The Role of Judges in Settling Complex Cases: The Agent Orange Example

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In the vast literature on the contemporary judiciary, the judge's role in settling civil cases receives little attention.¹ This neglect is striking for several reasons. The vast majority of civil cases are settled before trial and an even higher percentage are settled before verdict.² Moreover, judges routinely—indeed, often mandatorily—involve themselves in the settlement process,³ and there is at least anecdotal evidence that this involvement is increasing. As a purely statistical matter, then, judicial settlement activity bulks very large. Finally, the legal, philosophical, and policy issues raised by judge-contrived or judge-approved settlements are difficult and profoundly important. As my colleague Owen Fiss has recently reminded us,⁴ we cannot assume that a settlement is legitimate simply because the parties' lawyers voluntarily subscribe to it. Whether or not settlements are (as Fiss believes) the civil litigation equivalent of criminal plea bargaining,⁵ one's view of the propriety of the judge's role in fashioning them must surely be an important element in one's evaluation of our court procedures.

My own interest in this question arises from my recent study of the Agent Orange case.⁶ Although that study is primarily con-

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¹ There are some recent exceptions. *E.g.*, WAYNE BRAZIL, *SETTLING CIVIL SUITS* (1985); Galanter, " . . . A Settlement Judge, Not a Trial Judge": *Judicial Mediation in the United States*, 12 J.L. & Soc'y 1 (1985); Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1983-1984); Menkel-Meadow, *Judges and Settlement: What Part Should Judges Play?*, TRIAL, Oct. 1985, at 24; Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985).

² W. BRAZIL, *supra* note 1, at 43. A summary of Brazil's study appears in Brazil, *What Lawyers Want From Judges in the Settlement Arena*, 106 F.R.D. 85 (1985).

³ Brazil, *supra* note 2, at 87-88.

⁴ Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

⁵ *Id.* at 1075.

⁶ PETER SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (forthcoming, Harvard University Press, 1986).

The history of the Agent Orange case is long and complex, and the key cases for this

cerned with appraising the role of tort litigation in resolving the problem of mass exposures to toxic substances, it also provides a window through which we can observe a judge at work settling a particular dispute. In revealing how the settlement process unfolded in that complex civil case,⁷ this microcosm can help us begin to think more systematically about the questions, both positive and normative, raised by the settlement process.

These questions, especially the positive ones, are the subject of a small but growing literature on the civil litigant's decision to liti-

discussion of the settlement process are referred to where appropriate. In addition, a summary of the class action up to September 1984 appears in *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984). For a detailed history of the case through July 1985, see P. SCHUCK, *supra*, chs. 3-11.

The following key decisions provide an adequate background:

Cases prior to class certification: 506 F. Supp. 737 (E.D.N.Y. 1979) (denying defendants' motion to dismiss for lack of federal subject-matter jurisdiction, on grounds that federal common law applies to the case), *rev'd*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); 506 F. Supp. 762 (E.D.N.Y. 1980) (rejecting veterans' Federal Tort Claims Act claims, claims by family members, and defendants' indemnity claims against government, and granting government's motion to dismiss; authorizing class action by plaintiffs, with jurisdiction based on diversity; denying motion for summary judgment against defendants' government contract defense).

From certification to settlement of the class action: 100 F.R.D. 718 (E.D.N.Y.) (certifying class under rule 23(b)(3) of the Federal Rules of Civil Procedure, granting certification under rule 23(b)(1)(B) with respect to punitive damages, and defining plaintiff class; determining notification procedure), *certification for appeal with respect to class certification denied*, 100 F.R.D. 735 (E.D.N.Y. 1983), *mandamus with respect to class certification and notification procedure denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); 580 F. Supp. 1242 (E.D.N.Y.) (reinstating government as defendant with respect to independent claims by veterans' wives and children, but not with respect to claims by veterans and derivative claims by wives and children), *mandamus denied*, 733 F.2d 10 (2d Cir.), *appeal dismissed*, 745 F.2d 161 (1984); 580 F. Supp. 690 (E.D.N.Y. 1984) (applying federal or national consensus law).

Settlement of the class action: 597 F. Supp. 740 (E.D.N.Y. 1984) (approving settlement of class action), *appeals argued* (2d Cir. Apr. 9-10, 1986); 611 F. Supp. 1221 (E.D.N.Y. 1985) (dismissing manufacturers' claims against government for indemnity and contribution with respect to payments made in settlement of independent claims of family members); 611 F. Supp. 1296 (E.D.N.Y. 1985) (awarding attorney's fees in class action); 611 F. Supp. 1396 (E.D.N.Y. 1985) (approving distribution plan for class action settlement funds).

Cases involving plaintiffs who opted out of the class action: 603 F. Supp. 239 (E.D.N.Y. 1985) (denying plaintiff class certification and dismissing claims against government); 611 F. Supp. 1223 (E.D.N.Y. 1985) (granting manufacturers' motion for summary judgment against opt-out plaintiffs on grounds of failure to establish causation and to overcome government contract defense), *appeal argued* (2d Cir. Apr. 9-10, 1986).

⁷ By a "complex case," I mean a case that exhibits some or all of the following features: numerous parties raising unprecedented claims, which are to be resolved on the basis of a massive and ambiguous factual record concerning events or relationships that span long time periods and large geographical areas, and which will require resolution of novel procedural, choice-of-law, substantive, and remedial issues. Adjudication of such a case is very costly and time-consuming, and any judgment or settlement reached, even one for money damages, is likely to be difficult to implement.

gate or to settle. In particular, William Landes and Richard Posner have elaborated an economic model of this decision.⁸ That basic model has recently been extended by other law and economics scholars, most notably by Steven Shavell,⁹ and by George Priest and Benjamin Klein.¹⁰ The basic Landes-Posner economic model of the decision to litigate or to settle posits four variables that determine each party's decision—its litigation costs, its settlement costs, its stakes in the case, and its estimate of the likelihood of success at trial.¹¹ The Landes-Posner model predicts that the parties will litigate rather than settle if their estimates of these parameters differ by a sufficiently large amount. Shavell's principal refinement of the model is the addition of certain variables, such as rules for allocating lawyers' fees and costs, that the original model failed to take into account.

Priest and Klein accept the basic Landes-Posner model, and use it to describe the differences between disputes that are settled and disputes that are litigated. In the Priest-Klein model, the crucial determinant of whether the parties will settle or litigate is neither the content of the decision standard (e.g., negligence vs. strict liability) nor the "true" strength or weakness of the plaintiff's case. Rather, the parties' decision will turn upon differences in the parties' stakes in, and probability estimates about, the outcome of the case.¹² Priest and Klein add an important implication to the Landes-Posner model's emphasis upon the magnitude of the difference between the parties' individual estimates of the outcome. Priest and Klein maintain that those differences will be greatest—thus discouraging settlement and encouraging litigation—for the "close" cases (i.e., those disputes whose facts place them close to and on either side of the decision standard, regardless of what that standard is). According to Priest and Klein, the close cases, by definition, "generate more uncertainty as to their

⁸ See Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 66-69, 102-03 (1971); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417-29 (1973). Landes concentrates on criminal cases, Posner on civil cases. Because their approaches are similar, their theories have been referred to as the "Landes-Posner model." See Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 n.16 (1984).

⁹ Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 69 n.50 (1982).

¹⁰ Priest & Klein, *supra* note 8; see also Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215 (1985).

¹¹ See Posner, *supra* note 8, at 418-19.

¹² See Priest & Klein, *supra* note 8, at 4-5.

outcomes and, thus, more disagreement between the parties.”¹³ In the economic model as refined by Priest and Klein, then, uncertainty of outcome powerfully fuels litigation.

The economic model of the settlement decision is silent about the effect of judicial behavior on the decision to litigate or to settle. The Agent Orange case presents an unusual opportunity to “test” the model in the context of a dispute involving a high degree of judicial activity directed at settlement. It is fair to ask at the outset, however, how “typical” the Agent Orange case is of civil litigation generally and of judicial involvement in settlements in particular. As we shall see, the Agent Orange case is obviously unusual in certain respects, including some—such as the case’s political visibility and the settling judge’s intellectual caliber and managerial inclination—that profoundly influenced the settlement. But these unusual features are highly relevant to the emerging judicial role in settlement. Agent Orange exemplifies a class of cases, likely to grow in the future, whose complexity, costliness, and controversial nature generate strong pressures for settlement among parties, lawyers, and judges.¹⁴ If the court’s role in settlement deserves close scrutiny, as it surely does, we can look to this class of cases—atypical as it is in some respects—for clues about potential problems and solutions.¹⁵

This paper consists of three parts, each of which draws upon my analysis and interpretation of the Agent Orange experience. First, I provide some essential background information about the Agent Orange case, attempting to isolate the most important factors that affected the settlement negotiations and facilitated the eventual agreement. Second, I analyze the judge’s role in settling complex civil cases like Agent Orange. The analysis suggests that the economic model of the decision to litigate or to settle needs to be further refined to take account of the ways in which judges’ knowledge, power, and other resources can shape the course of legal disputes. Finally, I identify the most important risks associated with the active judicial role in settlement exemplified by the Agent

¹³ *Id.* at 16.

¹⁴ For discussions of the legal complexities of mass tort litigation, see, for example, *Catastrophic Personal Injuries*, 13 J. LEGAL STUD. 415 (1984).

¹⁵ In any event, one who would study this issue has little choice of data; the Agent Orange case is perhaps the only complex litigation whose settlement has been the subject of a detailed academic case study. Until more is known about other such cases, Agent Orange’s typicality must remain an open question.

Orange case, and consider several ways in which such risks might be reduced.¹⁶

I.

On May 7, 1984, Chief Judge Jack B. Weinstein of the Eastern District of New York, flanked by his special masters, announced that the Agent Orange class action had been settled only a few hours earlier, just before jury selection was to begin. The settlement of that action, which was then probably the largest single personal injury litigation in history,¹⁷ created a fund that now totals about \$200 million and increases by over \$40,000 each day. Approximately 250,000 individual and group claims have been lodged against this fund, and in May of 1985 the court established the framework for the complicated administrative apparatus that is to resolve and administer those claims.¹⁸

The Agent Orange case actually consists of two components: a class action consolidating more than 600 separate actions originally filed by more than 15,000 named individuals in courts throughout the United States, and almost 400 individual cases brought by

¹⁶ In the discussion that follows, I shall set aside certain questions that, while undeniably important, must remain largely or wholly beyond the compass of this article. One such question, raised by Fiss, is whether and under what circumstances settlement of a dispute can be said to be more or less "just" or desirable than the alternative of litigating to judgment. Fiss, *supra* note 4, at 1085. Apart from observing that certain judicial behavior in negotiating a settlement may offend procedural or other norms, however, I shall not attempt to address that issue.

Another question that will not be discussed is whether particular kinds of disputes should be in court *at all*. The literature on "alternative dispute resolution" is already immense. See, e.g., Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 Wis. L. Rev. 893.

Finally, I shall not consider whether there may be legal limits on the power of courts to employ, as they increasingly do, special masters for settlement in complex cases. See FED. R. CIV. P. 53(b); see also *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957) (calendar congestion in itself not "exceptional circumstance" justifying appointment under rule 53(b)). The power of appointment may be broader if the special master is not to make findings of fact that will bind the court to some degree. See *Mathews v. Weber*, 423 U.S. 261, 273 (1976); see also *In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985). The use of special masters for settlement in the Agent Orange case appears to fall within this class. However, litigant opposition to the use of special masters in analogous hazardous waste cases may be growing. See Moore, *Masters: A Hazard of Waste Cases?*, Legal Times, Aug. 19, 1985, at 1. For general discussions of special masters, see Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, 1982 A.B.F. RESEARCH J. 287, and Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986).

¹⁷ Depending upon one's calculus in such macabre matters, the subsequent Bhopal litigation may be larger.

¹⁸ *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1396 (E.D.N.Y. 1985).

plaintiffs who either did not fall within the plaintiff class or chose to opt out of it. The class action was settled;¹⁹ the individual claims were subsequently dismissed.²⁰ Both components are now on appeal to the Second Circuit.²¹

The class was defined to include some 2.4 million American veterans exposed to Agent Orange during the war in Vietnam, the wives and children (born and unborn) of those veterans, and exposed Vietnam veterans from Australia and New Zealand. The seven defendants (pared down from an original twenty-four) were the chemical companies that manufactured Agent Orange. The United States, not named by plaintiffs as a defendant, was joined by the defendants on an indemnity-contribution theory. Judge Pratt, who originally presided over the case, dismissed the government as a party in 1980.²² Although Judge Weinstein brought the government back into the case just before the settlement,²³ he subsequently dismissed the claims against it.²⁴

It is difficult to convey a sense of the gargantuan size and byzantine intricacy of the Agent Orange case. Crude measures must suffice. The case was initiated in 1978. By the conclusion of proceedings in the district court in mid-1985, the docket sheet contained 375 single-spaced pages and some six thousand individual entries, many representing documents hundreds of pages long; an entire room in the courthouse, staffed by two special clerks, was necessary just to house them. In order to manage the case, Judge Weinstein found it necessary to create a special bureaucracy within his own chambers. In addition to hiring extra law clerks and paralegals and assigning a federal magistrate to the case, he appointed no fewer than *seven* special masters (four or five of them working simultaneously) to assist him—and the masters them-

¹⁹ *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984) (tentatively approving settlement).

²⁰ *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223 (E.D.N.Y. 1985).

²¹ As of October 2, 1985, forty-five appeals had been filed. Letter from Robert C. Heinemann, Clerk of Court, Federal District Court for the Eastern District of New York (Oct. 2, 1985) (on file with author). The appeals were argued in the Second Circuit on April 9-10, 1986.

²² *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980).

²³ The government was reinstated as a third party defendant in claims involving birth defects and miscarriages. Judge Weinstein, like Judge Pratt, determined that the government was immune from claims by veterans. *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242 (E.D.N.Y. 1984).

²⁴ *In re "Agent Orange" Product Liability Litigation*, 603 F. Supp. 239 (E.D.N.Y. 1985).

selves sometimes turned to paid consultants for help. The financial and personnel demands on the parties, of course, have been staggering. The plaintiffs are represented by a network of lawyers numbering in the hundreds and reaching into every region of the country. The documented cost of the activities of the plaintiffs' management committee (PMC) alone exceeded \$10 million by early 1985.²⁵ The two-day oral argument in the court of appeals was said to be the longest scheduled for any case there in over forty years.

Although my study of the Agent Orange case includes a very detailed account of the settlement negotiations,²⁶ a highly condensed (and thus somewhat distorted) synopsis must suffice for present purposes. From the moment that Judge Weinstein replaced Judge Pratt on October 21, 1983, the goal of settlement was uppermost in his mind. He believed that toxic tort cases like Agent Orange, involving mass exposures and causal relationships that are extremely difficult and costly to prove, could not be litigated properly or at an acceptable social cost under traditional rules. Absent settlement, he predicted a one-year trial with results that would remain inconclusive for years to come. Although he harbored genuine doubts about the veterans' evidence on causation, he deeply sympathized with their plight. In open court and in his written opinions, he denounced the "injustices" they suffered, believed that "[t]hey and their families should receive recognition, medical treatment and financial support,"²⁷ and shared the now-conventional view that the American people had failed to discharge "the nation's obligations to Vietnam veterans and their families."²⁸ The prospect of having either to direct a verdict for the chemical companies or to reverse a jury verdict in favor of the veterans could not have been an appealing one. Unquestionably, he was prepared to do his duty if necessary, but a negotiated settlement offered the far more attractive possibility: everyone would gain something, soon, and at an acceptable social cost.

Earlier settlement discussions between the parties had failed.

²⁵ *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1296, 1346 (E.D.N.Y. 1985). One of the special masters reports having heard estimates that the defendants spent \$100 million merely to reach the eve of trial. Interview with Kenneth Feinberg (Apr. 11, 1985) (on file with the author).

²⁶ See P. SCHUCK, *supra* note 6, ch. 8, and sources cited therein.

²⁷ *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 857 (E.D.N.Y. 1984).

²⁸ *Id.* at 862. For a somewhat different view of the social response to the veterans, see JAMES JACOBS, *SOCIAL FOUNDATIONS OF CIVIL-MILITARY RELATIONS* ch. 7 (1986).

The court, however, had not been involved in those negotiations. And since then, circumstances had changed—most particularly, the identity and judicial style of the presiding judge. Weinstein immediately established a May 7, 1984 trial date—a little more than six months away—and left no doubt of his implacable determination to hold to it. He did this despite—or perhaps because of—the fact that the parties had to that point conducted little discovery except on a single issue, the government contract defense. He dragged the United States back into the case, believing that the government's presence would greatly facilitate settlement. He also indicated that he would submit the issue of government liability to the jury on an "advisory" basis (the Federal Tort Claims Act precluded a binding jury decision). Finally, he revealed to the parties, albeit only as a "tentative," "preliminary," and, as it turned out, non-appealable matter, how he intended to rule on a number of important and complex legal issues, such as choice-of-law and governmental immunity.

In February 1984, Weinstein requested and obtained permission to retain, at the defendants' expense, an unnamed consultant to develop a settlement strategy and plan. That consultant was later revealed to be Ken Feinberg, a lawyer whom Weinstein knew and trusted. Feinberg was not only knowledgeable about toxic tort litigation, but also had a reputation as an effective mover, shaker, and conciliator. By mid-March, he had prepared a settlement plan. It stated no dollar amount but contained three sections: an analysis of the elements for determining the aggregate settlement amount, especially the various sources of uncertainty and the likely number and nature of claims; a discussion of alternative criteria for allocating any liability among the chemical companies; and a discussion of alternative criteria for distributing any settlement fund to claimants. This document, which the judge made available to the lawyers, occasioned considerable disagreement but succeeded in setting the terms for the negotiations that followed.

On April 10, less than three weeks before trial, Weinstein appointed three special masters for settlement.²⁹ Feinberg and David I. Shapiro, a prominent class action expert and skillful negotiator, would work with the lawyers. Leonard Garment, a Washington po-

²⁹ Weinstein's appointment of special masters for *settlement*, rather than for discovery or remedy purposes, was itself a highly innovative action. For a subsequent example of settlement mastering, see Arthurs, *Master Lands Settlement That Almost Got Away*, *Legal Times*, Apr. 22, 1985, at 1. Litigants, acting on their own initiative, sometimes retain a third party for the same purpose.

litical insider, would explore what resources the government might contribute to a settlement. Feinberg and Shapiro immediately identified three major obstacles to settlement: the parties were more than *a quarter of a billion dollars* apart; each side was deeply divided internally over whether and on what terms to settle (and in defendants' case, how to allocate liability); and the government was manifestly unwilling to contribute toward a settlement fund or even to participate in settlement negotiations.

The judge and special masters decided to convene an around-the-clock negotiating marathon at the courthouse during the weekend before the trial. The lawyers were ordered to appear on Saturday morning, May 5, with their "toothbrushes and full negotiating authority." On that morning, while preliminary jury selection work was proceeding in another room, Weinstein met with the lawyers and gave them a "pep talk" about settlement. Then the special masters undertook a grueling two-day course of shuttle diplomacy, holding separate meetings with each side interspersed with private conferences with Judge Weinstein. On several occasions, the judge met privately with each side.

Several features of the discussion were particularly salient in generating the settlement agreement. First, the court did not permit the two sides to meet face-to-face until the very end, after the terms of the deal had been defined. This strategy preserved the court's control over the negotiations and prevented them from fragmenting. In particular, it stymied the plaintiffs' lawyers in their last-ditch effort to improve on the deal by settling with five of the defendants and isolating Monsanto and Diamond Shamrock, the two companies they thought most vulnerable to liability and punitive damages.

Second, the masters attempted to break log-jams in the negotiations by helping the lawyers to predict the consequences of the various approaches under consideration, and by proposing alternative solutions. For example, when the chemical companies' lawyers expressed the fear that a settlement would be rendered worthless if a large number of veterans decided to opt out of the class and sue on their own, Shapiro devised a "walk-away" provision that would minimize those concerns. The tax implications of a settlement were also questions that the masters helped to clarify.

Third, when especially difficult issues arose that threatened to derail the settlement, the parties agreed to be bound by the judge's decision. The most important example of the judge acting as arbitrator involved perhaps the most difficult question facing the defendants—how to allocate liability among themselves. Another ex-

ample involved the question of one of the defendants' "ability to pay" its share.

Fourth, the judge and his special masters, while being careful not to be duplicitous, did emphasize different things to each side. In their discussions with plaintiffs' lawyers, they stressed the weakness of the evidence on causation, the novelty of many questions of law in the case, the consequent risk of reversal on appeal of a favorable verdict, the prospect that they might lose everything if they rejected settlement, and the enormous costs of continued litigation. To the defendants' lawyers, they stressed the presumed pro-plaintiff sympathies of Brooklyn juries, the reputational damage that protracted litigation and unfavorable publicity would cause their clients, and the high costs of the trial and of the inevitable appeals.

Fifth, a common theme in all discussions was the pervasive *uncertainty* that surrounded the law, the facts, the duration and ultimate outcome of the litigation, and the damages likely to be awarded. By almost all accounts, it was this uncertainty that proved to be the decisive inducement to settlement.³⁰ On one count, however, Judge Weinstein left little doubt in the lawyers' minds: the court, having crafted and taken responsibility for the settlement, was in a position to make it stick.

Sixth, the imminence and ineluctability of trial "concentrated the minds" of the lawyers as nothing else could have done.³¹ This deadline imparted to their deliberations an urgency and a seriousness that swept aside objections that might have undermined negotiations in less compelling circumstances. The lawyers' growing physical and mental exhaustion during that weekend of feverish intensity abetted the conciliatory effect. As one plaintiff's lawyer later complained in his challenge to the validity of the settlement,

³⁰ This finding of a strong positive relationship between uncertainty of outcome and settlement, so apparent to all of the participants, suggests that the concept of uncertainty used in the model of the decision to litigate or to settle (especially as elaborated by Priest and Klein), which posits that uncertainty will actually *impede* settlement, is too broad. The concept needs to be unpacked and further specified if it is to have predictive power in complex cases, in which uncertainty of one kind or another is likely to be an important factor. See Priest & Klein, *supra* note 8, at 15-17; Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399, 403 (1980). It is important to distinguish, for example, between those changes in the level of uncertainty that lead both parties to be more pessimistic, which will tend to encourage settlement, and those changes that lead them both to be more optimistic, which will tend to discourage it. See *infra* notes 52-53 and accompanying text.

³¹ For a less favorable view of the judicial tactic of setting immovable trial dates, see Hazard & Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 AM. B. FOUND. RESEARCH J. 375, 386.

"the Judge wore us all down with that tactic."³²

Seventh, the judge and special masters displayed a degree of skill, sophistication, imagination, and artistry in fashioning the settlement that almost all the participants viewed as highly unusual. But even this would not have availed had Judge Weinstein not inspired an extraordinary measure of respect, even awe, in the lawyers, and had the special masters not been viewed as enjoying the authority to speak and make commitments for him.

Eighth, the settlement was negotiated without any agreement (or even any serious discussion) of how the settlement fund would be distributed among the claimants, and without reliable information as to the number of claims that would be filed.³³ The first, of course, was of great interest to the plaintiffs and a matter of indifference to the defendants. The second, however, was significant to both sides. It is not at all certain that settlement could have been reached had the parties been required to resolve these issues in advance. The problem was not simply that preparation of a distribution plan required an immense amount of analysis.³⁴ A protracted process of political compromise and education was also needed to gain support for the plan, a process whose results even now remain doubtful and perhaps legally vulnerable.

Ninth, the lawyers on the PMC at the time of the settlement possessed very different personalities, ideologies, and incentives than those of the group of lawyers that had launched the case and carried it through its first five years. These differences likely affected the lawyers' disposition to settle. The veterans' passionate desire for vindication at trial, quite apart from their wish for compensation, had strongly driven their chosen lawyer, Victor Yannacone, during the earlier stages of the litigation. Yet the PMC's deliberations concerning the settlement were strongly influenced by lawyers who had only the most attenuated relationship to the veterans. And under the terms of an internal fee-sharing agreement, these lawyers would be secured financially by even a "low" settlement.

Finally, the court was prepared to allocate substantial resources to the quest for a settlement. Judge Weinstein devoted a

³² The "exhaustion factor" apparently has figured heavily in other settlements as well. See, e.g., Arthurs, *supra* note 29, at 10.

³³ Indeed, the legality of the settlement has been challenged on the ground, *inter alia*, that any settlement lacking this information could not properly be approved.

³⁴ It was not published until May 1985, a year after the settlement, and was hundreds of pages long.

great deal of his own time to thinking through and implementing a settlement strategy. His three special masters for settlement commanded high compensation and worked long hours. Their billings to the court totaled hundreds of thousands of dollars, even excluding the massive amount of work they later invested in connection with the distribution plan.

According to virtually all of the lawyers who participated in the negotiation of the Agent Orange settlement, Judge Weinstein's distinctive intervention was essential to the settlement. It is possible, of course, that the lawyers are wrong, and that a pretrial settlement would have been reached even without Weinstein's intervention—or, at the very least, that a settlement would have been reached after some witnesses had testified and "blood" had been drawn. But the court's settlement activity was regarded as crucial by those in the best position to know.

II.

Why might it be necessary or desirable for a judge to play any role *at all* in the settlement of a complex case? If one subscribes to the dominant law-and-economics model of the decision to litigate or to settle,³⁵ the answer to this question is not at all obvious.

For present purposes, two of the model's central assumptions are most interesting. First, it assumes that settlement is a *two-person*,³⁶ party-exclusive bargaining process, one in which the judge plays no *distinctive* role. To be sure, he or she can provide information that may assist the attorneys to perform their cost and benefit calculations. But on the face of the model, the judge is no different in that respect from a newspaper account, a law book, or a deposition. Second, it assumes that the litigating attorneys possess perfect information about the magnitudes of their own and their opponents' litigation and settlement costs and their stakes in the case, and that each forms an estimate of plaintiff's probability of success on the basis of that information.

It seems likely that these assumptions more or less accurately characterize the decision to litigate or to settle in the vast majority of lawsuits. The judge, of course, will never know as much as the parties do about their settlement and litigation costs. The lawyers hardly need a judge to remind them that their *financial* incentives

³⁵ See *supra* notes 8-13 and accompanying text.

³⁶ But see Posner, *supra* note 8, at 417-18 & n.27 (admitting that reaching a settlement price may be more difficult in multiparty litigation).

to settle cases are already great.³⁷ The costs of trial (and appeal) are ordinarily quite high compared to the costs of pretrial litigation and settlement. The all-or-nothing aspect of most civil cases (comparative negligence is an important exception) presumably further encourages settlement by all but the risk-preferring lawyer and client.³⁸ And the contingent fee arrangements of most plaintiffs' lawyers, at least in tort cases, usually provide strong incentives for the lawyers to settle rather than to litigate.³⁹ Even a lawyer's fidelity to the client's interests, which may diverge from the lawyer's, cannot wholly eliminate the lawyer's powerful motive to settle.⁴⁰

Moreover, the judge will seldom know as much as the parties do about the plaintiff's probability of success or the likely size of a damage award, at least prior to trial.⁴¹ That is not to deny, however, that the judge sometimes has special knowledge that is relevant to the decision to litigate or to settle. Typically, the judge enjoys some discretion with respect to defining the outcome-relevant facts and law. If the manner in which the judge will exercise that discretion is important to the outcome, and if the parties' estimates of how it will be exercised are sufficiently divergent, they may not be able to negotiate a settlement on their own. A judge who informs the parties of the likely result of these discretionary decisions can, by helping the parties' estimates to converge, strongly influence their choice between litigation and settlement.

Although this possibility of superior judicial information certainly exists, one should not exaggerate its magnitude. First, unless the judge has participated extensively in resolving numerous discovery disputes in the case (a kind of participation that the growing use of special masters and magistrates makes increasingly unlikely), or has otherwise become immersed in the details of the litigation, the judge will probably not acquire more than a genera-

³⁷ As Judge Will has remarked, "the trial of a case is not usually profitable to a trial lawyer." Will, Merhige & Rubin, *The Role of the Judge in The Settlement Process*, 75 F.R.D. 203, 208 (1976).

³⁸ See Priest and Klein, *supra* note 8, at 7 n.22 (suggesting that their model will not hold for comparative negligence regimes); Posner, *supra* note 8, at 418 n.28 (noting basic model's assumption of risk neutrality).

³⁹ The fee for a successful settlement or verdict after trial is ordinarily higher than that for a settlement before trial, but the difference usually will not fully compensate for the additional time and risk entailed in trial.

⁴⁰ For a discussion of data on lawyer-client conflicts over settlement, see Brazil, *supra* note 2, at 91.

⁴¹ The situation might be different if the court has occasion to delve deeply into the merits, as on a motion for preliminary injunction or summary judgment.

lized understanding of the nature of a case until the parties file their trial briefs, or perhaps even until the trial is well under way. Indeed, a conscientious judge will strive (not always successfully) to avoid forming a settled view of the merits of the case as long as possible.⁴² The same scruples about detachment are likely to deter judges from early resolution of the kinds of "discretionary" issues that, as we have seen, may be highly relevant to the decision to litigate or to settle. Second, even if the judge knows a great deal about the case, its significance may only "come together" for him or her during the synthetic, focused process of trial. Finally, whatever the judge thinks of the case, the jury may think differently and the jury, in the end, usually has the decisive voice.

If lawyers already possess both the economic incentive to settle and the information (to the extent that *anyone* possesses it) that the Landes-Posner model deems relevant to making a rational decision, then the growing judicial role in settlement poses a genuine puzzle: under those conditions, after all, that role would seem to be superfluous. If judges are increasingly active in settlement activity, the model suggests, they are taking on an unnecessary burden—unless the model omits certain important features of the actual settlement process. Since it is demonstrable that trial lawyers emphatically do *not* regard an active judicial role in settlement as superfluous,⁴³ the latter explanation appears to be the correct one. As we shall see, the Agent Orange experience strongly supports that view.

In fact, a judge controls four distinct kinds of resources that may facilitate or even be indispensable to settlement, especially in complex cases. Typically, these resources are inaccessible to the lawyers except insofar as the judge decides to make them available. They include control over the disposition of certain issues; knowledge about other factors relevant to settlement of the case; the judge's reputation for fairness; and control over certain inducements and administrative supports. These resources, of course, are

⁴² This extended judicial ignorance of the case is not necessarily a bad thing; indeed, some commentators count it a great virtue, an important feature of a just procedural system. See, e.g., Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424-31 (1982). Hazard and Rice point out the anomaly of this stance from a management perspective:

[T]he person with administrative authority has relatively little information about the matter and is severely inhibited from getting such information, while the people who have the information have no authority to act on it. Indeed, the litigants often have incentives to use their superior information to offset or to subvert the judge's efforts at administration.

See Hazard & Rice, *supra* note 31, at 415.

⁴³ Brazil, *supra* note 2, at 85-87.

not equally important in any particular case, and some of them may actually conflict with others. Taken together, however, they go far towards explaining why judges sometimes play a key role in settlement and why the decision to litigate or to settle is often more properly viewed as a bargaining process involving three parties rather than two.

A. The Judge's Control over Particular Issues

I have already indicated that in many cases, especially complex ones, the judge will know little about the case prior to trial and thus will not be able to influence settlement negotiations by indicating in advance how he or she will rule on crucial issues. Occasionally, however, a judge will master the essentials of the case quickly enough to have a major impact. Agent Orange was such a case.⁴⁴

In Judge Weinstein's initial meeting with the lawyers, only days after he was assigned to the case, he displayed a mastery of the important features of the five-year-old Agent Orange litigation that was quite remarkable and much remarked upon. For present purposes, the question of how he acquired this knowledge so quickly is less interesting than the question of how he used it. He immediately took charge of the case, which had stalled for many months, and not only propelled it toward trial but self-consciously reshaped it, substantively and strategically, in ways that proved to be highly relevant to the case's eventual settlement.

Several examples must suffice. First, Judge Weinstein decided that while *Feres v. United States*⁴⁵ barred tort claims against the government by veterans, that bar did not apply to the independent claims of members of the veterans' families.⁴⁶ This novel proposition provided him with a reason (not to say a pretext) for restoring the government to the case—a crucial ingredient of the settlement that he hoped to fashion. Second, he suspected that the plaintiffs' causation evidence was weak. As the trial date approached, this suspicion ripened into a firm conviction, which the judge used as the essential premise and prod for goading the plaintiffs into a settlement. Finally, he made several so-called "preliminary" rulings

⁴⁴ The AT&T antitrust case, in which Judge Greene played a decisive role, may be another.

⁴⁵ 340 U.S. 135 (1950).

⁴⁶ *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1247-54 (E.D.N.Y.), *mandamus denied*, 733 F.2d 10 (2d Cir.), *appeal dismissed*, 745 F.2d 161 (1984).

that unmistakably signaled to the lawyers—especially plaintiffs' counsel—that they would probably not achieve certain hoped-for outcomes at the trial court level. His expressed intention to preclude the jury from awarding punitive damages⁴⁷ eliminated what was probably the single greatest source of the parties' uncertainty as to the stakes of the case. On the other hand, by indicating that he would apply "national consensus law" principles to resolve choice-of-law questions,⁴⁸ and by declining to indicate what those principles were, Weinstein maximized his own discretion, rendering the applicable law on a host of issues essentially indeterminate until such time as he should rule on each of them.⁴⁹

Two important points about Weinstein's signaling should be emphasized. First, he increased the parties' uncertainty in some respects and reduced it in others. There is no reason to believe, however, that these effects simply canceled one another out in the lawyers' calculations. The crucial consideration would seem to be that the uncertainty-reducing effect, especially as to causation and punitive damages, predominated. These rulings also favored the defendants, of course, and that fact strongly influenced the specific terms of the eventual settlement. For present purposes, however, the more important observation is that, as the Priest-Klein elaboration of the economic model predicts, Weinstein's rulings also increased the *probability* of settlement. This was not because of their substantive content, which was equally known and presumably taken into account by each side, but because, on balance, they reduced uncertainty and thus caused the parties' estimates of the probable outcome to converge.⁵⁰

Second, although Weinstein's rulings did reduce uncertainty, they did not wholly eliminate it. A great deal of uncertainty remained, both as to liability and as to damages. The lawyers on both sides believed that if the case went to a jury, a plaintiffs' verdict was quite possible and the damages, given uncertainty about the number and quality of claims and about the size of pain and

⁴⁷ Transcript of hearing before Judge Weinstein, Apr. 9, 1984, at 69-70.

⁴⁸ *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690 (E.D.N.Y. 1984). One of the reasons Judge Weinstein chose to apply "national consensus law" to choice-of-law questions was that the federal interest in the outcome of the case was far greater than that of any individual state. *Id.* at 704. *But cf. In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 995 (2d Cir. 1980) (reversing Judge Pratt's ruling that federal common law applied to the case, and therefore rejecting federal subject-matter jurisdiction).

⁴⁹ This indeterminacy was heightened by the fact that on many of the relevant issues, no national consensus appeared to exist.

⁵⁰ Priest & Klein, *supra* note 8, at 16-17.

suffering awards, would be unpredictable. Despite his expressed doubts about the causation evidence, Weinstein was careful not to state whether he viewed the plaintiffs' case as sufficiently weak to justify granting summary judgment in favor of the defendants, or whether he was prepared to enter judgment notwithstanding a pro-plaintiff jury verdict.⁵¹ In short, despite the judge's substantial control over the outcome and his willingness to signal his intentions with some clarity, the residual uncertainty was great.

In the end, this residual uncertainty proved to be an important motive for settlement. The reason is that *both sides seemed to become more pessimistic about the likely outcome at trial*. In terms of the economic model, judicial intervention will encourage settlement if both parties can be induced to reduce their estimates of their probable chances of winning at trial.⁵² The difficulty is that under ordinary circumstances, a given piece of information would be expected to make only one party more pessimistic; that information should cause the other party to become more optimistic. Judge Weinstein took two steps, however, that may have caused both sides to become more pessimistic, albeit for different reasons. First, he and his masters isolated the parties during the crucial stage of settlement negotiations and acted as an intermediary in all communications that passed between them. This stratagem enabled him to stress different aspects of the case to each side.⁵³ In particular, he was able simultaneously to arouse plaintiffs' fear that the case would not even reach the jury and defendants' fear that it would. Second, by clearly signaling how he was likely to rule on some issues, he suggested that he saw the remaining issues as very close ones, thus magnifying uncertainty and possibly reducing optimism on both sides.

⁵¹ Either move would have been highly questionable in the Second Circuit. See, e.g., *Heyman v. Commerce & Indust. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). For a discussion of summary judgment in the context of the claims of the opt-out plaintiffs in the Agent Orange case, see P. SCHUCK, *supra* note 6, at 227. In any event, the defendants' lawyers did not expect Weinstein to do either, and even refrained from moving for summary judgment.

⁵² The economic model shows that settlement becomes more likely as the plaintiff reduces the probability estimate of winning at trial or as the defendant increases the probability estimate of losing at trial. See Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 369-71 (1986); Priest & Klein, *supra* note 8, at 13. If both were to occur at the same time, the effect would be all the more pronounced. See also *supra* note 30 and accompanying text.

⁵³ For greater detail about how this was accomplished, see *supra* notes 29-30 and accompanying text; *infra* notes 62-65, 69 and accompanying text.

B. Knowledge About Other Factors Relevant to Settlement

In the Agent Orange case, the judge who fashioned the settlement also had the power to decide the case on the merits should settlement fail. As we have just seen, having one judge wield both of these powers was instrumental in producing the settlement. But this merging of roles is neither logically nor legally required, and some courts and most lawyers have rejected it.⁵⁴ Indeed, in a case like Agent Orange, this identity raises serious questions of judicial propriety, a point to which I turn in Part III. But even a "settlement judge" (or judicial adjunct) who lacks any power to rule on the merits acquires two types of knowledge that may be used to encourage settlement: knowledge about the social benefits and costs of a decision to litigate or to settle, and knowledge about barriers to settlement.

1. *Knowledge about Externalities.* The costs and benefits of litigation, especially in complex cases, do not accrue entirely to the parties and their lawyers. The parties have little or no incentive to attend to these external costs and benefits, and their decisions to litigate or to settle do not take them into account. The judge, in contrast, not only knows about certain externalities but is in a position to consider them when deciding whether and how to influence the parties' decisions. Indeed, in class actions certified under rule 23, the court is *obliged* to consider these social effects (among other considerations) in deciding whether to approve a settlement proffered by the parties.⁵⁵

The Agent Orange case suggests that the range and magnitude of externalities from the decision to litigate or to settle may be substantial. On the cost-of-litigation side, I have already described the burdens that the massive pretrial proceedings imposed on the court system; the administrative costs of the anticipated lengthy trial would have been even more formidable. To these costs, the value of judicial, lawyer, client, witness, and juror time and resources—only some of which the parties internalize—must be added. On the other hand, litigation can generate some important social benefits. By establishing and refining authoritative legal rules, litigation can minimize future disputes and litigation by informing the public about norms for conduct and the likely judicial

⁵⁴ See Brazil, *supra* note 2, at 90.

⁵⁵ See, e.g., *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), discussed in *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 761-63 (E.D.N.Y. 1984) (noting "the impact of the settlement on the community as a factor to be considered").

application of those norms. In the Agent Orange case, such guidance would have especially benefited those concerned with the manufacture, transportation, disposal, and storage of toxic substances. Litigation also serves important symbolic functions, using the evocative forms of narrative and combat to affirm certain fundamental communal values.⁵⁶ The veterans' desire to use the courts to tell their story to an uninformed public and to win vindication for their sacrifices is a classic example of that symbolic function.

For present purposes, it matters neither whether the judge *should* consider these externalities in deciding whether and how to seek to influence the parties' decision, nor whether these externalities were on balance positive or negative in the Agent Orange case. The important points are that they can be significant, and that only the "settlement judge," as the larger society's representative in the dispute, is in a position to take them into account.

2. *Knowledge About Barriers to Settlement.* According to the Landes-Posner model, the choice of whether to settle is a purely rational, resource-maximizing decision in which there are no barriers to communication between the lawyers, and in which the costs and benefits of the alternative courses of action are objective and verifiable. The Agent Orange case, however, suggests that the negotiation process is sometimes impeded by distorted perceptions, perhaps psychologically induced, that only a neutral third party can correct, and by strategic behavior that only such a third party can overcome.

As the inexorable Agent Orange trial date approached in early 1984, a "trial mentality" took hold. This mind-set had several notable features. First, although their financial incentives strongly favored settling the case, plaintiffs' lawyers—particularly those designated to try the case—nevertheless resisted broaching the subject of settlement with their adversaries. The defendants' lawyers were reluctant as well. Both sides feared that to initiate discussions would be to betray a lack of confidence in their case. They also feared that to enter into settlement negotiations while preparing for trial on an extremely tight schedule would sap the martial energy and interrupt the momentum thought to be essential to successful trial work in high-stakes litigation.

It is certainly not the case that the robust financial incentives to settle invariably bow to these psychological and strategic obsta-

⁵⁶ *E.g.*, THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* 172-98 (1935); Leff, *Law and*, 87 *YALE L.J.* 989, 997-98 (1978).

cles; obviously, the statistics on the frequency of settlement imply that the reverse is more likely to be true.⁵⁷ Rather, the point is only that such obstacles sometimes do exist, and that in certain cases, the intervention of a judge may be necessary to surmount them. The judge's role becomes one of opening and centrally coordinating a blocked communication system—convening the parties, defining the agenda, and saying what the parties know but are afraid to admit.

A second feature of the lawyers' "trial mentality" was a tendency to exaggerate both the strengths of their own case and the weaknesses of their adversaries' case. The Posner-Landes model does not consider how such perceptions might confound and distort the lawyers' evaluation of the parameters they face and thereby discourage certain settlement options that more accurate appraisals might commend to them. Judge Weinstein and his settlement masters, by furnishing the lawyers with an informed "outsider's" view, helped to counterbalance this tendency.

C. Reputation for Fairness

The judge's power over the disposition of particular issues, knowledge about externalities, and aid in overcoming barriers to bargaining can only be useful to the parties' search for settlement if they view the judge as fair. For the court to be serviceable, they need not think it indifferent as to the case's mode of disposition or even its outcome. The parties may suspect, for example, that the judge strongly desires a settlement in the case, yet believe that no recrimination will occur should they decide instead to litigate. They may even know that the judge has formed some opinion as to the merits. What is crucial is not that the judge be seen as a *tabula rasa* but that the parties view him or her as objective and fair-minded.

In the Agent Orange case, most of the lawyers who negotiated the settlement viewed Judge Weinstein as disinterested in this special sense. All were well aware, of course, that he wanted to settle the case—he had made his intentions unmistakably clear—but none believed that his desire for settlement was animated by personal bias, ideology, or anything other than his conception of what justice in the case required. Similarly, although his view of the merits, especially on the causation issue, was one with which plaintiffs' lawyers profoundly disagreed, most were convinced that he

⁵⁷ See W. BRAZIL, *supra* note 1, at 43.

had come to his view in a detached, intellectually honest fashion. Moreover, because they respected his acuity, his views influenced their own to some degree.⁵⁸

The judge's reputation for fairness can have an additional, more substantive effect on settlement. In any complex negotiation, certain issues will arise that are especially difficult to resolve and that threaten to derail the discussions. Sometimes only a trusted third party can resolve these "deal-breaker" issues.⁵⁹ As Part I indicated, the Agent Orange settlement almost foundered on several disputes of this kind, most notably problems of allocating liability among defendants and of insurance coverage. The parties' confidence in Judge Weinstein's wisdom and fairness enabled them to submit these issues to him for authoritative resolution.

D. Special Resources and Inducements

Two other kinds of resources can be used to encourage and shape settlements. I shall call them administrative resources and bargaining inducements. In terms of the economic model, they can be viewed as factors that reduce settlement costs and increase litigation costs. The important point that the model ignores, however, is that these resources, although valuable to the parties and their lawyers, are controlled by judges and thus can be manipulated by them to influence the decision to litigate or to settle.

1. *Administrative Resources.* A judge—especially, as in Agent Orange, the chief judge of a court—controls physical facilities, specialized personnel and support staff, a bureaucratic organization, a communications apparatus, and the litigation calendar. In the Agent Orange case, Judge Weinstein conspicuously and effectively wielded these and other trappings of judicial power first to facilitate and then to legitimate the settlement. For example, he convened intensive negotiations in the federal courthouse itself; appointed magistrates and special masters; presided over an unprecedented series of "fairness hearings" held in cities throughout

⁵⁸ As we shall see, this near unanimity concerning Weinstein's fairness and its importance to the initiation and development of the settlement did not extend to all stages of the negotiations. By the end, a few plaintiffs' lawyers claimed to believe that the judge's commitment to concluding a settlement had become so great that he was prepared to penalize them if they refused to accede to it. This claim is discussed below.

⁵⁹ A non-judicial "mini-trial" arranged by the parties exemplifies one effort to provide this disinterested perspective. See, e.g., Green, Marks, & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 Loy. L.A.L. Rev. 493, 501 (1978). Another approach is to hire an agreed-upon private mediator, albeit one who lacks certain of the judge's settlement-facilitating resources.

the nation to elicit the comments of class members on the proposed settlement; ordered unusual forms of class notice; and prepared, disseminated, and administered what may be the most complex distribution plan ever adopted by a court. His skillful deployment of these resources was probably essential to the negotiation, approval, and implementation of a settlement in so complex a case.

2. *Bargaining Inducements.* In addition to controlling administrative resources that facilitate settlement, a judge can create and manipulate incentives to which the lawyers are likely to respond, orchestrating those responses into a settlement agreement that might not otherwise be reached. The essential, unvarnished fact is this: The lawyers know—and the judge knows that the lawyers know—that the judge is in a position to make many decisions of vital concern to them and their clients in the future, both in this case and in subsequent cases in which they will appear before that judge.⁶⁰ Many of these decisions entail the exercise of some judicial discretion. Some, like the pace and nature of discovery, the time of trial, and the admissibility of expert testimony, are almost wholly discretionary. Especially in a complex case, even those decisions that are in principle not discretionary are often not appealable as a legal or practical matter. Some of the most important decisions from the lawyer's selfish point of view—class certification, appointment of lead class counsel, and award of attorneys' fees and costs—may turn upon the judge's perception of a particular lawyer's ability and performance. Rightly or wrongly, lawyers believe that these decisions are more likely to be favorable, at least at the margin, if the judge regards the lawyers as reasonable and cooperative. It would be astonishing, under these circumstances, if lawyers did not seek to present themselves as conciliatory actors who are anxious to please the court.

None of this suggests either that judges threaten lawyers with retribution if they are unwilling to settle on terms that the court proposes, or that lawyers sacrifice their clients' interests in a fulsome display of obeisance. The pattern of influence in the Agent Orange case was far more subtle. Much of Judge Weinstein's leverage over the lawyers was implicit rather than explicit; whatever force it exerted derived from the fact that it was felt, anticipated, and internalized without having to be discussed or justified. Its outward manifestations—the lawyers' deference, even obsequi-

⁶⁰ This is perhaps especially true in districts in which the number of judges on the panel is small.

ousness, towards the judge throughout the settlement process—were so conventional as to almost escape notice. To be sure, their responsiveness to his wishes partly reflected the unusual degree of admiration with which almost all of the lawyers regarded Judge Weinstein. But much of it seems more systematic, more deeply embedded in professional norms and strategic concerns.

III.

The analysis presented in Part II emphasizes that an active judicial role in the settlement of complex cases like Agent Orange may have several previously unsuspected or at least unarticulated features. Although there evidently is widespread support for such a role among lawyers, judges, and even clients,⁶¹ the reason for this support seems to be little more than an undefined sense that judicial involvement “works” in producing settlements that are regarded as acceptable. If the analysis is accurate, we now have a better idea of *why* and in *what respect* it works. Judicial involvement in settlement may tend to “perfect” the lawyer-centered bargaining process envisioned by the Landes-Posner model by introducing a third party who can correct for certain “market failures.” To put the point another way, the existing model identifies the variables relevant to the decision to litigate or to settle—settlement costs, litigation costs, stakes in the case, and estimated probability of success—but it ignores the judge’s role in influencing the magnitude and salience of those variables and thus the outcome of the decision.

The analysis also suggests, however, that there are risks to justice, and to the appearance of justice, when judges—especially those who are in a position to rule on the merits and thus control the outcome of a case—actively involve themselves in settlement. These risks exist even when settlement is thought to be a good thing, either in general or in a particular case. Even if the risks of judicial involvement are outweighed by the advantages, as I think they were in the Agent Orange case, they merit profound concern. These risks seem to me to be of three main types: judicial overreaching, judicial over-commitment, and procedural unfairness.

A. Judicial Overreaching

As noted in Part II, judges control inducements that they can manipulate in order to influence lawyers’ behavior. Even if judges

⁶¹ Brazil, *supra* note 2, at 85.

scrupulously avoid rewarding or punishing lawyers who do or do not cooperate in effecting settlement, the danger remains that lawyers will interpret judicial involvement as thinly-veiled coercion or will conform their behavior to what they believe the judge is demanding rather than to the needs of their clients. In the Agent Orange case, for example, several plaintiffs' lawyers alleged in their challenge to the settlement that Judge Weinstein improperly pressured them to settle.⁶² Consider one lawyer's account (in a sworn deposition) of the judge's behavior:

He would say: "Now, I am not going to hold it against you if you don't settle. I am not going to penalize you. I am going to conduct this trial on a fair basis to everybody," and then came the "but"

"But," he would say, "I have carried you plaintiffs all this time. I have decided a lot of questions in your favor I could have decided the other way. And I want you to know that at nine o'clock Monday morning [when the trial was to begin] I am through carrying you. You are on your own. I will do my duty as a Judge."

Then a little conversation would take place and then he would come back and say: "You know, remember, I just don't think you have got a case on medical causation. I don't think you have a case on punitive damages."⁶³

The question for present purposes is not whether this account of the exchange is accurate, or if so, how the judge's words were said and how they were understood by the lawyers. Such questions are probably impossible to resolve on the basis of the available evidence. Instead, two points seem especially pertinent. First, settlement discussions in such cases take place unrecorded, behind closed doors, in a highly-charged emotional environment. Under such circumstances, ambiguity and misunderstanding flourish. After-the-fact recrimination is a constant temptation. Second, except perhaps at the extremes, there is no consensus on what constitutes "judicial impropriety" in such a situation, much less the "appearance" of impropriety.⁶⁴ The facts that a judge as conscientious and

⁶² Benton Musslewhite's First Supplement to, and Brief in Support of, Motion Filed Under Rule 59 and 60 of F.R.C.P. Concerning the Court's Final Judgment Dated January 7, 1985, at 36-39; Ashcraft & Gerel's Petition for Writ of Mandamus 2 (April 3, 1985) (both on file with the author).

⁶³ Deposition of Benton Musslewhite 83-84 (Feb. 23, 1985) (on file with the author).

⁶⁴ See CODE OF JUDICIAL CONDUCT Canon 2 (1972) ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities").

sophisticated as Judge Weinstein could be accused of overreaching (although the lawyer hesitated to call it "duress") and that other judges have occasionally been found guilty of it⁶⁵ suggest that the risk is not a trivial one.

B. Judicial Over-Commitment

Judges, like other people, do not like to invest a great deal in a project without receiving the anticipated return. The Agent Orange experience suggests that fashioning a settlement in that kind of case requires an enormous judicial investment, and that a judge who makes such an investment is unlikely to remain indifferent as to the outcome of the negotiations. The risk is that the judge's commitment may become excessive, compromising the appearance or reality of the judge's fairness as to whether the case will be litigated or settled, and possibly even with regard to the merits.

The Agent Orange case exemplifies this risk. Under rule 23(e), Judge Weinstein was obliged to decide whether the settlement was "fair, reasonable and adequate."⁶⁶ Consider whether the reality of the situation permitted him to do so in a disinterested fashion. The settlement, after all, was not an agreement that the lawyers had negotiated and drafted by themselves and brought to the court for its evaluation and approval. Judge Weinstein had invested an enormous amount of the court's resources in the effort and had placed his considerable personal and judicial reputation on the line in extracting concessions and accommodations from both sides in the interests of securing an agreement.⁶⁷ Finally, he had, quite literally, dictated its principal terms—the settlement amount, the trigger date on interest, the opt-out walkaway provision, the preservation of claims against the government—and had cajoled the lawyers into accepting them.⁶⁸ Had he not contrived the settlement, it would by all accounts not have occurred when and in the

⁶⁵ See *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985).

⁶⁶ The cases have put this gloss on Fed. R. Civ. P. 23(e). See *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 761-63 (E.D.N.Y. 1984).

⁶⁷ Few judicial settlements, after all, produce a multi-page spread in the *New York Times* and articles in *Newsweek* and most other major news outlets in America and abroad. If the entire world was not watching, a good portion of it certainly was. For articles discussing the reaching of a settlement, see *The Bargaining Behind the Agent Orange Deal*, *BUS. WEEK*, May 21, 1984, at 39-40; *A Fast Deal on Agent Orange*, *NEWSWEEK*, May 21, 1984, at 56. For articles concerning Weinstein's approval of the settlement, see *Agent Orange: The Final Hurdle*, *NEWSWEEK*, Jan. 21, 1985, at 68; *Judge Gives Final Approval to Accord on Agent Orange*, *N.Y. Times*, Jan. 8, 1985, at B2, col. 1; *Agent Orange Settlement is Approved; Cash Awards are Likely to be Limited*, *Wall St. J.*, Jan. 8, 1985, at 6, col. 2.

⁶⁸ See P. SCHUCK, *supra* note 6, ch. 8.

form that it did; indeed, it may not have occurred at all. His broad conception of the lawsuit's structure and significance, and his architectonic strategy for settling it, had guided his every action and decision in the case. His hand (and that of his special masters) appeared in every provision, every detail of the settlement document.

The judge was deeply committed to the settlement in another sense. He had made many innovative rulings that might well be reversed on appeal if the case were to continue. To that extent, he had staked his reputation and authority upon his ability to craft a settlement that would terminate the dispute.

Given his firm commitment to a settlement almost entirely of his own creation, it was virtually inconceivable that Judge Weinstein would fail to find that the agreement was "fair, reasonable and adequate." Again, the issue is not whether the settlement met the standards implicit in rule 23; in my view, it clearly did. For present purposes, the more relevant and interesting question is whether Judge Weinstein at some point became so much the author of the settlement that he lost the ability to be the disinterested appraiser envisioned by rule 23(e). Again, in my view, he clearly did. He could not dispassionately evaluate the terms of a settlement that he had, with such difficulty and investment, personally wrought. He could not fairly act as a judge in what, in a real sense, had come to be his own case.

C. Procedural Unfairness

Settlement negotiations are necessarily informal, secretive, rapidly changing affairs, and are ill-suited to the conventional forms of procedural due process. Moreover, the settlement process in complex class actions like Agent Orange may be quite protracted, involving a variety of distinct phases: the negotiations themselves, "fairness hearings," a "fairness decision," preparation of a distribution plan, public consideration and court approval of a plan, and implementation of the plan. Some of the procedural short-cuts or compromises that are appropriate for one phase, such as negotiation, may be quite troubling when applied to another phase, such as approval of the distribution plan. The risk of procedural unfairness—the threat to procedural values such as accuracy, individual dignity, participation, openness of decisionmaking, and the like—magnifies the risks of judicial overreaching and overcommitment.

Again, the Agent Orange case exemplifies this risk, despite Judge Weinstein's energetic and sensitive efforts to minimize it.

During both the negotiation and the distribution plan phases, numerous *ex parte* communications passed between the judge and the special masters and between the special masters and the lawyers; in effect, then, these communications occurred between the lawyers and the judge. This problem was compounded by the decision to keep the two sides separate during negotiations and to channel all communications between them through the court. Whether or not this procedure violated Canon 3 of the Code of Judicial Conduct,⁶⁹ it clearly merits concern. Similarly, the distribution plan—the “bottom line” of the litigation for the veterans—was prepared and approved with few if any of the procedural protections that surround even the most trivial discovery motion—such as the right to a decision based on findings of fact derived from a record compiled through adversarial processes. Moreover, the distribution plan is an integral part of the settlement, and must be reviewed by the court before the settlement can be approved.⁷⁰ Weinstein’s decision to approve the settlement without such a plan seems improper. Again, the point is neither to disparage the results reached by Judge Weinstein and Special Master Feinberg nor to argue that different procedures would have yielded different outcomes. Rather, it is to suggest the dangers that the lack of procedural protections could pose in the less capable hands that more typically administer such matters.

If one assumes, as I think one should, that genuinely voluntary settlement of civil disputes short of trial is generally a good thing, then the emerging judicial role in settlement would seem to be a valuable instrument for reaching that objective. Judges may actually be able to facilitate some settlements, especially in complex cases, that are “better”—in the sense of more accurately reflecting what the parties would negotiate if they were fully informed about the relevant variables, including likely outcomes—than those that the litigation market would otherwise generate.

But that value, as the Agent Orange case suggests, can be obtained only at some risk of judicial overreaching, over-commitment, and procedural unfairness. It is impossible to know how great that risk actually is, for the only people in a position to identify and appraise it—the lawyers who interact with the settlement

⁶⁹ *Ex parte* communications by and to judges are expressly proscribed, but the commentary indicates that a judge may consult “with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.” CODE OF JUDICIAL CONDUCT Canon 3, § (A)(4) commentary (1972).

⁷⁰ See MANUAL FOR COMPLEX LITIGATION § 1.46 (1982).

judge—cannot always be counted on to blow the whistle. For example, the lawyer may have a personal financial or professional stake in a settlement that the client, if fully informed, would reject. The lawyer may not be sufficiently strong or independent to resist an oppressive judge bent upon settlement.

Although the risk of abuse cannot be quantified, there are several procedural reforms that might, at low cost, reduce it. First, the judge who is to preside over the litigation of the merits can be barred from participating in settlement negotiations. This procedure is already standard practice in certain judicial districts and apparently enjoys widespread support among attorneys.⁷¹ Although the advantages of this approach are obvious, its limitations should not be ignored. The risk of over-commitment may simply shift from “merits” judges to “settlement” judges; in fact, a judge whose only task with regard to a case is to settle it may have even stronger reasons to “force” settlement. In addition, the proposal could impose additional demands on scarce judicial resources. When applied to complex cases like Agent Orange, for a second judge (who is already busy with his or her own docket) to invest the considerable time and study required to learn what the “merits” judge already knows (or must eventually learn) would be costly.⁷² The use of special masters for settlement could reduce the drain on judges’ time, of course, but that resource is also costly—and the use of special masters creates its own problems.⁷³

Another procedural reform would be to bar the judge who fashioned a class action settlement from evaluating the fairness of that settlement. Since there are some advantages in cost and quality of decision in having the judge who is most knowledgeable about the case evaluate the fairness of the settlement, this change should ideally be limited to those cases in which the court played an active role in designing or negotiating the settlement. Those cases must be distinguished from the presumably far more common situations in which the settlement was essentially produced by the parties and merely presented to the judge. An important question, then, is how such a distinction would be defined and how difficult its application would be in practice. Moreover, this reform would affect only settlements in the relatively small percentage of cases that are class actions. A novel requirement that *all* settle-

⁷¹ See Brazil, *supra* note 2, at 90.

⁷² For an analysis of how costly a roughly analogous approach might be, see Posner, *supra* note 52, at 390-91.

⁷³ See, e.g., Brazil, *supra* note 16, at 417-23.

ments be judicially approved—and further, that they be approved by a judge not previously involved with the case—would be cost-effective only if a significant fraction of civil settlements are coerced or reflect improper judicial behavior.

Such an assumption is plainly unwarranted on the basis of the existing evidence.⁷⁴ Until stronger contrary evidence appears, we should seek to meet concerns about judicial overreaching, overcommitment, and procedural unfairness in settlements by tailoring the limited procedural reforms suggested above. More important, we must seek to strengthen the normative and institutional safeguards upon which any judicial system must principally rely: the self-consciousness of judges, the vigilance and assertiveness of advocates, the probing suspicions of journalists, and the fastidious carping of scholars.

⁷⁴ The evidence on the negative side consists of anecdote, theoretical possibilities, and a very occasional appellate court rebuke of an isolated trial judge, *see, e.g.*, *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985).