CLASS ACTION SETTLEMENTS AS CONTRACTS?*

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Courts routinely declare that class action settlement agreements are contracts, and when called on to interpret and enforce such settlements, courts invoke principles of contract law. But is a class action settlement really a contract? The relevant agreement in a class settlement is struck between a defendant and class counsel or class representatives; it is not an agreement with class members. What binds class members to the deal is not that they agreed to it, nor even that they agreed to be represented, but rather that a judge found the matter suitable for class treatment and entered judgment approving the proposed settlement terms. It is the law of judgments, not the law of contracts, that prevents class members from pursuing claims released in a class action settlement. Although certain aspects of contract law are apt, the nature of class settlements calls for an interpretive regime that places less emphasis on the intent of the parties and more emphasis on the scope of the deal that a judge saw fit to approve. This Article explores how courts should interpret the language of class action settlement agreements. It offers a framework that attends to the dual nature of class settlements and the agency risks that inhere in their negotiation. It encourages courts to stop reflexively treating class settlement disputes as contract disputes, but ultimately, whether courts call a class settlement a "contract" is less important than whether they understand the nature of these instruments and the modes of enforcement, interpretation, and construction that are appropriate to their implementation. Just as courts have deployed distinctive interpretive frameworks to shape contract law for other transactional contexts, they can similarly bring more thoughtful justice to the domain of class action settlement agreements.

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INTRODUCTION

Are class action settlement agreements contracts? Courts describe them that way. When enforcing and construing class settlements, judges routinely speak of agreement and compromise and principles of contract interpretation. They say that "a class action settlement—like any settlement—is a private contract of negotiated compromises"[1] and that "a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms."[2] In case after case, they

1. Marshall v. Nat'l Football League, 787 F.3d 502, 511 n.4 (8th Cir. 2015).
2. Sullivan v. DB Invs., Inc., 667 F.3d 273, 312 (3d Cir. 2011).

use *contract* to describe class action settlements,[3] and they apply principles of contract law to disputes over their interpretation.[4]

Class action settlement agreements, however, differ from most other legally enforceable agreements, including other settlements of litigated disputes. The agreement in a class settlement is struck between a defendant and class representatives, or more realistically with class counsel or putative class counsel. It is *not* an agreement with the absent class members themselves. The agreement becomes binding on class members only by the entry of a court judgment approving the class certification, the class counsel, and the proposed

3. *See, e.g.*, Two Shields v. United States, 820 F.3d 1324, 1329 (Fed. Cir. 2016) ("We treat the *Cobell* settlement as a contract, the proper interpretation of which is a question of law." (citations omitted)); *Sullivan*, 667 F.3d at 338 (Scirica, J., concurring) ("Settlement of a class action . . . is a contract between the parties . . . and establishes a contractual obligation as well as a contractual defense against future claims."); *In re* Wireless Tel. Fed. Cost Recovery Fees Litig., 396 F.3d 922, 934 (8th Cir. 2005) ("[A] class action settlement is a private contract negotiated between the parties."); Bauer v. Transitional Sch. Dist. of St. Louis, 255 F.3d 478, 482 (8th Cir. 2001) ("[S]ettlement agreements are creatures of private contract law."); Cohen v. Resol. Tr. Corp., 61 F.3d 725, 729 (9th Cir. 1995) ("The fact that it is approved by the court does not change the fact that the settlement is essentially a private, contractual agreement between the parties."); Bowling v. Pfizer, 144 F. Supp. 3d 945, 960 (S.D. Ohio 2015) ("Class action settlements, and amendments to them, are matters of contract between the parties, with courts having up or down approval authority, but nothing more."). *See generally* 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23.161[1] (3d ed. 2012) ("A class-action settlement, like an agreement resolving any other legal claim, is essentially a private contract negotiated between the parties."); 4 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 13:3 (6th ed.), Westlaw (database updated June 2023) (describing a class action settlement as "a contract among the parties that trades relief for the class for the release of claims against the defendant").

4. *See, e.g.*, *In re* Auto. Parts Antitrust Litig., 997 F.3d 677, 681 (6th Cir. 2021) (declaring, in a dispute over enforcement of class settlements, a "settlement agreement is a contract governed by principles of state contract law . . . . So this case simply requires us to apply that law to interpret the parties' contracts."); BP Expl. & Prod., Inc v. Claimant ID 100354107, 948 F.3d 680, 687 (5th Cir. 2020) ("In reaching this conclusion, we are guided by the fact that the [class action] Settlement Agreement is a maritime contract interpreted in accordance with federal admiralty law."); *In re* Deepwater Horizon, 785 F.3d 1003, 1011 (5th Cir. 2015) ("The interpretation of a settlement agreement is a question of contract law . . . ."); Navarro v. Mukasey, 518 F.3d 729, 733 (9th Cir. 2008) (applying California contract law to interpret a class settlement agreement); *In re* Cendant Corp. Prides Litig., 233 F.3d 188, 193 (3d Cir. 2000) (applying New York contract law to interpret a class settlement agreement); Air Line Stewards v. Am. Airlines, Inc., 763 F.2d 875, 877 (7th Cir. 1985) (holding state contract law governs interpretation of class settlements); Horton v. Metro. Life Ins., 459 F. Supp. 2d 1246, 1247 (M.D. Fla. 2006) ("Established rules of contract interpretation govern a class action settlement agreement."); Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir. 1989) (treating class settlements as contracts whose "enforceability is governed by familiar principles of contract law"); Gordon v. Kohl's Dep't Stores, Inc., 172 F. Supp. 3d 840, 861 (E.D. Pa. 2016) ("Settlement agreements, including class action settlement agreements, 'are regarded as contracts and must be considered pursuant to general rules of contract interpretation.'" (quoting Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 282 n.50 (3d Cir. 2014))); Sears v. United States, 124 Fed. Cl. 444, 447–48 (2015) (applying contract principles to construe a class settlement); Benacquisto v. Am. Express Fin. Corp., No. Civ.00-1980, 2006 WL 453135, at *1 (D. Minn. Feb. 23, 2006) ("A settlement agreement is a contract, subject to contractual rules of interpretation and enforcement.").

settlement.[5] What binds class members to the settlement is not that they agreed to it—they didn't—but rather that a court entered a judgment giving binding effect to the terms of the agreement reached between the defendant and class counsel. A court enters such a judgment only upon finding that the matter is fit for resolution as a class action,[6] that the lawyer is fit to serve as class counsel,[7] and that the proposed terms for resolving the dispute are "fair, reasonable, and adequate."[8] The binding effect of a class action settlement must, then, be understood in terms of the court's power to resolve disputes. It is the law of res judicata, not the law of contracts, that prevents class members from pursuing claims released in a class action settlement. Yet the terms of a class action settlement are the product of a process of negotiation and agreement rather than directly the product of litigation and adjudication.

Thus the question: Is a class action settlement rightly understood as a privately negotiated agreement—a *contract*—whose binding effect as a contract happens to be conditioned on judicial approval just as some other contracts involve conditional terms? Or, is a class action settlement rightly understood as a determination by a court of a resolution of a dispute—a *judgment*—whose origin and terms happen to derive from negotiation rather than trial? And if it is both, how ought courts give respect to that duality?[9]

5. *See* 6 RUBENSTEIN, *supra* note 3, § 18:19 ("The process by which a class action settlement is approved has the effect of turning the private settlement into a judicial ruling, a judgment. Thus, in class actions, future litigation is always governed by the doctrine of preclusion and never by the settlement contract directly."); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 766 (2005) ("[W]hen a lead plaintiff and her counsel exercise the authority to bind absentees to a settlement agreement, something more than 'pure contract law' is at work.").

6. FED. R. CIV. P. 23(a)–(b).

7. FED. R. CIV. P. 23(g).

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

9. Others have explored parts of this territory at the crossroads of contract and adjudication. Years ago, writing about the preclusive effect of consent judgments, Fleming James Jr. captured the "dual aspect" of judgments that embody negotiated agreements:

> A consent judgment has a dual aspect. It represents an agreement between the parties settling the underlying dispute and providing for the entry of judgment in a pending or contemplated action. It also represents the entry of such a judgment by a court—with all that this means in the way of committing the force of society to implement the judgment of its courts. Because of the contractual aspect of a consent judgment it is always relevant, in determining the effect of the judgment, to ascertain the intent of the parties in accordance with the usual rules for construing their agreements. Once this has been ascertained, two questions remain: (1) Is there any reason of policy why the law will not implement this intent? (2) Will the entry of judgment carry with it an effect beyond the intent of the parties . . . ?

Fleming James, Jr., *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173, 175 (1959). Regarding an entirely different topic—arbitration—that similarly merges aspects of contract with aspects of adjudication, Daniel Markovits has argued that "adjudication and contract are *not* generically different. Both legal orders belong to the genus of solidaristic social and legal practices through which open, complex societies sustain stable integration in the face of the myriad competing aims that they

In this Article, we argue that a class action settlement is sensibly understood both as a particular sort of contract and as a particular sort of judgment, with each of these facets carrying significance for how such settlements should be enforced, interpreted, and construed. Even though some courts recognize the special nature of class action settlement agreements,[10] they too often rely on unadorned principles of contract law when faced with disputes over their interpretation. In some settings, contract law is demonstrably the wrong framework for understanding class action settlements. In other settings, the contract framework is helpful but incomplete without more attention to the proper interpretive framework. Our point is not merely about a label: whether courts call a class action settlement a "contract" is less important than whether they understand the nature of these instruments and the modes of enforcement, interpretation, and construction that are appropriate to their implementation. One need not, for example, assess finally whether contracts of adhesion[11]—transactions in which one party must accept or reject terms on a take-it-or-leave-it basis—are contracts[12] or pseudo-contracts[13] or private legislation[14] to conclude that these instruments have distinctive features that can call for particularized interpretive regimes. Similarly, whether one labels a class action settlement a contract, a judgment, or both, one can recognize that it ought not be understood either just like any other contract or just like any other judgment.

Our focus in what follows is on how courts should interpret the language of class action settlement agreements when disputes arise. Our argument is that structural facts about class action settlements—both the nature of their binding effect and the dynamics of their negotiation—militate in favor of an interpretive approach that brings skepticism to the idea that the judge's role in these contexts

invite citizens to pursue." Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 469 (2010). The both/and thinking that Markovits brings to arbitration parallels the way we think about class action settlement agreements. *See infra* Section III.B.

10. *See, e.g.*, Grimes v. Vitalink Commc'ns Corp., 17 F.3d 1553, 1557 (3d Cir. 1994) (stating that a class action settlement is "not simply a contract entered into by private parties, but is one that has been given a stamp of approval by the court"); Sullivan v. DB Invs., Inc., 667 F.3d 273, 355 n.25 (3d Cir. 2011) ("The . . . assertion that the settlement of a class action is merely 'a contract between the parties' misses th[e] point . . . . A class action settlement, whether it involves a settlement or a litigation class, is not simply a private contract. If it were, it would not need court approval, and federal courts called upon to supervise class actions, including resulting settlements, are obligated to see that Rule 23 does not become a tool for modifying state law.").

11. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

12. *E.g.*, Omri Ben-Shahar, *The Myth of the "Opportunity To Read" in Contract Law*, 5 EUR. REV. CONT. L. 1, 2–7 (2009); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 627 (2002).

13. *E.g.*, Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1138–44 (2019).

14. *E.g.*, Stewart Macaulay, *Private Legislation and the Duty To Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1051–52 (1966).

is merely to promote the "intent of the parties."[15] Judges must never forget that it is a class action settlement agreement—with a required judicial role and with well-documented opportunities for misalignment between class counsel's interests and class members' interests[16]—that they are expounding.[17] A distinctive interpretive regime that recognizes the adjudicative nature of class settlements offers a way to bring more thoughtful justice to this domain. Others have called for heightened judicial sensitivity at the settlement phase of class actions;[18] we extend this call for sensitivity to downstream interpreters, and we offer a framework for downstream interpretation to recognize the nature of class action settlement agreements.

We proceed as follows. Part I looks at courts' treatment of class action settlements as contracts, exploring what may be at stake in this debate that courts barely realize they are having as they toggle in and out of contract and judgment conceptualizations. We show that across a wide range of class action contexts, raising a variety of interpretive issues, courts invoke contract law when enforcing, interpreting, and construing class action settlements. Part II then considers the two most significant ways in which class action settlements differ from other kinds of agreements. Class action settlements differ in the basis for their binding effect and in the structural dynamics associated with their negotiation. On both counts, a pure-contract intent-of-the-parties interpretive framework does not suffice for handling disputes in the enforcement,

15. Courts generally acknowledge the role of the judge as a "fiduciary" for absent class members. *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries."); Plummer v. Chem. Bank, 668 F.2d 654, 659 n.4 (2d Cir. 1982); Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1148 (8th Cir. 1999); Van Horn v. Trickey, 840 F.2d 604, 606 (8th Cir. 1988); *see also In re* Cendant Corp. Prides Litig., 233 F.3d 188, 194 (3d Cir. 2000) ("Though several aspects of this case are governed by straight contract law, Cendant's argument that this case is governed *only* by black-letter contract law is unavailing. In a class action settlement, a court retains special responsibility to see to the administration of justice. It is worth noting at this juncture that the foundation of this settlement litigation was a securities fraud class action against Cendant alleging overvaluation of stock, not a mere contract between neighboring farmers for the purchase of a milk cow.").

16. *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 373–74 (2000) [hereinafter Coffee, *Class Action Accountability*]; Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 862–64 (2016) [hereinafter Erichson, *Aggregation as Disempowerment*]; Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 957–61 (2014) [hereinafter Erichson, *Settlement Class Actions*]; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 370–71 (1999).

17. *Cf.* Barnett, *supra* note 12, at 639 ("We must never forget that it is a form contract [we are] expounding."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget that it is a *constitution* we are expounding.").

18. *See, e.g.*, Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 393–96 (2011); Chris Brummer, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1045 (2004); Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 175–77 (2009).

interpretation, and construction of class action settlements. Part III makes the case for a particularized interpretive regime for class action settlements. First, we show that in disputes over certain aspects of class action settlements, it makes no sense to apply a contract framework. Next, we explain why even in disputes where a contract framework can be helpful, class action settlement agreements require a more bespoke contract approach. Just as courts have contoured their contract law for other types of transactional contexts that do not sit neatly within a traditional conception of contract, courts can embrace an interpretive regime designed for class action settlement agreements. We offer a set of questions to guide courts in this interpretive process. Part IV offers four case studies, showing how our framework can be applied in actual adjudications. We conclude in Part V with a more explicit explanation of how the law of judgments intersects with the law of contracts in this area, including the choice-of-law implications whenever class settlements are enforced interjurisdictionally.

I. THE CONTRACT CONCEPTION OF CLASS ACTION SETTLEMENTS

The contract mindset is deeply ingrained in judges' thinking about class action settlements, and understandably so. Outside of class actions, most dispute settlements are contracts in the straightforward sense of an agreement by one party to pay some amount or offer some consideration in exchange for the other party's promise to release a claim. Settlements ordinarily require no judicial approval, as they are simply private agreements between parties concerning the release of a claim. Indeed, ordinary settlements do not require any lawsuit at all; even if no claim has been filed in court, if one person agrees to pay another in exchange for the latter's release of a claim, they have an enforceable contract that settles the claim. Courts therefore rightly treat settlements of both litigated and unlitigated disputes, in general, as contracts and apply contract law to them in discerning their meaning and legal effect.[19]

Class action procedural law, in certain respects, encourages such a contract conception. Federal and state class action rules envision settlement as a compromise,[20] and the federal rule explicitly directs judges to evaluate whether a deal was negotiated at arm's length.[21] The approval process for class action settlements does not ask the court to determine which side is correct on the facts and law, nor to make any ultimate determination of who should prevail on

19. *See, e.g.*, Weng v. Walsh, 30 F.4th 1132, 1133 (D.C. Cir. 2022). There could, of course, be a settlement with a minor that would require a guardian or other forms of court approval.

20. *See* FED. R. CIV. P. 23(e); *see, e.g.*, MASS. R. CIV. P. 23(c); N.Y. C.P.L.R. 908 (MCKINNEY 2009).

21. FED. R. CIV. P. 23(e)(2)(B).

the claims and defenses.[22] Indeed, a primary driver of a settlement may be the very uncertainty of who would prevail on the merits if a trial were conducted.[23] The leading treatise on class actions describes class action settlements in contract terms too: "As with the settlement of a two-party suit, a class action settlement agreement is a contract among the parties that trades relief for the class for the release of claims against the defendant."[24]

Further reinforcing a contract conception, the class action rule does not permit judges to alter the terms of proposed class settlements. As the Supreme Court explained in *Evans v. Jeff D.*,[25]

> Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed.[26]

In other words, the terms of the deal belong to the negotiating parties, not to the court. Of course, this does not mean that judges lack power to influence the terms of class settlements. Judges wield significant influence over the lawyers and the process, in part with the leverage of their power to reject proposed settlements. Indeed, some judges aggressively push class settlements toward terms they would be inclined to approve.[27] Nevertheless, judges cannot

22. *See* Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 152–55 (2018) (describing judicial deference to parties' conclusion that a proposed class settlement is fair). Under the federal class action rule, the settlement approval process requires a hearing and an opportunity for objections. FED. R. CIV. P. 23(e)(2), (5). Prior to 2003, the rule did not require a hearing although it was common practice for courts to do so. *See* FED. R. CIV. P. 23(e) advisory committee's note to 2018 amendment ("Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.").

23. *See* Howard M. Erichson, *Uncertainty and the Advantage of Collective Settlement*, 60 DEPAUL L. REV. 627, 643 (2011).

24. 4 RUBENSTEIN, *supra* note 3.

25. 475 U.S. 717 (1986).

26. *Id.* at 726; *see also* Ehrheart v. Verizon Wireless, 609 F.3d 590, 593 (3d Cir. 2010) ("A district court is not a party to the [class action] settlement, nor may it modify the terms of a voluntary settlement agreement between parties."); Bowling v. Pfizer, 144 F. Supp. 3d. 945, 946 (S.D. Ohio 2015) ("Class action settlements, and amendments to them, are matters of contract between the parties, with courts having up or down approval authority, but nothing more; although a court may make suggestions for amendments when it believes that the pending settlement is not approvable, it lacks power to order particular settlement terms.").

27. *E.g.*, Standing Order for Civil Cases Before Judge Vince Chhabria, 14–15 (N.D. Cal. May 27, 2022), https://www.cand.uscourts.gov/wp-content/uploads/judges/chhabria-vc/VC-Civil-Standing-Order-2023-06-01.pdf [https://perma.cc/4BEP-RQ4S]; Notice and Order re Putative Class Actions and Factors To Be Evaluated for Any Proposed Class Settlement and Protocol for Interviewing Putative Class Members at 1–7, Naiman v. Freedom Solar Servs., Inc., No. 19-00256 (N.D. Cal. Nov. 27, 2019), Doc. 81; *In re* Nat'l Football League Players' Concussion Inj. Litig., 307 F.R.D. 351, 364–65 (E.D. Pa. 2015), *aff'd*, 821 F.3d 410 (3d Cir. 2016).

simply impose terms or alter terms reached by negotiators in the ordinary case—and that reinforces the contractual nature of these instruments.

A few examples will illustrate how courts cling to contract framings and rely on the common law of contracts when enforcing, interpreting, and construing class action settlement agreements. We will return to four of these examples as case studies in Part IV. The examples not only illustrate courts' devotion to the contract conception but also provide a sense of the types of disputes that invite courts to consider the meaning and effect of class action settlement agreements. These examples involve a range of underlying disputes, a range of class action types, a range of contexts in which the settlement disputes arose, and a range of contract issues. What they have in common is, first, a commitment to contract law as the dominant mode of analyzing each dispute concerning the class action settlement and, relatedly, an abiding interest in giving force to the intent of those who negotiated the class settlement.

BP Exploration & Production, Inc. v. Claimant ID 100354107[28] was a million-dollar dispute between Walmart and BP over whether a particular Walmart store was a "start-up business" for purposes of calculating lost profits under the class action settlement that resolved business claims against BP after the 2010 Deepwater Horizon oil spill in the Gulf of Mexico.[29] The settlement defined "Start-Up Business" as one with "less than 18 months of operating history at the time of the Deepwater Horizon Incident."[30] A Walmart store on the Gulf Coast was destroyed by Hurricane Katrina in 2005 and was rebuilt and reopened by Walmart six months before the spill.[31] The class action settlement administrator treated it as a start-up business and awarded nearly $1 million to Walmart.[32] When the case reached the Fifth Circuit, the court looked to federal maritime contract law, explaining that "the Settlement Agreement is a maritime contract interpreted in accordance with federal admiralty law."[33] The court considered whether "the parties intended" to foreclose recovery under these circumstances, and concluded that the treatment of Walmart as a start-up was "not incongruent with the language of the Settlement Agreement."[34]

In re Airline Ticket Commission Antitrust Litigation[35] involved a dispute over whether the term "United States" in a class action settlement included Puerto

28. 948 F.3d 680 (5th Cir. 2020). For an explanation of how our proposed framework would apply to this case, see *infra* Section IV.A.

29. *BP Expl.*, 948 F.3d at 683.

30. *Id.* at 685.

31. *Id.* at 683.

32. *Id.*

33. *Id.* at 687.

34. *Id.* at 688.

35. 268 F.3d 619 (8th Cir. 2001). For an explanation of how our proposed framework would apply to this case, see *infra* Section IV.B.

Rico and the U.S. Virgin Islands.[36] Travel agents had brought an antitrust class action against airlines concerning caps on commissions.[37] The district court certified a class of "all travel agencies in the United States" and approved a settlement with payments to class members based on ticket sales.[38] When a Puerto Rican travel agency later filed a separate class action on behalf of agents in Puerto Rico and the U.S. Virgin Islands, the airlines argued that these agents were part of the original class settlement.[39] Class counsel from the original class action argued that the class did not include these agents, and instead of distributing settlement funds to Puerto Rican and U.S. Virgin Islands agents, class counsel requested a cy pres distribution to several charities.[40] Looking to Minnesota contract law, the district court and Eighth Circuit concluded that there was no evidence that the parties intended to assign a technical meaning to "United States" and that the "ordinary meaning" did not include Puerto Rico or the U.S. Virgin Islands.[41] Even if the term was ambiguous, the Eighth Circuit deferred to the district judge's "credibility finding" regarding the parties' intent.[42]

Two Shields v. United States[43] presented a dispute over whether a set of claims against the government was precluded by a prior class action settlement about the federal government's alleged mismanagement of assets of thousands of Individual Indian Money Accounts.[44] Two years after approval of the class action settlement, plaintiffs Ramona Two Shields and Mary Louise Defender Wilson sued the federal government for breach of fiduciary duty.[45] The government argued that the plaintiffs were members of the prior class and bound by the settlement.[46] The plaintiffs argued that their claims, which concerned the government's permission for the sale of oil and gas leases to a private company for below-market rates, had not accrued until after the date specified in the class action settlement.[47] The Federal Circuit stated, "We treat the [class] settlement as a contract, the proper interpretation of which is a question of law."[48] Looking to various aspects of contract law, the court concluded that the plaintiffs' claims were included in the class action settlement

36. *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d at 622.
37. *Id.* at 620.
38. *Id.* at 621.
39. *Id.* at 621–22.
40. *Id.* at 622.
41. *Id.* at 623.
42. *Id.* at 624.
43. 820 F.3d 1324 (Fed. Cir. 2016). For an explanation of how our proposed framework would apply to this case, see *infra* Section IV.C.
44. *Two Shields*, 820 F.3d at 1327–29.
45. *Id.* at 1328.
46. *Id.*
47. *Id.* at 1329.
48. *Id.* (citation omitted).

and therefore barred.[49] Among other things, the plaintiffs sought to introduce extrinsic evidence of context to show that the prior class settlement did not contemplate their claims, but the court rejected this based on its understanding of governing contract law.[50]

Navarro v. Mukasey[51] addressed a claim for deportation relief under the terms of a class action settlement that undid the Chief Immigration Judge's practice of ordering immigration judges to reserve decisions until the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") took effect.[52] The class action settlement permitted class members whose hearings had been "continued until after April 1, 1997" to apply for suspension of deportation under the more liberal pre-IIRIRA rules.[53] Carlos and Belem Navarro's hearing was continued until April 1, 1997 (IIRIRA's effective date).[54] The government argued that the Navarros were ineligible for suspension of deportation because their hearing was *on* April 1 and the language of the settlement limited eligibility to those whose hearings were continued until *after* April 1.[55] Declaring that "[o]ur interpretation of the settlement agreement is governed by principles of California contract law,"[56] the Ninth Circuit concluded:

> Under contract law, we have the power to 'reform' a contract where, due to mistake, the clear intention of the parties is not reflected in the final agreement. Here, it appears that there was a mistake in reducing the agreement to written form. Consequently, we read the settlement language as 'continued until April 1, 1997, or after.'[57]

Thus, despite the agreement's unambiguous language, the Ninth Circuit used California contract law to conclude that the Navarros were eligible to be considered for suspension of deportation under the class action settlement.[58]

In re Automotive Parts Antitrust Litigation[59] involved a dispute over whether certain plaintiffs were direct purchasers or indirect purchasers of certain rubber parts for cars.[60] A class action settlement had resolved the antitrust claims of indirect purchasers, and the defendants argued that the new plaintiffs' claims

49. *Id.* at 1333–34.
50. *Id.* at 1331.
51. 518 F.3d 729 (9th Cir. 2008). For an explanation of how our proposed framework would apply to this case, see *infra* Section IV.D.
52. *Navarro*, 518 F.3d at 733.
53. *Id.*
54. *Id.*
55. *Id.* at 736.
56. *Id.* at 733.
57. *Id.* at 737 (citations omitted).
58. *Id.* at 737–38.
59. 997 F.3d 677 (6th Cir. 2021).
60. *Id.* at 679.

were released in that settlement because the plaintiffs had not opted out.[61] The court applied Michigan contract law, emphasizing that the primary goal of contract interpretation is to discern the intent of the parties, and used dictionary definitions of contract terms to conclude that the plaintiffs were bound by the class action settlement.[62]

McDonough v. Toys "R" Us, Inc.[63] involved a defendant that failed to make its required payment in a multidefendant class action settlement that had received preliminary approval.[64] Plaintiffs moved to enforce the agreement against the nonpaying defendant, and the defendant argued that the agreement had been terminated.[65] The court looked to Pennsylvania contract law, emphasized the goal of determining the intent of the parties, disallowed extrinsic evidence, and ultimately found in favor of the plaintiffs.[66]

Finally, *Dahingo v. Royal Caribbean Cruises, Ltd.*[67] arose out of the settlement of a class action for denial of overtime pay for cruise ship employees.[68] Of the thousands of class members, several hundred submitted claims that were received by the settlement administrator after the deadline specified in the class settlement agreement, although many of these were postmarked before the deadline.[69] In addition, several hundred class members submitted claims that were not signed, as was specified in the agreement.[70] Class counsel argued that the late claimants should be accepted and that the nonsigning claimants should be given a chance to cure the defect; the defendant opposed.[71] The magistrate judge explained the reasoning that led him to conclude that although the administrator should notify nonsigning claimants to give them the opportunity to cure the defect, the late claims must be rejected:

> In general, settlement agreements are contracts and must therefore be construed according to general principles of contract law. This applies to class settlements as well as to the resolution of litigation between individual parties. A settlement agreement represents a compromise between parties who have waived their right to litigation and, in the interest of avoiding the risk and expense of suit, having given up something they might have won had they proceeded with the

61. The plaintiffs purchased from Bridgestone Retail, which is owned by Bridgestone Americas, a subsidiary of Bridgestone Corporation. *Id.* at 680. The issue was whether purchasing from a related entity constituted an indirect purchase. *Id.*

62. *Id.* at 681–83.

63. 795 F. Supp. 2d 329 (E.D. Pa. 2011).

64. *Id.* at 331.

65. *Id.* at 333.

66. *Id.* at 333–36.

67. 312 F. Supp. 2d 440 (S.D.N.Y. 2004).

68. *Id.* at 442.

69. *Id.*

70. *Id.*

71. *Id.* at 442–45.

> litigation. . . . This principle is strictly followed in class actions where the relief requested would exceed that which the parties had bargained for.[72]

In sum, even while recognizing certain equitable powers of courts in class actions, the *Dahingo* court, like so many others, treated the class action settlement agreement as a contract and applied contract law principles when called upon to enforce the terms of the deal.

The bottom line is that, when disputes arise concerning enforcement of class action settlements, courts often invoke contract law and treat the disputes as if they were disputes over the enforcement of contractual agreements.

II. HOW CLASS ACTION SETTLEMENTS ARE UNLIKE OTHER CONTRACTS

Despite judges' affinity for declaring that class action settlements are contracts, such settlements differ in important ways, as the courts themselves sometimes acknowledge.[73] Professor Rubenstein sums up the point this way:

> A settlement agreement is typically a contract negotiated by the litigating parties to which each consent in resolving the dispute. The settlement of a class action lawsuit, however, compromises the claims of absent class members, litigants not themselves part of the settlement negotiations. Worse, the class representatives and class counsel litigating on behalf of those absent class members may have incentives to settle which conflict with the class's interests.[74]

Here, we show how class action settlement agreements differ from most other enforceable agreements and why those differences matter. First, we examine the foundation for the binding effect of class settlements. Then, we explain the structural dynamics of class settlement negotiations. Together, these factors suggest the direction an interpretive regime should go for resolving disputes over the meaning of class settlement agreements.

A. *Class Action Settlements as Judgments with Preclusive Effect*

Class members are neither parties to a litigation nor parties to a settlement agreement, at least not in the usual sense. They are bound by the outcome of the class action proceeding—whether that outcome is the product of a judicial determination of the merits or judicial approval of a negotiated resolution—

72. *Id.* at 445 (internal citations, brackets, and quotation marks omitted).

73. *See* Grimes v. Vitalink Commc'ns Corp., 17 F.3d 1553, 1557–58 (3d Cir. 1994); Sullivan v. DB Invs., Inc., 667 F.3d 273, 319–20 (3d Cir. 2011).

74. 4 RUBENSTEIN, *supra* note 3; *see also* James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. REV. 387, 446 (2013) ("Class-action settlements are not and cannot be contracts, because class representatives are authorized to litigate on behalf of their fellows, not to negotiate contracts. The only way to make a release binding on a class is for the court to use its judgment power.").

only by virtue of the court's certification of the class, the power of the class counsel to represent them, and the court's entry of a judgment.[75] The Federal Rules of Civil Procedure provide that a class action "may be settled, voluntarily dismissed, or compromised only with the court's approval," and approval requires a finding that the settlement is "fair, reasonable, and adequate."[76] State-court class action settlements similarly require judicial approval.[77] In the context of evaluating proposed class action settlements, courts understand the importance of this step,[78] and some judges explicitly recognize an adjudicative conception of class action settlements. As one judge explained in the context of scrutinizing a proposed settlement and fee award rather than deferring to the proposed order submitted by class counsel, "[U]nlike individual actions, a class action settlement, if approved, is an adjudication of the matter as to the absent class members, who neither negotiated nor agreed to the settlement. To them, it is not a settlement at all."[79]

A judgment approving a class action settlement has claim-preclusive effect. Thus, if a class member attempts to relitigate claims released in a class action settlement, a court may dismiss the action under the doctrine of res judicata, treating the judgment approving the class action settlement as claim preclusive against the class member just as a court would treat a final adjudication on the merits as claim preclusive against a party.[80] In *Matsushita Electrical Industrial Co. v. Epstein*,[81] the Supreme Court considered a class action

75. Tobias Wolff explains it this way:

> In most circumstances, a settlement between two individual litigants is a simple contract. While such agreements are always made against a backdrop of sovereign authority, the active participation of the state generally is required in a settlement agreement between individuals only when a party seeks assistance in enforcing its terms. The same is not true of a class settlement. A settlement in a class action binds all the members of the class, just as a judgment would, even though absent class members never manifest the sort of individual consent or agreement that contract law would ordinarily require. This result is possible only because a class settlement constitutes an exercise of judicial authority, just as a judgment does.

Wolff, *supra* note 5, at 765.

76. FED. R. CIV. P. 23(e), (e)(2).

77. *E.g.*, CAL. CIV. CODE § 3.769 (Westlaw through Ch. 1 of 2023–24 1st Ex. Sess., and urgency legislation through Ch. 199 of 2023 Reg. Sess.) ("A settlement or compromise of a[] . . . class action . . . requires the approval of the court after hearing.").

78. *See* BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 9 (3d ed. 2010) (instructing judges that class action rules "unambiguously place you in the position of safeguarding the interests of absent class members by scrutinizing settlements approved by class counsel").

79. Fujiwara v. Sushi Yasuda Ltd., 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014).

80. *See, e.g.*, Moreno v. UtiliQuest, LLC, 29 F.4th 567, 578 (9th Cir. 2022). Courts tend to treat the preclusive effect of class action settlement-judgments a bit differently than they treat the preclusive effect of class action litigation-judgments. *See* 6 RUBENSTEIN, *supra* note 3, § 18:19. For settlement-judgments, many courts apply an "identical factual predicate" test to ascertain which claims are precluded by an approved class action settlement agreement. *Id.*

81. 516 U.S. 367 (1996).

settlement approved by a Delaware court.[82] Upon concluding that Delaware courts would treat the class settlement as preclusive, the Supreme Court held that a federal court must give full faith and credit to the Delaware judgment approving the class action settlement unless the class members were inadequately represented as a matter of due process.[83] As an enforceable judgment with claim-preclusive effect, a judgment reflecting a court's class action settlement approval functions just as it would if no settlement had been reached and the court had rendered a judgment on the merits in a certified class action.[84]

While class action settlements are not adjudications on the merits in the literal sense—consideration of a proposed settlement is not the same thing as a judge's or jury's independent application of law to facts—neither do class action settlements operate in a merits-free zone. Rule 23(e) directs the court to consider whether the relief is adequate in light of the risks of trial and appeal.[85] District courts must evaluate proposed class action settlements in light of how the recovery compares to possible outcomes if the claims were to be litigated to conclusion.[86] In other words, a judge cannot evaluate a proposed class action settlement without considering the strength of the class's claims and whether the proposed settlement adequately addresses those claims.

Finally, consider how settlements relate to principal-agent relationships. Outside of class actions, a client (as principal) may authorize a lawyer (as agent) to bind the client by agreeing to a settlement, just as agents may bind principals to other sorts of contracts.[87] Because class actions are representative litigation, it may be tempting to conceive of class action settlements as deals that are entered into by class counsel or by class representatives as agents on behalf of the class.[88] But class action settlements differ from the typical principal-agent model in two ways. First, although the class is bound by class counsel's conduct

82. *Id.* at 367.

83. *Id.* at 373.

84. *Id.* at 386.

85. FED. R. CIV. P. 23(e)(2), 23(e)(2)(C)(i).

86. *See, e.g.*, City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).

87. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 140, 143 (AM. L. INST. 1958) (detailing the requirements to authorize an agent and the corresponding liability created in the principal).

88. As between class *counsel* and class *representatives* as negotiators of class settlements and agents of the class, our analysis heavily emphasizes the role of counsel, acknowledging the reality of who strikes the deals and drafts the terms, but this is not to say that class representatives are always irrelevant. In securities class actions under the "empowered lead plaintiff" model of the Private Securities Litigation Reform Act, class representatives and other class members may play a meaningful role. *See* Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869, 869–79 (2005). Another example is what Elizabeth Cabraser and Samuel Issacharoff call "participatory class actions" such as the NFL concussion litigation. *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 849 (2017).

in *litigating* a class action, class counsel needs court approval to bind the class with a negotiated resolution. Second, to whatever extent class actions might be understood in agency terms, the agency relationship exists only by virtue of the court's certification of the class, appointment of class representatives, and appointment of class counsel.[89] In settlement class actions, the creation of the class and the appointment of class counsel occur simultaneously with the consummation of a negotiated resolution. The agency relationship that empowers class counsel to negotiate a settlement on behalf of a class is created as part of the same adjudicatory process that yields a settlement-judgment with binding effect. Class members have not agreed to anything—neither to the terms of the settlement nor to the appointment of the agent who negotiated those terms.

B. *Distinctive Concerns Raised by Class Action Settlement Agreements*

The judicial duty to protect class members from unfair settlements is no mere formality, no mere incantation to make a *fait accompli* agreement come to life. Courts review class settlements because negotiated resolutions of class actions in fact present serious risks that class members' interests will be disserved by those who purport to represent them in the negotiations.

The academic literature has explored agency risks in class action settlements at length,[90] and increasingly judges have come to understand the seriousness of the problem, even as they recognize the crucial function that class actions serve in the civil litigation system.[91] A summary suffices for our purposes, but our summary must be specific enough to illustrate the sorts of

89. *See* FED. R. CIV. P. 23(c) (certification of class, class definition, and appointment of class representative); FED. R. CIV. P. 23(g) (appointment of class counsel); *see also* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1654 (2008) ("Class actions further compromise litigant autonomy, for absent class members typically express their consent to a binding settlement not affirmatively but only tacitly, through their failure to withdraw from the class representation. Class settlements accordingly present a paradox. They require the same certainty of termination as any other case where legal claims are surrendered in exchange for a payment or a release. Yet the contractual terms that underlie class settlements are deeply problematic because the contracting party is an agent—class counsel—who can claim only indirect authorization to represent the absent class members." (footnote omitted)).

90. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1343–55 (1995) [hereinafter Coffee, *Class Wars*]; Coffee, *Class Action Accountability*, *supra* note 16, at 376–80; Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377–83 (2000); Erichson, *Aggregation as Disempowerment*, *supra* note 16, at 370–80; Nicholas Alejandro Bergara, Note, *Nipping It in the Bud: Fixing the Principal-Agent Problem in Class Actions by Looking to Qui Tam Litigation*, 97 N.Y.U. L. REV. 275, 280–89 (2022).

91. *See, e.g.*, Briseño v. Henderson, 998 F.3d 1014, 1018–19 (9th Cir. 2021); *In re* Subway Footlong Sandwich Litig., 869 F.3d 551, 552–53 (7th Cir. 2017); *In re* Walgreen Co. S'holder Litig., 832 F.3d 718, 718 (7th Cir. 2017); Marek v. Lane, 571 U.S. 1003, 1003 (2013) (Roberts, J., respecting the denial of certiorari); Caldwell v. UnitedHealthcare Ins., No. C 19-02861, 2021 WL 5359428, at *1–3 (N.D. Cal. Oct. 12, 2021).

terms that present identifiable risks of unfairness to class members. It is not enough to know that class members' interests may be disserved in settlements because class counsel's incentives sometimes line up with defendants rather than with class members. Rather, accounting for these risks in an interpretive framework requires an understanding of where to look. We therefore turn to some of the ways in which class counsel's interests in settlement negotiations align with the interests of the defendants they are suing, rather than with the interests of the class members they are supposed to represent.

First, defendants and class counsel share an interest in maximizing the scope of the class definition in settlement as well as maximizing the scope of claims released.[92] When defendants put money on the table to resolve a mass dispute, they want protection from future lawsuits. If a defendant can obtain extra protection for a relatively low cost by negotiating for an expanded settlement class definition or a more comprehensive release, that provides an attractive deal. For class counsel, expanding the scope of a settlement is arguably pure upside, a way both to expand one's own role and to meet a defendant's demands. A bigger class definition means a bigger franchise with a bigger total sum and higher fees.[93] Even if additional class members in an expanded settlement get little benefit, and even if additional claims are given little remedy, any expansion brings in parties or claims that class counsel otherwise would not have represented.

Class counsel's willingness to give a defendant broader protection from future liability, even at a low price, is driven by more than class counsel's desire to maximize the total size of the settlement and thus earn greater fees. For putative class counsel, the challenge of getting the defendant to say yes is existential. Class settlements often are not negotiated by class counsel who have already obtained class certification and thus have the power to take the class claims to trial. Rather, many class settlements are negotiated by *putative* class counsel or *interim* class counsel, hoping to get a settlement class action.[94] These lawyers negotiate on behalf of a putative plaintiff class that will not come into being unless the negotiation gets to yes. That is, the lawyers who negotiate a settlement class action with the defendant understand that they will get the privilege and profit of representing the class only if they reach terms that the defendant finds attractive.[95] These circumstances create a risk that counsel will

92. *See* Erichson, *Aggregation as Disempowerment*, *supra* note 16, at 893–97.

93. Class counsel fees are awarded by the court. *See* FED. R. CIV. P. 23(h). In determining the amount, courts generally use approaches that result in larger fees for larger settlements. *See* 5 RUBENSTEIN, *supra* note 3, § 15:67 (describing prevalence of percent-of-outcome method); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 811–14 (2010).

94. *See* 7B MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1797.2 (2023).

95. *See* Coffee, *Class Wars*, *supra* note 90, at 1370–72; Erichson, *Settlement Class Actions*, *supra* note 16, at 957–61.

accede to terms that (1) carry value for defendants by providing closure, (2) are costless to class counsel and indeed beneficial to class counsel because they expand the settlement, but (3) harm class members by resolving a subset of claims without sufficient compensation.

Second, defendants and class counsel share an interest in maximizing the *apparent* size of a proposed class action settlement. Even if neither the real value of a settlement to class members nor the real cost to defendants is as big as it appears, defendants and class counsel want a settlement to appear as large as possible to the judge.[96] Indeed, a cynic would say they share an interest in maximizing the ratio of the settlement's apparent value to its actual cost. By maximizing a settlement's apparent size without significantly increasing the cost to a defendant, class counsel may secure the defendant's participation and the court's approval of the proposed settlement, attorneys' fees, and payments to class representatives.

There are several ways lawyers may try to puff up the apparent size of a class settlement without significantly increasing its cost to the defendant. One troubling technique is to provide monetary relief on a claims-made basis and to impose a burdensome or intimidating claims process for any class member who wishes to get paid.[97] The negotiating parties anticipate a low claims rate, and therefore both a low cost to defendant and a low value to the class, but they can tout a large settlement fund when proposing the settlement to the judge.[98] To similar effect, some settlements include coupons or credits with face value much higher than their anticipated cost to defendants.[99] If the coupons or credits are no greater than discounts ordinarily offered by the company, or if the company uses them as a means to attract or retain customers, the remedy may be costless or even beneficial to a defendant. By making coupons or credits nontransferable, nonstackable, or time-limited, negotiators create a settlement component with

96. Reversing a district court's approval of a class settlement in a food mislabeling case, the Ninth Circuit recently highlighted the difference between settlement value asserted by proponents and a settlement's actual value to the class and actual cost to the defendant:

> The parties thus represented that their settlement could theoretically be worth over $100 million—around $95 million in value to the class ($67.5 million in potential payout and $27 million in injunctive relief value), along with another $6.85 million for the attorneys. Yet, when the dust settled, ConAgra shelled out less than $8 million, with a mere $1 million of that going to the class. Class counsel's fees swallowed $5.85 million, and expenses devoured another $978,671. Of the 15 million class members, barely more than one-half of one percent of them submitted a claim.

Briseño v. Henderson, 998 F.3d 1014, 1020 (9th Cir. 2021).

97. *See, e.g.*, Pearson v. NBTY, Inc., 772 F.3d 778, 783–84 (7th Cir. 2014); *see also* Erichson, *Aggregation as Disempowerment*, *supra* note 16, at 889–92.

98. For research on how settlement claims processes can be designed to increase actual compensation rates in class actions, see Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767, 770–71 (2015).

99. *See, e.g.*, Roes 1–2 v. SFBSC Management, LLC, 944 F.3d 1035, 1051–54 (9th Cir. 2019).

little cost to the defendant and little benefit to the class members but with a fictional value they hope will impress the judge.[100] Yet another technique is to include injunctive-style remedies with little value to claimants and little cost to defendants, such as pointless disclosures, promises to take steps that have already occurred, or steps that are reversible at the defendant's discretion.[101] Finally, some class action settlements include cy pres components in which money or goods are distributed to charitable organizations. Distribution to a well-chosen organization can be a reasonable way to benefit the class under circumstances where direct relief to class members is impracticable, but too often the cy pres recipients are ones that provide no benefit to class members and instead are ones to which class counsel or defendants wish to direct money.[102] Like burdensome claims processes, overvalued coupons, and spurious injunctive remedies, cy pres distributions offer class settlement negotiators the prospect of touting a high-value settlement while imposing little cost on defendants and offering little value to class members.

Third, defendants and class counsel share an interest in shifting money from class members to class counsel while minimizing overall cost to defendants.[103] Negotiators of class settlements may achieve this trade-off by setting up a separately negotiated fund from which to pay the lawyers, by including a "clear-sailing" agreement in which the defendant agrees not to object to class counsel's request for fees up to a specified amount,[104] or by

100. *See, e.g.*, *In re* EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1043 (S.D. Cal. 2013), *vacated*, 599 F. App'x 274 (9th Cir. 2015); *see also* Erichson, *Aggregation as Disempowerment*, *supra* note 16, at 878–82.

101. *See*, *e.g.*, Pearson, 772 F.3d at 785–874; Dennis v. Kellogg Corp., 697 F.3d 858, 861 (9th Cir. 2012); *see also* Elizabeth Cabraser & Andrew Pincus, *Claims-Made Class-Action Settlements*, 99 JUDICATURE 81, 81–88 (2015) (explaining claims-made class settlements and debating their benefits and risks); Erichson, *Aggregation as Disempowerment*, *supra* note 16, at 874–78 (discussing claims-made settlements as a red flag).

102. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 164 (3d Cir. 2013); *In re* EasySaver, 921 F. Supp. 2d at 1045–46; Dennis, 697 F.3d at 866–68; *see also* Erichson, *Aggregation as Disempowerment*, *supra* note 16, at 882–89. For a different view, supporting a class settlement based in part on the value of cy pres relief, see *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1107 (9th Cir. 2021).

103. The Ninth Circuit recently explained the problem in (overly) simple mathematical terms:

> Consider this example. What would any rational defendant do if faced with these two settlement options: (1) establish a $10 million fund for class members and pay $3 million in fees to class counsel for a total payout of $13 million, or (2) set up a $7 million fund and pay $4 million to class counsel for a total payout of $11 million. A defendant would choose the second option because it would save $2 million, even though it shortchanges class members.

Briseño v. Henderson, 998 F.3d 1014, 1025 (9th Cir. 2021).

104. *See* Erichson, *Aggregation as Disempowerment*, *supra* note 16, at 899–901 (discussing segregated revertible fee funds); *id.* at 901–03 (discussing clear-sailing agreements); William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 814

including a "kicker" agreement under which funds revert to a defendant if not awarded as counsel fees.[105]

These distinctive concerns suggest the usefulness of viewing certain settlement terms with less deference to the intent of the drafters. Suspicion of certain types of settlement terms plays an obvious role at the moment when a judge decides whether to approve a proposed class settlement, but it also plays a less obvious role when a judge is faced with deciding how to enforce, interpret, or construe class settlement terms whose meaning is later disputed. We pivot now in Part III to develop a proposed interpretive framework to address these structural dynamics associated with class action settlement agreements.

III. AN INTERPRETIVE FRAMEWORK FOR CLASS ACTION SETTLEMENT AGREEMENTS

Before turning to our proposed framework to help nuance courts' deployment of contract law and theory in class action settlement agreements, we will note that sometimes a contractarian approach simply asks the wrong questions. After specifying when contract ought to be abandoned altogether (Section III.A), we then turn to the idea that "contract" can mean many things (Section III.B) and that the sort of contract at work in class action settlement agreements demands a particularized interpretive framework (Sections III.C and III.D).

A. *Sometimes "Contract" Is the Wrong Framework*

Sometimes, as we explain below, a contract conceptualization provides a satisfactory starting point for adjudicating disputes under class action settlement agreements, as long as the contract framework is particularized to the context. Sometimes, however, contract is just the wrong operating concept, and it would be better for courts to acknowledge as much.

One setting where the contract framework does not work is when the dispute concerns the scope of judicial power. Consider *Jensen v. Minnesota Department of Human Services*.[106] There, the district court held that it had the power to enforce a settlement class action regarding claims of inhumane

(2003). Expressing concerns about clear-sailing agreements, the Seventh Circuit reasoned that "the defendant won't agree to a clear-sailing clause without compensation—namely a reduction in the part of the settlement that goes to the class members." Redman v. RadioShack Corp., 768 F.3d 622, 637 (7th Cir. 2014). Similarly, a district court in California rejected a proposed class settlement because it violated the judge's prior order stating: "To avoid collusive settlements, the Court prefers that all settlements avoid any agreement as to attorney's fees and leave that to the judge." *See* Caldwell v. UnitedHealthcare Ins. Co., No. C 19-02861, 2021 WL 5359428, at *1 (N.D. Cal. Oct. 12, 2021).

105. *See In re* Samsung Top-Load Washing Mach. Mktg., 997 F.3d 1077, 1088–89 (10th Cir. 2021).

106. 897 F.3d 908 (8th Cir. 2018).

treatment of civilly committed individuals by the State.[107] The State argued that the district court lacked continuing jurisdiction because the class settlement said the court retained jurisdiction to enforce the settlement for two years, and the State argued that the district court's extensions of its enforcement jurisdiction were improper.[108] On appeal, the Eighth Circuit looked to Minnesota contract law to decide whether to allow extrinsic evidence on the interpretation of the settlement's term regarding the court's retention of jurisdiction.[109] The Eighth Circuit noted that the record included a sworn affidavit from class counsel stating that, at the time of the negotiation, he understood the provision to allow the district court to retain jurisdiction in the event of noncompliance[110] and that the parties had proceeded without objection as the district court extended its jurisdiction three times.[111] These facts, according to the Eighth Circuit, supported the inference "that all sides understood the district court to have the authority to extend its jurisdiction as it deemed 'just and equitable.'"[112]

Had the court loosened contract law's grip on its analysis, it would have seen the issue more clearly. The question in *Jensen* was whether the district court had jurisdiction to enforce the duties of the Minnesota Department of Human Services under the class action settlement. Federal jurisdiction cannot be granted by the parties; the limited jurisdiction of federal courts flows from Article III's constitutional constraints on federal judicial power as a matter of both federalism and separation of powers.[113] A federal district court may retain jurisdiction to enforce a settlement in a dispute over which the court had subject matter jurisdiction,[114] but it is the court that does so in its public law face, not

107. Jensen v. Minn. Dep't of Hum. Servs., No. 09-1775, 2017 WL 2799153, at *11 (D. Minn. June 28, 2017).

108. *Jensen*, 897 F.3d at 912.

109. *Id.* at 913 ("The parties agree that interpretation of the Agreement is governed by Minnesota law regarding contract interpretation. 'Under Minnesota law, "the primary goal of contract interpretation is to determine and enforce the intent of the parties."' 'Where the parties express their intent in unambiguous words, those words are to be given their plain and ordinary meaning.' However, if a contract is '*reasonably* susceptible to more than one construction' it is ambiguous, and 'construction becomes a question of fact unless extrinsic evidence is conclusive.'" (citations omitted)).

110. *Id.* at 915.

111. *Id.*

112. *Id.*

113. *See* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE JURISDICTION § 3522 (2023).

114. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994). In *Kokkonen*, the Supreme Court held that a federal district court lacked jurisdiction to enforce a settlement because the enforcement proceeding was a state law breach of contract claim that lacked any independent basis for federal jurisdiction. The Court noted that the federal court would have power to enforce the settlement if it had explicitly retained it:

> The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate

as an incident of party intent to a contract. The question is whether the federal judge retained jurisdiction, not whether the *parties intended* for the court to do so. The court should have seen the question as whether the district court, when it entered its judgment approving the class settlement, retained jurisdiction to enforce the settlement beyond an initial two years. The language of the settlement provision concerning retention of jurisdiction should remain a focal point not because it indicates the parties' intent but because it indicates the decision of the judge who approved it. Regarding this question of subject matter jurisdiction, the court should not rely on an affidavit from one of the class settlement's negotiators regarding what that negotiator intended at the time, invoking contract law. This point may not generalize, but contract law is particularly inapt as a starting point in solving questions about federal jurisdiction.

Disputes over *who is included* within a class settlement likewise cannot be resolved by starting with a contract conceptualization. Recall that *In re Airline Ticket Commission Antitrust Litigation* involved a dispute over whether Puerto Rican travel agents were included in a class settlement that resolved the claims of "all travel agencies in the United States."[115] The airlines argued that the Puerto Rican agents were bound, but some Puerto Rican agents contended that they were not bound and attempted to assert their own claims.[116] The Eighth Circuit resolved the dispute by invoking Minnesota contract law and looking for the intent of the parties who negotiated the class settlement.[117] But how can contract law answer the question of whether these travel agents were part of the class action and thus bound by the resolution? Negotiating parties have no power to make persons part of a class action as a matter of contract; only the court has the power to make persons part of the class, and the court does so through the process of class certification.[118] If the Puerto Rican travel agents were included within the court's certification of the class, then they were bound by the settlement. If the Puerto Rican travel agents were not included within the court's certification of the class, then no amount of negotiation by the airlines and class counsel can bind those travel agents to the settlement. This is not to say that the question disappears. A court still must resolve the dispute over whether Puerto Rico was included in the settlement's scope covering the

provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.

Id.

115. *In re* Airline Ticket Comm'n Antitrust Litig., 268 F.3d 619, 621 (8th Cir. 2001).

116. *Id.*

117. *Id.* at 623.

118. FED. R. CIV. P. 23(c).

"United States." The right way to answer that question, however, is not to ask first and foremost what the negotiating parties intended when they struck a deal, but rather to ask first what the court intended when it certified the class and when it approved the settlement terms.

Similarly, recall that *In re Automotive Parts Antitrust Litigation* involved a dispute over whether certain purchasers of car parts were direct or indirect purchasers.[119] The defendants argued that the plaintiffs were barred from asserting antitrust claims because they were included in a class action settlement of indirect purchasers.[120] The plaintiffs argued that they were not part of the class action settlement because they purchased directly from a manufacturer's subsidiaries.[121] The Sixth Circuit resolved the dispute by invoking Michigan contract law, emphasizing intent of the parties, and looking to plain meaning and dictionary definitions.[122] Again, a court had to resolve the dispute over whether these plaintiffs were included in the class. The right way to ask the question is not to pursue what the negotiating parties intended as a matter of contract first and foremost but rather to interrogate the scope of the court's class certification and whether these purchasers fit within it.

Here, we are drawing an important distinction between the meaning of an agreement and the scope of who is bound by that agreement. In practice, of course, these questions may be intertwined because the terms of a deal often depend on who is bound. But even so, it is important to remain clear on the difference between the task of interpreting an agreement's terms—where it might make sense to consider contract principles and the intent of the parties first—and the task of determining whether a particular person or entity is bound by that agreement in the first place; presupposing a contractual frame is a kind of bootstrapping when the question is really the scope of a judgment. When the defendant airlines sought to bar new claims brought by Puerto Rican travel agents, or when the defendant automobile manufacturers sought to bar new claims brought by auto parts purchasers, their ensuing dispute with plaintiffs was all about *whether the plaintiffs were bound*. In each case, the plaintiffs' point was that whoever negotiated the agreements had no authority to bind them. They had not agreed to be represented by the class action lawyer, nor had they agreed to be bound by what that lawyer negotiated with the defendants. The only thing that could bind them to the negotiated deal would be if the court's class certification order made them part of the represented class.

It is instructive to consider how questions of who is bound are treated outside the class action context. For example, consider whether nonsignatories may be bound by arbitration agreements and forum-selection agreements.

119. *In re* Auto. Parts Antitrust Litig., 997 F.3d 677, 679 (6th Cir. 2021).

120. *Id.*

121. *Id.*

122. *Id.* at 682.

Nonsignatories can be bound under several theories that operate in and around contract and agency law: incorporation by reference in the agreement itself; assumption of the contract by the nonsignatory or an agent with authority to bind the nonsignatory; the alter ego status of the nonsignatory (or some other reason to pierce a veil between entities); or estoppel theories in which the nonsignatory got a benefit out of the agreement that would render it fair to bind it.[123] In the context of forum selection clauses, some courts have adopted a test that substitutes procedural for contract considerations, but enforcement against nonsignatories is problematic outside of well-established agency-based or other exceptions.[124] Thus, the starting point as a matter of contract law is that nonsignatories are not bound,[125] and when disputes arise over whether an exception exists that could bind nonsignatories, analytical avenues exist for reaching nonsignatories but require justifications that do not simply invoke the terms of an agreement.

Returning to class action settlement agreements, the process of class certification provides the functional equivalent of agency principles that can render nonsignatories bound by their agents' agreement. By certifying a class action, naming class representatives, and appointing class counsel, the court in effect appoints class counsel as the negotiating agent for all of the class members, subject to court approval of any proposed terms. If class counsel were to purport to bind claimants beyond those in the certified class definition, any

123. *See* GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1643 (2020) (noting that the Federal Arbitration Act generally permits courts to apply state contract law regarding enforcement of arbitration agreements, and "does not 'alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).'" (quoting Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 (2009))); E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 194 (3d Cir. 2001) ("[T]here is no dispute that a non-signatory cannot be bound to arbitrate unless it is bound 'under traditional principles of contract and agency law' to be akin to a signatory of the underlying agreement." (quoting BelRay Co., Inc. v. Chemrite (Pty) Ltd., 181 F.3d 435, 444 (3d Cir. 1999))); Inception Mining, Inc. v. Danzig, Ltd., 311 F. Supp. 3d 1265, 1274 (D. Utah 2018) (refusing to bind individual plaintiffs to an arbitration agreement because they were nonsignatories); Chesapeake Appalachia, L.L.C. v. Hickman, 781 S.E.2d 198, 217 (W. Va. 2015) ("A signatory to an arbitration agreement cannot require a non-signatory to arbitrate unless the non-signatory is bound under some traditional theory of contract and agency law. The five traditional theories under which a signatory to an arbitration agreement may bind a non-signatory are: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel."); *see also* 21 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2023) ("[T]raditional principles of state law allow a contract to be enforced . . . against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary theories, waiver, and estoppel.").

124. *See* John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 187, 211–14 (2021).

125. *See* United States *ex rel*. May v. Purdue Pharma L.P., 737 F.3d 908, 913 (4th Cir. 2013) (holding that a settlement agreement cannot serve as a defense to a claim asserted by a nonsignatory); Equal Emp. Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty.").

such negotiated agreement would be ultra vires.[126] Thus, just as questions of binding nonsignatories in other contract settings are resolved by reference to principles of agency, estoppel, and related doctrines, questions concerning the scope of who is included in a class action settlement should be resolved by reference to the breadth of the class certification, concepts of privity, or other bases for binding nonparties. When someone has not agreed to a deal and contends that they are not bound by it, the question of whether they are bound must be answered by something more than the terms of the deal itself and the intent of its drafters.

We have shown that certain class action settlement disputes cannot sensibly be resolved by reference to contract interpretation. Yet in a broad range of cases, abandoning contract thinking is not necessary as a categorical matter. Plenty of class settlement disputes involve the meaning of settlement terms or other matters that fit reasonably well into a contract framework. In what follows, we first explain the multifarious and pluralistic practices of contract that admit a broad array of specialized regimes for interpretation and construction (Section III.B). We then offer a form of analysis that suits the type of agreement class action settlement agreements actually are (Sections III.C and III.D). Once we build this interpretive framework, we apply it in Part IV to four illustrative cases.

B. *"Contract" Can Be Many Things*

If class action settlements are best understood *both* as a particular kind of judgment with binding effect as a matter of the law of judgments *and* as a particular kind of contract with binding effect as a matter of the law of contracts, and if class action settlements raise identifiable agency risks that threaten the interests of absent class members, what does this mean for how courts ought to interpret and construe these instruments in the broad set of cases in which courts are relying on contract law? Here, we make the case for applying a distinctive interpretive regime, just as courts have done for other types of binding agreements that do not sit neatly within a traditional framework of contracts based on mutual assent.[127]

When binding a *defendant*—a party that agreed to the terms of the class action settlement and participated in its negotiation and drafting—contract principles apply directly. However, when binding a *class member*—someone who neither agreed to the terms nor participated in their negotiation and drafting—

126. *Cf.* Red Dog Saloon v. Sedgwick Cnty. Bd. of Comm'rs, 33 P.3d 869, 871 (Kan. Ct. App. 2001) (holding that municipal government could not contract away the future exercise of its police powers so its settlement agreement with a saloon could not be enforced against it).

127. We are not the only pluralists about contracts. *See generally* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017) (discussing pluralism in contracts); Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915 (2012) (same).

contract principles apply only indirectly. Class members are bound by class action settlement agreements because of the court's power to resolve class actions; thus, the applicable law is the law of judgments in the first instance.[128] Contract principles enter the picture not because class members are bound by the agreement as a matter of contract law but rather because the *content* of the court's judgment is created by the terms of the negotiated agreement, and contract law has much to tell us about how to interpret and construe agreements. This brings us to the question of what sort of interpretive regime makes sense for class action settlement agreements.

Many types of contracts command their own interpretive regimes. When disputes arise concerning contract enforcement and construction, courts should apply the interpretive methods best suited to the type of contract at issue because not all contracts are created equal. Even if one grants that contract doctrine will be somewhat illuminating for some dimensions of class action settlement agreements, the real question is what sort of interpretive regime ought to apply. Thus, calling class action settlement agreements "contracts" and invoking "contract law" doesn't settle the consequential question of what interpretive regime to bring to bear to figure out a settlement agreement's legal meaning.

As an example, consider insurance contracts. No one really doubts they are contracts, even though they are in part regulated by insurance commissioners through public law.[129] As contracts, clear terms therein that have plain meanings are routinely enforced by courts, and courts draw upon general contract interpretation principles. Yet distinctive canons of construction recur in this contract type, nevertheless. For example, contra proferentem—the canon encouraging the construction of ambiguous terms against the drafting policy issuer[130]—is oftentimes referred to as a "first principle of insurance law."[131] As one court put it:

128. *See* Buchta v. Air Evac EMS, Inc., No. 4:19-cv-00976, 2020 WL 4583066, at *5 (E.D. Mo. Aug. 10, 2020), *appeal dismissed*, 2021 WL 3700936 (8th Cir. 2021) (applying Kentucky claim preclusion law to determine the binding effect of a class action settlement against a class member). See *infra* Part V for more on the intersection of contract law and preclusion law.

129. *See* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1264–69 (2011) ("[C]onsumer insurance policies in property and casualty insurance markets . . . are often described as 'super contracts of adhesion.'"). *But see* Christopher C. French, *Understanding Insurance Policies as Noncontracts*, 89 TEMP. L. REV. 535, 536 (2017) (arguing against the consensus view).

130. *See* Ethan J. Leib & Steve Thel, Contra Proferentem *and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773, 773 (2015) ("*Contra proferentem* usually requires that an interpreter read an ambiguous contract provision against the drafter of that provision.").

131. Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 531 (1996). *But see* Ed E. Duncan, *The Demise of* Contra Proferentem *as the Primary Rule of Insurance Contract Interpretation in Ohio and Elsewhere*, 41 TORT TRIAL & INS. PRAC. L.J. 1121, 1122 (2006) (detailing a shift in contract interpretation in Ohio that prioritizes the intent of the parties even where the language of the contract is ambiguous).

> [T]he *contra proferentem* rule[] is followed in all fifty states and the District of Columbia, and with good reason. Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.[132]

Another court put it this way:

> *Contra proferentem* has a usual application. In the typical coverage contest between an insurer and its insured, ambiguous terms in the insurance policy are construed in favor of the insured. This rule of construction recognizes the disparity in bargaining power that typically exists between an insurer and an insured, particularly since insurance contracts are often contracts of adhesion.[133]

Thus, even though we can say with confidence that insurance contracts are contracts and that they can therefore be subject to general contract interpretation principles, contra proferentem is a particular part of the law of contract interpretation that is especially relevant in the specific transactional context of insurance agreements.[134]

Even within the world of insurance contracts, interpretive principles differ as between those that apply to first-party insurance contracts (such as when a policyholder buys a policy to protect her property against damage or accidents) and third-party insurance contracts (when a policyholder buys a policy to protect against her liability to a third party for her own conduct).[135] Ultimately, courts tend to pursue "solicitousness for victims of mass toxic torts" in

132. Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 312 (7th Cir. 1992) (emphasis omitted) (quoting Kunin v. Benefit Tr. Life Ins. Co., 910 F.2d 534, 540 (9th Cir. 1990)).

133. Econ. Premier Assurance Co. v. W. Nat'l Mut. Ins. Co., 839 N.W.2d 749, 754 (Minn. Ct. App. 2013) (citations omitted).

134. *See generally* Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277 (2019) (discussing the role of the *contra proferentem* doctrine in contract interpretation generally and within the context of insurance agreements); Joanna McCunn, *The* Contra Proferentem *Rule: Contract Law's Great Survivor*, 39 OXFORD J. LEGAL STUD. 483 (2019) (discussing the historical development of *contra proferentem* and the role it plays in modern contract law).

135. *See* Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 233 (3d Cir. 2002) ("[T]he parties to each form of insurance contract assume vastly different roles. In the third-party setting, the insurer and insured may generally be considered allies, but in the first-party context, the insured and carrier are placed in an adversarial position. We are persuaded that the time-honored distinction between the two types of insurance coverage is valid and should be maintained."); Great N. Ins. Co. v. Mt. Vernon Fire Ins. Co., 708 N.E.2d 167, 170 (N.Y. 1999) ("[W]holly different interests are protected by first-party coverage and third-party coverage."); Winding Hills Condo. Ass'n v. N. Am. Specialty Ins. Co., 752 A.2d 837, 840 (N.J. Super. Ct. App. Div. 2000) (sustaining the doctrinal distinction between the "continuous trigger rule" for third-party claims and the "manifest trigger rule" for first-party claims).

establishing readings of, and rules for, third-party coverage but are willing to apply stricter rules that do not vindicate "public rights" when construing first-party coverage.[136] Thus, insurance contracts take account of public interests differentially depending upon the type of insurance contract. This reinforces an idea that not only can class action settlement agreements support a distinctive interpretive regime but also that such agreements might vary in ways that call for different treatment, tracking differential interests and agency concerns.

Or consider the American Law Institute's new *Restatement of the Law: Consumer Contracts*, which articulates a specialized interpretive regime for consumer transactions.[137] The *Restatement* highlights that a softer parol evidence rule ought to apply when a court is evaluating whether a consumer form contract is integrated and, thus, whether it bars additional or supplemental terms.[138] Again, the world of contract is multifarious and does not exclude this type of instrument as "contract" per se. Rather, there is increasing recognition that certain contract types call for specialized interpretive regimes where the baseline of the "intent of the parties" sometimes gives way to other public policy considerations.

For an even more mundane example, consider the Uniform Commercial Code ("UCC"), a distinctive regime for contracts that are, more or less, sales of goods rather than sales of services or real estate deals.[139] In these transactions, whatever else a state likes to do in its common law of interpretation to privilege text over context,[140] much about the UCC welcomes evidence of context into the interpretation of sales of goods.[141] Thus, even within the larger category of

136. *Winding Hills*, 752 A.2d at 840.

137. *See* RESTATEMENT OF THE LAW: CONSUMER CONTRACTS introductory cmt. (AM. L. INST., Revised Tentative Draft No. 2, 2022).

138. *See id.* § 8 reporters' note (discussing caselaw).

139. *See generally* Kastner & Leib, *supra* note 134 (exploring specialized regimes of contract for different transactional contexts); U.C.C. § 2-105 (AM. L. INST. & UNIF. L. COMM'N 2021) (governing contracts for the sale of goods).

140. *See, e.g.*, Laba v. Carey, 277 N.E.2d 641, 644–45 (N.Y. 1971) (stating the basic principles of contract interpretation under New York law, which tends to prioritize text); Kass v. Kass, 696 N.E.2d 174, 180–81 (N.Y. 1998) (same); Treemont, Inc. v. Hawley, 886 P.2d 589, 592 (Wyo. 1994) (holding that if "provisions are clear and unambiguous," courts "confine" their "examination" to the "four corners" of the contract); Citadel Holding Corp. v. Roven, 603 A.2d 818, 822 (Del. 1992) (stating the basic principles of contract interpretation under Delaware law, emphasizing text); Rainbow Navigation, Inc. v. Yonge, No. 9432, 1989 WL 40805, at *2 (Del. Ch. Apr. 24, 1989) ("[T]he attempt to define the legal meaning and effect of a contractual document must start in each instance with the language used in the contract itself."). For when Delaware courts may admit extrinsic evidence about the meaning of unambiguous language, see E. Norman Veasey & Jane M. Simon, *The Conundrum of When Delaware Contract Law Will Allow Evidence Outside the Contract's "Four Corners" in Construing an Unambiguous Contractual Provision*, 72 BUS. LAW. 893, 915–16 (2017).

141. *E.g.*, U.C.C. § 1-201(3) (defining "agreement" to include course of performance, course of dealing, and usage of trade); § 1-303 (defining those contextual cues further and requiring courts to render them consistent with one another whenever reasonable); § 2-202 (allowing final written

"contract," different tools can gain special relevance depending on transaction type. Which tools are most relevant in any transaction type requires sensitivity to the dynamics within the contract space that the interpretive regime governs.

This reality about the varied and pluralistic practice of "contract" invites the question of which ways the interpretation of class action settlement agreements ought to diverge from the kind of interpretive regime that might apply to an agreement among sophisticated parties bargaining, negotiating, and co-drafting at arm's length. Given the nature of the binding effect of class action settlements we explored in Section II.A and the structural facts about class action settlement dynamics that we identified in Section II.B, we would propose the interpretive framework below.

C. *Asking the Right Questions*

Whenever a dispute arises that requires a court to construe a class action settlement, the court should consider a set of questions to understand the nature of the dispute as it relates to the class action context. Faced with interpretive puzzles about class action settlement agreements, courts can use these questions to highlight key issues.

1. Against whom?

A court facing an interpretive issue in a class action settlement agreement should ask: In the pending dispute, who is to be bound by the terms of the class settlement?[142] Binding a dealmaker with the deal is not the same as binding a class member who did not have a seat at the negotiating table, did not agree to the settlement, and did not agree to be represented by those who struck the deal. If the dispute involves an attempt to bind someone who struck the deal and participated in the creation of settlement terms (in general this would include the defendant and class counsel, and in some cases the class representatives), then a heavy reliance on general contract principles may be warranted.[143]

agreements to be explained or supplemented by forms of extrinsic evidence). To be fair, states are not always able to swallow the UCC's permissive interpretive regime and find ways to skirt its ethos of permitting extrinsic evidence. *See, e.g.*, Binks Mfg. Co. v. Nat'l Presto Indus., Inc., 709 F.2d 1109, 1115–17 (7th Cir. 1983) (finding an ambiguous quotation to be a final integrated unambiguous writing to avoid the UCC's permissive approach to parol and extrinsic evidence); Fischer v. Zepa Consulting AG, 732 N.E.2d 937, 939 (N.Y. 2000) (refraining to find a contract to come within the UCC to avoid implied terms the UCC would otherwise supply).

142. A similar framing question is at the heart of John Coyle and Robin Effron's investigation into the law of binding nonsignatories to forum selection clauses. *See* Coyle & Effron, *supra* note 124.

143. Even before a judge has approved a class settlement—and thus before the settlement has become binding on class members—the deal may be binding on a party that agreed to it. In *Ehrheart v. Verizon Wireless*, 609 F.3d 590 (3d Cir. 2010), Verizon negotiated a class action settlement with counsel

In *McDonough v. Toys "R" Us, Inc.*, for example, when one of the defendants attempted to avoid paying its required share of an antitrust class action settlement, the court held as a matter of Pennsylvania contract law that the defendant was bound by the deal to which it had agreed.[144] Similarly, in *Febus v. Guardian First Funding Group, LLC*,[145] a defendant failed to pay the money that he owed under a settlement of a Fair Labor Standards Act collective action and a Rule 23(b)(3) class action for New York labor law claims.[146] The court enforced the agreement against the nonpaying defendant under New York contract law because his attorney, who agreed to the settlement, had apparent authority to do so.[147] This is straightforward, to be sure, but is sometimes lost in general talk of enforcing class action settlements as contracts: binding defendants who actually negotiated their agreements (as in *McDonough* and *Febus*) by simple contract principles is uncontroversial—but it is uncontroversial because of whom the court is being asked to bind.

If, on the other hand, the dispute involves an attempt to bind someone who neither struck the deal nor appointed an agent who did so (in general this would include any class member other than the class representatives), preclusion principles should play a more prominent role and intent-of-the-parties contract principles should play a weaker role, since the judgment

for a class of claimants asserting claims against Verizon for violations of the Fair and Accurate Credit Transaction Act ("FACTA"). *Id.* at 592. They submitted their proposed settlement to the district court for approval, and the court granted preliminary approval, moving forward toward notice and a final fairness hearing. *Id.* Shortly thereafter, Congress enacted and the President signed a law that amended FACTA, eliminating the legal basis for the plaintiffs' action. *Id.* Verizon sought to back out of the class settlement and sought dismissal of the plaintiffs' claims, arguing that the settlement was not yet binding because the district court had not granted final approval. *Id.* The district court agreed with Verizon, but the Third Circuit reversed, holding that Verizon was bound by the deal even though Congress had eliminated the plaintiffs' cause of action and even though the settlement had not yet become binding on the class. *Id.* at 608. The Third Circuit reasoned that the district court's role in approving class settlements relates to its duty to absent class members, not to whether a defendant is bound by the deal it struck:

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

Id. at 593 (citations omitted). For another example of a settlement binding a party that agreed to it, see *In re* Deepwater Horizon, 739 F.3d 790, 820 (5th Cir. 2014). In that case, the Fifth Circuit rejected BP's attempt to get out of the deal it struck for a settlement class action to resolve economic claims after the Gulf Oil Spill, noting that the purpose of district court's task under Rule 23(e) is to protect the interests of class members, not "the interests of the defendant, which in most settlements can protect its own interests at the negotiating table." *Id.*

144. 795 F. Supp. 2d 329, 335 (E.D. Pa. 2011).

145. 90 F. Supp. 3d 240 (S.D.N.Y. 2015).

146. *Id.* at 243–45.

147. *Id.* at 246–47.

dimension of the class action settlement is more central than the purported "agreement" to which no absent class member meaningfully consented. Indeed, for reasons explained below, when applying ambiguous class settlement terms to absent class members, courts might choose to employ a contra proferentem approach—favoring interpretations that promote the interests of the class member as nondrafting party rather than the interests of the defendant or class counsel as drafting parties. *Two Shields v. United States*, for example, involved the federal government's successful motion to bind two absent class members with the release in the Indian trust accounts class action settlement.[148] There is an enormous difference between binding absent class members—which cannot occur without the court's imprimatur—and binding those who actually agreed to the settlement.[149] Getting clear about this question first will help courts decide from the get-go whether "intent-of-the-parties" is the right frame or whether judgment principles should instead play a greater role—potentially applying contra proferentem to the underlying instrument at issue.

2. Tacit assent?

A second question for courts to consider: What was the nature of the opt-in or opt-out feature of the class action as it related to consummation of the settlement? In particular, did the opt-in or opt-out feature provide a basis for treating participation in the settlement as tacit agreement to its terms? This kind of analytical frame can also guide courts in their application of contract thinking to the settlement agreement since the type of consent parties offer can influence the application of contract law, as in adhesion contracts and procedural unconscionability analysis.[150]

If the settlement occurred in a Fair Labor Standards Act collective action or in a Court of Federal Claims class action, then the litigation worked on an opt-in basis because those rules require an affirmative step by class members to participate.[151] When dealing with disputes that arise under settlements of opt-in class actions, courts should ask whether the opt-in process occurred before or after the settlement terms were known. For example, consider *Sears v. United*

148. Two Shields v. United States, 820 F.3d 1324, 1327–28 (Fed. Cir. 2016). We described this case in Part I and will return to it in Part IV.

149. 4 RUBENSTEIN, *supra* note 3, § 13:46 ("When the parties propose a settlement of a class suit to a court, although they need judicial approval to bind absent class members, the agreement itself is nonetheless a private contract among the settling parties.").

150. *E.g.*, Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 268 (E.D. Mich. 1976) (listing procedural factors associated with consent—including that a contract is adhesive—that can lead to an unconscionability finding in a contract case); Wille v. Sw. Bell Tel. Co., 549 P.2d 903, 907 (Kan. 1976).

151. Portal-to-Portal Act of 1947, ch. 52, sec. 5(a), § 16(b), 61 Stat. 84, 87 (codified as amended at 29 U.S.C. § 216(b)) (permitting collective actions on behalf of employees similarly situated but providing that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party"); R. CT. FED. CL. 23(c)(2)(B)(v) (requiring notice "that the court will include in the class any member who requests inclusion").

States.[152] That case involved a dispute over whether certain landowners could proceed to trial on their rails-to-trails takings claims against the government, or whether they were bound by a not-yet-finalized settlement in a certified class action in the Court of Federal Claims.[153] In the *Sears* takings case, the opt-in occurred before the settlement.[154] Therefore, while it would have been inappropriate to treat a class member's participation as assent to the ultimate terms of the settlement, it would have been appropriate to treat each class member's participation as assent to be bound by the work of class counsel as agent.

Turning to class actions under Federal Rule of Civil Procedure 23, opt-out provisions depend on the category of class action. Class actions for money damages generally must be brought under Rule 23(b)(3), whereas class actions for indivisible injunctive or declaratory relief may be brought under Rule 23(b)(1) or 23(b)(2).[155] The most salient difference is that 23(b)(3) class actions *must* provide an opportunity for class members to exclude themselves, whereas in 23(b)(1) and 23(b)(2) class actions, such opt-out processes are discretionary and uncommon.[156] Thus, if the settlement occurred in a Rule 23(b)(1) or 23(b)(2) class action, most likely there was no opportunity for class members to exclude themselves, in contrast to Rule 23(b)(3) class actions. If a Rule 23(b)(3) class action is certified for *litigation*, then the opt-out process generally occurs prior to settlement. But if a Rule 23(b)(3) class action is certified solely for settlement purposes—that is, if it is a "settlement class action"—then the opt-out process occurs after the settlement terms are known. The latter situation, where class members have an opportunity to exclude themselves from a settlement after the terms are known, offers a potential basis for treating participation as tacit assent to the settlement terms, but only under certain conditions. If the class is large and individual settlement amounts are small, then one can presume that most class members pay no attention to the notice. Under these circumstances, failure to opt out says little about tacit assent. But if a class member has a substantial claim and has reason to know about the proposed class settlement, then failure to opt out may indicate meaningful assent to the terms of the deal, supporting the application of contract principles. Walmart's million-dollar claim in the Gulf Oil Spill class action[157] provides a good example of a situation where failure to opt out may reasonably be viewed as assent to the settlement. Even if Walmart did not have a hand in negotiating

152. 124 Fed. Cl. 444 (2015).

153. *Id.* at 446–47.

154. *Id.*

155. *See* FED. R. CIV. P. 23(b)(1)–(3).

156. *See* FED. R. CIV. P. 23(c)(2)(B)(v) (requiring notice in actions under Rule 23(b)(3)—but not under Rule 23(b)(1) or 23(b)(2)—of class members' right to exclude themselves).

157. *See* BP Expl. & Prod., Inc v. Claimant ID 100354107, 948 F.3d 680, 687 (5th Cir. 2020). We described this case in Part I and will return to it in Part IV.

the settlement agreement, its stake was large enough and its opportunity to opt out substantial enough that holding it to contract thinking is not anathema.

3. Agency risks?

A third question for a court to pose: Does the dispute involve a matter on which the interests of the settlement drafters diverged from the interests of class members? As we explored in Section II.B, in the negotiation of class action settlements, the interests of class counsel sometimes align with the interests of defendants in opposition to the interests of the class members whom class counsel are theoretically bound to represent. For example, class counsel and defendants often share an interest in maximizing the apparent size of a settlement—both to secure judicial approval and to maximize the award of attorneys' fees—even if the terms that expand the deal's apparent size do not actually benefit class members.

If a dispute involves an attempt to bind a class member with a particular interpretation of a term that presents this sort of agency risk in which the interests of the drafters (class counsel and defendants) diverged from the interests of class members, here too it seems especially appropriate for the court to apply the doctrine of contra proferentem to protect the interests of the class member. Thus, in a dispute over whether a class member complied with a complex claims process, or over the transferability of a coupon or credit where the settlement language could be read both ways, a court should consider that the drafters—class counsel and the defendant—shared an interest in magnifying the apparent size of the settlement without adding to the defendant's overall cost, and should read the ambiguous term to favor the interests of class members rather than the shared interests of the drafters.

Similarly, settlement terms that expand the definition of the class are generally good for defendants because they provide greater protection from future litigation, and generally empower and enrich class counsel by expanding the size of the franchise and the corresponding fees, but bad for the newly added class members unless significant value is added to the settlement to cover their claims. For similar reasons, both defendants and class counsel tend to benefit from terms that expand the scope of the release in terms of the legal categories, time frame, or factual scope of claims covered; yet such terms harm class members unless sufficient value is added to the settlement to justify the breadth of the release. For these reasons, utilizing the canon of contra proferentem in these contexts embraces a form of contract thinking—but with more sensitivity to the dynamics of drafting and negotiation, similar to insurance law and how it implements its fragmented contract principles.

4. Same judge?

In some circumstances, courts should ask whether the judge evaluating the interpretive dispute was the same judge who certified the class and approved the settlement. To the extent the dispute should be resolved by understanding the terms of the settlement that was approved by the court, some deference should be given to the judge who is best positioned to speak to the meaning of that settlement and thus the meaning of the judgment that made the settlement binding.[158] The dispute between Walmart and BP over the meaning of "start-up business" in the Gulf Oil Spill settlement, for example, was directed to the same judge in the Eastern District of Louisiana who had approved the settlement class action,[159] so it made sense to defer to his understanding of the meaning of the judgment he entered embodying the terms of the deal. By contrast, the *Cobell* class action that resulted in the Indian trust account settlement occurred in the U.S. District Court for the District of Columbia, whereas the dispute over whether Ramona Two Shields was precluded by that settlement was decided not only by a different judge but also by an entirely different court, the Court of Federal Claims.[160] We do not expect judges to have thought about every interpretive issue that may arise under a class action settlement agreement, and even if they did, we do not expect them to remember their thoughts years later when a dispute actually arises. Even so, for deciding the meaning of a judgment that gave binding effect to a class action resolution,

158. We emphasize the role of the judge who approved the proposed class settlement rather than the role of a mediator who may have helped bring the agreement into being. While it is true that mediators play a prominent role in class action settlements and are well-positioned to know the discussions that led to settlement agreement terms, there are reasons to be wary of looking to mediators for guidance on the meaning of settlement agreements. Mediators are subject to agency risks akin to those of class counsel and class representatives, *see* Howard M. Erichson, *The Dark Side of Consensus and Creativity: What Mediators of Mass Disputes Need To Know About Agency Risks*, 88 FORDHAM L. REV. 2155, 2155–62 (2020), so reliance on mediators' understanding of class settlement agreement terms may entrench rather than alleviate the problems identified *supra* Section II.B. Moreover, mediators are subject to both an evidentiary privilege and an ethical duty of confidentiality. *See* Scott Van Soye, *Mediation Confidentiality: The Twin Supports of Resolution*, ADR TIMES (Oct. 5, 2020), https://www.adrtimes.com/mediation-confidentiality [https://perma.cc/L8XD-56J4 (staff-uploaded, dark archive)].

159. *See BP Expl.*, 948 F.3d at 687.

160. Two Shields v. United States, 820 F.3d 1324, 1327–28 (Fed. Cir. 2016). Even when the judge deciding the interpretive dispute is not the same judge who approved the class action settlement, an adjudication mindset matters. On the question of whether to consider extrinsic evidence, the approach of the law of judgments is arguably looser than the approach of contract law in many jurisdictions. *See, e.g.*, Capco 1998-D7 Pipestone, LLC v. Milton Ventures, LLP, No. 05 C 1024, 2005 WL 1667445, at *2, *2 n.1 (N.D. Ill. July 13, 2005) (acknowledging the possibility of considering extrinsic evidence regarding defendant's claim preclusion argument and thereby converting motion to dismiss into summary judgment motion but finding it unnecessary to do so). By acknowledging that a class action settlement is not merely an agreement but also a judgment, courts might take a more permissive approach toward the admission of extrinsic evidence that helps them flesh out the meaning of a class settlement.

it seems relevant whether the decision-maker is the judge who approved the settlement and entered the judgment. The focus on the judge who entered judgment will not always displace the intent of the parties, of course, but some attention to who is in the best epistemic position to understand the terms of the deal seems appropriate.

D. *Reasoning Toward the Right Answers*

Taken together, we think the questions above can help guide courts, however imperfectly, toward better ways to bring their contract thinking into alignment with the transaction type they are interpreting. It is a mistake for courts to see their role in the interpretation of class action settlement agreements as merely effectuating parties' intent. This is because courts play an equally important role with regards to class action settlements—their role as protectors of absent class members. Not only must courts discharge this responsibility at the moment when they are asked to approve a settlement or set attorney fees,[161] but also role fidelity to their responsibilities to class members in class actions should support some "representation-reinforcing"[162] interpretive approaches downstream after a settlement is approved.[163]

Putting together judges' various role responsibilities in these contexts highlights what our questions make salient: just as defendants who negotiate their settlement agreements need to be bound to their terms, some interpretive postures to pursue the interests of class members for those who do not meaningfully consent to the terms of settlement agreements can also be appropriate—even as contract law. Hence our invocation of contra proferentem against both drafting parties and in favor of class members, who typically play zero role in the negotiating and drafting process. And hence our reminder to courts that when claimants are challenging the scope of the agreement as it

161. *E.g.*, Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975) (explaining, in the context of settlement review under Rule 23(e), that the "district court acts as a fiduciary who must serve as a guardian of the rights of absent class members"). For other judicial support for the general view that courts have fiduciary duties to absent class members in class actions, for example, *In re* BankAmerica Corp. Sec. Litig., 228 F. Supp. 2d 1061, 1064 (E.D. Mo. 2002); *In re* Sunbeam Sec. Litig., 176 F. Supp. 2d 1323, 1332 (S.D. Fla. 2001); *In re* Bausch & Lomb, Inc. Sec. Litig., 183 F.R.D. 78, 82 (W.D.N.Y. 1998); *see also In re* Cendant Corp. Litig., 264 F.3d 201, 255 (3d Cir. 2001) (emphasizing the court's role as protector of class members because of counsel's inherent conflicts of interest).

162. For the classic statement of how "representation-reinforcement" judging works, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980) (exploring how process failures supports judicial intervention on behalf of those poorly represented).

163. For an example of a Special Master in the NFL concussion class action settlement treating the settlement as a special kind of contract and noting his duty to protect absent class members (and citing a draft of this Article), see *In re* Nat'l Football League Players' Concussion Inj. Litig., No. 12-md-02323, at 15 n.78 (E.D. Pa. Oct. 7, 2023).

applies to them, law about nonsignatories might precede the application of basic rules of contract interpretation.[164]

The judge's special role to protect class members could also support other mainstream canons of interpretation. Consider the old canon of construction that contracts can be read to impose substantively reasonable obligations—where the idea of reasonableness flows from normative commitments in the transactional environment rather than emergent solely from the parties' intent or text.[165] To be sure, courts will still enforce plain meanings if they see them in these cases, but the shadow of substantive reasonableness during the interpretive process might do some of the equitable work of continuing to make sure the settlement was, as Federal Rule 23 requires, "fair, reasonable, and adequate."[166] As Farnsworth describes this potentially relevant rule of construction in his treatise, courts embrace "the assumption that the bargaining process results in a fair bargain, so that, between an interpretation that would yield such a bargain as a reasonable person would have made and one that would not, the former is preferred."[167] Judges should be aware that even if they grant the settlement agreement as contractual, there are interpretive resources available to provide the fairest rendering of that agreement—and our interpretive framework invites judges in their protective capacity to think not only of what class counsel thought they agreed to but what a reasonable class member might have.

More ambitiously still—and this is not a direct implication of any of our guidance questions for judges in these interpretive disputes but is not precluded by them either—judges who have a clearer perspective on the structural facts surrounding settlement class action agreements might even revive the canon of construction in *Restatement (Second) of Contracts* directing that "in choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred."[168] Although this directive appears in the current "restatement," few would suggest courts have applied this canon enthusiastically in the general law of contracts.[169] Yet it is there for use in just this transactional context where it could serve to promote the goal of fairness.

The larger message here is more important than any specific recommendation for principles of interpretation. That is, assimilating class

164. *See supra* Section III.A.

165. For a recent exploration of this canon, see generally Aditi Bagchi, *Interpreting Contracts in a Regulatory State*, 54 U.S.F. L. REV. 35 (2020).

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

167. E. ALLAN FARNSWORTH, CONTRACTS § 7.11 (4th ed. 2004).

168. RESTATEMENT (SECOND) OF CONTRACTS § 207 (AM. L. INST. 1981).

169. Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REG. 211, 241 n.119 (2015) ("Unfortunately, the principle has not caught on outside of limited contexts . . . .").

action settlement agreements to the category of contract invites further inquiry about the right interpretive tools to use to understand any given agreement's scope and meaning. Clarity about the judgment aspect of class action settlements alongside their contractual aspect should help judges better frame the issues when considering disputes over the interpretation of class action settlement agreements. And appreciating that contract law contains multitudes can help judges get the right contract law for this transactional environment with its distinctive negotiation dynamics.

IV. CASE STUDIES

To see how our proposed framework could alter how courts analyze disputes over the meaning of class action settlements, we turn now to four case studies. For each case, we begin by looking at how the court framed the dispute in contract terms. Then we explain how a court might have analyzed the dispute using the framework we developed in Part III, incorporating both an understanding of the adjudicative aspect of class settlements and a more sensitive approach to the contract analysis. Depending on how they answered certain questions, courts might have reached the same results under our analysis as they did under a simplistic contract-based analysis. Even so, we hope to show that our interpretive framework offers a workable method for courts to focus on key aspects of the class action context and that it lays out a way for courts to apply more thoughtful analysis in light of the particular nature of class action settlement agreements.

A. *The Gulf Oil Spill Settlement*

In *BP Exploration & Production, Inc. v. Claimant ID 100354107*, the Fifth Circuit addressed a dispute between Walmart and BP concerning the oil company's obligations under a class action settlement that resolved the massive litigation over the 2010 Deepwater Horizon oil spill in the Gulf of Mexico.[170] That class action settlement included a provision for compensating start-up businesses that suffered economic losses due to the oil spill.[171] It defined "Start-Up Business" as one with "less than 18 months of operating history at the time of the Deepwater Horizon Incident."[172] Walmart had opened a store on the Mississippi Gulf Coast in 2003; the store was completely destroyed by Hurricane Katrina in 2005; Walmart rebuilt the store and reopened it in October 2009; and six months later the oil spill occurred.[173] Walmart submitted

170. BP Expl. & Prod., Inc. v. Claimant ID 100354107, 948 F.3d 680, 683 (5th Cir. 2020).
171. *Id.* at 684.
172. *Id.* at 685.
173. *Id.* at 683–64.

a claim as a start-up business under the terms of the settlement.[174] The class settlement administrator awarded Walmart nearly $1 million for its losses, and over BP's objection, the amount was affirmed by an appeal panel within the settlement process.[175] BP sought review in district court, arguing that Walmart was not a start-up business under the agreement.[176] According to BP, Walmart should have received zero compensation under settlement terms that imposed different frameworks for calculating expected profits for regular businesses and start-ups.[177] The district judge denied discretionary review of the award, and the Fifth Circuit affirmed the decision.[178]

The Fifth Circuit explained its reasoning in terms of contract law, citing federal maritime contract cases:

> In reaching this conclusion, we are guided by the fact that the Settlement Agreement is a maritime contract interpreted in accordance with federal admiralty law, which dictates that a contract should be read as a whole and its words given their plain meaning unless the provision is ambiguous. A provision is not ambiguous if its language as a whole is clear, explicit, and leads to no absurd consequences, and as such it can be given only one reasonable interpretation. . . . As we read it, the definition of "Start-Up Business" in the Settlement Agreement is subject to at least two reasonable interpretations.[179]

On BP's reading, the settlement's definition of "start-up business" meant a business with less than 18 months of total operating history.[180] On Walmart's reading, the definition meant a business with less than 18 months of continuous operating history *immediately prior to the spill*.[181] Because each offered a reasonable interpretation of the contractual language, the Fifth Circuit held that the district court did not abuse its discretion by denying review of the $1 million award to Walmart.[182] Following the logic of contract law, the court considered what it could infer about the intent of the parties:

> Walmart's . . . argument provides evidence that the circumstance here was never even contemplated by the parties to the Settlement Agreement. We find it difficult to believe that the parties intended to foreclose recovery by businesses that suffered spill-related losses mere months after finally resurfacing from the Gulf Coast's previous catastrophe, Hurricane Katrina. . . . In sum, we hold that the appeal

174. *Id.* at 685.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 686, 688.
179. *Id.* at 687 (internal quotation marks and citations omitted).
180. *Id.* at 686.
181. *Id.* at 687.
182. *Id.* at 688.

> panel made a discretionary decision not incongruent with the language of the Settlement Agreement.[183]

Thus, the court treated the Gulf Oil Spill class action settlement as a maritime contract, applied maritime law precedents involving standard maritime contracts, and looked to the intent of the parties that negotiated the settlement. Finding the relevant contractual term ambiguous and finding that the negotiating parties had not contemplated the precise question in dispute, the court considered more broadly the parties' intent and inferred that they would not have intended to foreclose recovery for Walmart under these circumstances.

Now, suppose that the Fifth Circuit had applied our interpretive framework rather than jumping to federal maritime contract law. Its starting point would have been that the Gulf Oil Spill settlement was *both* a negotiated agreement *and* a judgment with preclusive effect. It would have seen that the principles for addressing a dispute over the meaning of class settlement terms depended on the class action context. The *BP* settlement was a Rule 23(b)(3) settlement class action, negotiated by BP with putative class counsel under the aegis of the MDL transferee judge, Judge Carl Barbier.[184]

First, under our framework the court would have considered who is to be bound. To the extent the case was an attempt by Walmart to bind BP with the terms of the settlement—indeed, this is the best way to describe the dispute, given that the question was whether the settlement administrator and review panel erred by treating Walmart as a start-up business over BP's objection—the court should have seen that binding a defendant like BP to the terms of a class settlement differs from binding absent class members. Because BP agreed to the terms of the settlement and participated in their creation, the court could look to standard maritime contract principles regarding how to approach the language to which BP agreed to be bound.

But to the extent the dispute involved an attempt by BP to bind Walmart—this describes a scenario in which the court found that Walmart was not a start-up—the court would treat this as an instance of binding an absent

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183. *Id.*

184. John Schwartz, *Accord Reached Settling Lawsuit over BP Oil Spill*, N.Y. TIMES (Mar. 2, 2012), https://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html [https://perma.cc/HMB9-L9NB (staff-uploaded, dark archive)]. In Multidistrict Litigation (MDL), as authorized by 28 U.S.C. § 1407, actions pending in multiple federal district courts are transferred to single federal district judge for pretrial purposes. DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL PART II § 1407 (2023). Unlike a class action, in which a class representative and class counsel represent the interests of an entire class in a single action, MDL involves a centralized process for handling multiple actions. *See id.* It is not uncommon, however, for the MDL to become the center of gravity in a mass dispute, *see id.*, and thus for settlements to be negotiated (on a class-action basis or on a non-class-action basis) by leadership counsel within the MDL and under the supervision of the MDL transferee judge, as occurred in the Gulf Oil Spill litigation. *See* Schwartz, *supra*.

class member to the terms of the settlement. In this latter scenario where Walmart is to be bound, a more nuanced contract framework informed by preclusion should be employed.

Next, under our framework the court should have considered the extent of assent. Here, the court would have noted that the agreement was a Rule 23(b)(3) settlement class action, so class members had the opportunity to exclude themselves after the terms of the deal were known. While the opt-out feature may be meaningless for the vast majority of ordinary class members in most class actions, Walmart's position in the Gulf Oil Spill situation was anything but ordinary. Both the size of the claim and the sophistication of the claimant weigh in favor of viewing Walmart's decision not to opt out as tacit assent to the terms of the settlement after those terms were known.

Then the court should have looked at the particular issue in dispute—whether to calculate Walmart's expected profits as a start-up or regular business. This is *not* the sort of issue on which BP's interests would have aligned with class counsel's interest at the expense of class members when BP and class counsel negotiated the terms of the settlement class action. Rather, this is an issue on which BP and class counsel likely would have had opposing views on how broadly to apply the more generous formula for start-ups. This issue does not implicate the sort of structural concerns in class action settlements that could require a contra proferentem reading.

Finally, the Fifth Circuit would have noted that this dispute went first to Judge Barbier, the very judge who had certified the Gulf Oil Spill class action and approved the settlement. Acknowledging the adjudicative aspect of the settlement class action, a court applying our framework would have seen that the question is not merely what BP and class counsel intended when they negotiated the deal but also what Judge Barbier intended when he reviewed the settlement and entered a judgment giving force to the deal because he found the terms fair. The fact that Judge Barbier rejected BP's plea to review the Walmart award might answer whether he thought the treatment of Walmart as a start-up was inconsistent with the meaning of the settlement that he had approved and thus the meaning of the judgment that he had entered.

Accordingly, our interpretive framework makes salient the most important questions the court should have been asking to help it answer the question before it. Since the court did not structure its inquiry in the way we would have, it is hard to tell whether the court got to the right answer, all things considered. But our framework provides a sounder set of considerations than a rough application of federal maritime contract law.

B. *The Airline Commissions Settlement*

In re Airline Ticket Commission Antitrust Litigation involved another dispute over the meaning of a class settlement term.[185] This time, the disputed term was "United States."[186] Travel agents had brought an antitrust class action against airlines concerning caps on commissions paid to travel agents.[187] The district court certified a class of "all travel agencies in the United States" that had issued relevant travel tickets, and the court later approved a settlement in which the airlines agreed to pay $86 million to be allocated pro rata to class members based on ticket sales.[188] Subsequently, a Puerto Rican travel agency filed a separate class action on behalf of travel agents in Puerto Rico (and the U.S. Virgin Islands).[189] The airlines opposed the new class action, arguing that the Puerto Rican agents were part of the prior class settlement.[190] In the ongoing original class action, a trade organization filed a motion to clarify the class definition, arguing along with the airlines that the Puerto Rican agents were class members and that the court should distribute unclaimed settlement funds to them.[191] Class counsel in the original class action opposed the motion, arguing that the class did not include Puerto Rican agents.[192] Instead of distributing unclaimed settlement funds to Puerto Rican agents, class counsel requested a cy pres distribution of unclaimed settlement funds to several Minnesota charities and three Minnesota law schools.[193] The dispute thus presented the question of whether "United States" included Puerto Rico for purposes of the class settlement.

District Judge James Rosenbaum, treating the dispute as one over a contract term, agreed with class counsel and found that the class settlement did not include Puerto Rican agents.[194] The court ordered the cy pres distribution that class counsel had requested.[195] On appeal, the Eighth Circuit similarly framed the case as a contract dispute: "The parties agree that [a] settlement agreement is a contract and is to be construed in accordance with contract principles and that Minnesota law applies."[196] Applying Minnesota contract law

185. 268 F.3d 619 (8th Cir. 2001). For a critical view of the case, see generally Lindsay M. Germano, Note, *Contract Law—Interpretation of United States—Eighth Circuit Holds Settlement Agreement for United States Travel Agents Excludes Affected Agents in Puerto Rico and the U.S. Virgin Islands*, 69 J. AIR L. & COM. 195 (2004).

186. *In re Airline Ticket Comm'n*, 268 F.3d at 622.

187. *Id.* at 621.

188. *Id.*

189. *Id.*

190. *Id.* at 621–22.

191. *Id.* at 622.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 623 (internal quotation marks omitted).

and citing Minnesota precedents, the court reasoned that contracting parties are "free to assign technical meanings to the words they employ,"[197] but the court agreed with the district judge that there was "no evidence that the parties intended to do so," so "the court correctly gave the contract language its plain and ordinary meaning."[198] The ordinary meaning of United States, the court said, did not include Puerto Rico. Even if the term "United States" was ambiguous in this regard, the Eighth Circuit stated that it "would affirm the district court's finding that the parties did not intend to include travel agencies in Puerto Rico," because the factual question of the parties' intent is reviewed for clear error, and the district judge had made a "credibility finding" regarding the parties' intent.[199] Moreover, the court found that the timing of the trade organization's and airlines' assertion that Puerto Rican travel agents were part of the class settlement was evidence that the parties had not considered that those agents would be included.[200] Thus, the Eighth Circuit affirmed the district court's ruling that Puerto Rican agents were not included in the class settlement, but as to the cy pres distribution, the court remanded to the district court to replace the local charities and law school with recipients more suitable for this nationwide class action concerning caps on travel agent commissions.[201]

How would our framework apply here? First, a court would note that the dispute centers on *whether certain parties are bound* and thus cannot be resolved by reference to terms that they did not agree to.[202] Rather, the question of who

197. *Id.* (quoting Lang v. Gen. Ins. Co. of Am., 127 N.W.2d 541, 545 (Minn. 1964)).

198. *Id.*

199. *Id.* at 624.

200. *Id.*

201. *Id.* at 626. In an ironic twist, the money ended up going to the Puerto Rican and Virgin Islands travel agents notwithstanding the ruling that they were excluded from the class. When the Eighth Circuit remanded to the district court to find an appropriate cy pres recipient, the district judge selected the National Association for Public Interest Law ("NAPIL"). The Eighth Circuit reversed again because of the disconnect between the recipient and the subject matter of the action:

> The district court did not fully carry out our mandate. Considering the evidence and the options before the district court, travel agencies in Puerto Rico and the U.S. Virgin Islands were clearly the next best recipients of the funds. The lawsuit challenged the caps on ticket commissions for flights "within and between the continental U.S., Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands." Travel agencies in Puerto Rico and the U.S. Virgin Islands, although not members of the class, were subject to the same allegedly unlawful caps. A cy pres distribution to these agencies would relate directly to the antitrust injury alleged in this lawsuit and settled by the parties. In contrast, as the district court appeared to recognize, NAPIL cannot claim any relation to the substantive issues in this case . . . . Accordingly, we reverse the district court's order and remand the case for a new cy pres distribution. The unclaimed funds should first be distributed on a proportional basis to the travel agencies in Puerto Rico and the U.S. Virgin Islands which were subject to the caps.

In re Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 683–84 (8th Cir. 2002).

202. On the inaptness of contract framing for questions of who is bound by a class action settlement, see *supra* text accompanying notes 115–26.

is bound implicates the scope of the class definition. If the court had appreciated that the class settlement was not merely contract but also judgment, it could have seen past "intent of the parties" to ask an equally important question, which is the scope of the class action that the district judge thought he was considering when he certified the class and the scope of the settlement that the district judge thought he was evaluating when he found the terms fair. Judge Rosenbaum, who ruled on this dispute and determined that the settlement excluded Puerto Rican agents, was the very judge who had certified the class[203] and approved the settlement.[204] Rather than frame its decision in terms of deferring to Judge Rosenbaum's credibility findings regarding the intent of those who negotiated the settlement, the Eighth Circuit could have framed its decision in terms of deferring to Judge Rosenbaum's ruling on the meaning of the orders that he himself had entered when he certified a class of "all travel agencies in the United States" and when he found that the settlement fairly compensated the class so defined.

As our interpretive framework recommends, the court should ask who is to be bound, and whether the issue in dispute implicates identifiable agency risks. This dispute, interestingly, involved competing positions between the class action defendants and class counsel—the airlines wanted to include the Puerto Rican agents while class counsel did not. A split between defendant and class counsel would not be unusual if the dispute concerned the size of payments to class members. But where a dispute concerns the scope of a class definition—an issue on which defendants' interests typically align with class counsel's interest to maximize the scope of those whose claims will be precluded by a settlement class action—the split may seem surprising. Here, the explanation may lie in the proposed cy pres distribution of unclaimed funds. The defendant airlines wanted to maximize the scope of res judicata from the class settlement, so naturally they favored an interpretation that included Puerto Rican agents as long as it did not increase the cost of the settlement. Class counsel, on the other hand, presumably had a hand in choosing the Minnesota charities and law schools to whom they wished to send unclaimed settlement funds. A court deciding how to construe the class settlement might reasonably discount these participants' assertions about their intent. This is not to say that the court should decide that Puerto Rican agents were included in the class settlement; it is merely to say that under these circumstances, the court should find it

203. *See* Revised Stipulation & Agreement of Settlement with Trans World Airlines, Inc. at *1, *5, *In re* Travel Agency Comm'n Antitrust Litig., No. 4-95-07 (D. Minn. May 23, 1995) (referencing class certification order of May 2, 1995).

204. *In re* Airline Ticket Comm'n Antitrust Litig., 953 F. Supp. 280, 286 (D. Minn. 1997); *see also In re* Travel Agency Comm'n Antitrust Litig., 898 F. Supp. 685, 687 n.2 (D. Minn. 1995) (explaining that Judge Rosenbaum was assigned the airline ticket commission antitrust cases by the Judicial Panel on Multidistrict Litigation when it ordered these cases transferred from various districts to the District of Minnesota for coordinated handling).

unsurprising and uninformative that the airlines would say they intended "United States" to include Puerto Rico, and that class counsel would say they intended the opposite.

Interestingly, the Eighth Circuit's opinion caroms back and forth between two conceptions of class action settlements without any apparent awareness of the difference. The opinion states, "We note that 'few persons are in a better position to understand the meaning of a [settlement agreement] than the district judge who oversaw and approved it.'"[205] Indeed! The class settlement was not merely an agreement between class counsel and the defendants; it was also a judgment entered by a district judge who found the class certifiable and who found the settlement terms fair, which is precisely what makes it binding on class members. Yes, the district judge who approved it is in the best position to understand the scope of the class settlement. But the Eighth Circuit seems to mean something rather different by its sentence about deference to the district judge. The line occurs at the end of a paragraph devoted to explaining why the district court's "credibility finding" was not clearly erroneous. "We review the court's findings concerning the parties' intent for clear error," the Eighth Circuit writes.[206] In other words, the Eighth Circuit sees the key question as what the airlines and class counsel intended when they negotiated the terms of the deal, not what the district judge intended when he certified and approved it. Its deference to the district judge, far from a recognition of the adjudicatory aspect of class settlements, merely reemphasizes the court's contract-based conception of class settlements and its narrow focus on the intent of the parties without any consideration that the "parties" who negotiated the deal and agreed to its terms are not the absent class plaintiffs who are now claiming they never had representation at the bargaining table but rather class counsel and the airlines. A court applying our framework may have reached the same result but would have gotten there with very different reasoning.

C. *The Indian Trust Settlement*

In *Two Shields v. United States*, the parties disputed whether a new set of claims against the federal government was precluded by a prior class action settlement.[207] The *Cobell* class action, brought on behalf of a class of hundreds of thousands of Native American holders of Individual Indian Money ("IIM") accounts, addressed claims that the federal government had mismanaged these accounts and their underlying assets.[208] The class settlement disposed of "known

205. *In re Airline Ticket Comm'n*, 268 F.3d at 624 (quoting W. Alton Jones Found. v. Chevron U.S.A., Inc., 97 F.3d 29, 33 (2d Cir. 1996)).
206. *Id.*
207. 820 F.3d 1324, 1328 (Fed. Cir. 2016).
208. Cobell v. Salazar, No. 96-CV-01285, 2011 WL 10676927, at *1 (D.D.C. July 27, 2011), *aff'd*, 679 F.3d 909, 924 (D.C. Cir. 2012).

and unknown claims that have been or could have been asserted through [September 30, 2009] for Interior Defendants' alleged breach of trust and fiduciary mismanagement of land, oil, natural gas, mineral, timber, grazing, water and other resources and rights."[209]

Two years after the U.S. District Court for the District of Columbia approved the *Cobell* settlement, plaintiffs Ramona Two Shields and Mary Louise Defender Wilson filed suit in the Court of Federal Claims, asserting that the federal government breached its fiduciary duty when it allowed a company called Dakota-3 to obtain oil and gas leases at below-market rates between 2006 and 2009 and to sell them for a profit of $900 million in November 2010.[210] The government moved for summary judgment, arguing that the plaintiffs were members of the *Cobell* class and bound by that settlement.[211] The plaintiffs argued that their claims related to Dakota-3 were not included because the claims accrued when Dakota-3 sold the leases in 2010, after the cut-off date specified in the settlement.[212] According to the plaintiffs, the small payments provided by the class settlement made no sense as applied to their high-value claims related to the Dakota-3 sale.[213] The Court of Federal Claims rejected the plaintiffs' arguments and found that their claims were released in the *Cobell* settlement.[214]

On appeal, the Federal Circuit went straight to contract law: "We treat the *Cobell* settlement as a contract, the proper interpretation of which is a question of law."[215] The court concluded that the claims were within the terms of the *Cobell* settlement and therefore barred.[216] As to the plaintiffs' contention that their claims surely were not included in the class settlement because they would not have released high-value claims in exchange for what that settlement provided, the court pointed to the plaintiffs' failure to opt out of the class settlement:

> Appellants' argument is foreclosed by the simple fact that they chose not to opt out of the settlement. Even if the *Cobell* payments are less than satisfactory in rectifying the . . . harm, Appellants are bound by the settlement's payment terms because they chose not to opt out . . . . [The court found the settlement fair, and] further reasoned that "the existence of the opt-out alternative effectively negates any inference that those

209. *Two Shields*, 820 F.3d at 1327 (internal citations omitted).
210. *Id.* at 1328.
211. *Id.*
212. *Id.* at 1329.
213. *Id.*
214. *Id.* at 1328.
215. *Id.* at 1329 (citations omitted).
216. *Id.* at 1333–34.

> who did not exercise that option considered the settlement unfair." We agree.[217]

The court treated the plaintiffs' failure to opt out as agreement to the terms of the settlement class action, reinforcing the contract mindset for evaluating whether the settlement barred the plaintiffs' claims.

The court turned again to contract law to address the plaintiffs' argument "that the Court of Federal Claims erred by arriving at its conclusion without first allowing discovery of extrinsic evidence regarding the facts and circumstances surrounding the negotiation and execution of the *Cobell* settlement."[218] The plaintiffs argued that "extrinsic context evidence must be considered in determining whether the *Cobell* release language applies to Appellants' . . . claims."[219] The court looked to contract law cases for the proposition that extrinsic evidence cannot be used "to create an ambiguity where a contract was not reasonably susceptible of different interpretations at the time of contracting."[220] Finding the *Cobell* settlement language sufficiently clear, the Federal Circuit affirmed the grant of summary judgment by the Court of Federal Claims on the ground that the plaintiffs' claims were barred by the class settlement.[221]

Now, suppose that the Court of Federal Claims and Federal Circuit had applied our interpretive framework, starting with the understanding that the *Cobell* class action settlement was both a negotiated agreement and a judgment with preclusive effect. In the first place, the law of judgments might have permitted a more liberal use of extrinsic evidence to determine the meaning of the judgment.[222] Moreover, the courts might have considered that *Cobell* was a settlement class action, negotiated by then-putative class counsel on behalf of an enormous class of several hundred thousand Native American holders of Individual Indian Money accounts that were allegedly mismanaged by the federal government. Because it was a settlement class action, the *Cobell* deal raises standard structural concerns that class counsel lacked trial leverage to resist defendant's preference for obtaining maximal res judicata at the lowest price.

The fact that it was a settlement class action means that the opt-out process in *Cobell* occurred after the deal was negotiated, thus in theory providing an opportunity for class members to exclude themselves if they found the deal unsatisfactory. However, the likelihood of individual class members making

217. *Id.* at 1330 (citations omitted).

218. *Id.* at 1331.

219. *Id.*

220. *Id.* (quoting Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin., 169 F.3d 747, 752 (Fed. Cir. 1999)).

221. *Id.*

222. *See supra* note 160.

such a decision is belied by the sheer size of the class. Indeed, of the hundreds of thousands of class members, only 1,824 individuals opted out of the settlement class action.[223] Unlike Walmart in the context of the BP Gulf Oil Spill settlement,[224] which was unusually well-positioned to consider opting out, individual class members in the Indian trust settlement were more like the typical absent class member. Failure to opt out of a class action reflects predictable human behavior to ignore such notices, not a cost-benefit analysis of whether to accept the proposed settlement terms.[225] A court applying our framework would avoid implying, as the Federal Circuit did,[226] that Ms. Two Shields's and Ms. Wilson's failure to opt out was a tacit agreement to the settlement terms.

A court applying our framework would consider whether the circumstances warrant a contra proferentem approach. The *Two Shields* case involved the government's attempt to bind Ramona Two Shields and Mary Louise Defender Wilson as class members. Specifically, it involved the government's argument in favor of a broader construction of the settlement that would maximize the scope of claims released, as against the plaintiffs' argument in favor of a narrower construction of the settlement that would allow them to go forward with their new claims. This dispute over how broadly to construe the scope of the release is precisely the sort of situation that reasonably calls for a contra proferentem approach in cases of ambiguity. The scope of claims released is a term on which the interests of class counsel align with the interests of a defendant—both want to maximize the scope of the deal—and the interests of these negotiating parties line up against the interests of absent class members who would prefer not to give up additional claims unless those claims are adequately compensated. In a settlement class action, class counsels have little leverage to resist a defendant's insistence on expansive release language, and no incentive to do so. Therefore, on the question of how broadly to construe the settlement class action's scope of released claims, a court should put a thumb on the scale in favor of a narrower construction favored by absent class members and against a broader construction proffered by the drafters (defendant and by class counsel).

223. *See* Cobell v. Salazar, No. 96-CV-01285, 2011 WL 10676927, at *4 (D.D.C. July 27, 2011), *aff'd*, 679 F.3d 909, 924 (D.C. Cir. 2012).

224. *See supra* Section IV.A.

225. *See* FED. TRADE COMM'N, CONSUMERS & CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF SETTLEMENT CAMPAIGNS 22 (2019) (reporting average opt-out rate of 0.0003% in consumer class actions); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (reporting average opt-out rate under 1%); THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, FED. JUD. CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 52–53 (1996) (reporting median opt-out rates of 0.1% and 0.2%).

226. *See Two Shields*, 820 F.3d at 1329.

This is not to say that such an approach would have necessarily changed the outcome. If Ramona Two Shields's claim fell squarely within the scope of the claims released by the *Cobell* settlement without ambiguity, contra proferentem could not save her claims. But courts hewing too quickly to a contract paradigm too often forget the kind of contract they are expounding—and therefore can miss pockets of contract law that are well-calibrated to the transaction type of the class action settlement agreement.

Interestingly, the perspective that was absent from the court's reasoning in *Two Shields* had been present in a Congressional hearing on the proposed *Cobell* settlement.[227] Professor Richard Monette explained that the *Cobell* class action, as initially filed and litigated, sought injunctive relief ordering the Department of the Interior to provide an accounting to reconcile IIM accounts.[228] The district court found an accounting impossible and ordered the government to pay $455 million in restitution, but the court of appeals remanded for a plan to achieve an accounting.[229] That was when, according to Professor Monette, "both sides found enough incentive to pursue a settlement."[230] He continued:

> At that juncture, the *Cobell* lawsuit fell victim to collusion at the expense of the American taxpayer. From that point forward, the record reveals less lawyering for the Plaintiffs, especially the absent class members, and more lawyering of the deal they'd struck behind closed doors.
>
> . . . .
>
> As soon as the dollar amount on the negotiation table went above 455 million dollars, it meant the Plaintiff class was getting more than the District Court believed they had made their case for. But the government didn't give this away for free; inevitably, Plaintiffs would be giving up something more in return.
>
> . . . .
>
> In short, the proposed settlement would relieve Defendants of more liability than Plaintiffs had made claim to, and would provide Plaintiffs relief for claims that they did not make. Primarily, what Plaintiffs would relinquish, and what Defendants would gain, is a settlement of so-called

227. *Proposed Settlement of the* Cobell v. Salazar *Litigation: Oversight Hearing Before the H. Comm. on Nat. Res.*, 111th Cong. (2010) (statement of Richard Monette, Professor of Law, Univ. Wis. Madison), https://www.govinfo.gov/content/pkg/CHRG-111hhrg55393/html/CHRG-111hhrg55393.htm [https://perma.cc/QHC3-SLB2].

228. *Id.*

229. *Id.*

230. *Id.*

> "Trust Administration" claims that were never part of the lawsuit, claims that Plaintiffs had neither the right nor privilege to cede, and that Defendants as Trustees had neither the obligation, nor the right, to accept.[231]

Having expressed doubts about the propriety of terms that would so broadly extinguish absent class members' claims, he pointed to terms in the proposed class settlement that provided up to $15 million in incentive awards for class representatives and up to $100 million in fees for class counsel.[232] To sum up, looking at the *Cobell* settlement several years before Ms. Two Shields and Ms. Wilson filed their lawsuit, Professor Monette had identified the class action settlement dynamics that should have informed the court's decision in *Two Shields*. The scope of the release in *Cobell* was driven by the government's desire for maximal protection from future litigation, and the deal was achieved under circumstances where class counsel and class representatives had neither the leverage nor the incentive to resist pressure to maximize the scope of the release. Our interpretive framework invites courts not to dismantle all contract thinking in these cases but rather to find the resources within contract law to address the adjudicative dimensions of preclusion and class action negotiation dynamics the cases often involve.

D. *The Suspension of Deportation Settlement*

Navarro v. Mukasey concerned a dispute over eligibility to take advantage of prior forms of deportation relief that had been phased out under newer legislation.[233] Before the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") took effect on April 1, 1997, a person against whom deportation proceedings had been commenced could apply for suspension of deportation if they had been continuously present in the United States for seven years; time toward the seven-year requirement continued to accrue during immigration proceedings.[234] IIRIRA imposed a stricter provision—a stop-clock rule—whereby accrual toward the seven-year requirement stopped when a person received a notice to appear (the charging document served on immigration respondents).[235] Before IIRIRA's effective date, the Chief Immigration Judge ordered immigration judges to reserve decisions until the statute took effect.[236] As a result, by the time immigration proceedings actually commenced, certain persons who had been eligible for suspension of deportation under the pre-IIRIRA regime were no longer eligible

231. *Id.*
232. *Id.*
233. Navarro v. Mukasey, 518 F.3d 729, 731 (9th Cir. 2008).
234. *Id.*
235. *Id.* at 732.
236. *Id.* at 733.

for relief.[237] A class action challenged this practice, and in December 2002, a district judge approved a class settlement.[238] The settlement permitted class members to apply for suspension of deportation under pre-IIRIRA rules, and it defined eligible class members as "individuals for whom the Immigration Judge either reserved a decision, or scheduled a merits hearing on a suspension application . . . between February 13, 1997 and April 1, 1997, and the hearing was continued until after April 1, 1997."[239]

Carlos and Belem Navarro had entered the United States without inspection on November 5, 1989. On October 4, 1996, they were ordered to appear before an immigration judge, but their hearing was continued until April 1, 1997.[240] At the hearing, the judge denied the Navarros' request for suspension because, under IIRIRA (which had gone into effect that day), they could not show seven years of presence.[241] The Navarros asked the Board of Immigration Appeals ("BIA") to reopen the proceeding on the ground that the class settlement made them eligible for suspension.[242] The government argued the Navarros were ineligible because their hearing was *on* April 1 and the plain language of the settlement limited eligibility to those whose hearings were continued until *after* April 1.[243] The BIA, agreeing with the government, found the Navarros ineligible and denied their motion.[244] On appeal, the Ninth Circuit disagreed with the government and the BIA and found the Navarros to be class members eligible for the benefits of the settlement.[245]

The dispute thus centered on the meaning of "continued until after April 1, 1997" as those words were used in the class settlement.[246] The negotiators and drafters of the class settlement, as well the judge who approved it, surely thought that they were making the IIRIRA stop-clock rule inapplicable to all of the potential deportees whose hearing dates had been pushed back until after IIRIRA went into effect. That, after all, was the point of the class action against the Attorney General, and it would make no sense for the settlement to include a one-day exception for the very day the statute was to take effect. But the

237. *Id.* at 732

238. Barahona-Gomez v. Ashcroft, 243 F. Supp. 2d 1029, 1029 (N.D. Cal. 2002).

239. *Navarro*, 518 F.3d at 733.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 736.

244. *Id.* at 733.

245. *Id.* at 737.

246. *Id.* at 736. Similarly, the parties disputed whether the settlement language "scheduled a merits hearing on a suspension application . . . between February 13, 1997 and April 1, 1997" referred to an immigration judge undertaking the date-setting act between those dates, or whether it instead referred to an immigration judge scheduling a hearing to take place between those dates. *Id.* at 734. On this point, the Ninth Circuit found the language ambiguous but found the first interpretation more reasonable and more in keeping with interpretive canons of contract law. *Id.* at 734–36.

language of the settlement—"after April 1"—seems clear on its face; *after* does not mean the same thing as *on or after*.

The Ninth Circuit turned to contract law: "Our interpretation of the settlement agreement is governed by principles of California contract law."[247] As a matter of contract law, the court focused first on plain meaning, stating that "[b]ecause the interpretation of this settlement agreement is governed by California contract law, we first determine whether the contract language is clear or ambiguous. If the contract language is clear, we give effect to its plain meaning."[248] But the court also cared about the intent of the parties if the language was ambiguous: "Under California rules of contract law, where contract language is susceptible to multiple interpretations, courts attempt to discern which interpretation the parties intended."[249] Regarding the settlement language that limited eligibility to those whose hearings were "continued until after April 1," the court explained the dilemma that the plain language did not capture the intended effect:

> The meaning of this phrase is unambiguous, but the language, as memorialized in the written agreement, contradicts the intentions of the parties. IIRIRA's effective date was April 1, 1997—not April 2, 1997. The definition of the class refers to those who "had (*or would have had*) suspension of deportation hearings conducted before April 1, 1997"—the clear implication being that class members include those who had their hearings April 1, 1997, or later. There is no reason to believe that the parties to the . . . settlement agreement meant to help all aliens whose hearings were continued until after IIRIRA went into effect, except the unfortunate few whose hearings were scheduled to occur on the very first day that IIRIRA became effective.[250]

Despite the unambiguous wording of the class settlement, the court concluded that the Navarros fell within the eligibility requirements:

> Under contract law, we have the power to "reform" a contract where, due to mistake, the clear intention of the parties is not reflected in the final agreement. Here, it appears that there was a mistake in reducing the agreement to written form. Consequently, we read the settlement

247. *Id.* at 733.

248. *Id.* at 734 (citations omitted).

249. *Id.* (citing CAL. CIV. CODE § 1636 (Westlaw through Ch. 1 of 2023–24 1st Ex. Sess., and urgency legislation through Ch. 199 of 2023 Reg. Sess.) ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.")).

250. *Id.* at 736–37 (emphasis added) (citing Barahona-Gomez v. Ashcroft, 243 F. Supp. 2d 1029, 1030–31 (N.D. Cal. 2002)).

> language as "continued until April 1, 1997, or after." This interpretation is consistent with the purpose of the . . . settlement.[251]

Thus, with creative use of California contract law in the face of unambiguous language, the Ninth Circuit reached the conclusion that the Navarros were eligible to be considered for suspension of deportation under the class settlement. In *Navarro*, the Ninth Circuit reached a plausible conclusion—that Carlos and Belem Navarro were eligible for deportation suspension under a class action settlement agreement that undid the Chief Immigration Judge's attempt to use continuances to effectively apply IIRIRA's stop-clock provision before its effective date to deport persons who otherwise would have been able to remain in the country.

The court in *Navarro* achieved its result through equitably reforming the settlement agreement, which was written in a way that literally would have precluded relief for the petitioners. The court did this by drawing on California's contract law of mistake, which could have permitted such a reformation upon good evidence (including extrinsic or parol evidence) of the parties' intent.[252] Rather than delving into much extrinsic evidence, however, the court drew upon "two interpretive canons" from public law to support its contract rendering:

> First, we have consistently held that ameliorative immigration laws enacted by the legislature to forestall harsh consequences should be interpreted in an ameliorative fashion . . . . Second, because of the harsh consequences that attach to removal of an alien from the United States, we have held that doubts in interpretation should be resolved in favor of the alien.[253]

How the public law informed the private law here was not made perfectly clear, though process rather than result is the focus of our proposed interpretive framework.

Suppose, instead, that the court had applied our framework. The court likely would have reached the same outcome, we suspect. But it would have done so without attempting to meld public law cases about statutes with corners of California contract law that are rarely drawn upon other than in the most exceptional cases. Our approach is more honest to the transactional environment: the Navarros were absent class members, implicating the class action court's duty to protect them from an unfair settlement. They were bound

251. *Id.* at 737 (citing Hess v. Ford Motor Co., 41 P.3d 46, 52 (2002); 1 WITKINS' SUMMARY OF CALIFORNIA LAW, CONTRACTS § 276 (10th ed. 2005) ("Where the parties come to an agreement, but by mistake (or fraud) the written instrument does not express their agreement correctly, it may be *reformed* or revised on the application of the party aggrieved . . . .")).

252. *Id.* at 737.

253. *Id.* at 735–36 (citing Akhtar v. Burzynski, 384 F.3d 1193, 1200 (9th Cir. 2004)).

not because of their agreement, but only because of the class action court's entry of a judgment approving the negotiated resolution, and it would be unreasonable to think that the court's approval of the deal excluded from eligibility anyone whose hearing was scheduled for the very day IIRIRA went into effect. And rather than needing to draw on contra proferentem here (since the language neither was ambiguous nor raised particular agency concerns), the term should still be interpreted in the class members' favor by applying the *Restatement*'s public-interest principle to allow the court to reach the sensible and reasonable result of interpreting the settlement to include persons whose hearings were on (rather than only after) April 1.[254] This way through the problem still needs to draw on controversial contract law but does not need to smuggle interpretive canons for statutes into the contract sphere with limited explanation—and can straightforwardly help courts puzzle through their contract thinking with a public interest focus baked into the transactional context.

V. CONTRACT, PRECLUSION, AND CHOICE OF LAW

Our interpretive framework will help courts navigate disputes that come before them when they are asked to enforce, interpret, or construe class action settlement agreements, and this usefulness does not depend on embracing one specific conception of what class action settlements are. The interpretive framework can do its work whether a court conceives of it mostly as a framework for applying the law of *contracts* or as a framework for applying the law of *judgments*.

For the sake of clarity and to guide choice-of-law decisions, however, it is helpful to be explicit about how these areas of law intersect. Whenever anyone seeks to bind class members to the terms of a class action settlement agreement, it is a court's judgment approving the agreement—rather than the agreement itself—that binds the class members. Therefore, from a choice of law perspective, the law directly relevant to enforcement of class action settlements against class members is the law of judgments.[255] The law of contracts becomes indirectly relevant by supplying principles that enable courts to understand the

254. *See* RESTATEMENT (SECOND) OF CONTRACTS § 207 (AM. L. INST. 1981).

255. *See* Buchta v. Air Evac EMS, Inc., No. 19-CV-000976, 2020 WL 4583066, at *5 (E.D. Mo. Aug. 10, 2020) ("In determining whether the *Peck* settlement agreement bars Buchta's claims, the Court applies Kentucky law. Under Kentucky law, res judicata, or claim preclusion, prohibits [relitigation of the same claims between the same parties]." (citations omitted)), *appeal dismissed*, 2021 WL 3700936 (8th Cir. 2021); *see also In re* Gen. Am. Life Ins. Co. Sales Pracs. Litig., 357 F.3d 800, 803 (8th Cir. 2004) ("The answer to the res judicata question, of course, must be determined by inspecting the language of the judgment that concluded the class action, including the settlement agreement that was included in that judgment.").

meaning of the terms in the court-approved settlement agreements.[256] The bottom line is that the binding effect of a class action settlement on class members should be governed by the applicable law of judgments (i.e., in general the preclusion law of the court that rendered the judgment approving the class settlement), but that law of judgments ordinarily should be informed by the law of contracts. By contrast, the law of contracts may apply directly to the binding effect of a class action settlement agreement on a defendant who agreed to the settlement.

The Supreme Court in *Matsushita*[257] mentioned that "if a State chooses to approach the preclusive effect of a judgment embodying the terms of a settlement agreement as a question of pure contract law, a federal court must adhere to that approach under § 1738."[258] While a "pure contract law" approach is problematic for the reasons we have explored in this Article,[259] the Court's full faith and credit framing appropriately puts the emphasis on the respect that must be given to state judicial proceedings. Under the full faith and credit statute, 28 U.S.C. § 1738, federal and state courts must give "the same full faith and credit" to a state-court judgment as that judgment would be given in the state where it was rendered.[260] A court determining the preclusive effect of a state-court judgment therefore applies the preclusion rules of the state that rendered the judgment.[261] If the state courts employ state contract law to construe and enforce class action settlements, then state contract law is effectively incorporated into the state's preclusion rules regarding the binding effect of judicially approved class settlements, and courts elsewhere must give full faith and credit to state-court class action settlements by giving them the same respect they would be given in the rendering state.

Still, the preliminary focus on the full faith and credit statute is interesting in its own right: had the Supreme Court meant to frame the issue in terms of the respect that courts must give just to contracts that are binding under state

256. *Cf. In re Gen. Am. Life. Ins. Co.*, 357 F.3d at 804 ("Once approved, a settlement agreement is interpreted as a contract." (quoting Thompson v. Edward D. Jones & Co., 992 F.2d 187, 191 n.5 (8th Cir. 1993))).

257. In *Matsushita*, the Supreme Court addressed the binding effect that a federal court must give to a Delaware state court class action settlement in a securities dispute and applied the federal full faith and credit statute, 28 U.S.C. § 1738, to hold that the federal court must give the settlement judgment the same effect that Delaware state courts would give it, even if the settlement releases claims under exclusive federal jurisdiction. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 369 (1996); *see also supra* text accompanying notes 81–84.

258. *Matsushita*, 516 U.S. at 379 n.6.

259. Tobias Wolff, in his study of preclusion in class actions, commented that "the Supreme Court's suggestion in *Matsushita* that some jurisdictions might treat class action settlements as 'a question of pure contract law,' if taken literally, is incoherent." Wolff, *supra* note 5, at 765–66 n.146 (citing *Matsushita*, 516 U.S. at 379 n.6).

260. 28 U.S.C. § 1738.

261. *See generally* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945 (1998) (discussing choice of preclusion law).

law, the Court would have stated the point in *Erie* terms[262] rather than in full faith and credit terms. If the binding effect of a state-court class settlement were merely a matter of respecting state contract law, it would have been easy enough to say that federal courts are *Erie*-bound to apply state contract law. Instead, the Court understood that the question of federal court enforcement of a state-court class action settlement is a matter of full faith and credit. Properly understood then, state preclusion law which incorporates by reference state contract law governs in federal courts, sitting in diversity. If a state were to adopt the framework proposed in this Article for construing class settlements agreement, then as a matter of full faith and credit, other state and federal courts would be bound to follow the same framework when enforcing class settlements from that state's courts. In this configuration, our interpretive framework can then be understood to be an implementation of both state contract law and state preclusion law, effectuating the idea that class action settlement agreements are both contracts and judgments—and can be treated as such with the benefit of our guidance here.

As a practical matter, however, since the Class Action Fairness Act of 2005 ("CAFA"), major class action settlements occur mostly in federal court rather than state court.[263] *Matsushita* predated both CAFA, which expanded federal jurisdiction over class actions, and *Semtek International, Inc. v. Lockheed Martin Corp.*,[264] which addressed choice of preclusion law for federal court diversity judgments.[265] Consider, then, the binding effect of a class settlement rendered by a federal court with CAFA jurisdiction. The binding effect of a federal court judgment in such cases is addressed neither by the full faith and credit clause in the Constitution nor the federal full faith and credit statute. Rather, the binding effect of a federal court judgment is instead a matter of federal common law (a common law that could embrace our interpretive framework, too).[266] However, if the first judgment were rendered by a federal court sitting in diversity, the Supreme Court held in *Semtek* that in general the state's preclusion rules should be incorporated into federal common law to govern the preclusive effect of the diversity court's judgment.[267] That might mean that a federal court would have

262. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938) (holding that federal courts must apply state substantive law in cases under their diversity jurisdiction).

263. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9 (codified at 28 U.S.C. § 1332(d)) (granting federal courts subject matter jurisdiction over class actions based on minimal diversity and an aggregate amount in controversy over $5 million); *id.* § 5 (codified at 28 U.S.C. § 1453) (removing barriers to removal of class actions from state court to federal court).

264. 531 U.S. 497 (2001).

265. *See id.* at 507–09.

266. Taylor v. Sturgell, 553 U.S. 880, 891 (2008) ("The preclusive effect of a federal-court judgment is determined by federal common law."); *Semtek*, 531 U.S. at 507–08 (2001).

267. *Semtek*, 531 U.S. at 508 ("This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits.").

to apply a state preclusion law that opted not to embrace our interpretive framework. Yet *Semtek* envisioned an exception: "This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests . . . . [F]ederal courts' interest in the integrity of their own processes might justify a contrary federal rule."[268] This might enable federal courts to deploy our framework when interpreting federal court class action settlement agreements, regardless of whether the state that supplied the underlying substantive law would have used our framework with regard to a class settlement that had been reached in state court.

When *Semtek*'s approach to federal diversity judgments is added to the *Matsushita* footnote's approach to state contract law, the upshot is this: when a class action settlement occurs in a state-law case in federal court, the binding effect of that settlement is a matter of federal common law; such federal common law generally should incorporate state preclusion rules; and such state preclusion rules may incorporate state contract law. The concern of federal courts to protect absent class members from unfair settlements, however, is just the sort of countervailing federal consideration that could override the general rule that federal common law incorporates state preclusion rules, under *Semtek*'s exception. Thus, if a court finds a sufficient countervailing interest in the federal court duty to protect absent class members from unfair settlements, embodied in Federal Rule of Civil Procedure 23(e), the court can apply our interpretive framework even if a state court where the federal court judgment was rendered would have looked only to a simpler rendition of contract law.

All of this suggests that our framework can enter the picture regardless of whether the class action was in federal court or state court, regardless of the source of underlying substantive law in the dispute, and regardless of whether one focuses on the contract aspect or the preclusion aspect. It can be applied by state courts as their law of preclusion incorporating the law of contracts. It can be applied by federal courts as their law of preclusion incorporating the law of contracts. It can be applied by federal courts as federal common law incorporation of state preclusion and contract law. And it can be applied by a federal court applying a federal common law to protect the interests of absent class members. In this way, our proposed framework really is meant to preempt the field and to offer a harmonized way for courts to approach the interpretation of class action settlement agreements.

CONCLUSION

In the final analysis, the interpretive framework a court brings to bear on a class action settlement agreement is more important than the label a court uses. If a court chooses to label a class action settlement agreement as a kind of

268. *Id.* at 509.

contract, the label does little harm within a pluralistic conception of contracts, as long as the court remains cognizant that this kind of "contract" binds absent class members not because they agreed to it but rather because of a prior court's power to resolve the dispute on a class action basis.

Even so, there is something to be said for clarity in the labeling of these instruments and their binding effect. A class action settlement agreement binds a *defendant* because the defendant agreed to it, and the law of contracts sensibly governs the effect of such an agreement on the defendant. A class action settlement agreement binds *class members* because a court entered a judgment giving effect to the terms of the negotiated agreement, after having found the matter suitable for class action treatment. The binding effect of the agreement on class members is governed not directly by the law of contracts but rather by the law of judgments. Because the content of the judgment is supplied by the terms of a negotiated agreement, contract law has much to say about how those terms should be understood. This is how contract law, properly understood, applies to class action settlement agreements.

Yet contract law is not one-size-fits-all. It provides principles for enforcing agreements in a range of contexts, and it is capacious enough to provide bespoke interpretive regimes where needed. Class action settlement agreements cry out for such a regime. In light of the source of their binding effect on class members, and in light of the agency risks that attend their negotiation, class action settlement agreements demand a specially designed interpretive framework that respects the role of the certifying court as protector of class members' interests.

We have proposed the outlines of such a framework here. We have not endeavored to address every dispute that may arise under class action settlement agreements, nor have we set out in detail every aspect that an interpretive framework for class action settlement agreements might consider. Rather, we have offered a set of questions to help judges focus on several of the most important contextual issues when enforcing, interpreting, and construing class action settlement agreements. We hope that this Article—both its recommendations and its framing of the problem—will help courts face more squarely the juxtaposition of the judgment aspect and the contract aspect of class action settlement agreements, with the goal of achieving a more sensitive application of preclusion principles and contract principles in this important area.