

THE PARTICIPATORY CLASS ACTION

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The class action has emerged as the settlement instrument of choice in mass harm cases such as the Volkswagen emissions scandal or the Deepwater Horizon aftermath. But the class action has also reemerged in the mass tort context, most notably in the NFL Concussion litigation. After seemingly collapsing following the Amchem and Ortiz Supreme Court decisions of the 1990s, the class action device is getting an important second life in courts today.

This Article argues that the new class action has a feature that should increase its doctrinal acceptability: forms of active class member participation. What we term the “participatory class action” emerges from two developments. The first is the technological transformation in the means of communication with class members, and among the class members themselves. The second is that the current class action almost invariably arises from the initial aggregation and centralization of large numbers of individual suits and putative class actions in the Multidistrict Litigation (MDL) process. As a result, classes are comprised not simply of lawyers and absent class members, but of hundreds or even thousands of individual claims, with individuals capable of monitoring the class and represented by independent counsel.

With over forty percent of the actively litigated civil cases in federal courts now in the MDL dockets, the transformation in mass resolution is well underway. In these new consolidations, the assumptions of older law about absent class member passivity break down. In the popular typology in academic examination of class actions, class action law should insist on the loyalty of agents and the importance of individual ability to exit as guarantors of systemic legitimacy. In the participatory class action, voice emerges as a critical element, with the capacity of the normally silent class members to assert their interests and their views. As with the need for class action law to move from first-class mail to Twitter, so too must the law embrace the implications of real participation by those represented in the assessment of representational propriety.

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INTRODUCTION

For generations, the central problematic in class actions has been the legitimacy of one party binding another to a distant outcome. Once the Supreme Court recognized in *Supreme Tribe of Ben Hur v. Cauble*¹ that representative litigation could conclusively resolve the rights of absent parties, the question immediately surfaced concerning when such *in absentia* proceedings could achieve adjudicative finality. In the words of the seminal decision in *Hansberry v. Lee*, class proceedings necessarily strained the presumption “in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”² The decision in *Phillips Petroleum Co. v. Shutts* filled the gap, but only temporarily, by supplying a transitional solution that characterized absent class members as non-parties (dispensing with the formalities of individual service at least), while confirming their procedural due process rights.³

Concern over representational legitimacy permeates the development of modern class action law.⁴ The modern exhortation that class actions must be subject to “rigorous” examination comes from *General Telephone Co. of the Southwest v. Falcon*,⁵ an employment discrimination case in which an employee passed over for promotion claimed to speak for a broad class of Mexican-Americans never hired by the same employer. Most critically to modern law, the antagonistic interests between present asbestos claimants and future victims doomed the proposed class action settlements in *Amchem Products, Inc. v. Windsor*⁶ and *Ortiz v. Fibreboard Corp.*⁷

Together, *Amchem* and *Ortiz* serve as our point of departure. These decisions rejected any easy application of the class action mechanism to the complete resolution of mass harm cases that could not be folded into traditional class action criteria. In turn, *Amchem* and *Ortiz* collectively ushered in a wave of new mechanisms designed to deal with the complications of consensual settlement through Rule 23.⁸ In

¹ 255 U.S. 356 (1921).

² 311 U.S. 32, 40 (1940) (emphasis added).

³ See 472 U.S. 797, 809–10 (1985).

⁴ See Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 *FORDHAM L. REV.* 3165, 3167 (2013) (discussing the “agency problem” in class action representation).

⁵ 457 U.S. 147, 161 (1982) (denying certification to diverse employment class).

⁶ 521 U.S. 591 (1997).

⁷ 527 U.S. 815 (1999).

⁸ See, e.g., Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 *STAN. L. REV.* 1475, 1476 (2005) (discussing how in *Amchem* “the perfect was the enemy of the good”).

the modern world of non-trial resolution of cases, pretrial dispositive motions and settlements are the customary way of resolving the broad run of cases. As the Court in *Amchem* noted, settlement may necessitate heightened scrutiny, as a binding settlement may emerge from negotiations among parties burdened by all sorts of competing interests.⁹ Indeed, agency costs imposed by class representatives, specifically class counsel, have been the mainstay of critical scholarship on class actions for decades,¹⁰ and have even led to a broad-scale indictment of settlement classes altogether.¹¹

Despite these concerns, class actions, and especially settlement classes, continue to thrive. With the passage of time, concerns over representational legitimacy have been tamed, if never fully domesticated. *Amchem* invited the use of subclasses as a “structural protection” against rivalrous claims to limited recoveries.¹² Other courts, most notably the Seventh Circuit, have stressed the efficiencies of class actions for common economic harms emerging from discrete courses of conduct.¹³ An increasing number of circuit courts have encouraged the use of issue classes to resolve the central points of contestation in large-scale harms, even if the final resolution of individual claims is left for another day.¹⁴ Yet others have allowed class

⁹ See *Amchem*, 521 U.S. at 620, 623–24.

¹⁰ See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1346 (1995) (explaining that tort “claim aggregation through class actions systematically tends to disfavor certain identifiable, but underrepresented” class members); John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 671–72 (1986) [hereinafter Coffee, *Plaintiff’s Attorney*] (pointing to “the conflicts that arise between the interests of [plaintiff’s] attorneys and their clients”).

¹¹ See, e.g., Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 952–53 (2014) (arguing that classes should never be certified for settlement alone).

¹² See *Amchem*, 521 U.S. at 627 (noting the need for “structural assurance of fair and adequate representation for the diverse groups and individuals affected”).

¹³ See, e.g., *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (emphasizing the need and appropriateness of using class actions to resolve cases where “issues of liability are genuinely common” and where “tortious harms of enormous aggregate magnitude [are] so widely distributed as not to be remediable in individual suits”); *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The realistic alternative to [this] class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”) (emphasis added); see also Elizabeth J. Cabraser, *The Rational Class: Richard Posner and Efficiency as Due Process*, 82 GEO. WASH. L. REV. ARGUENDO 85, 88 (2014), http://www.gwlr.org/wp-content/uploads/2014/10/Cabraser_Final_Redacted.pdf (reviewing Judge Posner’s emphasis on “judicial economy and litigation efficiency” in class certification decisions).

¹⁴ See, e.g., *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000, 2010 WL 2756947, at *3 (N.D. Ohio July 12, 2010) (“[T]he presence of a single common question is enough for certification—as long as resolution of that question will advance the litigation.”), *aff’d*, 722 F.3d 838, 854 (6th Cir. 2013) (“[D]etermination of

resolutions to be the foundation for elaborate administrative structures that serve to channel individual claims for compensation, and then admit direct individual participation in subsequent phases.¹⁵

To this list of important doctrinal evolutionary trends in class action law we add a further consideration that has thus far escaped academic scrutiny and has only begun to be acknowledged in case law: Increasingly, “absent” class members may not actually be absent. Large swaths of class action law concern cases in which unnamed class members may monitor the proceedings, oversee class counsel, retain individual counsel, and help mold the ultimate relief in the case. This is the new “participatory class action,” as we shall term it. Participatory class actions unsettle many of the operational assumptions of modern complex litigation law concerning “headless class actions,”¹⁶ “lawyers without clients,”¹⁷ and other such formulations that highlight the presumed stark divide between the interested (or self-interested) class leadership and the individual class member, who is rationally unable to monitor or shape a class action.

The participatory class action corresponds to two developments, one of which is technological and the other jurisprudential. The technological change is quite straightforward. In an era in which presidential campaigns may be run by direct contact from candidate to voters through social media, who would imagine that the main form of class member notice would remain the tombstone advertisement in the back pages of the *Wall Street Journal*? Increasingly, class member identities are easy to “ascertain” utilizing the data already kept by institutional defendants who maintain regular contact with their customer base.¹⁸ In turn, Facebook, Twitter, and other low-cost media

damages ‘may be reserved for individual treatment with the question of liability tried as a class action[.]’”) (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)), *cert denied*, *Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014).

¹⁵ See *In re Deepwater Horizon (Deepwater Horizon I)*, 732 F.3d 326, 329–32 (5th Cir. 2013) (describing structure of settlement for business economic loss claims).

¹⁶ *Satterwhite v. City of Greenville*, 557 F.2d 414, 425 (5th Cir. 1977) (Gee, J., dissenting) (describing “a headless lawsuit with, in effect, no plaintiff”), *vacated*, 578 F.2d 987 (5th Cir. 1978) (en banc), *vacated*, 445 U.S. 940 (1980); see also Elizabeth A. Grimes, *Satterwhite v. City of Greenville and Breathing New Life into the Headless Title VII Class Action*, 32 STAN. L. REV. 743, 747–52 (1980) (tracing the reasoning of each *Satterwhite* judicial opinion).

¹⁷ See William P. Barrett, *I Have No Clients*, FORBES MAG., Oct. 11, 1993, at 52 (“I have the greatest practice of law in the world . . . I have no clients.”) (quoting William Lerach); see also Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 132 (2001) (discussing ethical problems in class action representation).

¹⁸ See *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 657–58 (7th Cir. 2015) (declining to adopt a “heightened ascertainability” requirement as an additional threshold requirement for class certification), *cert. denied*, *Direct Dig., LLC v. Mullins*, 136 S. Ct. 1161 (2016); see

outlets allow not only for direct information to be given to class members on a regular basis, but also provide a ready platform for interested class members to organize themselves to oversee class proceedings.¹⁹ Not surprisingly, this technological blitz is overwhelming formal class action law, which is still organized around the injunction of the last century from *Mullane v. Central Hanover Bank & Trust Co.*—that all known class members must receive notice by first-class mail.²⁰

Less noticed, however, is the second source of change: the role of Multidistrict Litigation (MDL) in consolidating claims first brought in multiple jurisdictions into one central case. Increasingly, class actions are organized out of the centralizing function of MDL practice. In turn, the increased dominance of MDL consolidation has created an environment for the centralization of all claims, including state and federal regulatory actions, into one central proceeding. MDL cases now account for over forty percent of actively litigated claims in federal courts.²¹ More significant than even the stunning growth in numbers is the increasing role of MDL courts in consolidating mass harm cases owing to a common origin, such as with defective pharmaceuticals, widespread environmental harms, common origin tort claims, or broad consumer fraud. It is no coincidence that the largest class action settlements of late—such as *Deepwater Horizon*,²² *Volkswagen*,²³ or

also *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127 (9th Cir. 2017) (following Seventh Circuit interpretation of Rule 23(a) prerequisites to class certification); *In re Petrobras Sec.*, 862 F.3d 250, 264, 268–69 (2d Cir. July 7, 2017) (joining *Mullins* and *Briseno* and noting a “growing consensus” rejecting a “freestanding administrative feasibility requirement” as “neither compelled by precedent nor consistent with Rule 23”).

¹⁹ For this reason, class counsel now typically request at the outset of a case that defendants preserve electronically-stored customer information so that it survives for use in the class notice and claims administration processes.

²⁰ 339 U.S. 306, 318 (1950). In May 2016, the Advisory Committee on Civil Rules recommended an amendment to Rule 23(c)(2)(B) to explicitly provide for notice by “electronic means, or other appropriate means.” ADVISORY COMM. ON CIVIL RULES, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 2 (2016), <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2016>.

²¹ As of 2014, MDLs made up 36% of the civil caseload, and 45.6% of prisoner and social security cases are removed from the tally. DUKE LAW SCH. CTR. FOR JUDICIAL STUDIES, STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLs x–xi (2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf (analyzing statistics from United States courts, including Annual Reports of the Director, Statistical Tables for the Federal Judiciary, and Judicial Panel on Multidistrict Litigation: Judicial Business, available at <http://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary>); see also Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 845 (discussing the rise in MDL as a proportion of federal caseloads between 2002–2014).

²² *In re Oil Spill by Oil Rig “Deepwater Horizon,”* 910 F. Supp. 2d 891, 913, 961 (E.D. La. 2012) (certifying settlement class and approving settlement of economic loss and

*NFL Concussion*²⁴—all emerged from MDL consolidation of dozens or hundreds or thousands of underlying claims against common defendants.

The MDL origin of these cases fundamentally alters class action practice, and in particular, the role of class members as participants. An MDL is, by definition, a pretrial consolidation of multiple cases from many jurisdictions. This means that, prior to MDL consolidation, there must be many cases on file, presumably with many different lawyers. Frequently, MDLs are formed from the consolidation of a mix of both individual suits and multiple putative class actions.²⁵ As a result, MDLs and class actions do not exist as separate spheres, but rather as overlapping forms of consolidation of mass harm claims.²⁶

In what follows, we play out some of the implications of the new participatory class action. First, we examine the implications of class member participation for inherited class action law, running from the

property damage claims), *aff'd*, *In re Deepwater Horizon (Deepwater Horizon II)*, 739 F.3d 790, 795 (5th Cir. 2014), *cert. denied*, BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014).

²³ *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2016 WL 6248426, at *28 (N.D. Cal. Oct. 25, 2016) (granting final approval of settlement in relation to consumer claims over installation of software designed to cheat emission tests into diesel vehicles). There is currently an appeal pending in the Ninth Circuit.

²⁴ *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 423 (E.D. Pa. 2015) (certifying class settlement in relation to allegations that the NFL failed to reasonably protect players from concussive head injuries and fraudulently concealed those health risks from players), *aff'd*, 821 F.3d 410 (3d Cir. 2016), *cert. denied*, Gilchrist v. NFL, 137 S. Ct. 591 (2016) (No. 16-283), 2016 WL 4585281, and *Armstrong v. NFL*, 137 S. Ct. 607 (2016) (No. 16-413), 2016 WL 7182246; *see also In re NFL Players’ Concussion Injury*, 307 F.R.D. at 365–69 (describing settlement terms).

²⁵ In *Volkswagen*, the MDL also included government regulatory actions and suits filed by individual states. *In re Volkswagen*, MDL No. 2672 CRB (JSC), 2016 WL 6248426, at *2.

²⁶ One of the present authors, Elizabeth J. Cabraser, is widely regarded as one of the preeminent class actions lawyers in the U.S., handling a wide array of consumer, mass tort, and environmental claims, among others. *See, e.g.*, Sara Randazzo, *The Plaintiffs’ Lawyer Chasing VW*, WALL ST. J., Mar. 4, 2016, at B3. A review of her cases filed over the past 20 years reveals that there is not a single case that she filed involving nationally marketed products or services that did not end up as part of an MDL proceeding, regardless whether postured as a putative class action or individual case. *See, e.g.*, *In re Volkswagen*, MDL No. 2672 CRB (JSC), 2016 WL 6248426, at *1–2 (describing transfer and coordination of 56 related actions, including putative class actions, and 1101 tag-along actions for pretrial proceedings); Order No. 1415, *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig. (In re Diet Drugs)*, Nos. 1203, 99-20593, 2000 WL 1222042, at *3 (E.D. Pa. Aug. 28, 2000) (approving settlement after transfer and consolidation of over 18,000 individual actions); *In re Gen. Motors Corp. Pick-up Truck Prods. Liab. Litig.*, 55 F.3d 768, 779 (3d Cir. 1995) (vacating settlement approval in products liability case involving transfer and consolidation of dozens of related consumer class actions).

presumption of class member silence to the insistence on the role of the court as the only fiduciary for the absent class members. Second, we use the recently resolved *Volkswagen* and *NFL Concussion* cases to demonstrate that this new form of class action is alive and well, and highlight the key doctrinal implications of participation, particularly in the oversight of settlements and the “typicality” requirement for class representatives. But our point is to push this much further than current law allows. In the popular typology in academic examination of class actions, class action law should insist on the loyalty of agents and the importance of individual ability to exit as guarantors of systemic legitimacy.²⁷ In the participatory class action, voice emerges as a critical element, with the capacity of the normally silent class members to assert their interests and their views. As with the need for class action law to move from first-class mail to Twitter, so too must the law embrace the implications of real participation in the assessment of representational propriety.

I

CLASS MEMBER VOICE

The so-called “numerosity” requirement of Rule 23(a)(1) is, technically and expressly, an impracticability of individual joinder standard.²⁸ In the class action of the 20th century, impracticability of joinder derived from the expense and difficulty of communication with the class, exacerbated, perhaps, by the geographical dispersion of its members.²⁹ While Rule 23 imposes no express threshold of numerosity, in common practice, and at common law, the numerosity

²⁷ See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 377 (2000) [hereinafter Coffee, *Class Action Accountability*] (proposing the need to balance the requirements of exit, voice, and loyalty to protect class member interests); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341–42 (1999) (identifying that most class action reforms are focused on an exit, voice, and loyalty structure).

²⁸ See FED. R. CIV. P. 23(a)(1) (providing as a prerequisite that “the class [be] so numerous that joinder of all members is impracticable”).

²⁹ See, e.g., *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981) (citing 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1762 (3d ed., 2017), Westlaw (noting that factors other than class size, such as geography, are also relevant to impracticability of joinder); see also *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363 (1921) (citing *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853)) (noting the need for representative suits “to prevent a failure of justice” where “the parties interested in the suit are numerous, [and] their rights and liabilities are so subject to change and fluctuation by death or otherwise” that joinder would be highly inconvenient if not impossible).

threshold was as low as forty persons.³⁰ Above that level, it was thought that the communication and participation essential to active party status were inherently impractical, and a representative suit was the only viable alternative. The representative suit was seen as a fallback from a truly participatory action such as a binary suit or a multiparty action covered through joinder intervention or interpleader, and the defining characteristics of class members were passivity and absence.³¹

Indeed, “absent class members” became the common descriptor of class members, who were additionally tagged as the passive beneficiaries of the action.³² Class notice was rare, cumbersome, and expensive. One of the most influential classic class action decisions of the Supreme Court, *Eisen v. Carlisle & Jacquelin*, addressed whether adequacy of representation and due process required the named plaintiffs to underwrite the considerable cost of mailed notice to the class.³³

Early consumer actions were marked by anxiety over administrative burdens: The cost of notice or of preparing a check and mailing it to a class member might equal or exceed the value of the ultimate payment for any class member itself.³⁴ Consumer class actions, especially, teetered uneasily on the dividing line between utility and cost-ineffectiveness. And for those who may have wished to actively participate in their litigation, the class action was simply not an option: The “superiority” checklist of Rule 23(b)(3) included the claimants’

³⁰ See, e.g., *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 74 (S.D.N.Y. 2006) (citing *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)) (finding presumption of numerosity where class size is equal to or exceeds forty members); WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 3:12 (5th ed. 2011), Westlaw (“[A] class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone.”).

³¹ See, e.g., Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 *FORDHAM L. REV.* 1177, 1191–92 (2009) (noting that in large class actions, “permitting active participation . . . by unnamed class members would be entirely unworkable,” as they could not take an “active role in the day-to-day management and trial of a class action,” and would ultimately defeat the purpose of class actions to enable designated members “to represent the class as a whole”).

³² See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (“Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.”).

³³ 417 U.S. 156, 175–76 (1974).

³⁴ In *Eisen*, for example, the case was ultimately dismissed due to the class representative’s unwillingness to bear the “prohibitively high” cost of individual notice to 2.25 million class members, none of whom had a claim large enough to justify independent litigation. *Id.* at 175–76, 179.

“interests in individually controlling” their actions as a disqualifier.³⁵ The confluence of active participation and class membership was seen to be, at the very least, incongruous, if not categorically impossible. Mass litigation featuring many active plaintiffs might be a “mass action” or an aggregation, and, as noted above, would become an increasingly dominant model with the rise of MDLs, but it was not seen as the model for a class suit.

Fast forward to 2017: Communication is instantaneous and cheap, if not free—courtesy of the internet, email, Facebook, Twitter, and forms of electronic discourse as yet unimagined. Increasingly, these social media platforms are a venue for communications about class actions, as well as the source of discussion about the underlying claims themselves.³⁶ With the marginal cost of additional communication approaching zero, class notices may be transmitted electronically, without the former logistical and cost inhibitions of mass mailings. Whereas a simple mailing of class notice to a class of one million members would have cost over \$5 million in the 1980s in terms of postage and copying alone, electronic transmission of the same notice, on the same scale, is effectively free today.³⁷

³⁵ See FED. R. CIV. P. 23(b)(3) (providing that a class action may be maintained if “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”).

³⁶ Consumers and attorneys have used social media platforms to coordinate and share information about class actions and alleged harms or product defects. For example, a nationwide class action against Procter & Gamble alleging that certain diapers manufactured by the company harmed children reportedly grew out of consumer posts and discussions on Facebook. See *Pampers Dry Max Gave My Baby Chemical Burns and Rashes!*, FACEBOOK, <https://www.facebook.com/groups/115137328510785/> (last visited July 11, 2017); Sean Wajert, *Facebook Groups and Class Actions*, MASS TORT DEF. BLOG (June 4, 2010), <http://www.masstortdefense.com/2010/06/articles/facebook-groups-and-class-actions> (noting that online activism gave rise to both the litigation against Procter & Gamble as well as the Consumer Product Safety Commission’s review of consumer complaints); see also, e.g., Lief Cabraser Heimann & Bernstein, LLP (@LiefCabraser), FACEBOOK (Sept. 27, 2016), <https://www.facebook.com/LiefCabraser/> (providing information on Whirlpool moldy washer class action settlement and link to submit claims via Facebook post); Cassie Collignon & Paul Karlsgodt, *Class Actions 101: A New ‘Viral’ Class Action?*, AM. BAR ASS’N (Nov. 20, 2012), <http://apps.americanbar.org/litigation/committees/classactions/articles/fall2012-1112-class-actions-101-new-viral-class-action.html> (discussing “viral” opt-out campaigns, such as the campaign via Twitter, YouTube and a website, DontSettleWithHonda.org encouraging class members to opt out of a settlement related to mileage problems with Honda Civic hybrids); *Samsung Washing Machine Recall – Consumer Report (UNOFFICIAL)*, FACEBOOK, <https://www.facebook.com/groups/932938046762433/> (last visited July 11, 2017) (closed Facebook group for consumers to share information and provide a discussion forum related to a recall of Samsung washing machines).

³⁷ In recent years, aided by techniques like bulk mail and “postcard” notices, direct deposit and electronic payment “apps” such as PayPal, the costs of both disseminating notice and distributing payments have decreased. The class action notice and settlement administration field continues to pioneer more direct, less costly methods to identify,

In a traditional class action, these costs were logistical barriers that meant that there would be at most one or two occasions for communication to class members: a notice sent when the class was certified, and another when it was settled. The class action and the class members were strangers to one another. Indeed, the formidable cost barrier of class notice led to the practice of class certification for settlement purposes, combining a notice of class certification with a notice of proposed class settlement. Courts often voiced unease with this convergence, but it became the norm rather than the exception. A plaintiff lawyer “using” class certification might be unable, or rationally unwilling, to front the considerable cost of class notice in a case that could drag on for years and multiple appeals. As *Eisen*³⁸ held, class notice was the class representative’s responsibility. In a settlement, on the other hand, the settling defendant either addressed or predictably reimbursed notice costs, as part of the settlement administration and claims process. A recurring account of the reason why settlements so frequently followed on the heels of proposed class certification identified defendants as the catalyst.³⁹ In reality, both sides had incentives to combine certification with settlement.

There are contemporary risks to a class certification ruling today that were not present in the classic era: Since 2003, Rule 23(f) has provided an avenue for bringing an interlocutory appellate challenge

locate, inform, and compensate class members, including an industry preference for digital payment over traditional mailings. See, e.g., *Class Action Administration: Tax & Treasury*, EPIQ SYS., <http://www.epiqsystems.com/how-we-help/class-action-administration/services/tax-treasury> (last visited July 11, 2017). Reliance on electronic means of notice brings even more dramatic economies. See *Solutions*, RUST CONSULTING, www.rustconsulting.com/solutions (last visited Aug. 6, 2017). By contrast, the estimated average cost of issuing and supporting traditional paper checks is much higher, including both the processing costs of the recipient and the sender. See *The Cost of Issuing Checks*, ACOM SOLUTIONS (Dec. 23, 2016), <https://acom.com/cost-issuing-checks>.

³⁸ 417 U.S. at 178–79 (“[T]he plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.”).

³⁹ Class certification has been construed as exerting considerable pressure on defendants to settle due to the sheer scope of potential liability in the event of a trial loss. See, e.g., *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010) (discussing concerns that the pressure exerted by class certification would force defendants to settle even non-meritorious securities claims); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (noting that certification would “forc[e] these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle”). Defendants also may be encouraged to combine certification and settlement as a means of achieving global peace. See, e.g., *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 339 (3d Cir. 2011) (Scirca, J., concurring) (“A defendant, therefore, may be motivated to pay class members a premium and achieve a global settlement in order to avoid additional lawsuits”); Issacharoff, *supra* note 4, at 3184–85 (discussing defendant willingness to pay a “peace premium” for global settlements).

to class certification determinations.⁴⁰ The motion to decertify has become an acknowledged part of practice, and defendants can file them repeatedly. While the incidence of class trials has increased, and such trials have always existed, the challenges presented to both sides of how, exactly, to try a class action as such, and the anxieties—on both sides—about the scope of preclusion of a class verdict, have operated to maintain the class settlement as the most likely outcome of a certified class action. Thus, the class action settlement notice remains the first formal, Rule-sanctioned occasion for communications with the class. Despite “plain language” exhortations, these notices devolve to a ritualized style seeking to touch all the bases established by the Rules, case law, and judicial expectations of best practices.

But these notices are no longer the sole components of class communications in the emerging participatory class action. Now, courts supervising large litigations, whether as class actions or MDL dockets, routinely maintain official case-specific websites that post schedules, orders, transcripts, notices, and important briefs.⁴¹ When a class action is resolved, the class action settlement website becomes the hub of information, communication, and claims processing in major class action settlements. Because Rule 23(e)(1) (currently the subject of a proposed amendment to add “flexibility to class notice”⁴²) has often been interpreted as favoring or requiring first class mail, communications in class actions have not fully kept pace with communications in other areas of commercial life. Simply put, the average American is accustomed to receiving information through hundreds of email messages, Facebook postings, and Tweets per day, and could be forgiven for wondering why the litigation in which she is ostensibly a participant is not taking full advantage of these communications media. However, in many cases, this is already happening, and the proposed amendment to Rule 23(c)(2)(B), acknowledging “electronic means” of class notice is intended and expected to promote much

⁴⁰ See FED. R. CIV. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.”).

⁴¹ See, e.g., *IN RE GENERAL MOTORS LLC IGNITION SWITCH LITIGATION*, <http://gmignitionmdl.com> (last visited Apr. 15, 2017); *In re: Volkswagen “Clean Diesel” MDL*, U.S. DIST. COURT: N. DIST. OF CAL., <http://cand.uscourts.gov/crb/vwmdl> (last visited Jan. 15, 2017).

⁴² The proposed amendment would require that the “court must direct notice in a reasonable manner to all class members . . . if giving notice is justified by the parties’ showing that the court will likely be able to: (i) approve the proposal . . . and (ii) certify the class for purposes of judgment on the proposal.” ADVISORY COMM. ON CIVIL RULES, *supra* note 20, at 2–3.

more frequent communications to and from class members.⁴³ With these changes, the hallmark of class membership is no longer passivity or silence. It is, increasingly, participation and voice.

Now add the independent growth of MDL practice, and perhaps the merging of MDL and class action practices should come as no surprise. The first MDLs were coordinations of parallel class actions filed, first, under federal antitrust statutes, and then under federal securities laws.⁴⁴ These cases were the paradigms of complex litigation, and were litigated, and largely settled, under federal law in federal courts. The function of MDL centralization was to avoid duplication of judicial effort and pretrial discovery, and to avoid inconsistent class certification decisions.⁴⁵

By contrast, the cases that consume MDL practice today were once largely the province of state courts. Consumer claims and tort claims were matters of state law litigated in state courts. Only with some mass disaster cases, such as hotel fires,⁴⁶ did MDLs start to engage mass harms. But the so-called “dispersed mass torts” (typically involving asbestos, drugs, or medical devices distributed nationally) were filed individually in state courts by plaintiffs’ counsel, and MDLs

⁴³ See ADVISORY COMM. ON CIVIL RULES, *supra* note 20, at 2 (amending Rule 23(c)(2)(B) to explicitly provide for notice by “*electronic means, or other appropriate means*”).

⁴⁴ See, e.g., *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077, 1079 (E.D. Pa. 1972) (involving consolidation of 370 plumbing fixture antitrust cases), *vacated*, 540 F.2d 102 (3d Cir. 1976); *In re Four Seasons Sec. Laws Litig.*, 58 F.R.D. 19, 20 (W.D. Okla. 1972) (consolidating securities class actions).

⁴⁵ See, e.g., *In re Seeburg-Commonwealth United Merger Litig.*, 312 F. Supp. 909, 911 (J.P.M.L. 1970) (describing the purpose of consolidation as “to serve the convenience of parties and witnesses and to promote the just and efficient conduct of [multidistrict] actions.”); *In re Fourth Class Postage Regulations Litig.*, 298 F. Supp. 1326, 1327 (J.P.M.L. 1969) (emphasizing that consolidation would “eliminate any need for repetitive depositions and other discovery” and “avoid[] injury to like parties caused by inconsistent judicial treatment”); *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 491–93 (J.P.M.L. 1968) (describing the remedial aim of § 1407 “to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions” and to avoid “pretrial chaos in conflicting class action demonstrations”).

⁴⁶ See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litig.*, 50 F. Supp. 2d 100, 102 (D.P.R. 1999) (noting that the Court had distributed approximately \$220 million to 1400 claimants in consolidated litigation in an earlier stage of the litigation); *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913, 938 (D. Nev. 1983) (approving \$138 million settlement in consolidated litigation); *In re Fed. Skywalk Cases*, 97 F.R.D. 380, 381 (W.D. Mo. 1983) (approving settlement committing \$150 million to payment of compensatory damages for voluntary class action stemming from collapse of two skywalks at the Hyatt Regency Hotel in Kansas City).

were utilized strategically by defendants to cabin cases that had been removed to federal court.⁴⁷

Following the enactment of the Class Action Fairness Act (CAFA),⁴⁸ a new wave of consumer actions came into federal courts, to be centralized through the MDL process just as had been federal antitrust, securities, and, to a lesser extent, employment cases. CAFA federalized broad areas of law governing mass harms by, in effect, voiding out the state court fora in which these cases had traditionally resided.⁴⁹ MDL judges then borrowed the organizing and judicial supervision principles of Rule 23 to manage non-class aggregations of tort claims, whether openly labelled as “quasi-class” case management by judges,⁵⁰ or presented as originating from private contracts among the parties.⁵¹ The increase in the scope of federal diversity jurisdiction for consumer claims after 2005, the growing resignation to—if not comfort with—federal courts’ management of tort claims, combined with the expansion of antitrust, securities, and auto safety enforcement from 2008–2016 created the expansion of MDLs that continues today. The scope of this workload alone would suggest a rational interest in renewed or expanded uses of established case management, adjudication, resolution, and preclusion mechanisms. The Rule 23 class action is the most established and familiar of these mechanisms, with pre-existing procedures and a robust jurisprudence. It should not be a surprise that, in recent years, use of the class action is rising, not falling.⁵²

⁴⁷ See, e.g., *In re Diet Drugs Prods. Liab. Litig.*, Nos. 1203, 99-20593, 2000 WL 1222042, at *3 (E.D. Pa. Aug. 28, 2000) (discussing numerous class actions in both federal MDL and state courts stemming from use of diet pills associated with valvular heart disease).

⁴⁸ Class Action Fairness Act of 2005, 28 U.S.C.A. §§ 1453, 1711–15 (West 2016).

⁴⁹ See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1415–19 (2006) (discussing the federalizing effect of CAFA on broad areas of state law that could only be litigated in aggregate fashion).

⁵⁰ See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122, 122 (E.D.N.Y. 2006) (classifying as a “quasi-class action” a case involving “many of the characteristics of a class action,” including “a large number of plaintiffs subject to the same settlement matrix approved by the court”).

⁵¹ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1353 (J.P.M.L. 2005) (consolidating 148 actions for proceedings in the Eastern District of Louisiana); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2007 WL 3354112, at *1 (E.D. La. Nov. 9, 2007) (settlement agreement); see also Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 274–81 (2011) (describing settlement reached by agreement between defendant Merck and plaintiff’s counsel); Ratner, *supra* note 21, at 859 (same).

⁵² See Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1589 (2016) (describing rising trends in securities cases); see also SEYFARTH SHAW LLP, 12TH ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 14 (2016), http://www.seyfarth.com/dir_docs/publications/2016WCARfinal.pdf (finding year-on-year increases in employee wage FLSA filings and a 450% increase over the last 15 years);

Yet what is most noteworthy is the re-emergence of class actions in the highest-profile, most difficult, and most tort-like situations: a scenario that only a few years ago would have seemed nigh-impossible. The participatory class action has bridged the gap between the situation as of the early 2000s, when the mass tort class action seemed to have severely diminished in the aftermath of *Amchem* and *Ortiz*, and the contemporary scene, which is punctuated with the examples of *Deepwater Horizon*, *NFL Concussion*, and *Volkswagen*.⁵³ Each of these cases, alone, could reasonably be viewed as exceptional, and none of them is likely to be replicated precisely. Yet, in combination, a pattern emerges: that of engagement and participation by claimants and their individual lawyers, enabled by direct, frequent, and court-authorized communications among class counsel, class members, non-class counsel, and the courts themselves.

Further, the structure of the MDL adds something that had been missing from the prototypical class action. Much of the class action law leading up to *Amchem* and *Ortiz* assumed no intermediation between appointed class counsel and the class members. The class itself not only lacked meaningful opportunity to participate, but it also had little incentive to do so. In negative-value cases, one of the prime justifications for class aggregation,⁵⁴ individual class members are deemed to be “rationally apathetic”⁵⁵ and cannot be expected to engage with whatever class counsel does. Similarly, in the sweeping asbestos cases, the Court confronted classes so broad as to include virtually the entire American population,⁵⁶ most of whom did not

Thomas H. Barnard & Amanda T. Quan, *Trying to Kill One Bird With Two Stones: The Use and Abuse of Class Actions & Collective Actions in Employment Litigation*, 31 HOFSTRA LAB. & EMPL. L. J. 387, 387–89 (2014) (noting year-on-year trends of increasing FLSA actions); Elizabeth J. Cabraser, *The Class Abides: Class Actions and the “Roberts Court,”* 48 AKRON L. REV. 757, 800 (2015) (arguing that, despite legal scrutiny, “straightforward application of enduring Rule 23 principles to produce the fair and efficient adjudication—or resolution—of core questions . . . may again be on the rise.”).

⁵³ In furtherance of full and complete disclosure, the authors were involved in all three of these matters.

⁵⁴ See, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (distinguishing the case at hand from “most class actions—and those . . . in which the rationale for the procedure is most compelling—[where] individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation”).

⁵⁵ See Coffee, *Class Action Accountability*, *supra* note 27, at 382 (noting that, in negative value claims with small individual damages, “the individual stakes are [not] large enough to overcome the clients’ rational apathy”); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (“Many persons in the exposure-only category . . . may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.”).

⁵⁶ See, e.g., *Amchem*, 521 U.S. at 602 n.5 (defining class as everyone who worked or had a family member who worked in the U.S. prior to 1993).

think of themselves as being at risk of distant future manifestations of asbestos injury. In such circumstances, the easy judicial assumption was that only the courts stood between the class and potential maltreatment—hence, the courts were called upon to act as the fiduciaries for the absent class members.⁵⁷

Because MDLs consolidate multiple cases that had been previously filed across several jurisdictions, presumably by many different lawyers, class members increasingly have contact with other lawyers in addition to the class counsel. With the appointment of a Plaintiffs' Steering Committee or interim class counsel, these other lawyers and their individually named clients do not disappear. Rather, they become the organizing springboard for a monitoring group that has the ability and the incentive to challenge the fruits of the representative action. In short, at least some absent class members in an MDL-based class action already have separate, independent counsel and have individually asserted their own claims.

II MEANINGFUL NON-EXIT

Two insights have dominated the critical commentary on class actions. First, whether colorfully depicted as a “Frankenstein Monster”⁵⁸ or more prosaically as an “entity,”⁵⁹ class actions had a more organic institutional form than a mere joinder of related claims. Second, agency costs plagued the gulf between the intense interests of class counsel and the generally passive class of stakeholders,⁶⁰ replicating the classic separation of ownership and control that preoccupied the law of corporate governance.⁶¹ Together, the idea of a class as an independent organizational form with poorly tethered leadership

⁵⁷ See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (describing judge as “a fiduciary of the class”); see also Chris Brummer, Note, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1060 (2004) (“[A] trial judge not only has a general duty to uphold the rights of absent class members, but is also a fiduciary for them . . .”).

⁵⁸ Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 665 (1979).

⁵⁹ David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 918 (1998).

⁶⁰ See Coffee, *Plaintiff's Attorney*, *supra* note 10, at 679–80.

⁶¹ See PRINCIPLES OF THE LAW: AGGREGATE LITIG. § 1.05 Reporters' Notes cmt. a (AM. LAW INST. 2010) (“A foundational insight of the economic literature on agency relationships is that ownership of assets and control of their disposition must often be separated to achieve economies of scale . . .”); ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119 (1932) (examining the divergence between ownership and control).

dominated the growing academic assessment of class actions.⁶² When *Amchem* stressed the incentives facing class counsel and the need for structural protections of absent class members,⁶³ the agency cost theory emerged at the heart of class action jurisprudence.

In the aftermath of *Amchem* and *Ortiz*, the question became what forms of structural protections might suffice to overcome the inherent problem of insufficient class member capacity to monitor class counsel. One approach was to generalize from the inherent tensions between present and future claimants in the asbestos context and demand extensive subclasses that would each be as homogeneous as possible, thereby avoiding intragroup conflict.⁶⁴ That approach risked easy balkanization of the class away from any workable entity that could litigate or settle claims effectively. In the recent NFL setting, for example, amicus Public Citizen proposed subclasses that would include players' wives with consortium claims, players who suffered specific symptoms such as headaches and insomnia, together with separate representation based on years of play, and so on.⁶⁵ Endless subclassing, and its attendant dissolution of the advantages of a coordinated proceeding, had little appeal to courts or commentators.⁶⁶

⁶² See, e.g., Coffee, *Class Action Accountability*, *supra* note 27, at 370–72, 380–93; Issacharoff, *supra* note 27, at 366–80.

⁶³ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (“The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.”).

⁶⁴ See, e.g., *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 256–57 (2d Cir. 2011) (requiring subclasses that represented claimants with only one of three categories of copyright claims, but not requiring seven subclasses for all the possible combinations of three claim categories); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 303–08 (3d Cir. 2005) (recognizing that some settlement class members would release colorable claims that “were not asserted by class counsel either in the complaint or during negotiations of settlement” and stating “[a]t the very least, consideration should have been given to the feasibility of dividing the class into sub-classes” with similar claims); *Epstein v. MCA, Inc.*, 179 F.3d 641, 656 (9th Cir. 1999) (Thomas, J., dissenting) (“This result must be especially discouraging to responsible law firms specializing in class action suits, who assiduously and carefully construct subclasses to assure adequate representation of diverse interests, even at the expense of their own fees.”).

⁶⁵ See Brief for Public Citizen as Amici Curiae Supporting Petitioners, *Armstrong v. NFL*, 137 S. Ct. 607 (2016) (No. 16-413), 2016 WL 7182246, at *8, *11 (comparing the similarities in the settlement allocations between the *Amchem* and *NFL* classes).

⁶⁶ See, e.g., *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1145–48 (8th Cir. 1999) (rejecting subclass treatment in favor of a recovery compensation formula to create a common interest of the class); Lynn A. Baker & Charles Silver, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1496–97 (1998) (arguing that prohibition of some conflict accommodation within a class would be the “*reductio ad absurdum*” that would deny “plaintiffs the benefits that make group litigation attractive”); Coffee, *Class Action Accountability*, *supra* note 27, at 374–75 (citing the need to determine when adequate representation requires subgrouping a class due to concerns about a subdivided class being unable to litigate effectively).

Indeed, as Morris Ratner notes, in reality, even the largest class actions have utilized only minimal subclassing to address fundamental crevices in the class, rather than attempting to provide separate representation for all potential subclasses.⁶⁷

Academic discourse turned instead to the pioneering work of Albert O. Hirschman in organizing relations between institutions and their constituents along a spectrum of exit, voice, and loyalty.⁶⁸ Of the three, loyalty fit most easily within the stated concerns in *Amchem* and *Ortiz* about the inevitable tension in class counsel making intra-group allocations that invariably would lead to robbing Peter to pay Paul.⁶⁹ Having an agent with incentives antagonistic to those of the principal necessarily compromised the duty of loyalty. This aspect of *Amchem* and *Ortiz* was internalized in class action practice with surprising ease, yielding the common practice of using special masters and claims administrators, rather than class counsel, to handle intraclass allocations.⁷⁰ Further, greater vigilance over attorneys' fees sought to link the payment of class counsel to the amount of proceeds actually obtained by the class, which is another form of scrutinizing loyalty.⁷¹

⁶⁷ See Ratner, *supra* note 21, at 785 (“Since the 1990s, the lower federal courts have chipped away at the foundation of [the subclassing] regime by limiting *Amchem* and *Ortiz* to their facts, narrowly defining the kinds of conflicts that warrant subclassing, and turning to alternative assurances of fairness that do not involve fostering competition among subclass counsel.”).

⁶⁸ See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970); Coffee, *Class Action Accountability*, *supra* note 27, at 376–77, 376 n.17 (developing Hirschman’s terminology in application to class actions); Issacharoff, *supra* note 27, at 366 n.104 (same).

⁶⁹ See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 786 (2002) (noting that Coffee “accurately describes the Court’s approach in *Amchem* and *Ortiz* as emphasizing rights of loyalty”). See generally *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) (“[A] class divided between holders of present and future claims requires division into homogeneous subclasses . . . to eliminate conflicting interests of counsel.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (“In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.”).

⁷⁰ This “Ken Feinberg-ization” of class action practice has now become routine. See, e.g., *In re Oil Spill*, No. 2179, 2015 U.S. Dist. LEXIS 165622, at *12 (E.D. La. Dec. 10, 2015) (noting that the Halliburton and Transocean Settlement Agreements both provide for a court-appointed “Allocation Neutral” to allocate the aggregate payments between the old class and the new class).

⁷¹ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13 (AM. LAW INST. 2010) (requiring that fee awards be based on the actual value of the judgment or settlement); RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 237–41, 250–68 (2007) (proposing fee scrutiny as indispensable for overcoming agency cost problem).

Exit had already attained independent constitutional status in *Phillips Petroleum Co. v. Shutts*, at least for purposes of establishing personal jurisdiction over absent class members.⁷² From there, it was a short step to generalizing a right of exit through the opt out mechanism as securing a minimal level of constitutional legitimacy for ultimate class resolutions.⁷³ Indeed, the offer of a “back end opt out” for future disease manifestations in the *Diet Drugs* class settlement⁷⁴ was, for Richard Nagareda, a wise use of the exit option to salvage broad class resolution from the conflict concerns of *Amchem* and *Ortiz*.⁷⁵

For all the attention to Hirschman, voice was relegated to a silent partner in the literature. There were some ill-founded proposals for class voting, a hollow form over substance among the rationally indifferent.⁷⁶ The implicit assumption was that class members speak by exiting—in effect, the decision not to opt out showed approval of the stewardship of class counsel and of the decisions regarding litigation or settlement.⁷⁷ When cases settled, the usually sparse numbers of opt outs⁷⁸ could then be compared to the silence of the majority, a skewed

⁷² 472 U.S. 797, 811–12 (1985) (holding that where “the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law,” due process requires “an opportunity to remove himself from the class”).

⁷³ See generally Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002) (discussing the importance of opt out availability).

⁷⁴ *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 144 (3d Cir. 2005).

⁷⁵ See NAGAREDA, *supra* note 71, at 796–805, 822–24.

⁷⁶ See Coffee, *Class Action Accountability*, *supra* note 27, at 417 (proposing, but discounting, voting mechanisms such as class member ratification of the proposed settlement). Voting among the disengaged has the same artificiality as the early proposal of the Third Circuit task force that individual class members be selected to monitor and negotiate with class counsel. See *Court Awarded Attorney Fees*, 108 F.R.D. 237, 256 (3d Cir. 1985) (“[I]t is recommended that the court appoint a non-judicial representative . . . who will negotiate the arrangement in the usual marketplace manner and submit the proposal for the court’s approval.”). For a fuller account of the difficulty of applying democratic legitimacy norms to class actions, see Issacharoff, *supra* note 4, at 3169–81 (describing how the class entity falls short of the standards of democratic legitimacy because of, *inter alia*, the inability of class members to furnish retrospective review).

⁷⁷ See, e.g., *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005) (considering nine factors, including “the reaction of the class to the settlement”); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534–35 (3d Cir. 2004) (same); *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988) (considering four factors, including “the amount of opposition to the settlement”); *Laskey v. Int’l Union*, 638 F.2d 954, 957 (6th Cir. 1981) (giving weight to the fact that “only seven out of 109 made any kind of objection”); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979) (considering as a “significant element[]” of settlement fairness that “[t]here were virtually no objections from members of the settlement class”).

⁷⁸ See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (“[O]n average, less than 1 percent of class members opt-out and about 1 percent of class members object to class-wide settlements.”).

way of determining the level of class member support for the settlement. Silence might very well equal assent; silence might also reflect the rationality of not paying attention to claims that don't merit individual prosecution. The same efficiency concerns that justified collective treatment of the claims—particularly when small stakes condemned individual claims to negative litigation value—also made informed consent problematic.

Now, contrast the emerging participatory class action model. Any class originating in the pretrial consolidation of already-filed cases in an MDL presupposes a significant number of individually-represented plaintiffs (a prerequisite for MDL transfer to a centralizing court) and independent representation by lawyers who may ultimately serve on the Plaintiffs' Steering Committee, or who may not. Independent groups of counsel provide a more engaged form of class counsel monitoring than either court oversight or unrepresented class members making a yes or no decision on a settlement offer.⁷⁹ The fact that class members filed suits on their own prior to MDL centralization would make it more likely that they will avail themselves of social media to follow the progression of their claims, and thus more likely that their continued participation in the suit is equivalent to assent, unlike in the classic model.

III

DOCTRINAL IMPLICATIONS OF THE PARTICIPATORY CLASS ACTION

A. *Giving Form to the Class Action*

As with all new developments, one should be cautious before claiming participatory class actions to be the exclusive new model.

⁷⁹ See, e.g., *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2016 WL 6248426, at *3 (N.D. Cal. Oct. 25, 2016) (462 objections), *appeal filed sub nom. Hill v. Volkswagen*, No. 16-17185 (9th Cir. filed Nov. 29, 2016); *In re NFL Players' Concussion Injury Litig.*, 307 F.R.D. 351, 369 (E.D. Pa.) (83 objections filed by 205 objectors), *judgment amended* by No. 2:12-md-02323-AB, 2004 WL 12827803 (E.D. Pa. May 8, 2015); *In re Oil Spill by Oil Rig "Deepwater Horizon"*, 910 F. Supp. 2d 891, 935 (E.D. La. 2012) (223 objections filed by 13,786 objectors). Note that in many cases, the objections are strategically aimed to extort pay off. See, e.g., *Garber v. Office of the Comm'r of Baseball*, 2017 U.S. Dist. LEXIS 27394, at *39 (S.D.N.Y. Feb. 27, 2017) ("Bandas has orchestrated the filing of a frivolous objection in an attempt to throw a monkey wrench into the settlement process and to extort a pay-off."); *In re Initial Pub. Offering Secs. Litig.*, 721 F. Supp. 2d 210, 215 (S.D.N.Y. 2010) ("[P]rofessional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients."); *Barnes v. FleetBoston Fin. Corp.*, C.A. No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072, at *3 (D. Mass. Aug. 22, 2006) ("Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements.").

Our aim is not to suggest that this new participatory capability explains all or most class actions, or even most MDLs. But class members in cases like *NFL Concussion* or *Deepwater Horizon* or *Volkswagen* are active, contact class counsel frequently, make demands for consumer service, are frequently represented by independent counsel, and have points of intermediate organization on Facebook or Twitter that allow them to function more like a group. Thus, as of February 18, 2017, 470,302 of the 474,000 owners of the Volkswagen 2-liter engine class had registered with the claims administrator for settlement benefits, even though the appeals process had barely begun.⁸⁰ Similarly, in *NFL Concussion*, more than half of the roughly 22,000 class members had taken initial steps to enroll in settlement benefits, even while ongoing appeals were delaying the commencement of benefits.⁸¹ This was then followed up by more than 20,300 class members formally enrolling for settlement benefits once the litigated challenges concluded, meaning that more than 92 percent of retired players took the individual initiative to claim settlement benefits.⁸² These extraordinary levels of involvement in the acceptance of settlement terms simply cannot be compared to the older cases that still formally define the judicial inquiry into the appropriateness of class certification. In the era in which mail notice was the only point of engagement with the class litigation, paltry opt out numbers were seen as a sign of class members' approval, given the lack of alternative forms of engagement.⁸³

⁸⁰ Report of Independent Claims Supervisor on Volkswagen's Progress and Compliance Related to Resolution Agreements Entered October 25, 2016 at 23, *In re Volkswagen*, 2016 WL 6248426, <http://www.cand.uscourts.gov/filelibrary/2967/2979-Independent-Claims-Supervisor-February-20.pdf>.

⁸¹ Joint Report on Preparation to Implement the Settlement Program after the Effective Date, at 2, *In re NFL Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. Oct. 7, 2016) (ECF No. 6919). The participation extends beyond mere enrollment. One thousand four hundred twenty class members joined a recent webcast court status conference on settlement implementation. See *NFL Concussion Settlement 2/8/17 Status Conference*, YOUTUBE (Feb. 8, 2017), <https://www.youtube.com/watch?v=0Ndz33HIHgA>; ANALYTICS FEBRUARY 8TH STATUS CONFERENCE - FINAL REPORT (2017) (spreadsheet file) (on file with authors).

⁸² See BrownGreer PLC, *NFL Concussion Settlement Registration Report* (Sept. 1, 2017) (unpublished report) (on file with the New York University Law Review).

⁸³ Indeed, in the *Deepwater Horizon* litigation, BP did not account for the likely levels of class member participation, and the resulting demand for compensation under the settlement. See *In re Deepwater Horizon (Deepwater Horizon II)*, 739 F.3d 790, 795 (5th Cir. 2014) ("BP also now asks this court to vacate the district court's order, although BP is not formally an appellant and, in fact, BP originally supported both class certification and settlement approval before the district court.").

We can leave to the side the question of how extensive this new form of participatory class action might be.⁸⁴ For now, our argument turns not on the empirical issue of how broad this new form of the participation class will prove to be. We believe that the low-cost forms of communication, including the still developing use of social media, makes this form of class member engagement possible even in what would have been considered low-value claims in times past. Recent experiences with stunningly large claims rates in overcharge cases involving milk⁸⁵ or Red Bull⁸⁶ indicate just how sweeping is this transformation.

Rather, the claim here is that where there is evidence of extensive class member participation, the judicial inquiry should be adjusted to absorb this new reality. First and foremost, the *Amchem* and *Ortiz* assumption, that the bulk of the affected class is necessarily passive before class counsel, breaks down under scrutiny. Neither the formality of subclasses nor the formal oversight of class counsel provides the main check against improper internal compromises. As Judge Ambro wrote in *NFL Concussion*:

[O]ne of the principal concerns driving *Amchem*'s strict analysis of adequacy of representation was the worry that persons with a nebulous risk of developing injuries would have little or no reason to protect their rights and interests in the settlement. We have evidence that in this case the concern is misplaced because many retired players with no currently compensable injuries have already taken significant steps to protect their rights and interests. Of the 5,000 players who sued the NFL in the MDL proceedings, class counsel estimated that 3,900 have no current Qualifying Diagnosis. These 3,900 players are represented, in turn, by approximately 300 lawyers. And with so many sets of eyes reviewing the terms of the

⁸⁴ The phenomenon is broader than just the blockbuster cases. Consider, for example, the moldy washer case. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000, 2016 WL 5338012 (N.D. Ohio Sept. 23, 2016). Under the settlement, owners experiencing mold problems could claim \$50 cash, 20% off in credit toward a new machine, or up to \$500 in out-of-pocket repair costs. *Id.* at *4–5. Of the 5.5 million or so machines sold (most between 8–15 years old at the time of settlement), class counsel estimates that 22.7% of those appliances were experiencing mold. E-mail from Jonathan D. Selbin to authors (Jan. 16, 2017 18:12 EST) (on file with authors). Over 331,000 class members—or about one third—made such claims, responding to a multi-media/social media claims campaign. *Id.*

⁸⁵ See Jacob Gershman, *Land of Milk Money: Dairy Consumers Cash in on Class-Action Settlement*, WALL ST. J.: L. BLOG (Jan. 18, 2017, 4:25 PM), <http://blogs.wsj.com/law/2017/01/18/land-of-milk-money-dairy-consumers-cash-in-on-class-action-settlement/> (citing one million claimants).

⁸⁶ See Pete Brush, *Red Bull for Everybody! Judge OKs \$13M False Ad Settlement*, LAW360 (May 1, 2015), <https://www.law360.com/articles/650701/red-bull-for-everybody-judge-oks-13m-false-ad-settlement> (citing two million claimants).

settlement, the overwhelming majority of retired players elected to stay in the class and benefit from the settlement. We thus have little problem saying that their interests were adequately represented.⁸⁷

The diversity in the points of oversight ensures representative oversight far better than does the formal allocation of responsibility through subclasses. This is simply an application of the law of large numbers, in that thousands of claimants and hundreds of lawyers are more likely to view any proposed settlement through the range of class member experiences than are any tractable number of subclasses.

Second, the participatory class alters the role of the class representative and takes considerable pressure off the poorly specified inquiry into typicality in Rule 23(a)(3). The typicality requirement has long been the weak link in the prerequisites for class certification, and the case law has largely subsumed the typicality requirement under the general rubric of adequacy of representation.⁸⁸ In turn, courts quickly came to understand that efficiency-driven class actions under Rule 23(b)(3) were largely the product of entrepreneurial lawyers, and that the class of all purchasers of a stock offering or a consumer product likely had few organic ties among themselves other than common participation in the broad market of mass society. Accordingly, adequacy of representation under 23(a)(4) focused on the incentives and ability of class counsel, leaving the typicality of the named plaintiff largely a formalistic inquiry.⁸⁹

As initially formulated, Rule 23(a)(3) linked the typicality of the class representative to his or her ability to adequately represent the class under Rule 23(a)(4). The class action was a representative suit and, it would seem to follow, the typicality of the representative was the operative guarantee of the adequacy of the protection of the interests of the absent class members. The reality proved otherwise, and it soon became apparent that a named representative with a small claim

⁸⁷ *In re NFL Players' Concussion Injury Litig.*, 821 F.3d 410, 433 (3d Cir. 2016).

⁸⁸ *See, e.g., Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting that typicality and adequacy of representation requirements merge); *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011) ("In many cases, including this one, the requirement of typicality merges with the further requirement that the class representative 'will fairly and adequately protect the interests of the class.'" (quoting *FED. R. Civ. P. 23(a)(4)*)).

⁸⁹ *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (explaining that the purpose of the class action "is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

had no greater incentive to monitor the progress of the class suit than would a rationally passive absent class member.

When Congress recast the standards for securities fraud litigation in 1995 in the Private Securities Litigation Reform Act (PSLRA),⁹⁰ one of the primary aims was to change the mechanism for selecting the named class representative. The statutory lead plaintiff presumptively became the class member with the largest loss in the alleged fraud. The underlying theory was that having the class representative be the largest loss-bearer would give that class member the greatest incentive to monitor litigation performance, and would allow the absent class members to free ride on the lead plaintiff's unique interest.⁹¹ In effect, the PSLRA model rejected Rule 23(a)(3) in favor of selecting the class representative precisely because of the lead plaintiff's *atypicality*.

Even if the PSLRA rejection of Rule 23(a)(3) were accepted, it would be hard to generalize to the broad consumer case, or to the tort-based aggregate proceeding in which all individuals stand in pretty much the same relation to the defendant. The post-*Amchem* search for multiple sub-classing may be seen as an attempt to cure the representation problem by focusing on fine-grained distinctions of typicality. Objectors in *NFL Concussion*, for example, sought to challenge the named class representatives on the question of whether they had in their individual capacities asserted all of the potential injuries that could result from brain injuries in football.⁹² Both the district court and the Third Circuit rejected this argument in favor of holding the named class representatives only to an adversarial relation to the NFL defendants, and to being at risk as a result of the alleged common conduct of the defendants.⁹³

⁹⁰ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

⁹¹ See Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2056 (1995) (noting that institutions with large stakes in class actions "might be well situated to monitor the conduct of plaintiffs' attorneys as proxies for all members of plaintiffs class").

⁹² See Petition for Writ of Certiorari at 6, *Armstrong v. NFL*, 137 S. Ct. 607 (No. 16-413), 2016 WL 5543299, at *6.

⁹³ See *In re NFL Players' Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016) ("[C]lass members need not 'share identical claims' What matters is that [class representatives] seek recovery under the same legal theories for the same wrongful conduct as the subclasses they represent." (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994))); *In re NFL Players' Concussion Injury Litig.*, 307 F.R.D. 351, 372 (E.D. Pa. 2015) ("The factual differences among Retired Players do not defeat typicality. Class members need not 'share identical claims.'" (quoting *Baby Neal*, 43 F.3d at 56)).

The minimal view of the role of the class representative in the new class action makes sense of recent case law that looks to the named representative primarily as the guarantor of an actual case or controversy. As expressed by the Fifth Circuit in *Deepwater Horizon*: “[T]he class action in this case survives Article III because the named plaintiffs have each alleged injury in fact, traceability to the defendant’s conduct, and redressability by the relief requested.”⁹⁴ The named plaintiffs provided the jurisdictional foundation for the case, and for that purpose, “[e]ach one of these named plaintiffs satisfies the elements of standing by identifying an injury in fact that is traceable to the oil spill and susceptible to redress by an award of monetary damages.”⁹⁵

In *Spokeo, Inc. v. Robins*, the Supreme Court further specified that standing under Article III required both a cognizable concrete injury and the “particularization” of that injury to the named plaintiff.⁹⁶ The limited inquiry into the Article III standing of the named plaintiff also resonates with the Court’s rejection of the “pick-off” strategy of proffering a Rule 68 offer of judgment to the named class representative to abort the class claims. If the role of the class representative is largely to ensure an initial level of constitutionally-mandated adversariality—that is, to occupy the left side of the “v” to ensure a formal controversy—the representative becomes a part of the threshold inquiry, not the fulcrum of the dispute. As the Supreme Court recognized in *Campbell-Ewald Co. v. Gomez*,⁹⁷ the class certification process is itself an adversarial proceeding—defendants almost universally oppose class treatment for litigation purposes. Thus, as the Court expressly held, the initial inquiry into the standing of the class representative is a predicate for the class to then take form: “While a class lacks independent status until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted.”⁹⁸

The passing reference to the “independent status” of the class, once certified, may be the closest the Court has come to acknowledging that a certified class is indeed an entity with norms of structure,

⁹⁴ *In re Deepwater Horizon (Deepwater Horizon II)*, 739 F.3d 790, 802 (5th Cir. 2014).

⁹⁵ *Id.* at 803.

⁹⁶ See 136 S. Ct. 1540, 1548 (2016) (explaining that to establish injury in fact, a plaintiff must show that he or she suffered “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’” (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992))); see also *Strubel v. Comenity Bank*, 842 F.3d 181, 194 (2d Cir. 2016) (interpreting *Spokeo* to require particularized manifestation of harm to named plaintiff).

⁹⁷ See 136 S. Ct. 663, 670–71 (2016) (holding that a rejected settlement offer does not vitiate the adverse nature of the class certification process).

⁹⁸ *Id.* at 672 (citation omitted).

governance, and participation that must be tailored to the practical realities of the reason the class was certified. Where there is evidence of real participation, as in *NFL Concussion*,⁹⁹ that participation should be an important component in determining whether “certification is warranted.”¹⁰⁰

B. Participation and Preclusion

In the spirit of what’s old becomes new again, the concept of the participatory class action bridges older forms of class member participation and the newer hybrids of class actions and individual claims that have emerged in recent years. Some level of active class member participation has long been the norm in class actions, though perhaps not appreciated as such. The most common form of direct class member engagement occurs at the claims-making stage, when claimants provide information to establish their membership in the class and quantify their individual damages. In the classic Rule 23(b)(3) money damages class action, entitlement to compensation upon such individualized proof is all that remains after the defendant’s liability has been established at trial, or a compensatory settlement has been reached.

But some applications of the class action mechanism require more intensive participation by class members as individual litigants. Under one form of class action, the Rule 23(c)(4) “issue” class, class members must actively participate in trials themselves, to litigate the individual issues that remain after one or more common questions have been decided for the class.¹⁰¹ In a Rule 23(c)(4) class action, the judgment on class issues has preclusive effect on the defendant and class members, while individual issues (such as causation, injury, and, in some tort cases, relative fault) remain to be tried on an individual basis.¹⁰² Classwide adjudication of common questions serves the goals of efficiency and judicial economy by avoiding costly and time-consuming repetitive trials of the same issues, while preserving indi-

⁹⁹ *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015), *aff’d*, 821 F.3d 410 (3d Cir. 2016).

¹⁰⁰ *Id.* at 663.

¹⁰¹ FED. R. CIV. P. 23(c)(4) (formerly 23(c)(4)(A)) (“When appropriate, an action may be brought or maintained as a class action with respect to particular issues.”).

¹⁰² Of course, in a typical class action, individualized issues will remain after the common questions have been decided; for example, individualized damages determinations are a feature of most Rule 23(b)(3) class actions. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045–49 (2016); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–70 (2013). Rule 23(c)(4) issue classes are distinctive in that some elements of liability, as well as damages, may depend upon individual proof after common issues have been adjudicated.

vidual defenses to class member-specific issues. As Judge Posner has observed, “a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.”¹⁰³

Rule 23(c)(4) “issue” classes have been historically underutilized, largely the consequence of a Fifth Circuit opinion in the opening salvoes of the tobacco wars.¹⁰⁴ The world has moved since; and by now all federal circuits, including the Fifth Circuit, have endorsed the class treatment of specific issues (either by explicitly invoking Rule 23(c)(4), or approving the classwide adjudication of an identified liability issue as a case management technique) in a variety of contexts.¹⁰⁵ Ironically, one of the defining applications of Rule 23(c)(4) occurred in *Engle v. Liggett Group, Inc. (Engle III)*—the ongoing tobacco litigation to address the individual questions of addiction, disease causation, comparative fault, and damages that remained in the wake of a classwide trial on questions of product defect and industry conduct in a class action of Florida smokers.¹⁰⁶

The *Engle III* litigation began as the only statewide certified class action of injured smokers against tobacco companies during the heyday of tobacco litigation in the early 1990s. Despite appellate chal-

¹⁰³ *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013).

¹⁰⁴ *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying class because the district court failed to take into account how the differences in state law for individual members will affect class management).

¹⁰⁵ *See, e.g., In re Deepwater Horizon*, 739 F.3d 790, 806 & n.65 (5th Cir. 2014) (noting that “[t]his court has previously ‘approved mass tort or mass accident class actions when the district court was able to rely on a manageable trial plan—including bifurcation’ of ‘class-wide liability issues’ and issues of individual damages.”) (citing *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006)). For other examples of Rule 23(c)(4) trial plans, see *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012) (in employment case, approving issue class to determine disparate impact, with individual trials to determine damages); *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010) (in consumer case, upholding class certification on common issue of inherent design defect, with individualized causation determinations).

¹⁰⁶ *Engle v. Liggett Group, Inc. (Engle III)*, 945 So. 2d 1246 (Fla. 2006). The court’s opinion includes a lengthy analysis of Rule 23(c)(4) jurisprudence and adopts issue class principles in giving preclusive effect to the jury decisions on trial questions involving the conduct of each defendant toward the members of the *Engle* class. The *Engle III* court reversed the then-existent 23(c)(4) jurisprudence, including two Fifth Circuit smoking-related cases, rejecting the rationale of *Castano* (the first of the smoking cases) and empowering the subsequent *Mullen* analysis. *Id.* at 1270 (first citing *Castano*, 85 F.3d at 750 and then citing *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 628–29 (5th Cir. 1999)). Although *Engle III* decertified that class, it held, on judicial economy grounds, that individuals within the class definition could utilize these classwide determinations—the “common core findings”—in their own follow-on actions. 945 So. 2d at 1269.

lenge, the *Engle III* class survived pre-trial proceedings, and a year-long “Phase I” class-wide trial was held to determine certain liability-related questions, involving the tobacco companies’ products and conduct during a specified time period, with respect to a class of smokers determined to have one or more of a specified list of tobacco-related diseases as of a certain date. Phase I tried these common questions for the class, as well as the complete claims of a handful of class representatives, and the issue of punitive damages liability. The punitive damages verdict was a whopper: \$145 billion. On appeal, the Florida Supreme Court, in its 2006 *Engle III* decision, eradicated the class-wide punitive damages verdict, but ushered in a new era of follow-on litigation by the *Engle III* class members.¹⁰⁷

The *Engle III* “common core” or “approved” findings, held as established for use without further evidence or proof in follow-on cases, were that: smoking could cause a list of twenty specific diseases including lung cancer; that nicotine in cigarettes was addictive; that defendants placed cigarettes on the market that were defective and unreasonably dangerous; and that defendants concealed or omitted material facts about the health effects of the addictive nature of the cigarettes they sold to the class.¹⁰⁸ While some of the jury determinations were held to be too individualized for classwide application, the *Engle III* court held that most findings of the jury in Phase I should have res judicata effect in the ensuing individual trials, explaining:

The pragmatic solution is to now decertify the class, retaining the jury’s Phase I findings other than those on the fraud and intentional infliction of emotion[al] distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature. Class members can choose to initiate individual damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials.¹⁰⁹

Thousands of these former class members, now called the “*Engle* progeny” did file their own cases, which have gone to trial by the hundreds in Florida’s state and federal courts over the past decade. These trials provide a real world demonstration that giving preclusive effect to common questions does not prejudice the ultimate outcome of the remaining issues, nor violate due process. The verdicts in both state

¹⁰⁷ See *id.* at 1263–65; Zachary B. Savage, Note, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. REV. 439, 465–68 (2013).

¹⁰⁸ See *Engle III*, 945 So. 2d at 1276–77; *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1282–83 (11th Cir. 2013).

¹⁰⁹ *Engle III*, 945 So. 2d at 1269; see also Savage, *supra* note 107, at 467 n.158 (describing how “res judicata” was subsequently interpreted to mean issue preclusion).

and federal courts, tried to different juries, and presided over by scores of state and federal judges, have yielded both defendant and plaintiff verdicts, and wide ranges of compensatory and punitive damages.¹¹⁰ This range of verdicts indicates that each side in these cases receives due process through the combination of pre-determined common questions and de novo trial of individual issues. Individual outcomes are most likely tied as much to the individual plaintiffs' respective impressions upon the ultimate fact-finders as to any overarching effect of the instructions to the jury that certain issues relevant to, but not conclusive of, defendants' liability to a specific plaintiff, have already been decided in an earlier time.¹¹¹ Indeed, Florida's federal and state appellate courts have repeatedly upheld the preclusive effect, propriety, and constitutionality (e.g., under the 7th Amendment) of the utilization of the "approved *Engle* findings" in subsequent *Engle* progeny individual smokers' trials.¹¹²

The "approved *Engle* findings" do not dictate the outcomes in individual *Engle* progeny trials, but they do accomplish a primary purpose of the class action mechanism: to provide a cost-effective means for numerous persons allegedly injured by the conduct or product of a defendant to gain access to court for adjudication of their claims on the merits within a reasonable period of time. Our state and federal legal systems do not have the capacity to provide completely individualized, front-to-back trials for all of the thousands (or hundreds of thousands, or millions) of consumers economically damaged or physically injured by a fraudulent scheme, or a mass-marketed defective product. Where, as in the *Engle* smokers' claims, some questions, such as specific causation, addiction, and relative fault, cannot plausibly be adjudicated on a class-wide basis, individual smokers may have a fixed period of time to bring their own cases, as with the one-year limit in

¹¹⁰ Of the 34 *Engle* progeny trials conducted in federal courts, for example, 59% were won by defendants, and 14 generated plaintiffs' verdicts. In these, plaintiffs' verdicts ranged from \$5000 to over \$27 million; not all plaintiffs' verdicts included punitive damages. Defendants appealed all plaintiffs' verdicts, which were upheld in *Walker*, 734 F.3d at 1286–90, and *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1186–91 (11th Cir. 2017) (en banc). Others are on appeal. The federal trials yielded data to enable a comprehensive settlement of 415 cases. Several hundred *Engle* progeny cases have gone to trial in Florida's State Court System, yielding a similarly wide range of verdicts, including a substantial percentage of defense verdicts.

¹¹¹ See Alexandra Bursak, Note, *Preclusions*, 91 N.Y.U. L. REV. 1651, 1670–72 (2016).

¹¹² The 2006 *Engle III* decision was relatively unpublicized before the wake of follow-up federal and state appeals and decisions relating to its implementation. *Engle III*'s preclusive effect was subsequently upheld by the Florida Supreme Court in *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419, 422–25 (Fla. 2013), and by the Eleventh Circuit in *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1335–36 (11th Cir. 2010); *Walker*, 734 F.3d at 1286–90; and *Graham*, 857 F.3d at 1186–91.

Engle itself.¹¹³ The result is that the certification of those questions that are common, that do have a single answer, and that would significantly advance each claimant's case, are given the benefit of class-wide determination.¹¹⁴ As Judge William Pryor recently reiterated for the en banc Eleventh Circuit, the class action affords a number of tools for the residual individualized issues in aggregative proceedings, including empaneling separate juries for damages determinations, handling damages administratively in front of a magistrate judge or special master, and decertifying the class after liability is determined with notice to individuals to carry the remainder of the issues for damages on their own.¹¹⁵

CONCLUSION

Five years ago, Judge Scirica of the Third Circuit sounded a caution that *Amchem* and *Ortiz* had not so much ended the era of aggregate treatment of mass harm cases, but instead had driven them into obscurity outside of the understood contours of Rule 23:

[C]lass settlement in mass tort cases (especially personal injury claims) remains problematic, leading some practitioners to avoid the class action device This is significant, for outside the federal rules governing class actions, there is no prescribed independent review of the structural and substantive fairness of a settlement including evaluation of attorneys' fees, potential conflicts of interest, and counsel's allocation of settlement funds among class members.¹¹⁶

For Judge Scirica, the class action vehicle had to be harnessed to the fairness demands of mass harm cases:

The class action device and the concept of the private attorney general are powerful instruments of social and economic policy. Despite inherent tensions, they have proven efficacious in resolving mass claims when courts have insisted on structural, procedural, and substantive fairness. Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured

¹¹³ 945 So. 2d at 1277.

¹¹⁴ These benefits can include substantial time savings. The *Engle* progeny cases tried in federal courts, for example, were subject to specific time limits. Each side got a limited number of hours to present its case, such that a trial that would otherwise have taken weeks or months was completed to verdict within a matter of a few days. The year-long *Engle* Phase I classwide trial on tobacco company, on common conduct and general causation questions, did not need to be repeated in each of these *Engle* progeny cases. The findings of that lengthy trial were compressed into a set of preclusive findings that took less than one minute to recite to the jury.

¹¹⁵ *Graham*, 857 F.3d at 1184.

¹¹⁶ *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 336 (3d Cir. 2011) (en banc) (Scirica, J., concurring) (footnote omitted).

claimants, and finality. Arguably a legal system that permits robust litigation of mass claims should also provide ways to fairly and effectively resolve those claims. Otherwise, mass claims will likely be resolved without independent review and court supervision.¹¹⁷

The aggregation of mass harm cases in federal courts did not end with *Amchem* and *Ortiz*—it just took more experimental and less transparent forms. For the asbestos cases that prompted Supreme Court review, the specialized treatment of asbestos under Section 524(g) of the Bankruptcy Code provided an organizing mechanism that transferred much of the settlement structure at issue in *Amchem* and *Ortiz* into a different forum.¹¹⁸ Regardless of the forum, the same issues of due process in representation, fairness in distribution, and procedural transparency followed asbestos into the bankruptcy setting in ways that echoed the Rule 23 concerns.¹¹⁹ Outside asbestos, the most recent data on MDL cases reveals that MDLs have become the situs for the consolidation and resolution of mass harm cases, even as the class action device has been relegated to a background role.¹²⁰

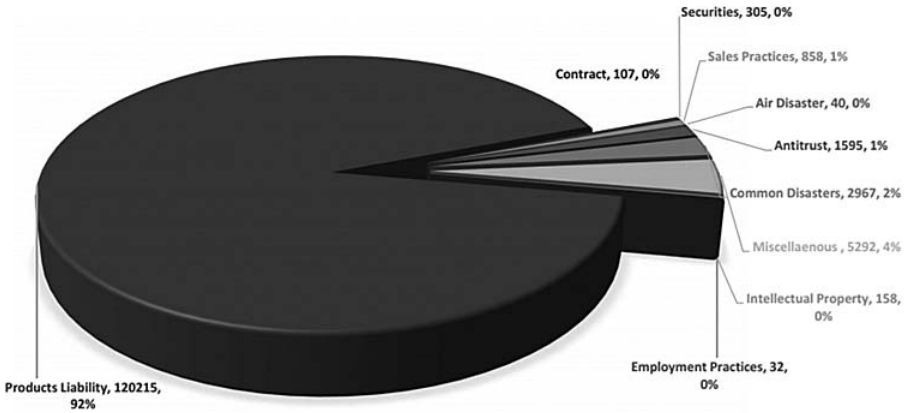
¹¹⁷ *Id.* at 340.

¹¹⁸ See Bankruptcy Code, 11 U.S.C. § 524(g)(2)(B)(i)(I) (2012) (granting “exclusive jurisdiction” to the district court that enters an injunction in “actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products”); see also William Hao, Alessandra Backus & Tom Clinkscales, *Recent Developments in the Case Law of Section 524*, 2016 NORTON ANN. SURV. BANKR. L. 605, 606 (describing the background and recent developments in case law related to § 524(g), which “codified the treatment of asbestos-related claims” and “provide[d] for the establishment of a trust to which present and future asbestos claims may be ‘channeled’ and from which such claims may be paid”); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 963–64 (2012) (arguing that the presumption of collective resolution gives bankruptcy law an organizational advantage in dealing with mass torts).

¹¹⁹ See *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 245 (3d Cir. 2004) (invoking *Amchem* and *Ortiz* and due process to strike down a bankruptcy allocation plan: “In the resolution of future asbestos liability, under bankruptcy or otherwise, future claimants must be adequately represented throughout the process.”).

¹²⁰ The data in the Table were assembled by Professor Issacharoff for a presentation to a gathering of MDL judges. The data come from the researchers at the Federal Judicial Center and special thanks are owed to Lead Researcher Emery Lee for assistance in this undertaking.

FIGURE 1



Data Courtesy of Judicial Panel on Multidistrict Litigation

Although there are many kinds of *actions* spread across the MDL courts today, the reality is that the overwhelming concentration of *cases* consolidated are the sorts of mass harms that lend themselves to the participatory form of the class action. What is perhaps even more significant is that the MDL is the only forum that provides the necessary framework for a consolidated resolution. By one account, of the roughly 550,000 cases transferred to MDL courts between 1968 and 2015, almost 75% are resolved in MDL courts and only a paltry 2.9% are ever remanded for trial to the court of origin.¹²¹

What then happens in MDLs? Increasingly, judges rely on tools that ensure fairness in aggregation. As with the Third Circuit's invocation of class action practice in the bankruptcy setting, the tools of choice rely heavily on the experience gained in fifty years of class action practice, whether denominated by the quasi-class action or simply case management. But some significant number of these MDLs are not simply the "absent class member" or "passive beneficiary" class actions of old. Instead, the centralized proceedings created by judicial panel transfer orders not only move all federal actions to one venue, but assign a single judge as ongoing case manager, providing a mechanism for participation and oversight that legitimates the process. This needs formal recognition in doctrine, as begun in *NFL Concussion*. Under the centralized case management approach, the class action is not so much a means to assign responsibility for *in*

¹²¹ *Judicial Business 2015: Judicial Panel on Multidistrict Litigation*, ADMIN. OFF. U.S. COURTS (2015), <http://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2015> (citing statistics maintained by the clerk's office of the Judicial Panel); see also Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 n.4 (2015) (discussing statistics in MDL between 1968 and 2013).

abstentia representation of absent parties, as has long dominated the thinking about class actions. Rather, the class action becomes a structured, organizing process for the collective resolution of claims of common origin, with a formal leadership structure, but also with judicial attentiveness to class member voice.

This then leads to the ultimate aim: optimizing the outcome for both sides. Many of the new MDL class actions we describe provide great benefits by enabling the exchange of a bill of peace for the defendant to obtain enhanced value for the claimants collectively.¹²² The participatory class action salvages this collective benefit by expanding the domain of Rule 23, and its mature forms of judicial oversight. At the same time, class member participation should lower agency costs by providing multiple forms of scrutiny of class counsel and the effects of any proposed class resolution: not only the judicial overseer, but the claimants themselves, are engaged in evaluating the outcome. The capacity of the class to participate, and the evidence of that participation, is a significant development in the real world of practice, and one with which doctrine is only now starting to catch up. Through the large scale harm cases such as *Deepwater Horizon*, *Volkswagen*, and *NFL Concussion*, and increasingly in the smaller harms consolidated in the MDL process, it becomes apparent that the class action mechanism has attained a flexibility to accompany its formality, and has captured a characteristic once seen as incongruous: the active participation of class members.

¹²² See Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 413–18 (2014) (“Defendants in mass litigation want peace, and they are often willing to pay for it.”); see also *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 310–11 (3d Cir. 2011) (en banc) (“From a practical standpoint, . . . achieving global peace is a valid, and valuable, incentive to class action settlements. Settlements avoid future litigation with all potential plaintiffs—meritorious or not.”).