] Class action settlements, like individual settlements, allow parties to explore new options in ways not available in court. Parties may bargain for nonpecuniary awards (medical monitoring, coupons, and warrantees)[49] or different settlement procedures (predetermined awards or individual evaluations).[50] At the same time, class action settlements seek to split the pie more fairly when defendants with limited funds are accused of massive harm.[51] In such cases, without a

48. Nancy Morawetz, *Bargaining, Class Representation and Fairness*, 54 OHIO ST. L.J. 1, 42–46 (1993) (articulating a "mixed-model" of fairness that balances the utilitarian interest in maximizing the total recovery for the class against the defendants' cost structure and the need to ensure that the settlement does not unfairly exclude individual members of the class). The idea that funds should compensate as many eligible claimants as equitably as possible is also reflected in the claim settlement procedures of many mass tort settlements forged through class actions and bankruptcy. *See, e.g.*, NAT'L GYPSUM CO. BODILY INJURY TRUST, FIRST AMENDED CLAIMS RESOLUTION PROCEDURES 1 (2003) (on file with the *Duke Law Journal*) ("[T]he NGC Bodily Injury Trust shall treat similar claims with similar circumstances as equivalently as possible."); UNR INDUS. INC. ASBESTOS-DISEASE CLAIMS TRUST, ANNEX B TO THE PROPOSED TRUST AGREEMENT: ASBESTOS-DISEASE CLAIMS RESOLUTION PROCEDURES 134–35 (1990) (on file with the *Duke Law Journal*) ("The purpose of the Procedures is to provide fair payment to all persons . . . . [S]ettlements shall be favored over all other forms of claim resolution, and the lowest feasible transaction costs shall be incurred in order to conserve resources and ensure, as much as possible, substantially equal payment for all valid claims."); MANVILLE PERS. INJ. SETTLEMENT TRUST, TRUST DISTRIBUTION PROCESS 1 (1988) (on file with the *Duke Law Journal*) ("The goal of the Manville Personal Injury Settlement Trust . . . is to treat all claimants equitably.").

49. *See* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97, 101–07 (1998) (developing a "typology" of in-kind awards used in class action settlements that includes (1) coupons, (2) securities, (3) medical monitoring for future harm, (4) funds in which unclaimed settlement funds return to the defendant, and (5) "fluid recovery" schemes in which unclaimed settlement funds are distributed to organizations other than injured class members).

50. *See* Alexander, *supra* note 3, at 681 (observing that the opportunity for claimants to "testify about the consequences of the events and to express their rage, frustration, and sorrow could be a constructive and desirable function of claims administration"); Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79, 94 (1990) (recognizing that the range of procedures in a compensation fund may range from a simple, workers' compensation–like system, which issues predetermined awards based on limited characteristics of the claim, to more complex and individualized processes).

51. *See* FED. R. CIV. P. 23(b)(1)(B); Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present, and Future*, 4 JUST. SYS. J. 197, 211 (1977) ("The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund . . . [and t]here is

class action, the first claimants to bring lawsuits might receive astronomical awards, and other victims might receive nothing.[52]

B. Public Compensation Funds

Public compensation funds also compensate for widespread harm, but are created by formal legislation or administrative regulation. Although modern, high-profile examples of public compensation funds, like the September 11 Victim Compensation Fund, have been described as sui generis,[53] public compensation funds have been used throughout American history to compensate classes of people injured by wars, natural disasters, or other calamities.[54]

In the early days of the Republic, individuals privately petitioned Congress for tax, debt, and disaster relief.[55] By the early 1820s, private bills were gradually replaced by general statutes aimed to benefit whole classes of potential victims. Under such statutes, commissioners oversaw large public funds that resembled modern administrative agencies. Commissioners often had broad discretion to evaluate claims, accept evidence, and distribute money according to defined

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a risk, if litigants are allowed to proceed on an individual basis, that those who sue first will deplete the fund and leave nothing for the late-comers.").

52. Many of the goals of class action settlements, particularly in mass tort cases, may also be accomplished in bankruptcy. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 681–82 (1989) (analyzing the mechanics of estimating total claims and providing different options to claimants); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2048 (2000) (same); Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1615 (2008) (describing bankruptcy proceedings as an important tool in mass tort cases). For a comparison of settlement funds accomplished through bankruptcy and class actions, see ELIZABETH GIBSON, FED. JUDICIAL CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS (2000), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/MassTort.pdf/$file/MassTort.pdf. For this reason, this Article refers to "class action settlement funds" and "private settlement funds" interchangeably.

53. *See, e.g.*, Schneider, *supra* note 3, at 460; Erin G. Holt, Note, *The September 11 Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513, 513 (2004).

54. *See, e.g.*, 4 ANNALS OF CONG. 1000–02 (1794) (delegating authority to the President to establish a commission for the distribution of relief following the Whiskey Rebellion); Act of April 9, 1816, ch. 40, 3 Stat. 261 (1816) (indemnifying private property losses in the War of 1812).

55. *See* Michele L. Landis, Note, *"Let Me Next Time Be 'Tried by Fire'": Disaster Relief and the Origins of the American Welfare State 1789-1874*, 92 NW. U. L. REV. 967, 975–81 (1998) (describing private petitioning of Congress early in American history).

eligibility criteria.[56] Early examples include public funds created in the wake of the Whiskey Rebellion,[57] the Haitian "slave insurrection,"[58] and the War of 1812.[59]

Today, public compensation schemes may be permanent—like workers compensation, no-fault automobile insurance, and national flood insurance.[60] They may be overseen by administrative agencies charged with distributing fines assessed against violators to victims of fraud, environmental damage, or other types of harm.[61] Or they may be public *settlement* funds, narrowly designed to induce people to opt out of traditional litigation and join an alternative dispute system, like the September 11 Victim Compensation Fund;[62] the National Vaccine Injury Compensation Program;[63] or, more recently, the Minnesota Bridge Collapse Emergency Relief Fund.[64] Public *settlement* funds are different from other kinds of public compensation funds because they require the claimant to waive the right to sue in exchange for participating in the fund.[65] Although many of the principles addressed in this Article are applicable to other public compensation funds, this

56. *Id.* at 981–89 (tracing the development of disaster relief funds from the 1790s through the Reconstruction Era); Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 290 (2003) (comparing the administrative efforts to compensate victims in the aftermath of the War of 1812 and September 11, 2001).

57. Act of Feb. 27, 1795, ch. 33, 6 Stat. 20.

58. Act of Feb. 12, 1794, ch. 2, 6 Stat. 13.

59. Act of Apr. 9, 1816, ch. 40, 3 Stat. 261.

60. *See, e.g.*, Black Lung Benefits Act, 26 U.S.C. § 9501 (2006); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–50 (2006); National Flood Insurance Act, 42 U.S.C. §§ 4001–129 (2006).

61. Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 952 (describing the increasing role of administrative agencies, like the FTC, SEC, and EPA, to provide compensation through "disgorgement, mediation, settlement, and other techniques").

62. Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, §§ 401–07, 115 Stat. 230, 237–41 (2001) (codified at 49 U.S.C. § 40101 (2006)).

63. 42 U.S.C. § 300aa-11 (2006).

64. *See* Minnesota Emergency Relief Fund, 2008 Minn. Laws, ch. 288 (codified at MINN. STAT. §§ 3.7391–.7395 (2008)). Other examples of such settlement programs include the Ricky Ray Hemophilia Relief Fund Act, 42 U.S.C. § 300c-22 note (2006), establishing a $750,000,000 fund to pay $100,000 worth of "compassionate payments," and the Energy Employees Occupational Illness Compensation Program Act, 42 U.S.C. §§ 7384–85s-15 (2006), compensating Department of Energy nuclear weapons workers who suffered occupational illnesses as a result of exposure.

65. *See, e.g.*, 49 U.S.C. § 40101 note sec. 405(c)(3)(B)(i) (conditioning eligibility on a waiver of "the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001").

Article principally addresses public *settlement* funds and class action settlement funds.

Like class action settlement funds, public settlement funds are designed to provide more access, efficiency, and equity than traditional litigation.[66] But private and public settlement funds share at least two other important features. First, both are settlements, and accordingly, offer awards only if the claimant waives his or her right to litigate. Second, both provide the details of settlements directly to potential claimants, who, for various reasons, may not consult with counsel prior to making a decision to join or opt out of the fund.[67]

C. Large Funds Assume Rational Decisionmaking

All large settlement funds, including class action settlements and public settlements, vary significantly because they are creatures of private negotiation or special legislation.[68] To achieve many of the goals that this Article highlights—increased access, efficiency, and equity—settlement funds offer claimants several settlement options, assuming that claimants will choose among them rationally. Section 1, below, defines "rationality" broadly to include all knowable, stable, and context independent preferences. Section 2 describes the ways such large settlement funds offer substantive, procedural, and filing options based on the incorrect assumption that claimants rationally decide among these options.

1. *Rationality Assumes Identifiable Preferences*. Rationality, as described in more detail below, means that a person's preferences are

66. *See, e.g.*, September 11 Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,274 (interim final rule Dec. 21, 2001) (codified at 28 C.F.R. pt. 104) ("The Fund offers the eligible claimant an alternative to litigation. To succeed in the courtroom, a victim of the September 11 tragedy, or his or her representative, would be compelled to litigate, probably for many years at excessive cost, and with all the uncertainty of result which is part of the litigation process."); U.S. Dep't of Health Res. and Servs. Admin., National Vaccine Injury Compensation Program, http://www.hrsa.gov/Vaccinecompensation/ (last visited Jan. 26, 2010) ("The VICP was established to . . . maintain an accessible and efficient forum for individuals found to be injured by certain vaccines.").

67. *See, e.g.*, September 11 Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,280 ("The Department believes that it is important that this Fund be accessible to potential claimants who have limited resources and who are not trained in the law.")

68. *See, e.g.*, McGovern, *supra* note 15, at 1367 (observing that the source of authority and funding for the facility will affect the choice of "organization, methodology, and payment mechanisms").

at least (1) knowable, (2) stable, and (3) context independent.[69] Knowable preferences, or value maximizing preferences, require that decisionmakers develop preferences independently, without regard to the relative perception of other available options.[70] Given a clear set of options, a person should choose the one with the highest value for him or her. Imagine that a person is given a restaurant menu that offers only chicken and steak. A person has a value maximizing preference if that person knows that chicken is different from steak, knows that he or she prefers chicken to steak, and, if all other things are equal, he or she will order chicken.

Having a stable or invariant preference means that if a person prefers Option A to Option B he cannot simultaneously prefer Option B to Option A.[71] A corollary to stable preferences is the idea of context independence.[72] Context independence means that a person's relative ranking of two options should not be affected by the addition of another irrelevant option. For example, if a person prefers chicken to steak, context independence means that he or she will still prefer chicken to steak if fish is also on the menu.

It is worth noting that rationality also includes rational ignorance. There are situations in which people may rationally prefer not to know their own preferences—not to read forms, seek advice, or perform research—because the costs of doing so are too high.[73]

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69. Gary Becker provides a traditional account of the basic assumptions that underlie rational decisionmaking. *See* GARY BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976) ("[A]ll human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information . . . ."); *see also* Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S251–54 (1986) (summarizing a hierarchy of principles underlying rational choices).

70. *See* Kelman et al., *supra* note 14, at 287–88.

71. *Id*.; *see also* Joel Huber, John W. Payne & Christopher Puto, *Adding Asymmetrically Dominated Alternatives: Violations of Regularity and the Similarity Hypothesis*, 9 J. CONSUMER RES. 90, 90 (1982) (describing the basic premises of regularity).

72. *See* Kelman et al., *supra* note 14, at 287–88 (describing the basic premises of context independence).

73. *See, e.g.*, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 832 (2006) ("Indeed, the costs of becoming informed may exceed the benefit, resulting in rational ignorance of hidden traps in contracts that competition may not dispel."); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contracts*, 47 STAN. L. REV. 211, 243 (1995) ("For the form taker, any given form contract is normally a one-shot transaction. This is one reason why the costs of searching and deliberating on the terms or of retaining a lawyer to evaluate them will normally far exceed the benefits of search and processing."). Indeed, a substantial body of law and economic literature in the area of consumer contracting is devoted to encouraging rational contracting based on the

Such preferences, however, are themselves knowable, stable, and context independent.

For descriptive and normative reasons, the design of large settlement funds assumes that claimants meet this definition of rationality. Descriptively, funds offer options to claimants based on the assumption that claimants can effectively know and pursue their own goals.[74] Normatively, this assumption respects individual dignity and autonomy.[75]

2. *Substantive, Procedural, and Filing Options*. Substantive, procedural, and filing options in large settlement funds all reflect these basic principles of rationality.

First, funds offer claimants multiple substantive awards assuming that claimants behave rationally. Funds may simply offer claimants the choice to accept a settlement or retain the right to sue.[76] Or large funds may offer claimants a choice among awards with various degrees of liquidity and value—like cash, coupons, extended warranties or in-kind awards. For example, the Apple iPod Battery Settlement offered many iPod owners three options: (1) opt out and reserve the right to sue, (2) receive a $25 dollar check, or (3) receive a $50 "store credit" toward the purchase of almost any Apple-branded product.[77]

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assumption that consumers will not read standard form contracts. *See* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge that Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 725 n.10 (2008) (gathering scholarship critical of standard form contracting); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 273 (1990) (noting how it is rational for individuals to sign standard form contracts without understanding their terms due to the high costs involved); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 636 (1979) (arguing that although many consumers do not read contracts, a minority of "informed consumers" will police suspicious contract terms).

74. *See infra* Part I.C.2.

75. *See, e.g.*, Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL. F. 475, 510 ("[A]ll options have some positive value, and the control of one's own litigation cannot be regarded as a small detail within the overall scheme of civil procedure.").

76. For example, securities class action settlements typically only offer these two options. This is because securities class actions do not present the difficult questions of causation and injury as personal injury, antitrust, and consumer protection claims.

77. *See* Claim Form, Apple Computer, Inc.: iPod Misrepresented Battery Life, http://classactionworld.com/public/showdocument.php?d=10908 (last visited Jan. 26, 2010) (explaining the terms of the iPod Battery Settlement).

Different settlement awards thus accommodate different claimants' rational interests in a final settlement.[78] Such options also expand the pie because some consumers may value an extra dollar in coupons more than the extra cost of those same coupons to the manufacturer.[79]

To illustrate the traditional rationale behind multiple settlement options, imagine that a manufacturer sells tires that are unusually "prone to failure" on potholed streets.[80] Potholes are far more common in urban areas than in the suburbs. As a result, those who drive primarily in urban areas will expect more damages than those who drive primarily in suburban areas.[81] A two-option settlement—$1,000 in coupons for four new tires or $500 in cash—promotes the goals of access, efficiency, and equity by capturing different claimants' rational interests in the settlement:

> The coupon option will be more valuable to individuals who drive mainly in urban areas, whereas the cash alternative will be more valuable to individuals who drive primarily in suburban areas. Thus, the liability costs borne by the car manufacturer will naturally reflect the driving habits of—and therefore the harms suffered by—its customers.[82]

Settlements that offer multiple options not only reflect people's concrete values, so the argument goes, but are also more efficient and equitable. If the settlement used cash alone under these circumstances, a court or policymaker would more likely overestimate or underestimate damages to different kinds of plaintiffs.[83]

Funds also offer claimants multiple settlement processes based on the assumption that claimants will choose rationally among the processes. Procedural options may include predetermined awards

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78. Morawetz, *supra* note 48, at 42–46 (balancing the interest in maximizing the total recovery for the class against the defendants' cost structure and the need to ensure that the settlement does not unfairly exclude individual members of the class); A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Damage-Revelation Rationale for Coupon Remedies*, 23 J.L. ECON. & ORG. 653, 654 n.6 (2007) ("Intensive iPod users are more likely to experience another battery failure in the future and would value the store credit more than the cash alternative, whereas infrequent users would benefit more from the cash.").

79. Morawetz, *supra* note 48, at 14–15.

80. Polinsky & Rubinfeld, *supra* note 78, at 654–55.

81. *Id.*

82. *Id.*

83. *Id.*

based on minimal evidence (like a short questionnaire or sworn statement), damage matrices (grids that account for the medical condition, age of claimant, and length of illness), or case-by-case award determinations based on a stronger showing (receipts, medical records, live testimony).[84] Such procedural options are commonly used in mass tort and fraud cases in which evidentiary problems require more stringent procedures to assess higher damage awards.[85]

As in the failing tire example, procedural options are thought to promote access, efficiency, and equity when claimants are offered a rational choice between administratively inexpensive settlement procedures and more expensive and individual settlement procedures.[86] A person who chooses the administratively efficient option may do so because he or she is too busy or does not want to wait for an individualized determination, whereas another person who opts for an individualized determination may be more willing to expend the time and effort to get more money and have more say in the final outcome.[87]

For example, sample notice forms published by the Federal Judicial Center imagine two procedural options for eligible claimants to a mass tort settlement.[88] Claimants may choose between a process that offers a predetermined award, like $1,000, and a more individualized process that allows them to present more evidence for

84. *See, e.g.*, *In re* Diet Drugs Prods. Liab. Litig., 543 F.3d 179, 181 (3d Cir. 2008) (utilizing matrices of injury to determine payout).

85. *See* Feinberg, *supra* note 50, at 94 (observing that the selection of an "appropriate procedural mechanism for distributing money is closely tied to the issue of valuation of claims"); *see also, e.g.*, NAT'L GYPSUM CO. BODILY INJURY TRUST, *supra* note 48, at 2 (providing that claimants may seek expedited review and payment ("ER") or individual review and payment ("IR")).

86. *See* 1 FEINBERG, *supra* note 2, at 2 ("Had the Fund opted to curtail access or failed to offer explanations . . . some portion of claimants would likely have been sufficiently uncomfortable or uncertain to commit to the Fund."); Resnick, *supra* note 44, at 371 (citing a study of court-annexed arbitration and noting that the most "frequently cited objective of lay litigants . . . in adjudicatory proceedings was to 'tell my side of the story'").

87. *See* Kenneth Feinberg, *The Building Blocks of Successful Victim Compensation Programs*, 20 OHIO ST. J. ON DISP. RESOL. 273, 274–75 (2005) ("If you tell 9/11 families, 'You get an award; that's it, you can't go to court,' every intuitive bone in my body says, 'That won't work. . . .' You must give claimants a sense that they are involved in the process. This idea that an award will come on down from on high and you'll take it and like it doesn't sit well with families or with any consumer of a designed program.").

88. FED. JUDICIAL CTR., "ILLUSTRATIVE" FORMS OF CLASS ACTION NOTICES: PRODUCTS LIABILITY CLASS ACTION CERTIFICATION AND SETTLEMENT: FULL NOTICE 6 (2003), http://www.fjc.gov/public/pdf.nsf/lookup/ClaAct04.pdf/$file/ClaAct04.pdf.

a higher amount. Both are common procedural options in mass tort settlement funds.[89]

Figure 1. Federal Judicial Center Sample Notice[90]

MEDICAL MONITORING FUND PAYMENTS		
Exposure to Asbestos	**Medical Expenses**	**Payment**
You have evidence of exposure to asbestos in an ABC product.	You *do* have evidence of your medical expenses to test for an asbestos-related disease.	$1,000 or your actual expenses, whichever is greater.
	You *don't* have evidence of your medical expenses to test for an asbestos-related disease.	$1,000

Finally, a settlement fund may also provide claimants with different default rules and deadlines for filing with the fund based on the assumption that claimants will act rationally. Large settlement funds may require claimants to opt out of a fund, or, less frequently, to opt in.[91] Rules may also require participants to make settlement decisions at various times in the litigation process—sometimes before a final settlement amount has been determined and other times a year or two after the final settlement has been determined.[92]

89. *Id.* Similarly, the September 11 Victim Compensation Fund offered victims' families two procedural alternatives. *See* 28 C.F.R. § 104.31 (2009) (Procedure for Claims Evaluation). Those who selected "Track A" were entitled to an administrative determination of a wrongful death and estate award based on a limited number of factors in 45 days. *Id.* § 104.31(1) (describing the "Track A" process). Those who selected "Track B" were entitled to submit more information and attend a hearing before the Special Master or his designee within 120 days. *Id.* § 104.31(2) (describing the "Track B" process).

90. This Figure comes from a Federal Judicial Center sample form. *See* FED. JUDICIAL CTR., *supra* note 88, at 6.

91. Opt-in class actions also exist in limited contexts, like in employment and labor litigation. *See, e.g.*, Age Discrimination and Employment Act, 29 U.S.C. § 626(b) (2006); Fair Labor Standards Act, 29 U.S.C. § 216 (2006). Since 1966, however, class action settlements generally require that participants affirmatively opt out of most settlements either before or after terms of the settlement have been reached. *See* FED. R. CIV. P. 23(b)(3), 23(e). Notwithstanding the fact that opt-in class actions are rare under federal and state law, some commentators have recommended that class action rules formally require parties to opt in. *See* DEBORAH R. HENSLER ET AL., *supra* note 1, at 476–77 (describing recommendations to change Rule 23 to an opt-in process).

92. Class action settlements may require that claimants file anywhere from sixty days after receipt of a class action notice to two years after receipt of the notice. *Compare* Claim Form, *supra* note 77, *with In re* A.H. Robins Co., 88 B.R. 742, 745 (E.D. Va. 1988) (establishing a nine-month deadline), *and In re* Holocaust Victim Assets Litig., 319 F. Supp. 2d 301, 302 (E.D.N.Y. 2004) (establishing a lengthy deadline in light of the difficulty of identifying claims). The National Vaccine Injury Compensation Program offers parties the opportunity to opt out of the traditional litigation system, in some cases, as early as 240 days. 42 U.S.C. § 300aa-21(b)(1)

Default rules and deadlines promote efficiency by giving claimants rational incentives to enter into a binding settlement, without completely eliminating participants' right to access the courts. For example, under Federal Rule of Civil Procedure 23(b)(3), the opt-out rule, which automatically binds parties to the outcome of the lawsuit unless they absent themselves from the class, seeks to efficiently resolve the dispute once and for all. At the same time, the right to opt out of a settlement fund serves an important democratic principle, preserving the right to a jury trial.[93]

Courts have long considered a small number of opt outs and objections as a sign that a large settlement equitably reflects the values of the participants.[94] Many consider the right to opt out of a fund as critical to ensuring that large settlements are "fair, reasonable and adequate."[95] When few people affirmatively opt out or object to a settlement, courts and administrators assume that the fund

(2006). The September 11 Victim Compensation Fund, by contrast, gave claimants two years to opt into the fund. 49 U.S.C. § 40101 note sec. 405(a)(3) (2006). The Ricky Ray Hemophilia Relief Fund gave claimants three years to opt into the fund. *See* 42 U.S.C. § 300c-22 note sec. 105 (2006).

93. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 846–47 (1999) (observing that class actions that do not permit claimants to opt out defy the "day-in-court" ideal); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (observing that due process requires that "at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class"); *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1447, 1465 (1995) (highlighting the importance of the right to opt out in mass tort cases).

94. *See, e.g.*, Deloach v. Philip Morris Co., No. 1:00CV01235, 2003 WL 230949907, at *11 (M.D.N.C. Dec. 19, 2003) (finding that the small number of claimants who chose to opt out warranted higher than usual compensation for counsel); *In re* Am. Bank Note Holographics, Inc., 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (observing as significant that out of 5,000 notices "not a single objection . . . ha[d] been received"); Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 961 (E.D. Tex. 2000) (taking judicial notice that, "despite a potential class of thousands—if not millions—of owners" of Toshiba laptop computers, fewer than thirty objections were filed in response to the "well-publicized announcement of this proposed Settlement Agreement"); *see also* 4 CONTE & NEWBERG, *supra* note 39, § 11:48; Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 87–90 (2007) (gathering cases).

95. Redish & Larsen, *supra* note 5, at 1575 (arguing that funds that do not provide an opportunity to opt out "should be found to be unconstitutional" except in limited circumstances); *see also* Coffee, *supra* note 4, at 376–77. *But see* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 369 (noting that although the opt-out right has been recently equated with fairer settlements, historically "it has never been clear that the capacity to absent oneself has ever served as the key to due process protections").

successfully represents what claimants rationally want.[96] The effectiveness of public compensation funds, like the September 11 Victim Compensation Fund, is also evaluated based on participation rates.[97]

D. Criticisms and Proposed Reforms to Settlement Funds

Most of the scholarly commentary on public and private settlements has not challenged the assumption that potential claimants are rational. Criticisms of and proposals to reform large settlements instead tend to fall into two camps—market-based and process-based critiques. Both of these kinds of critiques value litigant autonomy—that is, giving claimants more opportunities to make a rational choice between a settlement and a lawsuit. But neither of these critiques accounts for irrational decisionmaking and the adverse impact that cognitive biases may have on claimants settling with a large fund.

Market-based critiques argue that the class counsel and class participants suffer from a principal-agent problem, like managers and shareholders of large corporations.[98] These critiques observe that participants in a class settlement lack rational incentives to monitor the class counsel because participants have a comparatively small stake in the entire enterprise.[99] Such commentators accordingly warn

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96. *See* sources cited *supra* note 94 and accompanying text; *see also* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1441 (2003) (arguing that individuals who opt out are signaling dissatisfaction with the suit and are protecting their own interests).

97. Many commentators considered the September 11 Victim Compensation Fund to be a success because over 97 percent of all potential victims chose to join the fund. The fund, however, would not have successfully attracted families without the unprecedented levels of assistance from lawyers providing free services. *See, e.g.*, LLOYD DIXON & RACHEL K. STERN, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS 40 n.46 (2004) (detailing the success of the Fund but observing that over 1,100 attorneys provided free legal services to over 1,700 Fund applicants); Leo Boyle, *No Victim Left Behind*, TRIAL, July 2004, at 66, 66 (estimating the value of free legal services at $350 million).

98. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 726 (1986) (explaining that the goal of class action reform should be to reduce agency costs between class counsel and its members); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991) (arguing that class action attorneys operate according to their own personal interests with little oversight).

99. Leslie, *supra* note 94, at 81. Others observe that attorneys lack rational incentives to obtain fair settlements for their clients because attorneys may earn large attorneys' fees by settling quickly. *See, e.g.*, Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW.

of incentives to forge collusive or sweetheart deals with defendants.[100] They also argue that class actions involving coupon settlements, like the failed tire settlement, may ignore the interests of plaintiffs if the class counsel is paid based only upon the face value of coupons distributed to the class.[101] And although Congress promotes public settlement funds—not entrepreneurial plaintiffs' attorneys—public funds raise analogous concerns about the relationship between the participants and other would-be agents, like lawmakers in Congress.[102] Market-based critiques recommend using competition and market forces to ensure that funds better reflect claimants' rational interests.

Democratic or process-based critiques charge that large class action settlements lack procedural fairness and fail to give individual

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U. L. REV. 469, 529 (1994) (noting criticism and observing that judges should "ensure that the contingency fee system and the incentives that it is founded upon operate properly and are not distorted by the nature and size of the cases").

100. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883–89 (1987) (describing the possibility of "sweetheart settlements" arising for the benefit of the defendant and class counsel); Leslie, *supra* note 94, at 79–84.

101. *See, e.g.*, Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479, 479 (1997) (articulating concerns about class counsel "selling out" and settling for less than reasonably possible); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 996 (2002) ("Although the class counsel is supposed to represent the class's interests and be compensated based on how well it does so, coupon settlements decouple the interests of the class and its counsel.").

102. *See* Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 394–95 (2007) (comparing "capture" by special interest groups of public agencies to collusion between defense and class counsel at the expense of the plaintiff class). Those challenging public settlement funds argue that they are substantively unfair because they are the product of "rent-seeking" legislation—laws that provide benefits to discrete groups of businesses or private interests who have rational incentives to petition the government at the expense of the national interest. The September 11 Victim Compensation Fund, for example, was criticized as a product of airline lobbyists and other interest groups seeking to protect themselves but ignoring other victims of terrorism. *See, e.g.*, Alexander, *supra* note 3, at 653 (raising questions of fairness in the September 11 Victim Compensation Fund by asking "[w]hat distinguishes the beneficiaries of this program from other similarly situated persons and requires us to treat them differently"). Other public settlement schemes have attracted the same kind of controversy. The Price-Anderson Act, 42 U.S.C. § 2210(c) (2006), which caps damages in any single nuclear accident at $560 million, the National Vaccine Program, 42 U.S.C. §§ 300aa-1 to -33, which imposes limits on the assertion of claims against vaccine manufacturers, and the proposed Fairness in Asbestos Injury Resolution Act of 2003 ("FAIR Act"), S. 1125, 108th Cong. §§ 202–04 (2003), which placed caps on asbestos liability for certain businesses and insurers, have all been criticized as providing unearned benefits to particular interest groups.

participants an adequate voice in the settlement.[103] For example, members of the class action may have irreconcilable conflicts of interest, settlements may lack sufficient transparency or judicial oversight,[104] and settlements may deny claimants the political and psychological value that comes with meaningful participation in a formal court process.[105] Public settlement funds do not raise the same conflicts of interest between class counsel and claimants because they are administered by government agents.[106] They may be procedurally unfair, however, because they lack the transparency, judicial oversight,[107] and process available in traditional civil litigation.[108]

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103. *See, e.g.*, AM. LAW INST., COMPLEX LITIGATION PROJECT 24 (1993) ("The procedural fairness achieved by processing claims individually may sacrifice the fairness of reaching a just result in a timely fashion."); Resnick, *supra* note 44, at 376 ("[W]hen the principal and agent are client and lawyer, the relationship . . . has a social and political valence.").

104. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1084–85 (1984) (arguing that settlement procedures are not adjudicative, but rather, the "products of a bargain between parties rather than of a trial and an independent judicial judgment"); Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 545 (1986) (criticizing the development of large alternative compensation schemes and trusts because they empower private administrators to decide compensation "without providing sufficient justification of why they deserve expanded authority"); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 425 (1982) (arguing that the shift to large class action settlements transforms the judge into a manager and creates "opportunities for judges to use—or abuse—their power").

105. *See* WILLGING, *supra* note 47, at 18 (observing that large settlements involving mass torts "make it more likely that individual cases will be disposed of without trial or hearing, raising questions of procedural unfairness in terms of satisfying litigant interests in participating meaningfully in resolving their cases"); Tyler, *supra* note 6, at 204.

106. Accordingly, some, like Professor Richard Nagareda, have argued that public compensation funds may more legitimately resolve large numbers of claims. *See* NAGAREDA, *supra* note 15, at 102–08 (observing that public compensation funds, because they are formed through public legislation, more legitimately resolve large numbers of claims than class action settlements, but are more rare because of the "difficulty of obtaining Congressional action").

107. Schneider, *supra* note 3, at 499 ("With the Fund, the effectiveness of claims resolution has been reduced because of other factors as well, such as the complexity of the process . . . the discretion of the Special Master and of his decisions, and the fact that his discretion is unreviewable.").

108. *See, e.g.*, Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645, 645 (2008) (evaluating responses of claimants to the September 11 Fund and finding that "the choice to forego litigation required the sacrifice of important nonmonetary, civic values"); Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L REV. 355, 355 (2003) (observing that the Victim Compensation Fund violates perceptions of procedural and distributive fairness because rules creating the Fund were determined without "procedurally fair" mechanisms). *But see* Brian H. Bornstein & Susan Poser, *Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund*, 17 CORNELL J.L. & PUB. POL'Y 75, 96 (2007) (finding that claimants to the September 11 Fund were more satisfied with the procedural than

Both of these critiques value "litigant autonomy"—that is, giving claimants more chances to make rational choices about their settlement options.[109] But they also assume that claimants make decisions based on their own preferences. They do not account for the way different settlement contexts may interfere with claimants' abilities to make rational decisions.

For example, funds that offer multiple settlement options not only reflect people's concrete values, but are considered more efficient and equitable. Under either a democratic or market-based critique, a fund that offered claimants two options, like cash and an in-kind award, would be considered better than a settlement that offered only one of those options.[110] Neither theory can account for the possibility that claimants may be influenced by *irrelevant* settlement alternatives. That is, neither theory contemplates that claimants may be irrationally influenced by the introduction of settlement awards that they do not intend to choose.

Moreover, if the stakes are high enough, a minimally rational person should opt out of a settlement fund.[111] According to a market-based account, the opt-out right is one of the few weapons that claimants have to foster competition among rival attorneys and to improve the overall settlement.[112] Citing democratic values, others suggest that opt-out rights "check[] the alienation and disempowerment that result from overreliance on lawyers."[113] Such accounts do not provide for the possibility that parties will not opt

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the substantive aspects of the Fund, and that perceptions of justice were correlated with the amount of compensation participants received).

109. *See* Redish & Larsen, *supra* note 5, at 1574 (arguing that the failure to provide opt-out rights generally violates "litigant autonomy," which he describes as the freedom to control litigation).

110. *See, e.g.*, Leslie, *supra* note 101, at 1076 (calling coupons "gravy" when offered in conjunction with cash awards); Resnick et al., *supra* note 44, at 383 (observing that the law of aggregate litigation promotes values associated with process and participation by "attend[ing] to varying and potentially incommensurate valuations across a range of litigants").

111. *See* Coffee, *supra* note 4, at 377 (recommending an enhanced right to withdraw from class actions as a way to improve accountability in class action settlements and comparing the option to the ability of a shareholder to sell into the market); George Rutherglen, *Better Late than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 259 (1996) (arguing that notice "can be effective in giving most class members an opportunity to object to the terms of settlement or to obtain individual relief").

112. Coffee, *supra* note 4, at 427.

113. Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 100 (2003); *id.* at 100–06 (describing democratic solutions and values of class action governance); *see also* Rutherglen, *supra* note 111, at 281 (arguing that "[a]n increased likelihood of settlement cannot come at the expense of [the claimants'] right to control their claims").

out, even when the claimant knows that he benefits more from a private lawsuit.

Finally, under a democratic theory, deadlines should be flexibly designed to afford people enough time to knowingly participate.[114] And in economic terms, an extended deadline is thought to increase the chance that the parties will settle, so long as plaintiffs and defendants place different weight on the time value of money.[115] Neither theory accounts for the effect of deadlines on procrastination—a phenomenon under which people voluntarily delay action even when they expect to be worse off for the delay.

As demonstrated in Part II, however, decisionmakers often change course based upon just these factors. A person may prefer a settlement over a lawsuit based on an irrelevant alternative, like whether the fund also offers coupons or other in-kind awards. A person may change his or her mind to join a large settlement fund simply because the default is to opt out and not to opt in. Or a person may decide to file earlier because a rolling deadline limits filing to the first week of the month.

As a result, absent some form of intervention, cognitive biases may frustrate the purpose of large funds to provide more access, efficiency, and equity than traditional litigation. As Part III also shows, however, there are ways to reframe options to minimize or accommodate the effects of cognitive errors in decisionmaking, without unduly eliminating options in large funds. Such libertarian paternalistic solutions may, in fact, complement market and process reforms to large settlement funds.

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114. *See, e.g.*, Hadfield, *supra* note 108, at 647–48 (arguing that, due to time constraints, claimants to the September 11 Victim Compensation Fund had to balance monetary rewards against civic values that might be won through litigation like obtaining "information," seeking "accountability," and promoting "responsive policy change").

115. *See* Richard A. Epstein, *Second Order Rationality*, *in* BEHAVIORAL PUBLIC FINANCE 355, 356 (Edward J. McCaffery & Joel Slemrod eds., 2006) ("[Rationality] presupposes that individuals have a stable set of preferences concerning what they desire not only in the present, *but* also *in any future state of the world*, and that they can choose those courses of action that will maximize their chances of reaching their chosen goals." (emphasis added)); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 420 (1973) (observing that delay increases the likelihood of settlement because, assuming higher borrowing costs for plaintiffs, the expected value of litigating shrinks more rapidly for the plaintiff than the defendant and thereby causes the plaintiff's minimum settlement offer to shrink more rapidly than the defendant's).

II. BIASES IN LEGAL DECISIONMAKING

Studies in cognitive psychology have long shown that people's intuitive judgments are not "stable," but rather are often quickly "constructed" based on the context of the decision.[116] Intuitive judgments are very difficult to resist, particularly when the choice is unfamiliar and unassisted by counsel. Section A of this Part briefly discusses the cognitive psychological literature of intuitive and deliberative thought processes. Section B then assesses the implications of three biases associated with intuitive decisionmaking for large settlement funds.

A. The Dual Process Model of Decisionmaking

Cognitive psychologists and neurologists have identified two types of decisionmaking processes: intuitive and deliberative.[117] Intuitive decisionmaking processes, which are sometimes called System I processes, are intuitive, automatic, and quick, encompassing the types of instantaneous judgments that permit a person to immediately size up a situation.[118] Deliberative processes, sometimes described as System II processes,[119] describe reflective, logical, and self-conscious thinking. Some speculate that deliberative and intuitive decisionmaking arose out of separate evolutionary developmental processes.[120]

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116. Paul Slovic, *The Construction of Preference*, 50 AM. PSYCHOL. 364, 364 (1991); *see also* Kahneman, *supra* note 8, at ix–xvii (presenting the four main themes of decision theory).

117. Jennifer Arlen & Eric Talley, *Introduction* to EXPERIMENTAL LAW AND ECONOMICS, at xviii (Jennifer Arlen & Eric Talley eds., 2008) (observing that decisions result from the "concurrent operation of distinct cognitive 'programs', some of which affect our conscious deliberation while others are intuitive, non-conscious processes that intervene prior to conscious decision making"); Guthrie et al., *supra* note 16, at 6–9; Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49, 51–60 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002). Psychologists have described many different dual-system models of cognition, but they all distinguish between intuitive processes and deliberative processes. *See* Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra*, at 421, 436–38 (observing the burgeoning dual system models). *See generally* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY (Shelly Chaiken & Yaacov Trope eds., 1999) (collecting dual-process theories).

118. Kahneman & Frederick, *supra* note 117, at 49; Stanovich & West, *supra* note 117, at 436.

119. Kahneman & Frederick, *supra* note 117, at 51.

120. Guthrie et al., *supra* note 16, at 9 n.49 (collecting literature suggesting that dual process models of the brain "find support from evolutionary psychology and neuropsychology"); Steven

Although System I processes are prone to error,[121] they are difficult to avoid for two reasons. First, people tend to rely on such processes when confronted with rare decisions—the home they purchase, the person they marry, the risky medical procedure they choose.[122] Accordingly, when a decisionmaker lacks experience, and an important decision is required, System I processes may have a powerful effect. Second, even in familiar situations, people tend to repeat cognitive responses used in the past.[123]

Repetition can correct certain error-prone processes, which is why practice allows people to swim, bowl, or play chess with less reflection.[124] Moreover, deliberative processing can "override" System I processes under certain circumstances.[125] This is why people are less susceptible to cognitive bias when there are opportunities to learn from experience or when they have access to third-party expertise, like lawyers, doctors, or other specialists.[126] Even with expertise,

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G. Sapra & Paul J. Zak, Neurofinance: Bridging Psychology, Neurology, and Investor Behavior 2–3 (Dec. 1, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1323051 (attributing automatic processes to early stages of evolutionary development); *see also* ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND 69–72 (2001).

121. There are some cases in which such intuitive judgments can be remarkably accurate. MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 44 (2005). Some compare System I processes to a basketball player's "court sense" or Patton's "coup d'oeil"—literally, the "power of the glance"—to "see and make sense of the battlefield." *Id.* (describing the "theory of thin slices"—the ability of unconscious processes to identify accurate patterns based on very narrow slices of experience).

122. *See* Tversky & Kahneman, *supra* note 69, at S274 (noting that most important decisions are unique and provide little opportunity for learning or overcoming bias).

123. On Amir & Jonathan Levav, *Choice Construction Versus Preference Construction: The Instability of Preferences Learned in Context*, 45 J. MARKETING RES. 145, 145 (2008) (showing in repeated experiments that learning through repeated decisions is "highly sensitive" to the structure and context of the original choice set); Dan Ariely, George Lowenstein & Drazen Prelec, *"Coherent Arbitrariness": Stable Demand Curves Without Stable Preferences*, 118 Q.J. ECON. 73, 73, 102–03 (2003) (showing participants' repeated choices were "strongly influenced by arbitrary 'anchors' [prior cues]").

124. Guthrie et al., *supra* note 16, at 30 nn.148–49 (gathering sources showing that System I processes, with appropriate opportunities for feedback, enable expert intuitive thinkers, such as grandmasters at chess, to make better decisions with "a minimum of time, knowledge, and computation"); Kahneman & Frederick, *supra* note 117, at 51 (arguing that System I is not "necessarily less capable" than System II and describing the ability of "chess masters to perceive the strength or weakness of chess positions instantly").

125. Kahneman & Frederick, *supra* note 117, at 51 (observing that in contrast to System I, which "quickly proposes intuitive answers" to problems as they arise, System II "monitors the quality of these proposals, which it may endorse, correct, or override").

126. *See, e.g.*, Korobkin & Guthrie, *supra* note 16, at 124 (observing that the presence of legal counsel, who may be experienced repeat players, can mitigate potential biases in

cognitive biases also are extremely persistent and subject to manipulation.[127]

Notably, because claimants to large settlements are generally unassisted laypersons, large settlement funds are particularly compelling settings for examining the adverse impact of System I cognitive errors.

B. Biases that Impact Decisionmaking

Three specific biases may affect claimants' intuitive judgment in a large settlement fund: (1) status quo bias, (2) contrast bias, and (3) procrastination-related bias. This Section describes empirical studies of each bias and their potential impact on settlement funds.

1. *Status Quo Bias*. The status quo bias refers to a party's tendency to stick to the status quo even when other options increase an individual's well-being. Status quo effects complicate the long-held belief that opt-out rules in funds ensure fairer settlements, greater due process, or an adequate opportunity to claim awards through the fund. For this reason, large funds should be designed to be more sensitive to the ways in which bias affects individuals' decisionmaking after they have joined a group settlement, like the decision to complete claim forms, register objections, or evaluate other settlement options.

a. Definition of the Status Quo Bias. The status quo bias refers to the tendency to value the status quo over other options, even when those options increase individual welfare.[128] In principle, a completely rational person will choose between alternatives based on his or her preferences and the potential costs of making an informed decision. In practice, however, simply characterizing an option as the status quo significantly increases the chances that a person will choose that alternative.

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decisionmaking in settlement); *cf.* Arlen, *supra* note 16, at 1780 ("Experts, such as lawyers, may be able to reduce the [endowment] effect by reducing people's personal attachment to goods.").

127. Guthrie et al., *supra* note 16, at 6–29 (summarizing the literature on tests that exploit cognitive biases of "anchoring," "representativeness," and "hindsight bias" and the results of such tests administered to newly appointed judges); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 976 (2006) (describing how race operates as a System I influence on judgment); *see also* Tversky & Kahneman, *Judgment Under Uncertainty*, *supra* note 8, at 1128 (describing "systematic errors" from intuitive processes).

128. William Samuelson and Richard Zeckhauser originally coined the term "status quo bias." *See* Samuelson & Zeckhauser, *supra* note 21, at 19.

There are several different explanations for status quo bias. One is omission bias.[129] Omission bias is an exaggerated preference for inaction.[130] Omission bias describes a person's aversion to risks caused by his or her own actions, even when there are greater risks associated with inaction. For example, adults attach more weight to the risks of vaccinating their children than the risks of not vaccinating their children.[131] Organ donation rates are dramatically higher in countries that presume people to consent to organ donation programs than in countries that require people to opt in to organ donation programs.[132] Omission bias bolsters the status quo effect because a failure to act increases the persistence of the status quo.[133]

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129. *See, e.g.*, Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 198 (1991) [hereinafter Kahneman et al., *Endowment Effect*]. Another explanation is the endowment effect. An endowment effect describes occasions when people value what they *already* have more than what they *can* have; mere possession of something enhances its value. In the now famous "mugs" experiment, a classroom of business students was offered a choice of coffee mugs or chocolate bars. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1341–42 (1990) [hereinafter Kahneman et al., *Experimental Tests*]. When asked to choose, half of the students chose coffee mugs, and the other half, chocolate. Another class was made the same offer *after* the mugs and chocolate were randomly distributed to the class. In the second class, only ten percent of the students traded their mugs and chocolate, far below what should have taken place given a random distribution. *Id.* The students only possessed the coffee mug or chocolate for a few seconds, not enough time to develop an emotional, habitual, or learned basis for keeping their items. But when polled, those who were given the mugs tended to demand a price two to three times greater than the price that those without mugs were willing to pay. RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 66 (1992). In that short time, the subjects' willingness to give up what they had for something of equivalent value had changed. Kahneman et al., *Experimental Tests*, *supra*, at 1341–42.

130. *See* Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 ORG. BEHAV. & HUM. DECISION PROCESSES 475, 478–81 (1994) (examining the possible causes of status quo and other biases); Maurice Schweitzer, *Disentangling Status Quo and Omission Effects: An Experimental Analysis*, 58 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 457, 459 (1994) (explaining causes of status quo bias and omission bias). The converse of omission bias is action bias, when people take excessive preventative action to avoid low-probability but high-consequence events, like acts of terrorism or airplane crashes. *See* Cass R. Sunstein & Richard Zeckhauser, *Overreaction to Fearsome Risks* 3 (Harv. Univ. Law Sch. Prog. on Risk Regulation. Paper No. 08-17, 2008), *available at* http://ssrn.com/abstract=1319881.

131. Jonathan Baron & Ilana Ritov, *Omission Bias, Individual Differences, and Normality*, 94 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 74, 75–78 (2004) (reviewing the literature on omission bias in vaccinations).

132. Eric J. Johnson & Daniel G. Goldstein, *Defaults and Donation Decisions*, 78 TRANSPLANTATION 1713, 1715 (2004) (finding donation rates of 98 percent or greater in all but one of the countries requiring people to opt out of organ donation plans, but 27.5 percent or less in countries that required participant's affirmative consent).

133. Some speculate that this effect is the result of "[l]oss aversion." *See, e.g.*, Kahneman et al., *Endowment Effect*, *supra* note 129, at 200. People disfavor losses more than they favor gains,

As a result, people make different decisions depending on how the status quo is characterized. For example, some commentators argue that status quo bias affects contracting by causing parties to prefer default terms or those included in a first draft of a contract.[134] Alternative investment and saving options are also significantly more popular when designated as the status quo or the default choice.[135] Because of the status quo effect, some commentators have advocated "libertarian paternalistic" ways to encourage saving. These commentators advocate changing the default rules to promote particular outcomes—like an employee's decision to enroll in a 401(k) retirement plan—without limiting the employee's opportunity to opt out of the plan at a later time.[136]

The impact of default rules on decisionmaking can be partially explained by rational decisionmaking. After all, there are costs associated with filling out forms, gathering information, seeking advice, and exploring other alternatives. Accordingly, a claimant may rationally decide that it is not worth the time, money, or potential opportunity cost to act. Moreover, people may be rationally indifferent to certain choices. Such explanations, however, do not fully account for the way people make decisions. People irrationally

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and accordingly, risk more to avoid losses than to secure gains. This is one of the reasons why gamblers and stockholders will risk substantial losses to break even, rather than sell shares or stop gambling for a comparatively small but certain loss. *See* Terrance Odean, *Are Investors Reluctant to Realize Their Losses?*, *in* CHOICES, VALUES, AND FRAMES, *supra* note 8, at 371, 371. Omission bias is a natural consequence of loss aversion because the disadvantages of any potential change loom so much larger than the advantages.

134. *See* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1587 (1998); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 664–65 (1998).

135. Samuelson & Zeckhauser, *supra* note 21, at 14.

136. *See* James M. Poterba, *Individual Decision Making and Risk in Defined Contribution Plans*, 13 ELDER L.J. 285, 298–301 (2005) (discussing methods to encourage saving); *see also* Shlomo Benartzi & Richard H. Thaler, *Naive Diversification Strategies in Defined Contribution Saving Plans*, 91 AM. ECON. REV. 79, 95–96 (2001) (discussing the role of default options in diversification). Absent automatic enrollment, studies demonstrate that only 20 percent of all employees take advantage of 401(k) plans in the first month, and that figure steadily increases to 65 percent over the course of three years. In contrast, automatic enrollment encourages 90 percent of all employees to enroll, and that number steadily increases to 98 percent over the course of the year. *See* THALER & SUNSTEIN, *supra* note 33, at 109 (citing Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1149–225 (2001)). Automatic enrollment options are solutions commonly associated with "libertarian paternalism" and described in more detail in Part III, *infra*. *See* SUNSTEIN & THALER, *supra* note 33, at 108–11.

overvalue either the default option or the costs associated with departing from the default option.[137]

Although no study has evaluated the impact of the status quo bias on large settlement funds, scholars have found that claimants exhibit an exaggerated preference for default choices in similarly structured no-fault automobile insurance funds. Professor Eric Johnson examined the status quo effects of New Jersey and Pennsylvania automobile insurance plans on drivers in each state.[138] Both states offered a choice between two types of virtually identical automobile insurance policies: a cheaper policy that restricted the right to sue and a more expensive policy that maintained the right. Both policies offered the same premiums for each plan, but New Jersey offered its motorists the inexpensive policy, with the right to opt for the more expensive policy, whereas Pennsylvania offered its motorists the more expensive policy, with the right to opt for the cheaper one.

Consumers choosing between both policies were dramatically influenced by the default rule. On average, 78 percent of both New Jersey and Pennsylvania drivers chose the default option.[139] The status quo effect was actually more robust in real life than in Professor Johnson's hypothetical experiments of the status quo effect on test subjects, even though the policies came at no small cost to New Jersey and Pennsylvania drivers.[140] Had Pennsylvania offered the same

137. THALER, *supra* note 129, at 66 (finding that the costs of departing from the default, in some cases, double the value of obtaining a good). Notably, the strength of the endowment effect and the status quo bias is not free from debate. *See* Arlen & Talley, *supra* note 117, at xli–xliv (summarizing the debate over the scope of the endowment effect). *See generally* Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay–Willingness to Accept Gap, the "Endowment Effect," Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530 (2005) (contesting the existence of the endowment effect). For example, studies have shown that subjects who are only given a voucher that can later be exchanged for a mug—and not the actual mug—exhibit only a weak endowment effect. *See* Kahneman et al., *Experimental Tests*, *supra* note 129, at 1344. Substantial evidence, however, also demonstrates that such effects may be prominent for rare decisions, when valuation is difficult. *See* Leaf Van Boven, George Loewenstein & David Dunning, *Mispredicting the Endowment Effect: Underestimation of Owners' Selling Prices by Buyer's Agents*, 51 J. ECON. BEHAV. & ORG. 351, 362–64 (2003).

138. Eric Johnson et al., *Framing Probability Distortions, and Insurance Decisions*, *in* CHOICES, VALUES, AND FRAMES, *supra* note 8, at 224, 238.

139. *Id.*

140. *Id.*

default option as New Jersey, the authors estimate that Pennsylvania drivers would have paid $200 million less for auto insurance.[141]

b. The Impact of the Status Quo Bias on Large Settlement Funds. As this Section has explained, large settlement funds operate very much like the New Jersey and Pennsylvania insurance plans. Large settlement funds must set default rules to determine when parties are bound to a fund, requiring parties to opt out or opt in. Such status quo effects complicate the long-held belief that opt-out rights (1) ensure fairer settlements, (2) provide an adequate opportunity to claim and reject awards through the fund, and (3) offer greater due process.

First, many consider the right to opt out of or object to a fund critical to ensuring that large settlements are "fair, reasonable and adequate."[142] When few people affirmatively opt out or object to a settlement, courts and administrators have assumed that the fund successfully represents what claimants rationally want.[143] Because of this assumption, recent amendments to the Federal Rules of Civil Procedure grant judges more power to offer claimants "super" opt-out rights, a second chance to opt out of a class action after the final terms of the settlement are disclosed.[144]

Status quo bias, however, provides a reason to be skeptical of reforms that allow more or less scrutiny of settlements based on the number of objections or opt-out filings. The status quo effect demonstrates that many people will join a large fund not because the overall settlement reflects their values and interests but because the

141. *Id.*

142. *See* Redish & Larsen, *supra* note 5, at 1575 (arguing that funds that do not provide an opportunity to opt out "should be found to be unconstitutional," except in limited circumstances); *see also* Coffee, *supra* note 4, at 376–78. *But see* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 369 (noting that, although the opt-out right has been recently equated with fairer settlements, historically "it has never been clear that the capacity to absent oneself has ever served as the key to due process protections").

143. *See* source cited *supra* note 96.

144. Eisenberg & Miller, *supra* note 1, at 1538–40. In 2003, the Supreme Court amended the Federal Rules of Civil Procedure to provide district courts with discretion to reject a settlement "unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." FED. R. CIV. P. 23(e)(2); s*ee also* Eisenberg & Miller, *supra* note 1, at 1538–40 (discussing the commentator's opinions on opt-out rights). For a detailed discussion of so-called "back-end" opt-out rights, see generally Rhonda Wasserman, *The Curious Complications with Back-End Opt-Out Rights*, 49 WM. & MARY L. REV. 373 (2007).

default rule requires parties to affirmatively opt out of or opt into a fund. This is the case even when claimants have valuable claims.

Second, the status quo effect contributes to the phenomenon of "underclaiming" that persists in large settlements—in which parties refuse to opt out of a settlement, but never claim an award.[145] Many public and private settlements require additional filings to accept or reject an award.[146] For example, although class action settlements automatically include claimants in the settlement fund, such settlements still may require parties to complete new forms to claim an award, choose among substantive settlement options, or select a settlement process.[147] Status quo bias, however, may lead large numbers of claimants to join funds, but never complete such forms. As a result, although claimants overwhelmingly join public and private settlements, many give up their legal rights for nothing.[148]

Third, as a result, opt-out rights may raise concerns under the Due Process Clause. Due process theoretically requires that the government's interest in promoting a large settlement fund outweigh the risk that a large settlement fund will "erroneous[ly] depriv[e]" claimants of the right to an entitlement.[149] So long as claimants receive sufficient notice, adequate representation, and an opportunity to opt out of or object to a fund, it has long been assumed that large settlements satisfy due process.[150] The government interest in large settlement funds is high because, as discussed in Part I, large funds provide more access, efficiency, and equity than traditional litigation. Moreover, the risk of erroneous deprivation is relatively low when

145. See HENSLER ET AL., *supra* note 1, at 459 (surveying class action settlement funds and finding the fraction of funds actually disbursed was "modest to negligible" in so-called "claims-made" settlements, in which class members are asked to come forward and claim compensation).

146. *See id.* at 460.

147. *See supra* Part I.C.

148. The litigation system itself depends on a certain amount of underclaiming to function. A system in which everyone filed claims for their legal grievances, it has been argued, would overwhelm the court system. *See, e.g.*, SHAVELL & KAPLOW, *supra* note 18, at 231. Whatever the merits of this argument, it has less weight in the context of a class action settlement or large public settlement fund because such funds are designed to promote equitable and efficient access for a discrete class of potential litigants.

149. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (listing the three factors considered in the due process analysis).

150. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 846–47 (1999); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (holding that assertion of jurisdiction over absent plaintiffs is consistent with the Due Process Clause because plaintiffs received notice and the right to opt out of class settlement).

claimants receive clear notice of their rights and possess a right to exclude themselves from the settlement fund.

The status quo bias heightens the risk that people will fail to opt out of a large fund even when they would like to do so because they have suffered a substantial injury. The status quo bias thus lends force to those who argue that opt-out settlement funds are unconstitutional because people with substantial claims may inadvertently waive rights to a trial in exchange for participating in an undesirable class action settlement.[151] For example, opt-out class settlements have been compared to criminal and civil actions where the Supreme Court has barred implied waivers as unconstitutional.[152] In such cases, the Court has found that it is unfair to assume that a party voluntarily consents to give up a trial-related right. In any event, the Due Process Clause may require funds to make a greater effort to ensure that claimants do not inadvertently give up a settlement award after waiving the rights to a lawsuit.

Many commentators understand that the default option makes a difference. Claimants participate more often in large settlement funds that ask claimants to affirmatively opt out, than those that require claimants to affirmatively opt in. To date, however, most commentators assume parties do this for rational reasons. Claimants may be "rationally indifferent" to their options.[153] Claimants may lack information or may never have been notified of the existence of a fund.[154] These descriptions of claimant behavior generally have not

151. Redish & Larsen, *supra* note 5, at 1616.

152. *Id.* at 1612–14 (observing that "[o]n a number of occasions, the Court has rejected implied waiver in the civil context"). On the other hand, the status quo bias means that the governmental interest in encouraging large settlements—collectively providing more access, efficiency, and equity than traditional litigation—is also higher than has been previously acknowledged. Status quo bias means that when a fund requires people to opt in to participate, people may systematically undervalue the benefits of a group settlement. Thus, opt-in funds may steer litigants away from settlements that they otherwise would like to join. Such effects may also punish those claimants who, although unaffected by status quo bias, are unable to obtain counsel: Attorneys may not undertake the risks of aggregate litigation when, because of the status quo bias, there are not enough claimants to make group litigation worthwhile. *See* Issacharoff, *supra* note 95, at 369–70 (describing plaintiff attorney investment costs in aggregate litigation).

153. *See, e.g.*, Coffee, *supra* note 93, at 1362–63 (arguing that "members of [a] future claimant class can be expected to be rationally apathetic about their future legal rights"); Eisenberg & Miller, *supra* note 1, at 1562 (observing that class members "appear to be rationally ignorant about the qualifications of their representatives and accordingly tend to do nothing when offered the opportunity to opt-out or object").

154. *See, e.g.*, Todd B. Hilsee, Shannon R. Wheatman & Gina M. Intrepido, *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More*

accounted for the status quo bias, which causes decisionmakers to systematically overvalue the default choice notwithstanding substantial personal or financial consequences to the decisionmaker.

The status quo bias in class action settlements and public settlement funds may be unavoidable. After all, there must be a default rule that asks people either to affirmatively join or affirmatively withdraw from a large settlement fund.[155] As a result, designers of a settlement have no choice but to select an option that will influence claimant decisionmaking. Changing one default option, however, is not always sufficient. Because of the status quo bias, policymakers may need to design rules that ensure that people make good choices after defaulting into a particular program. For example, Cass Sunstein and Richard Thaler note that, in the past decade, several employers have automatically enrolled new employees in 401(k) plans with tremendous success.[156] People still tend to default to a small withholding rate, however, which may be too low for retirement, or default to a single employer's stock, which may be too risky.[157] This is why many plans (before the market collapse in 2008) defaulted to mutual funds that were targeted to the average employee's best interests.[158]

In sum, the status quo bias provides a reason to be skeptical of reforms that seek to improve settlement funds based on increased

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than Just Plain Language: A Desire to Actually Inform, 18 GEO. J. LEGAL ETHICS 1359, 1373–75 (2005) (describing cases in which claimants never received notice).

155. Some savings plans have experimented with "forced-choice" rules, plans that force parties to choose to opt into the fund or opt out of a fund. SUNSTEIN & THALER, *supra* note 33, at 111–12. Such a system, however, is not practical for large settlements. Unlike employers, who can withhold pay until an employee chooses a particular option in a 401(k) plan, no similar incentives exist for claimants to complete forms for a large public or private settlement.

156. *Id.* at 111. More recently, commentators have demonstrated that institutions can encourage greater personal savings by using framing effects. *See* Emmanuel Saez, *Details Matter: The Impact of Presentation and Information on the Take-up of Financial Incentives for Retirement Saving*, 1 AM. ECON. J.: ECON. POL'Y 204, 204 (2009) (finding, in a study involving sixty branch offices of H&R block, tax filers were more likely to contribute to IRA plans when an employer subsidy was characterized as a "matching contribution" than as an equivalent "tax credit").

157. SUNSTEIN & THALER, *supra* note 33, at 112, 127–29; *see also* Lisa Meulbroek, *Company Stock in Pension Plans: How Costly Is It?* 27–28 (Harv. Bus. Sch. Working Papers Collection, Paper No. 02-058, 2002), *available at* http://www.hbs.edu/research/facpubs/workingpapers/papers2/0102/02-058.pdf (estimating that owning stock in one's own employer is worth about half that of a diversified portfolio).

158. *See* SUNSTEIN & THALER, *supra* note 33, at 131–32 (describing plans that default participants into funds and managed accounts based on the participants' age and other information).

opportunities to opt out, particularly when they demand parties to complete additional claim forms to receive awards. For that reason, large funds—like the modestly paternalistic employer retirement plans described by Sunstein and Thaler—should be designed to be more sensitive to the ways bias affects individuals' decisionmaking *after they have joined a group settlement*, like the decision to complete claim forms, register objections, or evaluate other settlement options. These options are discussed in more depth in Part III.

2. *Contrast Bias*. Contrast bias is the irrational tendency to weigh one option more or less favorably when in the presence of other options. Contrast bias is the reason why a subject chooses George Clooney over Brad Pitt when the survey includes a picture of an "ugly" George Clooney. As set forth below, because of contrast bias, too many options may induce decision-conflict, causing people to unwittingly delay or avoid filing claims against the fund. Moreover, the presence of a third, "decoy" option may steer claimants to select comparatively more attractive, but substantively undesirable options. Accordingly, fund designers—judges, lawyers, and public administrators—must also account for how a settlement option may unwittingly impact a choice between cash and in-kind awards, like coupons and warranties, or the length of a settlement process.

a. Definition of Contrast Bias. Contrast bias is the irrational tendency to weigh an option more or less favorably depending on the presence of other options. Theoretically, a rational decisionmaker should not rank options differently simply because the options are described in a particular way.[159] Moreover, the introduction of an additional choice should not alter a person's relative valuation of other options.[160] Marketers have long relied on just such "preference reversals," however, when introducing new lines of products to consumers.[161] Contrast bias is the reason why the patron's choice of

159. Kelman et al., *supra* note 14, at 287.

160. For additional discussion, see *supra* Part I.C.1.

161. *See, e.g.*, ARIELY, *supra* note 11, at 1–6, 8, 14 (describing contrast effects in magazine, real estate, and consumer sales); Moran & Meyer, *supra* note 24, at 142 (describing ways in which decoy effects can increase relative attractiveness of dominant brands); Simonson, *supra* note 24, at 70 (describing increased sales of a Williams-Sonoma bread-maker resulting from the introduction of a new, more expensive one).

chicken over steak, as discussed in Part I, changes depending on whether fish is also on the menu.[162]

Psychologists and behavioral economists have found that contrast effects directly impact a wide array of decisions, including consumer good purchases,[163] employment decisions,[164] elective medical procedures,[165] presidential elections,[166] and even, whether "George Clooney" is better looking that "Brad Pitt."

There are many explanations for contrast bias. Some have proposed the "Cost-of-Thinking" model—suggesting that it is simply easier to compare similar options among a set of choices than to give an absolute or innate value to any particular option.[167] The decisionmaker identifies the easier choice between two goods and simply ignores the third. Others believe that, just as two identical figures may appear to be different sizes when set against different backgrounds, different attributes are highlighted depending on the other options made available at the time of decision.[168]

Contrast bias influences decisionmaking in two relevant ways. First, decisionmakers respond more quickly to offers that involve one

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162. *See* Kelman et al., *supra* note 14, at 288–89. Of course, if the new option conveys relevant information about the other options, it is reasonable for people to change their assessments of the other options in the choice set. A person who prefers chicken over pasta might rationally change her preference upon learning that veal parmesan is on the menu because the restaurant may specialize in Italian food. *Id.* at 287 n.2. But if the new option does not convey relevant information about the food, people should not adjust their assessments. *Id.* at 287.

163. SHAFIR ET AL., *supra* note 22, at 607–11 (describing decision-conflict and asymmetric dominance in the sale of compact disc players, Minolta cameras, microwaves, and pens); Simonson & Tversky, *supra* note 22, at 287 (describing asymmetric dominance effects in the sale of Cross pens).

164. Scott Highhouse, *Context-Dependent Selection: The Effects of Decoy and Phantom Job Candidates*, 65 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 68, 75 (1996).

165. SHAFIR ET AL., *supra* note 22, at 609 (describing decision-conflict and asymmetric dominance in medical procedures).

166. Yigang Pan, Sue O'Curry & Robert Pitts, *The Attraction Effect and Political Choice in Two Elections*, 4 J. CONSUMER PSYCHOL. 85, 93–99 (1995) (finding evidence of contrast effect in a study of over 300 students after the reentry of H. Ross Perot into the 1992 U.S. presidential election).

167. *E.g.*, Moran & Meyer, *supra* note 25, at 144.

168. Ravi Dhar, Stephen M. Nowlis & Steven J. Sherman, *Trying Hard or Hardly Trying: An Analysis of Context Effects in Choice*, 9 J. CONSUMER PSYCHOL. 189, 189–90 (2000) (articulating two alternative explanations for contrast bias—one based on attempts to limit effort, the other on perceptual contrast); Sanjay Mishra, U.N. Umesh & Donald E. Stem, Jr., *Antecedents of the Attraction Effect: An Information-Processing Approach*, 30 J. MARKETING RES. 331, 332–35 (1993) (describing different explanations for contrast and decoy effects in consumer decisionmaking).

option over those that involve two attractive options—even if both options, taken alone, are preferable to the status quo.[169] Cognitive psychologists and neurologists suspect that this effect, also described as "decision-conflict," occurs because people tend to adhere to the status quo when confronted with a complex choice.[170]

For example, in one study, two groups of subjects were asked to imagine a one-day clearance sale for two CD players—one, a popular Sony model offered for $99 and the other, a top-of-the-line AIWA player for $169.[171] Of those polled, 27 percent indicated that they would buy the AIWA, 27 percent indicated they would buy the Sony, and 46 percent indicated they would defer until they learned more about the various models.[172] Another group was then given the same hypothetical scenario, but informed only about the Sony model, not the AIWA. This time, the second cohort chose to purchase the Sony over deferring the purchase, 66 percent to 34 percent.[173] Between the first and second groups, 20 percent more students decided to buy a CD player immediately because there was one less option.[174]

Second, the addition of a third, relatively inferior option (or "decoy" option) often creates a more favorable impression about a superior, but already existing option.[175] Such decoy effects have also

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169. *See* SHAFIR ET AL., *supra* note 22, at 607–08; Ravi Dhar, *Consumer Preference for a No-Choice Option*, 24 J. CONSUMER RES. 215, 229 (1997) (finding that people are more likely to choose the status quo over two equally attractive options, even if both of these options are individually preferred to the status quo); Jean-Baptiste Pochon et al., *Functional Imaging of Decision Conflict*, 28 J. NEUROSCIENCE 3468, 3471 (2008).

170. *See* Pochon et al., *supra* note 169, at 3468 (noting that there is "considerable evidence" demonstrating that decision-conflict between two equally attractive choices can lead to "suboptimal" decisions and mapping the neurobiological effects in the anterior cingulate cortex).

171. SHAFIR ET AL., *supra* note 22, at 607.

172. *Id.*

173. *Id.*

174. *Id.* (observing that the addition of a "competing alternative" increased the tendency to delay a decision). A closely related concept to decision-conflict is "option devaluation." *See* Guthrie, *Panacea*, *supra* note 14, at 610–14 (describing different consumer studies of "option devaluation"). People rate options more favorably in isolation than when those options are compared to other options. *Id.* at 608–09.

175. *See, e.g.*, Huber et al., *supra* note 71, at 94; *see also* Kelman et al., *supra* note 14, at 290–97 (conducting and describing studies of decoy and compromise effects in jury decisionmaking); Moran & Meyer, *supra* note 25, at 142 (describing ways in which decoy effects can increase the relative attractiveness of dominant brands). These types of effects can occur even when the third option is not clearly inferior to either of the alternatives. Douglas H. Wedell, *Distinguishing Among Models of Contextually Induced Preference Reversals*, 17 J. EXPERIMENTAL PSYCHOL.: LEARNING MEMORY & COGNITION 767, 768 (1991) (describing how new choices may steer decisionmakers to choose other options).

been documented in legal decisionmaking.[176] Subjects are more willing to impose a sentence of community service over jail time, when the list of sentencing options also included counseling services.[177] Subjects also will select different settlement outcomes when categorically inferior choices are included in settlement negotiations.[178]

A study of individual settlement behavior illustrates how the use of coupons or other in-kind settlement options may influence claimant decisionmaking in large settlements.[179] Subjects were asked to choose among several settlement proposals to resolve a nuisance lawsuit against a noisy nightclub.[180] One group was asked to consider two settlement alternatives. The club would either: (1) pay the plaintiff to stay in a nice hotel each weekend and $120 a week or (2) reduce the noise levels.[181] A separate group was then asked to consider three alternatives. [182] The first two options were exactly the same. Under the third alternative, however, the nightclub offered to pay the plaintiff to stay in a nice hotel each weekend, $40 in cash, and $85 of vouchers per week (which could be redeemed at several nightclubs).[183]

The third option was designed to be inferior to the first; vouchers, cash, and a hotel stay arguably are less desirable than an unrestricted amount of cash and hotel for almost the same value. Assuming rational decisionmaking, the second group should have behaved very similarly to the first group. And indeed, no one accepted the voucher option.[184] The results, however, showed the addition of a seemingly irrelevant third alternative significantly affected the decision to take the cash settlement. The popularity of

176. Guthrie, *Panacea*, *supra* note 14, at 617–21 (demonstrating effects in negotiation and settlement); Kelman et al., *supra* note 14, at 290–97 (conducting and describing studies of decoy and compromise effects in jury decisionmaking and settlement negotiations); Korobkin & Guthrie, *supra* note 16, at 124.

177. Kelman et al., *supra* note 14, at 296–97.

178. Guthrie, *Panacea*, *supra* note 14, at 619 (finding that in the two-option condition, 65 percent of the subjects preferred to sell a commonly owned painting and 35 percent preferred to give it to the law partner, but in the three-option condition, only 30 percent of the subjects preferred to sell the painting, whereas 70 percent of the subjects preferred to give it to the partner).

179. Kelman et al., *supra* note 14, at 299–300.

180. *Id.*

181. *Id.* at 299.

182. *Id.*

183. *Id.*

184. *Id.* at 300 (finding that, in the three-option group, none chose the "inferior weekend lodging option").

the hotel and $120 unrestricted cash option *increased* from 47 percent to 75 percent when the third voucher option was also included in the choice set.[185]

Expert legal advice has been shown to minimize the effect of such biases.[186] Accordingly, in individual settlements, some commentators recommend more transparent and open discussions between the attorney and his or her client about settlement.[187] Unfortunately, in the class action settlement context, counsel is rarely sought or available for such decisions. Similarly, many public settlement funds are, by design, meant to avoid the costs associated with retaining counsel.

b. The Impact of Contrast Bias on Large Settlement Funds. Settlement funds ask claimants to choose from an array of options after joining a settlement. In some cases, settlement options are intended to benefit claimants with different interests. As this Section has demonstrated, however, too many options may induce decision-conflict, causing people to unwittingly delay or avoid filing claims

185. *Id.*

186. Although lawyers and judges appear to be subject to the same kinds of biases, *see* Guthrie at al., *supra* note 16, at 19–29 (cataloging studies of judicial decisionmaking), other studies demonstrate that lawyers were comparatively immune to contrast effects in the settlement context, *see* Korobkin & Guthrie, *supra* note 16, at 82. It is unclear whether lawyers respond more rationally because they are repeat players, charged with deciding for someone else, or because they, on average, are more rationally minded. *See* James R. Bettman, Mary Frances Luce & John W. Payne, *Constructive Consumer Choice Processes*, 25 J. CONSUMER RES. 187, 187 (1998) (describing how repeat player effects may cause consumers to act more rationally); Guthrie, *Panacea*, *supra* note 14, at 641 (noting that neuroscientists have "selected lawyers when they wished to test an occupational group that is characteristically analytical in its preferred mode of thought"); Korobkin & Guthrie, *supra* note 16, at 124 (suggesting that lawyers may make more rational decisions because they do not have a personal stake in the negotiated outcome). Recent psychological evidence suggests that decisions about risky choice are affected by the way that people are informed about the decision. Novices make decisions based on information that they obtain through description with little feedback. In such cases, people tend to overvalue rare but risky losses. In contrast, experts who learn by experience, making repeat choices and receiving feedback, tend to undervalue rare but risky losses. *See* Ralph Hertwig et al., *Decisions from Experience and the Effect of Rare Events on Risky Choice*, 15 PSYCH. SCI. 534, 535–36 (2004) (observing that "[p]atients' and doctors' decisions are often based on information that, though equivalent in content, comes from different sources").

187. *See* John M.A. DePippa, *How Prospect Theory Can Improve Legal Counseling*, 24 U. ARK. LITTLE ROCK L. REV. 81 *passim* (2001) (applying prospect theory to legal counseling); Korobkin & Guthrie, *supra* note 16, at 82–83 (arguing that lawyers can promote efficiency in dispute resolution by following a "cognitive error approach"); Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783 *passim* (2003) (describing methods to avoid framing, representation, and other biases in counseling).

against the fund. Moreover, the interrelationship of various settlement options may unwittingly impact a choice between cash and nonpecuniary awards, like coupons and warranties, or the length and complexity of a settlement process.

First, as described above, studies of decision-conflict suggest that when funds offer claimants two competing but attractive settlement alternatives, claimants may be less inclined to select either option. As discussed in Part I, consumer and antitrust class action settlements typically award different substantive settlement options, like cash or in-kind awards, to accommodate different interests in settlement. Under rational theories of choice, such options are thought to promote access, efficiency, and equity.[188] Because of decision-conflict, however, some substantive options may unexpectedly discourage people from selecting other options, or even filing with the fund. As a result, in the case of in-kind awards, like coupons, a court may need to determine whether the introduction of a voucher discourages parties from accepting cash award options, after they have joined the fund.

Decision-conflict has more profound implications for procedural options that may be available in a settlement fund. Funds based on a mass tort generally offer only cash settlements (or insurance programs, like "medical monitoring"). But as discussed in Part I, many mass tort funds do offer multiple procedural options. When a fund offers claimants a choice between an administratively simple process and a more sophisticated hearing process, fund designers have not typically accounted for the possibility that claimants may be discouraged from filing simply because the fund offers two procedural alternatives instead of one. There is no reason, however, to assume that the risks associated with offering claimants a choice between two different procedural options are not subject to the contrast effect.

The Dalkon Shield settlement fund offered claimants four options: (1) a flat payment that required minimal evidence of eligibility but was lower in amount than other options; (2) a worker's compensation–like grid that required additional evidence of eligibility but offered more money based upon where the claimant fell on the grid; (3) an individualized review that required very specific evidence but also promised an even higher award; or (4) deferral until the

188. One commentator has called coupons "gravy" when large settlement funds offer cash and coupons, so long as trial judges do not include the coupons' face value when calculating the counsels' fees. Leslie, *supra* note 101, at 1076.

claimant had assessed the full extent of her injuries.[189] Claimants proceeding through the fund were afforded representation, which likely minimized any contrast bias on claimants.[190] In other settlement funds in which attorney involvement is limited, however, such procedural options may adversely affect choice—by steering people away from the fund as a result of "decision-conflict."

Second, the presence of a third, decoy option may steer claimants to select comparatively more attractive options. This means that fund designers—judges, lawyers, and public administrators—cannot review the value of each substantive award option for claimants in isolation. Rather, fund designers must also account for how each option impacts the selection of other settlement options.

For example, judges weighing the value of a coupon may ask the parties to submit expert testimony that describes the rate at which claimants will redeem the coupon.[191] The Class Action Fairness Act ("CAFA") also requires courts to conduct "fairness hearings" to assess the quality of a settlement and the size of attorneys' fees based on the value of the redeemed coupons.[192] Studies in decisionmaking, however, show that it is not enough to estimate the value of a coupon based solely on how often claimants choose to redeem the coupon. The coupon may have a decoy effect—encouraging claimants to accept other options that, by comparison, seem to offer a better value or greater liquidity, just like the "noisy nightclub" study.

The decision-conflict and decoy options create tension between policies that promote choices in a settlement fund and those that value access, efficiency, and equity. Although eliminating settlement options minimizes the potential for contrast bias,[193] such a move

189. *See* Georgene Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 630–32 (1992) (describing settlement options and selection rates in the Dalkon Shield Settlement Trust).

190. An independent review of claims found that only a very small portion of claimants sought procedural options that did not match their injuries. *See* Georgene M. Vairo, Georgine*, The Dalkon Shield Settlement Trust, and the Rhetoric of Mass Tort Claim Resolution*, 31 LOY. L.A. L. REV. 79, 134 n.275 (1997).

191. *See* HENSLER ET AL., *supra* note 1, at 489 (observing that the monetary value of coupons can be estimated because "many defendants use coupons as marketing devices").

192. 28 U.S.C. § 1712 (2006) (limiting the recovery of attorneys' fees in "coupon settlements" and requiring a court hearing to address the reasonableness and adequacy of any "coupon settlement"). Any attorneys' fees based on coupons "shall be based on the value to class members of the coupons that are redeemed." *Id.* § 1712(a).

193. Indeed, many funds, like securities class action settlements, generally only offer one process for evaluating claims because they do not pose the same evidentiary issues as products liability cases.

would not serve rational claimants with a genuine interest in choosing one process over the other. Should a fund eliminate a second procedural option just because a judge fears that some claimants will be influenced by decision-conflict or contrast bias? Decision-conflict may be the price of client autonomy.

There may be cases, however, in which decision-conflict and contrast bias are not acceptable in light of the purpose of such funds, which aim to resolve claims more efficiently, equitably, and accessibly than traditional litigation. Class action settlements and public settlement funds expensively require notice, settlement administrators' fees, attorneys' fees, and the participation of many government agents and processes.[194] In light of the purposes and costs of administering large funds, there is a point at which fund designers should avoid creating options that dissuade people from making effective choices.

When claimants are offered options in a settlement, some amount of bias in decisionmaking is inevitable. Claimants may be encouraged or discouraged from joining the fund, completing forms, and selecting substantive or administrative choices. At a minimum, courts and policymakers should be aware of the impact that multiple settlement options have on the reasonableness of the settlement and attorneys' fees. A more difficult question is whether there are occasions when funds could, using libertarian paternalistic solutions, exploit contrast effects to steer claimants toward particular settlement options.[195] Part III addresses whether fund designers may account for contrast biases without unduly limiting claimants' choices.

3. Procrastination Related Bias. As discussed below, time-inconsistent biases refer to a person's tendency to prefer different tradeoffs depending on when he or she is asked. Small tastes for immediate gratification may cause a person to continuously postpone making decisions with an eye toward making them tomorrow.

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194. *See* HENSLER ET AL., *supra* note 1, at 468 (calculating the transaction costs in large class action settlements and placing the costs of notice, attorneys' fees, and administrative costs in the "tens of millions of dollars").

195. For example, a decoy option, like a coupon, may counter underclaiming. As discussed above, many claimants default into a settlement fund but never claim an award because of the status quo effect. The "noisy night club study," however, suggests that a settlement fund that offered claimants a decoy—say $25 in cash, a $30 coupon, or the option to give up the right to a lawsuit in exchange for nothing—may actually induce more people to file and select the cash option than to let their rights expire. *See infra* Part III.B.4.

Conversely, very small short-term incentives or penalties may reduce procrastination. As a result, a lengthy period before a filing deadline may actually encourage procrastination. A rolling deadline that limits filing to particular times of the month or year, however, may provide sufficient incentives to encourage earlier action, saving administrative costs and interest for potential claimants to a fund.

a. The Definition of Time-Inconsistent Preferences. To procrastinate is "to voluntarily delay an intended course of action despite expecting to be worse off for the delay."[196] Several variables explain why individuals procrastinate. Two factors—time-inconsistent preferences and the *under-appreciation* of time-inconsistent preferences—substantially affect the decision to procrastinate.

Rational models of choice assume that people have *time-consistent* preferences. That is, a person's relative preference for gratification will be the same no matter when he or she is asked.[197] The relative desire to choose watching a Bruce Springsteen concert over completing a term paper should not change based on the day of the week. Substantial evidence, however, demonstrates that people have *time-inconsistent* or *present-biased* preferences.[198] That is, people systematically overvalue benefits today compared to benefits offered in the distant future.[199]

Time-inconsistent biases are compounded by naivety and nonintegrated decisionmaking.[200] First, many people are naïve about

196. Piers Steel, *The Nature of Procrastination: A Meta-Analytic and Theoretical Review of Quintessential Self-Regulatory Failure*, 133 PSYCHOL. BULL. 65, 66 (2007) (broadly examining the psychological research on procrastination).

197. *See* Ted O'Donoghue & Matthew Rabin, *Choice and Procrastination*, 116 Q.J. ECON. 121, 125 (2003).

198. *See, e.g.*, George F. Lowenstein & Dražen Prelec, *Preferences for Sequences of Outcomes*, *in* CHOICES, VALUES, AND FRAMES, *supra* note 8, at 565, 576 (observing that "[t]he tacit premise has been that such judgments will reveal an individuals 'raw' time preference, from which one can then derive preferences over more complex objects. This view we now know to be fundamentally incorrect.").

199. Shane Frederick, George Lowenstein & Ted O'Donoghue, *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351, 382 (2002); Dilip Soman et al., *The Psychology of Intertemporal Discounting*: *Why Are Distant Events Valued Differently from Proximal Ones*?, 16 MARKETING LETTERS 347, 347 (2005); Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 627–30 (collecting studies of "intertemporal discounting" or "hyberbolic discounting").

200. O'Donoghue & Rabin, *supra* note 197, at 123–24 ("[W]hether the person ever completes that task depends on a comparison of its immediate cost to the benefits forgone by brief delay, and has very little to do with either its long-run benefit or the features of other tasks available.").

their own procrastination; they not only procrastinate, but they overestimate their ability to make better decisions in the future than in the present. One prominent theory on procrastination describes naïve procrastination as a choice between movies and homework.[201] If a person has several days to write a paper, and he knows that the paper will take no more than a day to write, more often than not, he will choose to watch a Johnny Depp movie today instead of writing his paper. This is because he believes that tomorrow he will make a different decision. When tomorrow arrives, however, he again chooses to watch yet another Johnny Depp movie. Naïve procrastination describes the tendency to overestimate self-control in the future, and as a result, to fail to complete tasks in the present.[202] Even if the cost of completing an undesirable task is very small, the naïve procrastinator repeatedly chooses to wait today, because the task will still be completed tomorrow.

Second, procrastination results from nonintegrated decisions—rational decisions about costs and benefits in irrationally short periods of time.[203] If a person had to choose to write his paper or watch a YouTube video for five minutes, he will rationally choose YouTube, the more pleasurable activity. After five minutes, he will rationally make the same decision again. And again. When the decision is viewed under a more "integrated" time horizon—four hours of paper writing versus four hours watching YouTube—however, he would rationally choose to write his paper. Because people are susceptible to nonintegrated decisionmaking, even small tastes for immediate gratification, or small costs associated with a task, may cause a naïve person to continuously postpone making decisions.

In models of procrastination and savings behavior, Professors Rabin and O'Donoghue demonstrate how even negligible costs can force people to procrastinate about even more important decisions

201. O'Donoghue & Rabin, *Now or Later*, *supra* note 23, at 118–20.

202. The concept of naïve procrastination is closely related to the "planning fallacy," when people underestimate the time it takes to perform a task in the future, even when they know that they have not completed similar tasks by the predicted time in the past. *See* Wistrich, *supra* note 199, at 621–26 (collecting studies explaining the planning fallacy).

203. Camerer et al., *supra* note 33, at 1248–49 (describing challenges to integrated decisionmaking); Lowenstein & Prelec, *supra* note 198, at 572–76 (finding that "framing," "spreading," and "time intervals" for a set of choices over time may counter time-inconsistent bias); Daniel Read et al., *Choice Bracketing*, 19 J. RISK & UNCERTAINTY 171, 191 (1999).

than writing term papers, like the willingness to save for retirement.[204] They posit a hypothetical investor who keeps $10,000 in a noninterest-bearing account but retains the opportunity to transfer the principal into a 5 percent interest account at any time.[205] Making an immediate transfer increases retirement savings by $35,000, relative to never making the transfer.[206] Taking into account the time value of money and transfer costs, a fully rational person would make the transfer immediately.

Naïve, nonintegrated decisionmakers, however, perceive the decision differently. Such a person believes that she will complete the task tomorrow. Because the lost retirement savings from one day are minimal, a small taste for immediate gratification may cause her to put off the task of transferring the funds indefinitely. As a result, a person might "never make the transfer even when the immediate effort cost of doing so is as little as $7."[207]

The converse of this is that procrastinators will be highly sensitive to very small short-term incentives, or small penalties. For example, because of the time-inconsistent biases described above, a person will procrastinate unless the cost of a short delay is enough to overcome the desire to put off the decision until later—or, in this case, more than $7. Policies that make the cost of a short delay loom larger thus make procrastination less likely.

Limiting opportunities to complete a transaction achieves just such a result. Although a single fixed deadline encourages filing on or near that date without any ostensible benefit for filing earlier, a rolling deadline that limits filing to particular times of the week, month, or year may encourage earlier action.[208] Deadlines that require filing, for example, on the first day of every month force unwitting procrastinators to balance the added cost of procrastination—a

204. *See* O'Donoghue & Rabin, *supra* note 197, at 121, 125, 148; O'Donoghue & Rabin, *Now or Later*, *supra* note 23, at 111; O'Donoghue & Rabin, *Procrastination*, *supra* note 23, at 150.

205. O'Donoghue & Rabin, *supra* note 197, at 127.

206. *Id.*

207. *Id.* at 128.

208. Dan Ariely & Klaus Westenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 PSYCHOL. SCI. 219, 222 (2002) (finding that evenly spaced deadlines discourage procrastination and improve performance); Wistrich, *supra* note 199, at 638 (reviewing the literature of procrastination and finding that it "is not just that deadlines matter, but also that the structure of deadlines matters").

month's loss of interest—in a more integrated fashion.[209] As the first of the month approaches, the decisionmaker recognizes that the cost of delaying past the first is not a few days, but rather an entire month.[210]

Federal Individual Retirement Accounts ("IRAs") provide a real world example of how rolling deadlines may directly affect savings behavior. People cannot deposit funds into their IRA whenever they want; rather, to receive the benefit of tax deferral, they may only set aside a maximum amount of money by April 15 of each year.[211] Unsurprisingly, the deadline substantially impacts savings behavior. Although fully rational people ought to invest in IRAs as early and regularly as possible to avoid paying taxes on the interest earned during the delay, one study showed that over 45 percent invested in their IRAs in the following year just before the April 15 deadline. On the other hand, the rolling IRA deadline system encourages people to invest at least once a year, over the course of their working lives.[212]

b. Applying Time-Inconsistent Preferences to Large Settlement Funds. Time-inconsistent bias may prove costly to claimants filing with a fund and to the administrative operation of the fund. Although some settlement funds fix relatively short deadlines, requiring filing within three to six months of settlement, other more complicated mass tort funds may allow one to two years to file.[213] In many cases, there is no overt penalty for failing to file at an earlier time. There is a very powerful hidden penalty, however, to claimants—the time value of money and potential lost interest. In mass settlements in which awards are high, the costs associated with delayed filings can also be

209. Ted O'Donoghue & Matthew Rabin, *Incentives for Procrastinators*, 114 Q.J. ECON. 769, 770 (1999) (considering the role of procrastination in the context of economic incentive schemes).

210. Colin Camerer and his coauthors use the following example:

> Suppose a person has $10,000 to invest and plans to invest this money in a fund that will yield a 10% APR (continuously compounded). In this situation, the cost of a one day delay is $2.75 of interest, and therefore, a person could easily prefer making the investment tomorrow rather than today. Now apply the deadlines discussed above (she can only invest on the first of the month) and consider a person's decision at the deadline. Because delay at the deadline means that the investment will not be implemented for (at least) thirty days, the cost of delay is now (at least) $82.53. Therefore, the person will be more motivated not to delay.

Camerer et al., *supra* note 33, at 1248–49.

211. O'Donoghue & Rabin, *supra* note 197, at 151.

212. *Id.* at 152.

213. *See supra* note 92 and accompanying text.

very high for administrators, who must struggle to process large numbers of claims filed simultaneously.[214]

For example, even though average awards from the September 11 Victim Compensation Fund exceeded $2.1 million, 70 percent of victims' families filed claims in the last few months of a two-year filing period.[215] Commentators offered rational procedural, psychological, and economic explanations for late filings.[216] Some suggested that claimants needed to obtain more information before filing with a large settlement fund, yet others suggested that claimants needed additional psychological distance from the September 11 attacks before filing.[217] These explanations, however, insufficiently accounted for the concentration of claims at the filing deadline. It is more likely that the September 11 claim filings reflected present-biased preferences. Special Master Ken Feinberg acknowledged the impact of time-inconsistent filing behavior by participants in the September 11 Fund:

> Senator Leahy said to me: "Ken, shouldn't we extend the program?" This was three months ago. Extend the program? You extend the program and the procrastinators will wait until the new deadline of the extension. That's human nature, that's the way it works. No, don't extend the program. Well, what if some people miss the deadline? Then extend the program after the fact.[218]

Feinberg's plan worked. Over half of the 5,500 victims filed in the last month of the two-year-long operation of the fund.[219] And his plan exploited an important cognitive bias. He imposed a "penalty"—

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214. *See, e.g.*, 1 FEINBERG, *supra* note 2, at 75 (observing that "[i]n anticipation of the filing of massive numbers of claims in and around the deadline for filing, the legal staff for the last six months" increased from eight to twenty-nine). Attorney hours for the September 11 Victim Compensation Fund, from November 2001 to September 2004, exceeded 19,000 hours, totaling almost $7.2 million. *See id.* at 75 n.203. Separate totals for the last four months of the Fund are not publicly available.

215. *See id.* at 112 tbl.14.

216. *See* Alexander, *supra* note 3, at 672 ("Many potential claimants delayed filing claims so as to obtain more information about the size of the awards from the Fund and the possibilities for tort recovery."); Hadfield, *supra* note 108, at 647 (evaluating responses of claimants to the September 11 Fund and finding that the choice to forgo litigation was not the easy choice that most lawyers and judges thought it would be, but rather, was a "deeply troubling trade-off between money and a host of nonmonetary [civic] values"); Schneider, *supra* note 3, at 458–59 (observing that the delay in filings was due to grief and trauma).

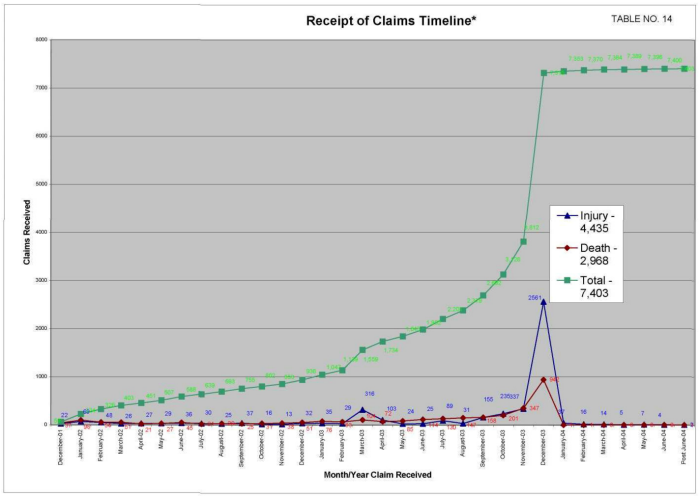
217. Alexander, *supra* note 3, at 672; Schneider, *supra* note 3, at 458–59.

218. Feinberg, *supra* note 87, at 276.

219. Chen, *supra* note 3, at A1; *see also* 1 FEINBERG, *supra* note 2, at 112 tbl.14.

to borrow from Professors O'Donoghue and Rabin. In this case, the penalty was the severe risk that a claimant would obtain no compensation after December 22, 2003, and it induced a rapid spike in filing, as demonstrated in Figure 2.

Figure 2. Claims Filed with the September 11 Victim Compensation Fund[220]



But should Feinberg have done it differently? Assuming that Professors Rabin and O'Donoghue are correct, a rolling deadline that encouraged a claimant to file a year earlier would have yielded even more savings given the time value of money: approximately $105,000 per claimant, assuming a 5 percent annual interest rate. Should fund designers use libertarian paternalistic solutions, like rolling deadlines, to encourage early filings in a settlement fund? Part III addresses these questions.

III. A NEW BEHAVIORAL FRAMEWORK

Modern reforms to large settlements have largely focused on solutions that aim to increase choices as a way to make large funds more accessible, efficient, and fair.[221] Prevailing proposals emphasizing choice, however, do not account for cognitive bias. As set forth in Part I, "super" opt-out rights not only secure claimants' right to a trial but can also provide a signal that claimants approve of

220. This Figure appears in 1 FEINBERG, *supra* note 2, at 112 tbl.14.

221. *See, e.g.*, *supra* note 144 and accompanying text.

the fund when few people affirmatively opt out. Multiple settlement options are supposed to provide claimants with more say in a final settlement, while efficiently accommodating claimants' divergent interests in a final award. And typically, claimants are generously awarded time to weigh the economic and personal benefits of a settlement.

As set forth in Part II, however, studies in decisionmaking strongly suggest that the structure of such choices will affect claimants in ways that undermine their decisions. Because of the status quo bias, many claimants join funds that they do not necessarily like and never claim their awards. Because of contrast biases, many claimants decide based on irrelevant settlement procedures and substantive awards. And because of time-inconsistent biases, claimants may lose money while they inadvertently put off the decision to file a claim.

Cognitive bias thus threatens the basic goal of large funds to provide more access, efficiency, and equity to claimants than what the claimants would obtain in traditional litigation. Fund designers accordingly need to adopt rules that account for cognitive errors in decisionmaking but do not limit choices or undermine the benefits of a large settlement.

As set forth in Section A below, architects of settlement funds may use paternalistic solutions to identify cognitive bias, and in some cases, channel it to benefit as many claimants as possible. Fund designers should not, however, adopt procedures that unduly eliminate settlement options for more rational claimants or impose excessive administrative costs on all members of the fund. Section B then examines the costs and benefits of four specific solutions that would minimize or channel the effects of cognitive bias in a settlement fund.

A. Why Fund Irrationality?

Despite their limitations, settlement funds still offer valuable alternatives to traditional litigation. That is, even if cognitive bias affects settlement decisions, such bias alone does not completely undermine the value of a large fund. To the extent that large funds provide *some* option for choice that *some* people will act upon, settlement funds are better than traditional litigation, which offers less access to counsel, imposes higher costs, and can produce less

equitable outcomes.[222] Rather, fund designers should examine how they can improve settlement funds by taking steps to accommodate claimants whose decisions are affected by cognitive biases.

Cognitive biases in large settlement funds merit some kind of legal intervention. Judges and public administrators already owe special obligations to ensure that a settlement process is designed fairly.[223] The Federal Rules of Civil Procedure and the Due Process Clause[224] require that large settlement funds be "fair, reasonable, and adequate"[225] to prospective claimants. Judges and lawmakers, however, generally discharge that duty by taking steps to protect only rationally acting claimants—ensuring that participants' "decision[s] to participate or to withdraw" are made on the basis of an "independent analysis of [their] own self interest."[226] Federal district courts "closely monitor" the notice process so that "class members are informed of the opportunity to exclude themselves" from the class settlement.[227] Judges may also ensure that claimants are not swayed by entrepreneurial lawyers who seek to sabotage the settlement and may police what can be said to potential claimants to ensure that they make unbiased decisions.[228] Public administrators have similar duties and obligations.[229]

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222. *See supra* Part I.A; *see also* WEINSTEIN, *supra* note 45, at 1 ("[L]awyers have been devoted to dealing with individuals and their problems on a retail basis. Modern disasters affecting large numbers of people make that approach impossible except at unacceptable transaction costs and inefficiencies that would prevent vindication of most people's rights.").

223. Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981) ("[A] district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.").

224. Although due process does not require that a "legislatively enacted compensation scheme . . . duplicate the recovery at common law or provide a reasonable substitute remedy" to a lawsuit, *see* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 (1978) (upholding the compensation system for nuclear accidents under the Price-Anderson Act), it may not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2006); *see also* Colaio v. Feinberg, 262 F. Supp. 2d 273, 300–01 (S.D.N.Y. 2003) (finding that the notice regarding the distribution of proceeds from the September 11 Fund did not violate due process).

225. FED. R. CIV. P. 23(e)(2).

226. *See* Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky.), *appeal dismissed*, 659 F.2d 1081 (6th Cir. 1981).

227. Georgine v. Amchem Prods., Inc., 160 F.R.D. 478, 490 (E.D. Pa. 1995).

228. *See In re* Visa Check/Mastermoney Antitrust Litig., No. CV-96-5238, 2006 WL 1025588, at *4 (E.D.N.Y. Mar. 31, 2006) ("[T]his is not a run-of-the-mill business environment, subject solely to market forces and the principles of contract and tort law that control behavior in that environment. The fact that the merchant class is huge does not alter the nature of the Court's relationship with its members. . . . I have an affirmative obligation to protect those interests."); *Georgine*, 160 F.R.D. at 498 ("The issuance of a remedial order under Fed.R.Civ.P. 23(d) does

Although courts rightly examine notices to protect rationally behaving claimants, such review does not guarantee that settlements are "fair, reasonable and adequate" to the claimants whose decisions are influenced by cognitive bias.[230] As this Article has demonstrated, even the decision to opt out of or into a fund and to elect other settlement alternatives is not solely determined by the claimant but rather by the design of the fund. As yet, fund designers have no method to account for errors that are caused by the structure of the fund.

Fund designers could eliminate settlement choices so that people do not err when filing with a fund. Multiple settlement processes and awards, however, serve important democratic and economic purposes. As discussed in Part I, individuals play a more significant role in their own redress when they choose among litigation or administrative procedures; parties flexibly expand the pie by selecting remedies otherwise unavailable in traditional litigation; and, in rare cases, claimants register their objections in fairness hearings or by opting out of the fund in large numbers.[231] Those responsible for the design of large funds—lawyers, judges, and lawmakers—need a framework to determine when they should intervene to counter or use the effects of cognitive bias, without undermining participation in a large fund, or efficient compensation and deterrence.

Professors Cass Sunstein and Richard Thaler suggest that, in light of cognitive bias, policymakers should design options for citizens that both preserve liberty and maximize welfare through "libertarian paternalism."[232] They argue that policymakers can alter the sequence of options and default rules to promote policies that encourage

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not require a finding of actual harm. A remedy is appropriate if the communications at issue create a 'likelihood' of abuse, confusion, or an adverse effect on the administration of justice." (citation omitted)).

229. *See, e.g.*, 1 FEINBERG, *supra* note 2, at 14 (describing the dissemination of information to all victims, families of victims, and other interested parties as "[o]ne of the Special Master's principal objectives"); *see also* Exec. Order No. 13,179, 3 C.F.R. 321 (2001), *reprinted in* 42 U.S.C. § 7384 (2006) (requiring the Secretary of Labor to develop "informational materials . . . to help potential claimants understand the Program and the application process").

230. *See, e.g.*, WEINSTEIN, *supra* note 45, at 9 ("The judge should, it is submitted, expose himself or herself on a person-to-person basis to the emotional and other needs of the litigants. This proposition requires a shift from the traditional Anglo-American jurisprudential view that the common law judge is an oracle on high, muffled in a black robe of anonymity, uttering the law and deciding the facts without involvement.").

231. *See supra* Part I.B–C.

232. THALER & SUNSTEIN, *supra* note 33, at 4; *see id.* at 3–4 (defining the concept of the "choice architect").

people to make better decisions for themselves and for society as a whole, without eliminating people's choices. For example, as discussed in Part II.B, an employer can encourage savings and maintain choice by automatically enrolling employees in an optional 401(k) plan.[233]

In this way, opt-out settlements already are a form of libertarian paternalism. By automatically enrolling plaintiffs in a settlement unless they object, opt-out settlement funds reverse the traditional assumption that plaintiffs cannot silently waive rights to a civil lawsuit to provide them with more benefits than what they would obtain in traditional litigation.[234] Large settlement funds, however, have limited resources, and accordingly, are somewhat different from the 401(k) plans described by Professors Sunstein and Thaler.[235] Measures that encourage more filings to improve the well-being of some claimants necessarily will impose a cost on other participants of the fund, who will receive less available compensation per person as a result of more filings.

Moreover, adjusting funds to account for cognitive bias is extremely difficult.[236] Fund designers need to be wary of creating systems that could themselves replace one set of biases with other biases that create even less desirable outcomes.[237] Although behavioral and cognitive psychologists have found that cognitive bias robustly affects very similar kinds of legal decisions, there has not been an empirical study devoted to these effects in a large settlement fund. Just as the effects of cognitive bias may vary in different

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233. *See id.*; *see also supra* note 136 and accompanying text.

234. *Compare* FED. R. CIV. P. 23(b)(3) (requirements for class certification), *with* Edelman v. Jordan, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . . ."), *and* Fuentes v. Shevin, 407 U.S. 67, 95 (1972) (noting that a waiver of constitutional rights "in any context must, at the very least, be clear" (emphasis omitted)).

235. *See supra* Part II.B.1.

236. On Amir & Orly Lobel, *Stumble, Predict and Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2116 (2008) (reviewing THALER, *supra* note 33, and ARIELY, *supra* note 11) (cautioning against overestimating the capability of "choice architecture" to address some forms of cognitive bias); Jolls & Sunstein, *supra* note 33, at 225–34 (describing potential pitfalls and objections to procedures that account for cognitive bias); Rachlinski, *supra* note 9, at 1168 ("The principle lesson of cognitive psychology is . . . that people develop complex, contextual strategies for making choices.").

237. *See* Jolls & Sunstein, *supra* note 33, at 227 (describing offsetting effects of cognitive biases).

consumer markets,[238] one may expect the power of cognitive bias to vary based on the nature of the claim.

A modified form of paternalism, called "asymmetric paternalism," takes into account such concerns.[239] Asymmetric paternalism favors policies that benefit those prone to make cognitive errors, while imposing little to no cost on those who otherwise choose rationally. Asymmetric paternalism recognizes that studies in behavioral science are still developing, and accordingly, that some paternalistic policies may harm those who are not prone to cognitive bias.[240] Given the lack of empirical study of cognitive bias in large settlement funds, a cautious approach that seeks to maximize the welfare of rational and irrational claimants to a fund, while minimizing costs, seems warranted.

As a result, architects of settlement funds should adopt procedures that also balance the costs to other claimants in a settlement fund. Fund procedures should identify and, in some cases, make use of cognitive bias to benefit claimants' welfare. Fund designers, however, should not adopt procedures that unduly eliminate settlement options for fully rational claimants, or that impose excessive administrative costs on all members of the fund. Rather, the benefits of any paternalistic solution—preventing avoidable harm to irrational claimants—must outweigh the potential costs, including the value of client autonomy, the chance of error, and the burden on the courts and public administrators. For example, it may be possible to combat status quo bias by automatically processing claims in large settlements involving shareholder fraud because fund designers may have a great deal of information about claimants when the awards are modest, and when claimants generally do not have to choose among multiple settlement options.[241] Such solutions, however, are more problematic in large mass tort settlements in which awards are large, information about individual claimants is limited, and a greater potential for fraud exists.[242] In such

238. *See* Bar-Gill, *supra* note 25, at 750–51 (observing that consumer mistakes may vary between different types of markets).

239. *See* Camerer et al., *supra* note 33, at 1211–14 (proposing the concept of "asymmetric paternalism" as an alternative to regulatory systems aimed at redistribution or at imposing harm on individuals to realize "net societal benefits").

240. *See id.* at 1218 (recognizing the challenge of determining when applying policies that adjust for irrational choices would undermine rational choices).

241. *See infra* Part III.B.2.

242. *See infra* Part III.B.2.

cases, the costs of automatically processing claims would not be worth the administrative cost, the burden on the courts, and the potential for error.

B. Examples of Funding Irrationality

Legal scholars who study the effects of cognitive bias in other forms of legal decisionmaking have suggested three types of approaches to cognitive error. Such approaches may either (1) *insulate* legal outcomes from cognitive bias by barring certain contractual arrangements, (2) *debias* decisionmakers by requiring people to take steps to reduce bias in decisionmaking, or (3) *rebias* decisions, channeling people's extant biases to improve settlement outcomes. Each solution varies in effectiveness and cost.

Insulating solutions, although sometimes necessary, arguably pose the highest costs on other members of the fund because they impose a one-size-fits-all rule on potential claimants.[243] Such rules may bar certain settlement options entirely, like coupons, because they induce decision-conflict.[244] Such solutions may be very effective for some people, but at a minimum, require more study because they limit choices for rational acting claimants.

Debiasing solutions, unlike insulating solutions, do not limit choices. They may not correct cognitive error as effectively in large settlement funds, however, as they do in other contexts. A well-known example of debiasing occurs when litigants are asked to evaluate their settlement options from the other side's perspective.[245] Although litigants tend to be subject to self-serving biases—that is, they optimistically view the likely outcomes of a trial in light of their

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243. For example, one might argue that the business judgment rule, which limits juries' and judges' review of corporate board decisions, is an insulating legal solution. *See* Jolls & Sunstein, *supra* note 33, at 200 (offering the business judgment rule as an example of how the law has incorporated the theory of bounded rationality). This is because the rule insulates boards from irrational post-hoc determinations by judges and juries that may be influenced by hindsight bias—the tendency to review past decisions in light of recent events. Such a solution, however, fails to account for rationally minded judges and juries who may accurately evaluate poor board decisions.

244. *See supra* Part II.B.2.

245. *See* Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 917–21 (1997) (presenting the results of an experimental simulation of a lawsuit in which the "litigants" were required to evaluate the weaknesses of their own cases); Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1256 n.40 (2005) ("Asking . . . subjects to consider alternative or opposing arguments . . . has been found to ameliorate the adverse effects of several biases . . . .").

own interests—scholars have found that such mental exercises encourage the parties to develop more accurate views of likely trial outcomes.[246] Another form of debiasing occurs when people delegate certain decisions to specialists who may be less prone to make cognitive errors because the choice is familiar.[247]

Fund designers theoretically could use language in settlement notices to debias settlement decisions. For example, a notice could highlight the costs of leaving awards unclaimed after joining a fund. Such a notice would encourage parties to think more carefully about combinations of options and to highlight the impact of a delayed settlement decision. Such debiasing efforts, however, may be less effective in settlement funds, as there is little designers can do to ensure that claimants will follow the instructions in their settlement notices. Similarly, although many funds staff toll-free hotlines to answer questions, there are few assurances that claimants will call them.

Finally, funds could attempt to rebias, by redirecting existing cognitive biases to improve outcomes, without limiting choices.[248] Rebiasing solutions include changing default rules, employing rolling deadlines, and even including additional decoy options to affect claimants' choices.[249] Such options will cost claimants. Rebiasing requires money to monitor the effects of a potential bias and to administer special procedures.[250] And, as a result, rebiasing may reduce the total available funds to rational acting claimants.[251]

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246. *See, e.g.*, Jolls & Sunstein, *supra* note 33, at 201 (describing a "long-standing literature" dealing with the problem of bounded rationality in "the adjudicative process"); *cf.* Rachlinski, *supra* note 9, at 1207–11 (describing methods to reduce bias in decisionmaking through "alternative representational structure[s]").

247. *See* Rachlinski, *supra* note 9, at 1214–16 (describing the ways professionals offer more than "just knowledge" by providing a "better decisionmaking perspective"); *see also* Jennifer Arlen, Mathew Spitzer & Eric Talley, *Endowment Effects Within Corporate Agency Relationships*, 31 J. LEGAL STUD. 1, 4–6 (2002) (evaluating experimental results indicating that corporations effectively remove biases by delegating decisions to managers).

248. *Cf.* Amir & Lobel, *supra* note 236, at 2114–17 (describing debiasing approaches).

249. *See id.* at 2116 (describing a program in Chicago in which city planners used decoy effects to reduce speeding accidents by requiring unevenly spaced street paint to create the illusion for drivers that they were moving faster on the highway).

250. *See id.* at 2122–23 ("[T]here must be a continuous study as to whether the chosen design attains its intended effect . . . .").

251. *See, e.g.*, *id.* at 2123–24 (describing the distributional effects of new default rules for customers and homebuyers on credit card companies and mortgage brokers); Epstein, *supra* note 25, at 835 (arguing that reforms to credit card markets based on cognitive biases benefit those at "the bottom end of the distribution, but only at a high price for everyone else").

Moreover, such solutions threaten individual autonomy because they ultimately seek to steer parties to choose particular outcomes. Rebiasing, however, may be more effective than debiasing approaches in settlement funds because they target the intuitive decisionmaking of potential claimants.[252] That is, they may still be effective, even when people miss the fine print in the settlement notice.

This Section examines procedures that insulate, reduce, or channel cognitive biases under an asymmetrically paternalistic approach, one that respects the autonomy of rational decisionmakers but nudges those susceptible to cognitive biases toward better outcomes. From the least to most intrusive and costly, these procedures include: (1) the use of rolling deadlines to increase earlier filings; (2) the use of default options to reduce underclaiming; (3) fairness hearings that account for cognitive bias; and (4) the use of decoy options to reduce underclaiming.

1. *Rolling Deadlines.* Most settlement funds face spikes in filings as the deadline for filing claims approaches, as discussed in Part II. This delay places additional costs on the fund as a whole because it requires additional resources to timely process such claims.[253] Late filings also may result in forgone interest for claimants, particularly in high stakes settlements.[254]

As this Article has discussed in Part I, democratic and economic considerations explain some late filings. Claimants may choose to gather more information before filing with a large settlement fund. Or, particularly in large funds involving personal injuries, parties may need additional psychological distance from the event that gave rise to the claim. These explanations, however, insufficiently account for the concentration of claims at the filing deadline. It is more likely that claim filings represent present-biased preferences, as discussed in Part II.

A debiasing solution could correct for such delays. Claim settlement notices could include information that describes the interest to be lost or gained by settling by a particular date. Staffers at fund telephone hotlines could also be provided with such information.

252. *See supra* Part II.A.

253. *See supra* note 214 and accompanying text.

254. *See supra* Part II.B.3.

The Truth in Lending Act ("TILA")[255] generally requires such disclosures to mortgage borrowers so that they may fully evaluate the true cost of a loan.[256] Although such approaches could ensure that claimants understand the costs of delays, they do not directly penalize claimants or come at a large cost to the fund. It is unclear, however, that additional disclosures in a settlement mailing will effectively induce a claimant to rethink his or her decision.[257]

A settlement fund could, accordingly, adopt a rebiasing solution, like rolling deadlines, to encourage earlier filings. Parties could be required to file in the first week of each month until the final deadline. Such a system has never been applied in large public or private settlement funds. Cognitive science, however, suggests that such short-term incentives will encourage claimants to file more often over the duration of the fund, saving both opportunity costs to claimants and administrative costs to the fund.[258]

Asymmetric paternalism, of course, requires that such a solution take into account costs. Undoubtedly, rolling deadlines impose a cost on individual actors, who would suffer the inconvenience of filing at the beginning of the month, as well as on a large fund, which would have to expend additional resources making such a filing system easy and transparent. Those exercising fully rational behavior, however, would suffer marginal losses from rolling deadlines. A party unable to file at the beginning of the first month would always retain the ability to file the following month.[259] A party that wants to wait for other strategic, information-driven, or psychological reasons would still retain that right.[260]

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255. 15 U.S.C. §§ 1601–67f (2006).

256. *See id.* §§ 1602, 1631–32, 1637a (disclosure guidelines and obligations). TILA also requires that, for credit card applications sent through the mail, any annual, periodic, or membership fees are disclosed in a tabular format, *see id.* § 1632(c), known as a "Schumer Box," *see, e.g.*, Michael Schroeder, *Bigger Print for Rates in Credit-Card Data May Be on the Way*, WALL ST. J., May 18, 2000, at A3. The Schumer Box attempts to describe the key terms of the loan transaction, including fees, in a more accessible format. *See* 15 U.S.C. § 1632(c).

257. *See* Lawrence J. Sanna & Norbert Schwarz, *Integrating Temporal Biases: The Interplay of Focal Thoughts and Accessibility Experiences*, 15 PSYCHOL. SCI. 474, 480 (2004) (suggesting that consideration of alternative outcomes may fail as a debiasing strategy when the alternatives considered are too numerous).

258. *See supra* Part II.B.3.b.

259. Such a policy comes at another cost. When large funds pay claimants sooner rather than later, they necessarily require more money upfront from defendants, or, with respect to public compensation funds, from the government.

260. *See, e.g.*, DIXON & STERN, *supra* note 97, at 41 (describing the strategic, emotional, and legal factors that slowed enrollment in the fund).

Because of such costs, an asymmetrically paternalistic policy would tailor deadlines for different kinds of funds. Rolling deadlines and disclosure policies may be more justified in funds that pay high-value claims, like mass torts and some antitrust settlements, but not necessarily those that pay low-value claims, like consumer class actions. For high-value claims, the additional savings to the individual and the fund justify taking measures to prevent parties who might otherwise suboptimally delay filing. Such policies, however, may not be justified if the class action settlement involves small claims because claimants will not lose much in forgone interest and because such funds have shorter filing deadlines. In such cases, disclosure policies likely will not be very effective and rolling deadlines would not be worth the additional inconvenience they impose on fully rational claimants.

2. *Underclaiming*. As discussed in Part II, status quo bias explains why many claimants join large settlements, but ultimately fail to claim their awards.[261] Many public and private settlements require additional filings to accept or reject an award.[262] Commentators studying claim rates in class action settlements have found that the fraction of funds actually disbursed was "modest to negligible" in so-called "claims-made" settlements, in which class members are asked to come forward and claim compensation.[263] This includes cases in which claimants were otherwise entitled to substantial awards.[264] As a result, although claimants overwhelmingly join public and private settlements, many give up legal rights for nothing.

Class action settlements could reduce underclaiming by eliminating choices—a classic insulating strategy. When possible, settlement funds could simply eliminate the additional settlement choices, and automatically distribute a single award in exchange for joining the settlement.[265] Such a policy would mitigate decision-conflict and status quo bias which give rise to underclaiming. That

261. *See supra* Part II.B.1.b.

262. For examples illustrating this proposition, see *supra* Part II.B.1.b.

263. HENSLER ET AL., *supra* note 1, at 458–60 (surveying class action settlements).

264. *See* Eisenberg & Miller, *supra* note 1, at 1548–49, 1566 (comparing opt-out rates for small, "negative-value" consumer claims with large mass tort claims).

265. Some commentators, like Deborah Hensler, have elsewhere described the advantages of automatically processing class action settlement claims. *See, e.g.*, HENSLER ET AL., *supra* note 1, at 458–59 (emphasizing the disadvantages of nonautomatic disbursements).

system, however, may also unduly limit choices, an outcome that is inconsistent with asymmetric paternalism.

Alternatively, settlement funds could debias claimants. Claim forms could describe any failure to return claim forms in terms of losses, rather than gains. Studies in decisionmaking have long shown that claimants respond more frequently to risks framed as losses than to risks framed as gains.[266] Recent evidence suggests that reframing filing options may encourage people to overcome the status quo bias and file more claims.[267]

Finally, settlement funds could rebias claimants by automatically processing claims yet preserving choice. Under such a system, the fund could automatically distribute presumed awards to claimants who join the fund but grant claimants an opportunity to reject or exchange the presumed award for another settlement option. Any automatic payment process would require fund designers to carefully assess the default choice. Just like the designers of employer 401(k) plans, fund designers would have to assess the default option—a cash award or a coupon, a more individualized process or an administrative one—understanding that claimants will be influenced by the status quo bias. Because of the status quo effect, claimants will be much less likely to request an alternative after receiving a check or coupon. Such a system, however, would strongly reduce unclaimed awards.

The latter policy would more likely comport with the goals of asymmetric paternalism, because a fully rational claimant would be able to elect another option. Such a policy, however, would come at a cost. Funds would bear the administrative cost of precisely identifying eligible claimants in advance of payment.[268] Moreover, depending on the structure of the fund, defendants may offer lower awards per claimant knowing that more claimants will participate in the fund. This final concern is less important in light of the overriding goal of class action settlements, which is to provide an alternative form of legal access to all potential participants.[269]

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266. *See* sources cited *supra* note 133.

267. *See* Saez, *supra* note 156, at 204–05 (finding, in a study involving sixty branch offices of H&R block, that tax filers were more likely to contribute to 401(k) plans when an employer subsidy was characterized as a "matching contribution" than as an equivalent tax "rebate").

268. *See* Polinsky & Rubinfeld, *supra* note 78, at 660–61 (comparing low-care and high-care firms in dealing with cash-coupon remedies).

269. For a description of the importance of equity in large settlements, see *supra* Part I.A.

Like rolling deadlines, an asymmetrically paternalistic approach to automatic processing would vary based upon the type of the fund. Automatic processing will be more justified in welfare benefit settlements[270] or shareholder class action funds,[271] in which the fund designers typically have a great deal of information about claimants, the awards are modest, and claimants generally do not choose among multiple settlement options. Such policies are more problematic in large mass tort settlements when awards are large, settlement trusts or public settlement funds have less information about potential claimants, and claimants may be offered various procedural and substantive options in the settlement. In large-value cases, automatically processing claims would not be worth the administrative cost, the burden on the courts, and the potential for error or fraud.

3. *Hearings that Account for Cognitive Bias.* As set out in Part I, commentators tout opt-out procedures in large settlements for two reasons. First, courts and lawmakers have relied upon claimant participation rates as a way to monitor the success of a settlement fund. When more people join a fund, courts have held that it is more likely that the fund successfully represents claimant interests.[272] Moreover, opt-out rights give claimants a voice in the settlement. Commentators argue that claimants should have additional opportunities to opt out of the fund at later stages in the settlement, particularly when new information about the settlement surfaces.[273]

As this Article has explained, however, such examinations may systematically underestimate the effects of cognitive bias in individual settlement decisions. Absent attorney involvement, people are much more likely to stick with funds that require no action, even when the costs of switching out of the fund are very low or the potential benefits are very high. The default rule—whether claimants must affirmatively opt into or opt out of a fund—will, more often than not,

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270. *See, e.g.*, Leslie Kaufman, *A Bounty of Food Stamps, Harvested from a Lawsuit*, N.Y. TIMES, Nov. 27, 2008, at A36 (describing a settlement in which 9,500 class members illegally denied food stamps were automatically credited $12 million through the use of electronic benefit cards).

271. Automatic processing is more feasible in shareholder class actions in which claimants are generally not required to choose among multiple settlement awards. Rather, pro-rata awards are offered to claimants based upon trading data. *See* SEC v. Bear Stearns, 626 F. Supp. 2d 402, 406–07 (S.D.N.Y. 2009) (describing the practice in shareholder class action settlements).

272. *See supra* note 143 and accompanying text.

273. *See supra* Part I.D.

predict whether claimants decide to join a fund. Accordingly, under an asymmetrically paternalistic approach, courts would not consider participation rates when evaluating the fairness of an opt-out or opt-in settlement fund.[274]

Moreover, under an asymmetrically paternalistic approach, judges should refrain from awarding attorneys' fees in large class settlements offering both cash and coupons.[275] Since 2005, the Class Action Fairness Act ("CAFA") has required courts to conduct "fairness hearings" in coupon-only settlements and to postpone decisions about the size of attorneys' fees until after the coupons have been redeemed.[276] CAFA's purpose is to ensure that the attorneys' award is closely connected to the actual value of the settlement to the class.[277] No similar requirement exists, however, for settlements involving both coupons and other options under CAFA.[278] Rather, courts may award fees based on an estimate of the cash value of the settlement that does not involve coupons. Because of contrast biases, courts should wait for claimants to redeem coupon-cash settlement awards, too. This is because the coupon may have an unexpected effect on the other option. The coupon and additional option may create decision-conflict, lowering expected claim filings. Or the coupon may encourage claimants to accept another settlement option that, by comparison, seems to offer a better value or greater liquidity.

Finally, in rare cases, courts may need to police against the improper use of decoy options. Assuming that it is possible for counsel to intentionally use a decoy coupon to deter claim filings, it may be appropriate for a court to adopt insulating solutions, like reviewing settlements for the use of decoys or taking steps to reduce an attorney fee award. Because decoy options will not always be obvious, courts may need to evaluate the rate at which multiple option settlements will be chosen by claimants. Expert testimony in a fairness hearing is not, however, novel. Courts have long relied on additional expert testimony to evaluate the fairness of a class action

274. Indeed, the recently released ALI *Principles of the Law of Aggregate Litigation* already recommends that settlements be evaluated on other considerations. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.0 (Tentative Draft 2008).

275. *See* HENSLER ET AL., *supra* note 1, at 489 (observing that the monetary value of coupons can be estimated because "many defendants use coupons as marketing devices").

276. *See supra* note 192.

277. 28 U.S.C. § 1711(a)(3)(A) (2006).

278. *Id.* § 1712(c).

settlement.[279] In many such cases, courts will attempt to estimate the total value of the settlement to the class and the rates at which parties may participate in the settlement.[280]

Such additional evaluations are still paternalistic—they assume that the claimants' decision to join the fund was not a meaningful decision and try to insulate fairness decisions from such biases. And they come at a significant cost to the government and bear a significant risk of error.[281] Additional controls to police fairness, however, like requiring experts to account for cognitive bias when evaluating coupon redemption rates, do not unduly restrict rational claimants' interests in liberty or efficiency.

4. *Decoy Options.* Even under an asymmetrically paternalistic framework, it is difficult to imagine cases where fund designers could properly make use of decoy options to improve claimant decisionmaking or reduce administrative costs. It is true that claimants may be powerfully influenced by options that they never intend to choose.[282] Such an approach, however, raises difficult ethical and practical concerns.

For example, a fund designer could explore the benefits of decoy settlement options to lower the risk of underclaiming. The fund designer could add an additional option that would encourage claimants to overcome decision-conflict and file with the fund. Such a system presents problems of paternalism, much like the use of automatic processing discussed above. Any decoy necessarily encourages claimants to view one option more valuably than another. Accordingly, the addition of a less valuable coupon to a settlement involving both coupons and cash may encourage claimants to choose

279. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 27, § 21.644 (observing that judges may retain special masters, experts, and technical advisors to "examine issues regarding the value of non-monetary benefits to the class"); FED. R. EVID. 706 (allowing court appointment of experts).

280. *See, e.g.*, O'Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 287 (E.D. Pa. 2003) (involving a class action against vehicle manufacturers); *see also* Leslie, *supra* note 101, at 1082 (gathering and criticizing methodological approaches used to value class action coupon settlements). Such cases have even employed behavioral economists. *See, e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 807–14 (3d Cir. 1995) (products liability); *In re* Motorsports Merch. Antitrust Litig., 112 F. Supp. 2d 1329, 1334–38 (N.D. Ga. 2000) (price-fixing).

281. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 27, § 21.644 (observing that reviewing the fairness of a settlement is a "time consuming and demanding task" but concluding that "it is essential and must be done by the judge").

282. *See supra* Part II.B.2.b.

coupons. A decoy option could encourage claimants to choose more administratively inexpensive procedures or more expensive, individualized procedures. In either case, just like the design of a default option, fund designers would have to exercise careful oversight to determine which default option is preferable.

One could even argue that using decoys this way is arguably less intrusive and less costly than automatically processing payments. Automatic payments require parties to expend effort to return the default award and the fund to expend additional resources identifying claimants (and their damages). In contrast, a fully rational person would not expend any additional effort ignoring the decoy. Moreover, funds could benefit by reducing total administrative costs if the decoy effect actually channeled parties into less expensive administrative procedures.

Even assuming that such an approach improves well-being, however, employing decoy options to manipulate choice is far more insidious than the other proposals discussed in this Section. Moreover, the costs of monitoring such a program may outweigh the potential benefits. Because the decoy effect is less understood than status quo bias, there is a greater risk that settling parties may manipulate claimants to accept solutions that claimants would not otherwise want. This is a particular concern for class action settlements in which, as discussed in Part II, the only check on such manipulation is the district court judge.

For this reason, some commentators recommend adopting a "publicity" principle when evaluating the appropriateness of any paternalistic solution.[283] The publicity principle bars the use of government manipulation that it would not be able to otherwise defend publicly.[284] If a court or public administrator is actually willing to disclose, for example, that some options are offered solely to improve efficiency, then such an option arguably could be employed. If, however, the principle is to deceive claimants into selecting awards to save defendants money or to discourage claimants from filing at all, such a proposal could not be defended.

Decoy options may steer claimants to select undesirable settlement options. As a result, courts and policymakers should recognize the impact that one settlement option may have on the

283. *See* SUNSTEIN & THALER, *supra* note 33, at 246–49 (advocating that transparency in the form of publicity is key to evaluating paternalistic solutions).

284. *Id.* at 247 (citing JOHN RAWLS, A THEORY OF JUSTICE (1971)).

selection of other options. It is unlikely, however, that the potential benefits of affirmatively exploiting such a poorly understood bias to manipulate outcomes will outweigh the costs.

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Funding irrationality promises real benefits. Such procedures may encourage claimants to file earlier, more often, and in ways that are more equitable than if a settlement fund were not adjusted to account for cognitive bias. All such solutions, however, vary in effectiveness and pose different costs to claimant autonomy, to the administration of the fund, and in some cases, to other rational claimants. Fund designers must balance the effectiveness of such procedures against the possibility that they will unduly eliminate settlement options or impose excessive administrative costs.

C. Objections

There are several potential objections to the use of procedures designed to correct for cognitive error.[285] The proposed solutions discussed in this Part already attempt to account for potential costs. Three additional objections—the "bad fund designer problem," the "autonomy problem," and the "wash-out" problem—are addressed in turn.

1. *Bad Fund Designers*. One objection is that fund designers may have incentives to adopt procedures that benefit lawyers, judges, and administrators more than claimants. As demonstrated in Part I, many commentators have criticized large settlement funds for just such principal-agent problems.[286] Lawyers may be more interested in maximizing their own fees than representing their clients. Judges may be more interested in ensuring that unrecovered funds go to their favorite charity. Administrators may be more concerned with clearing case loads than providing claimants with adequate process. Even proponents of "libertarian paternalism" do not recommend

285. For general criticisms of the "paternalistic" use of biases to sway human decisionmaking, see Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620 (2006); Mario J. Rizzo & Douglas Glen Whitman, *Paternalist Slopes*, 2 N.Y.U. J.L. & LIBERTY 411 (2007); Glen Whitman, *Against the New Paternalism: Internalities and the Economics of Self-Control*, CATO INST. POL'Y ANALYSIS, Feb. 22, 2006, at 1.

286. *See supra* Part I.C.1.

paternalistic solutions when a situation "contains special risks of self-dealing."[287]

Moreover, there is some evidence that fund designers also may be subject to cognitive bias themselves.[288] Scholars argue that public officials lack incentives to correct cognitive error because they are not directly affected by bad decisions.[289] Others observe that judges and administrators rarely receive feedback on their decisions.[290]

There are two answers to this objection. First, cognitive bias is unavoidable in settlement funds. Conflicted fund designers already have the power to misuse bias, and, as demonstrated in Parts II and III, cognitive bias will infect cognitive decisionmaking even if fund designers ignore its effects. Moreover, because claimants rarely make settlement decisions, there will not be many opportunities for claimants to learn how to make better decisions in a settlement fund. At a minimum, policymakers and judges can seek to evaluate the effects of cognitive bias, transparently account for bias when it appears in the design of settlement funds, and attempt to adjust rules in a way that imposes low costs on other claimants to the fund.

Second, the potential for bad fund designers is one reason why fund designers should maintain choices, when possible. Although this Article argues that claimants will be less willing to take advantage of their options than others suggest, it does not dispute that choice can serve as an important safety-valve and check against self-dealing fund designers.

2. *The Autonomy Problem.* Another potential objection is that such solutions rob people of "litigant autonomy"—the right to be "wrong" or to value settlements in unpredictable ways.[291] This Article

287. SUNSTEIN & THALER, *supra* note 33, at 251.

288. *See, e.g.*, Linda Babcock et al., *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 296–97 (1995) (finding that framing effects had a similar impact on lawyer and nonlawyer subjects); Marjorie Anne McDiarmid, *Lawyer Decision Making: The Problem of Predictio*n, 1992 WIS. L. REV. 1847, 1868–75 (worrying that lawyers' decisionmaking is also affected by cognitive bias); Rachlinski, *supra* note 9, at 1217 n.274 (collecting studies demonstrating lawyers' cognitive biases).

289. Edward Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 144 (2006) ("Consumers face stronger incentives to correct errors that directly impact their well-being than do government bureaucrats.").

290. Rachlinkski, *supra* note 9, at 1220.

291. *See* Amir & Lobel, *supra* note 236, at 2126 ("The fact is that human beings come into the world with a passion for control, they go out of the world the same way, and research suggests that if they lose their ability to control things at any point between their entrance and

has assumed that, absent irrationality, every individual would agree that greater returns on their claims are better than alternatives affected by cognitive bias.[292] This may not always be the case, however. In individual settlements, a divorce lawyer may feel that a client is willing to give away too much because of the context of the decision; the client may be eager to exit his or her marriage or may be tired of the process. But whether this is a bad decision for the client is hard for someone other than the client to say.

This Article does not dispute that these reforms impact client autonomy. Rather, this Article assumes that policies behind large settlement funds—more access, efficiency, and equity in claim value—will inevitably require fund designers to take a stand that may be inconsistent with some claimants' valuation of a settlement. The point is to adopt measures that improve the welfare of as many claimants as possible, consistent with these goals, while minimizing harm to others. To the extent that cognitive biases undermine these goals, it is appropriate to examine their effects, and when the costs are low, to intervene to encourage different outcomes.

3. *The Wash-Out Problem.* Finally, many commentators have warned that correcting biases can be extremely difficult.[293] Those who manipulate biases run the risk of not only paternalism, but also of overcompensating or supplanting one bias with another undesirable response.[294] For example, using automatic claim filing processes to take advantage of the status quo bias, may have a reactive effect, causing people to consider the original opt-out option more or less carefully.[295] Similarly, providing alternative representations of different decisions may help people overcome decoy effects, but may also induce decision-conflict.[296] Adopting policies that prevent procrastination may induce nonprocrastinators to file earlier than they would like.

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their exit, they become unhappy, helpless, hopeless, and depressed."); Rizzo & Whitman, *supra* note 285, at 411.

292. *See* Kaplow & Shavell, *supra* note 18, at 23 (arguing that, "if individuals do not understand their well-being," their argument applies to "actual well-being—what they would prefer if they correctly understood how they would be affected").

293. *E.g.*, Amir & Lobel, *supra* note 236, at 2116; Arlen, *supra* note 16, at 1769; Jolls & Sunstein, *supra* note 33, at 225–35; Rachlinski, *supra* note 9, at 1168.

294. Jolls & Sunstein, *supra* note 33, at 227.

295. Amir & Lobel, *supra* note 236, at 2116 (describing "reactive effects" of redesigning default options in national organ donation plans).

296. *Id.* (describing "reactive effects" to decoy ploys).

These problems do not undermine the case for adopting procedures that help claimants make better decisions in funds. If a particular procedure works for many people and imposes few costs on others, then it should be adopted. Such problems, however, do mean that fund designers should be sensitive to the "cognitive costs" of a particular solution. As Professor Jeffrey Rachlinski writes: "Just as parties negotiate around transaction costs, they adapt around cognitive impediments to good judgment."[297] Paternalistic constraints on choice cannot be justified absent a showing that the "costs of privately developing better ways to make choices" are greater than the benefit of a legal intervention.[298] Nonetheless, large funds merit special examination and legal intervention precisely because there are so few opportunities for claimants to privately develop better ways to make such choices.

CONCLUSION

This Article begins a discussion about a relatively unexplored topic in the literature of large settlement funds. Over the past fifty years, public and private actors have expanded their efforts to compensate groups of people for collectively experienced harm. Class action settlement funds and public settlement funds are just two prominent examples of this trend. But large funds exist in many other areas of the law—in criminal restitution actions, state victim compensation programs, insurance funds, and emergency and international relief.[299]

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297. Rachlinski, *supra* note 9, at 1225.

298. *Id.*

299. One recent example is the fund developed to compensate former investors of Bernard Madoff. Three separate agencies will be responsible for collecting funds on behalf of victims—the Securities Investment Protection Corporation ("SIPC"), an agency charged with insuring accounts with brokers and dealers, the United States Attorneys Office, which sought criminal restitution awards against Madoff, and the SEC, which continues to seek civil disgorgement awards against those who may have abetted Mr. Madoff. *See* Patrick Danner & Martha Brannigan, *Madoff's Victims Still Pursue Justice, Money*, MIAMI HERALD, July 6, 2009, at 1A (quoting an SEC spokesperson who declared that "[e]verything the SEC collects will be for the benefit of investors"). On December 15, 2008, the Securities Investment Protection Corporation moved to liquidate Mr. Madoff's fifty-year-old firm, Bernard L. Madoff Investment Securities, and will oversee the distribution of most of those collected funds. *See* Securities Investor Protection Act, 15 U.S.C. 78eee(a)(3) (2006) (permitting the appointment of a trustee and removal to bankruptcy court when a debtor is unable to meet his obligations to investors); *see also* Trustee's First Interim Report for the Period December 11, 2008 Through June 30, 2009, No. 08-1789 (Bankr. S.D.N.Y filed July 9, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/business/Interim.pdf (summarizing bankruptcy court proceedings, objections to

In the literature that has accompanied and, in some cases, criticized the growth of such funds, many commentators have addressed ways to improve either (1) public oversight of such funds or (2) the incentives of private actors—like plaintiffs counsel—to adequately represent and serve large groups of people.[300] As Part I of this Article explains, one popular way to accomplish both goals has been to increase people's choices. More opportunities to opt out of a large fund ensure, at least theoretically, that the fund represents the interests of those who do not. More choices of settlement processes and outcomes means claimants will be more satisfied with their final awards. More time to decide assures claimants that they will arrive at a decision that reflects their interests. Notwithstanding the focus on improving choice, however, relatively little study has been devoted to the way people make those choices. Modern reform efforts, rather, have assumed that claimants make rational decisions about their options.

This Article does not challenge efforts to increase choices and opportunities for claimants to large funds. It does, however, question whether such efforts, by themselves, are enough to accomplish their objectives of greater fairness, efficiency, and equity. Although such measures better ensure that rational participants may monitor, object, and exclude themselves from such funds, few measures exist to protect the vast majority of claimants who will make decisions based upon cognitive error. As this Article has demonstrated, there will be cases in which, on balance, many subjects make even poorer decisions for themselves and the fund as a whole when available settlement options are not adjusted to account for cognitive biases. This is, in part, because in many large funds parties lack individual access to third-party expertise, like lawyers. Given the tremendous economic, social, and institutional resources devoted to operating large funds, it is worth asking: short of providing each claimant with individual counsel, can funds be designed in smarter ways? Can they accommodate both rational and irrational decisionmaking?

This Article answers "yes," by recommending an asymmetrically paternalistic approach to reforming large settlement funds. Asymmetric paternalism favors policies that benefit those prone to

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claims determinations, and claims administration for the first six months of the bankruptcy trust operation); Diana B. Henriques, *It's Thankless, But He Decides Madoff Claims*, N.Y. TIMES, May 29, 2009, at A1 (describing the disputed method for paying claims).

300. *See supra* Part I.C–D.

make cognitive errors, while minimizing costs to those who otherwise choose rationally. In so doing, this Article recommends accounting for and sometimes exploiting the timing, structure, and combination of options in large settlements to increase the welfare of all potential participants. Such solutions raise fundamental questions of fairness and efficiency themselves: Will fund designers suffer from their own biases? Will procedures that fund irrationality limit claimants' rights to control their own litigation or impose excessive costs? Will funding irrationality risk replacing one set of claimant biases with new biases that lead to even less desirable outcomes? These are all valid concerns. The compensatory goals of large funds require, however, that we understand how claimants make choices and, when possible, adjust rules so that funds better serve them.