

# TOWARD A BANKRUPTCY MODEL FOR NONCLASS AGGREGATE LITIGATION

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*In recent years, aggregate litigation has moved in the direction of multidistrict litigation followed by mass settlement without certification of a class action—a form sometimes referred to as the “quasi-class action.” Driven by increased restrictions on class certification, particularly in mass tort cases, the rise of the quasi-class action has been controversial. In particular, critics object that it overempowers lawyers and devalues the consent of individual claimants in the name of achieving “closure” in litigation. This Article presents two claims.*

*First, the debate about the proper scope and form of aggregate litigation too frequently relies on the class action as the touchstone for legitimacy. References to the class action, however, are more often misleading than helpful. The basic assumptions behind the class action are different in degree and in kind from the reality of the quasi-class action. Overreliance on the class action as the conceptual framework for aggregation carries the significant risk of unintentionally shackling courts in their attempts to coordinate litigation. The very reason the quasi-class action emerged—the ossification of the class action model of litigation—suggests that courts and commentators should look for another reference model when assessing what is proper or improper in quasi-class actions.*

*Second, bankruptcy serves as a better model for judging when to use, and how to order, nonclass aggregation of mass tort litigation. The entirety of bankruptcy practice need not be imported to realize that bankruptcy may provide a useful lens for viewing aggregation more generally. That lens helps to clarify some of the most troubling concerns about the quasi-class action, such as the proper role of lawyers and the place of claimant consent. Bankruptcy serves as a superior reference model because it starts with an assumption that collective resolution is necessary but tempers the collective with individual and subgroup consent and with institutional structures to counterbalance the risk of excessive empowerment of lawyers or particular claimants.*

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INTRODUCTION

Mass tort litigation stands at a procedural crossroads. Where parties and their counsel once relied on the class action to resolve widespread personal injury and products liability litigation, the limitations of that procedural device have made it much less useful as a peacemaking tool.<sup>1</sup> As a result, parties have turned elsewhere to pursue a final resolution of their disputes and to achieve global peace.<sup>2</sup> Bankruptcy proved attractive as an aggregation device for a

<sup>1</sup> See RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 12 (2007).

<sup>2</sup> I accept in this Article that, as a descriptive matter, peacemaking becomes the overriding goal as a mass tort reaches maturity—that is, once the key legal and factual questions have been identified and tested after the initial formative stage of the dispute. The normative value of that goal, of course, remains subject to serious debate. See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 319

limited number of cases, particularly those involving asbestos claims. But the perceived costs and limitations of the bankruptcy process prevented its broader use. Instead, recent years have seen a rise in the use of coordinated multidistrict litigation to aggregate mass tort claims, usually with the aim of collective settlement, in a series of procedural moves that have morphed into the so-called “quasi-class action.”<sup>3</sup> The literature on the mass tort class action is deep and extensive,<sup>4</sup> but only now has a substantial body of scholarship begun to supplement this

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(2010) (questioning the necessity and value, from a social perspective, of comprehensive closure in mass tort litigation); see also Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers’ Powers*, 79 GEO. WASH. L. REV. 628, 657–67 (2011) (observing a change in the legal and political landscape toward more robust commitments to aggregation “as an ordinary form of procedure”).

<sup>3</sup> Judge Weinstein coined the term “quasi-class action” as a label for aggregate resolution of claims through a mix of pretrial multidistrict consolidation, unified judicial case management, and private agreements between defendants and plaintiffs or their respective counsel. *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (“While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action; it may be characterized properly as a quasi-class action subject to the general equitable power of the court.”); see also Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 481 (1994) (“It is my conclusion . . . that mass consolidations are in effect quasi-class actions. Obligations to claimants, defendants, and the public remain much the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations.”). The term has been adopted in judicial opinions by other courts facing similar models of aggregate litigation, for example, *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 611 (E.D. La. 2008), and in the academic literature on complex litigation. See Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1111–15 (2010) (connecting the term “quasi-class action” to the broader problem of aggregation outside the traditional class action); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 110–11 & n.7 (2010) (tracing the origins of the quasi-class action concept).

<sup>4</sup> See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371 (2000) (conceptualizing the difficulties presented by class actions as problems of governance in private organizational forms); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 338–39 (analogizing the governance of class actions to the governance of states); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12–26 (1991) (analyzing class action litigation through the lens of agency cost theory); Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1827–38 (1995) (describing the interplay between the procedural form of mass tort litigation and the behavior of lawyers and litigants); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 901–03 (1996) (analyzing settlement classes from the perspective of administrative law); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representations, and Fees*, 71 N.Y.U. L. REV. 296, 298–305 (1996) (presenting mass tort litigation as a challenge to the class action model of aggregation); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917–18 (1998) (proposing that class members should be viewed as a collective entity rather than individuals joined for purposes of litigation).

literature by taking note of the turn toward the quasi-class action.<sup>5</sup> There is, however, unease about the quasi-class action on a number of related grounds. The quasi-class action, commentators have objected, overempowers lawyers while devaluing the consent of individual claimants in the name of peacemaking.<sup>6</sup>

This Article seeks to intervene in the developing literature to make two claims. First, the debate about the proper scope and form of aggregate litigation too frequently relies on the class action as the touchstone for legitimacy. Much of the scholarly disagreement about the quasi-class action, I contend, has failed to move beyond the conceptual framework of the class action. That framework is more misleading than helpful, and overreliance on it could undermine the appropriate use of nonclass aggregation. When judged against the norms of the class action, coordinated multidistrict litigation followed by settlement will inevitably be viewed harshly.

Second, bankruptcy serves as a better model for judging when to use, and how to order, nonclass aggregation of mass tort litigation. Without importing the entirety of bankruptcy practice, courts and commentators would benefit from viewing nonclass aggregation through the lens of bankruptcy. This lens can help clarify some of the most troubling questions raised by recent attempts at aggregate litigation outside the class action. In particular, heated debates about the role of lawyers and individual claimants' consent in nonclass mass tort litigation would benefit from turning to bankruptcy as a reference model. The class action starts with an assumption that individual claimants will be brought to a collective resolution only on the strictly limited terms of formal procedural rules but, once within the collective, have little voice in it. Bankruptcy, by contrast, starts with an assumption that collective resolution is necessary, but then tempers the emphasis on the collective with group and individual consent and with institutional structures that prevent the excessive accretion of power by lawyers or particular subgroups of claimants.

My tentative assessment is that the essentials of the bankruptcy process make it a superior framework, at least for the most vexing

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<sup>5</sup> The quasi-class action has only recently begun to generate substantial scholarship. See generally Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506 (2011) [hereinafter Burch, *Group Consensus, Individual Consent*]; Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1 (2009); Erichson & Zipursky, *supra* note 2; Nagareda, *supra* note 3; Silver & Miller, *supra* note 3; Thomas E. Willging & Emery G. Lee III, *From Class Action to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 KAN. L. REV. 775 (2010).

<sup>6</sup> For the most complete account of this objection, see generally Erichson & Zipursky, *supra* note 2.

mass tort cases. It is best suited to achieve the high level of finality and coordination necessary for peacemaking while still accommodating the need for the consent of claimants in the resolution of mass litigation.

Nevertheless, the limitations of the bankruptcy process will continue to restrict its general applicability to mass tort litigation. Because it is not possible to export outright the bankruptcy framework to nonbankruptcy contexts,<sup>7</sup> in an ideal world it would be better to adjust and perfect the bankruptcy process than to try to recreate its features outside of bankruptcy. That conclusion is tempered, however, by the reality of the political economy of change in bankruptcy law, which makes it difficult to achieve limited bankruptcy reform tailored to the resolution of mass tort litigation. For that reason, the emerging quasi-class action is a necessary route for most mass tort cases that cannot be resolved through the traditional class action. But rather than attempt to nip and tuck the quasi-class action in order to replicate the lost world of the class action, this emerging method of aggregation should model the essential features of bankruptcy.

This Article proceeds in three parts. Part I narrates the story of why the class action, although once the preferred tool for aggregate litigation, ultimately faced severe limitations in its usefulness in mass tort cases. Part I also details the rise of the quasi-class action—the form of aggregation in which formally separate actions are centralized through federal multidistrict litigation venue transfer procedures and then resolved by settlement between defendants and groups of plaintiffs' lawyers. I explain why lawyers and litigants have turned to this form of aggregation in recent years and the criticisms that have been leveled at the quasi-class action.

Part II explains why bankruptcy became one route for aggregation of mass tort litigation outside the class action but failed to become a more widely used device. Despite the benefits of bankruptcy, which centralizes the forum for dispute resolution and provides a powerful method of achieving finality, the perceived costs and limitations of the bankruptcy process reduced its use to only a small number of the mass tort cases—those involving widespread “long tail” liability that threatened to overwhelm the enterprise value of defendants.

In Part III, I make the case for bankruptcy as a reference model for nonclass aggregation. Those commentators who have championed the use of bankruptcy in mass tort litigation have been met by the

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<sup>7</sup> As I explain in Part II.C, directly exporting many of the specific features of the bankruptcy process would require significant changes in jurisdictional statutes.

valid objection that the bankruptcy process is ill suited for resolution of most mass torts. What has not been recognized, however, is that the bankruptcy model can inform lawyers, courts, and scholars seeking to give direction to the quasi-class action. The upshot is both theoretical and practical. As a theoretical matter, the basic organization of a bankruptcy case, properly understood, provides a way of assessing the types of maneuvers in the quasi-class action that should not be objectionable, while highlighting the gaps in the quasi-class action that remain to be filled. Thus, the process of seeking group consent—a commonplace in bankruptcy—should not be treated as an unprecedented innovation when used in quasi-class actions. And courts and commentators considering proposals to provide for advance consent of claimants to be bound by an aggregate settlement would do well to consider those proposals in light of similar group-based voting rules in bankruptcy. At the same time, the turn to a bankruptcy model provides more immediate practical suggestions for the structure of aggregate litigation. Some of the institutional design of the bankruptcy process could be deployed in the quasi-class action to address concerns about the excessive empowerment of lawyers. In particular, the presence of a permanent monitor—a key feature in bankruptcy cases meant to check the power of lawyers—should be considered as one reform proposal for the quasi-class action.

## I

### FROM CLASS ACTIONS TO “QUASI-CLASS ACTIONS”

In the mid-1990s, the settlement-only class—intended by the parties to be judicially certified for settlement rather than litigation purposes—became the dominant method of peacemaking in mass tort cases.<sup>8</sup> By then, courts and counsel had thirty years of experience with the modern class action.<sup>9</sup> After an earlier period of fairly cautious resort to class actions in high-dollar personal injury cases, lawyers for plaintiffs and defendants adapted to the almost routine use of class actions for settling mass tort litigation.<sup>10</sup> In the late 1990s the Supreme

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<sup>8</sup> See THOMAS E. WILLGING ET AL., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61–62* (1996) (discussing the prevalence of settlement classes).

<sup>9</sup> Class litigation is not, of course, a new creation in American law. By “modern,” I mean the form and practice of class litigation that arose after Federal Rule of Civil Procedure 23 was extensively revised in 1966. See STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 238–39* (1987) (describing the conceptual approach to the class action taken by the drafters of Rule 23).

<sup>10</sup> The drafters of the 1966 version of Rule 23 did not anticipate that it would be used for mass tort litigation. See FED. R. CIV. P. 23 advisory committee’s note (1966) (“A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class

Court upset this extended experiment with peacemaking in a pair of decisions that signaled a highly skeptical judicial attitude toward settlement classes.<sup>11</sup> The Court's "mood" in those cases, perhaps more than the letter of the decisions,<sup>12</sup> sparked serious interest in nonclass aggregation methods as alternative peacemaking devices.

### A. *The Use (and Abuse) of the Settlement Class*

Grasping why settlement classes in mass tort cases proved so attractive—and so controversial—requires an understanding of the basic dilemma posed by the mass tort class action. When the modern class action was born in 1966 with the revision of Rule 23 of the Federal Rules of Civil Procedure, its creators contemplated two categories of cases encompassed by the Rule.<sup>13</sup> First, Rules 23(b)(1) and 23(b)(2) provided for mandatory class treatment when equitable principles demanded drawing together all claimants in a single proceeding or when a class requested injunctive relief against a defendant, respectively.<sup>14</sup>

Second, Rule 23(b)(3) provided for the creation of nonmandatory classes involving common questions of law or fact.<sup>15</sup> The guideposts

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action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.”). Even years after its drafting, Rule 23 was subject to a good deal of uncertainty in mass tort litigation. See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* 10–14, 63–65 (1987) (describing the ambiguous state of the law through the 1980s as to whether certification of a mass tort class action was appropriate). Compare Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1056 (1993) (“There has been a dramatic shift in beliefs about the appropriateness of Rule 23 class actions for mass toxic torts since the Advisory Committee penned its admonition against the use of the Rule in tort actions in 1966.”), with Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1049 (1986) (“Inventive attorneys have argued that mass-tort cases fit within each of the Rule 23 categories, only to be rejected by the district courts.”).

<sup>11</sup> *Ortiz v. Fibreboard*, 527 U.S. 815 (1999); *Amchem v. Windsor*, 521 U.S. 591 (1997).

<sup>12</sup> Indeed, the Court's approach in both *Ortiz* and *Amchem* has been described as “obsessively focused on the language of Rule 23.” Coffee, *supra* note 4, at 437. Despite the Court's highly technical approach, the decisions, taken together, sent a clear signal that chilled the continued use of the settlement class in mass tort litigation. See *id.* at 372–73.

<sup>13</sup> For a detailed account of the drafting of the 1966 version of Rule 23 and its aftermath, see generally Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979).

<sup>14</sup> FED. R. CIV. P. 23(b)(1), (2). The Rule contemplated mandatory class treatment, for example, in cases involving multiple claims against a limited fund or cases presenting considerations comparable to joinder of a required party under Rule 19. See FED. R. CIV. P. 23(b)(1), (2) advisory committee's note (1966) (clarifying the appropriate occasions for maintaining class actions).

<sup>15</sup> FED. R. CIV. P. 23(b)(3).

for this category of class action were convenience and efficiency, rather than the necessities of equity. Unlike its predecessor Rule, which was in essence a procedural tool facilitating voluntary joinder by plaintiffs, Rule 23(b)(3) included class members within the class unless they opted out.<sup>16</sup> The rulemakers, in explaining the opt-out provision, presented it as allowing aggregation in actions seeking damages when “a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated for cases, without sacrificing procedural fairness or bringing about other undesirable results.”<sup>17</sup> Only when common questions predominated over individual differences among class members—the rulemakers presumed—would sufficient economies be achieved to justify use of the class action device.<sup>18</sup> Otherwise, a case brought nominally as a class action would degenerate into multiple lawsuits, squandering the savings in litigation transaction costs that would otherwise justify class treatment. Even when common questions predominated, a court would have to satisfy itself that a class action was superior to other methods of handling the litigation, such as the consolidation of separate actions.<sup>19</sup> Once so satisfied, a court could proceed with certification and notice to the class; class members wishing to pursue independent actions could opt out of the collective and avoid the binding effect of a judgment in the class action.<sup>20</sup>

The drafters of Rule 23 sought largely to codify and clarify existing practices and not to revolutionize them,<sup>21</sup> but courts and scholars soon recognized the significance of the amended Rule. Rule 23(b)(3) in particular emerged chiefly as a litigation enablement

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<sup>16</sup> The predecessor Rule had permitted so-called “spurious” class actions for resolving common questions of law or fact and for providing common relief. But no mechanism was provided for identifying the members of the class before judgment, with the result that a potential member of the class could adopt a wait-and-see attitude during the course of the litigation. Only if it became clear that a favorable judgment was forthcoming would the claimant accept the invitation to join the class action. *See* *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 545–47 (1974) (explaining the perceived flaws of the pre-1966 class action rule).

<sup>17</sup> FED. R. CIV. P. 23(b)(3) advisory committee’s note (1966).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> FED. R. CIV. P. 23(c)(2)(B), (c)(3)(B).

<sup>21</sup> *See* Miller, *supra* note 13, at 669 (describing and defending the advisory committee as having “few, if any, revolutionary notions about its work product”). One prominent historian of the Federal Rules of Civil Procedure has argued, however, that the drafters understood that they were indeed breaking new ground with their revisions of the Rule. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1487 (2008).



device. For class members with negative-value claims,<sup>22</sup> the opt-out class served as a procedural tool that sufficiently lowered the transaction costs of litigation to make prosecuting their claims worthwhile. The Reporter to the Advisory Committee on Civil Rules during the drafting of Rule 23 embraced that development,<sup>23</sup> and courts frequently recounted the rationale when discussing the opt-out class device.<sup>24</sup>

But the drafters of Rule 23 did not contemplate the routine use of class actions in mass tort cases. In explaining the reasoning behind the opt-out class, the advisory committee included a cautionary note explicitly identifying mass tort cases as “ordinarily not appropriate” for class treatment.<sup>25</sup> The rationale for excluding such cases rested solely on the perceived inefficiency of the practice. The rulemakers understood mass tort cases as likely to require examination of individual questions central to liability and damages.<sup>26</sup> Accordingly, the time and costs ordinarily saved by class action treatment would be squandered by piecemeal examination of individual claimants’ demands for relief.

The rulemakers’ cautionary note about mass tort class actions carried through to the courts, which remained cool to such cases. Pioneering plaintiffs’ lawyers did press the envelope of class certification in the early 1980s by attempting to litigate mass tort class actions. But those attempts generally did not succeed against the vigorous opposition of defendants and the skepticism of the courts. Few district courts ventured to certify mass tort class actions, and those that did typically faced reversal on appeal.<sup>27</sup>

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<sup>22</sup> “A ‘negative value’ suit is one in which class members’ claims ‘would be uneconomical to litigate individually.’” *In re Monumental Life Ins. Co.*, 365 F.3d 408, 411 n.1 (5th Cir. 2004) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)).

<sup>23</sup> See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397–98 (1967) (endorsing the ability of an opt-out class to allow vindication of “small claims held by small people”).

<sup>24</sup> *E.g.*, *Shutts*, 472 U.S. at 812–13 (comparing an opt-out class favorably with an opt-in requirement, which “would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit.”); *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980) (“A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney’s fees, by allocating such costs among all members of the class who benefit from any recovery.”).

<sup>25</sup> FED. R. CIV. P. 23(b)(3) advisory committee’s note (1966).

<sup>26</sup> See *supra* note 10.

<sup>27</sup> See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1357 (1995) (describing cases where parties unsuccessfully litigated mass tort class actions). Decertification on appeal did not always mean that litigants abandoned the use of the class action device in a particular case. The Hyatt Skywalk case—a

The courts' resistance to the mass tort class action, however, softened with the advent of truly massive and seemingly intractable tort litigation. The change in attitude made perfect sense on two levels. First, the rulemakers who drafted Rule 23 had cast doubt on the appropriateness of mass tort class actions based not on fundamental incompatibility with collective resolution in a representative action but rather on the assumption that the class action would provide few, if any, efficiency gains. The asbestos crisis in particular tested that assumption, as courts candidly admitted.<sup>28</sup> By one estimate, the transaction costs of asbestos litigation amounted to sixty-one cents for every dollar paid—that is, a plaintiff would see only thirty-nine cents for every dollar spent in total on the litigation.<sup>29</sup> To the extent that experience seemed to suggest that a class action would resolve sprawling litigation more efficiently than the separate resolutions of thousands of cases, the turn to the class action was unsurprising.

The second reason for the courts' willingness to entertain mass tort class actions was that class action litigation rarely involved trials. The drafters of Rule 23(b)(3) assumed that minitrials for each class member would inevitably occur in mass tort cases, thereby negating the benefits of class treatment. But what if trial did not follow from class certification? Once the assumption of trial fell from the equation, efficiency became much more closely tied to broad-based resolution in the form of settlement. The concern about class trials that might fracture and degenerate into minitrials lost its force as a reason to reject the class action device in mass tort cases. Remarkably, in the Agent Orange litigation, the Second Circuit expressed its sympathy with the "prevalent skepticism" of mass tort class actions, cast doubt on the value of the class members' claims, yet nevertheless *affirmed* the district court's orders certifying the class and approving a global

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mass accident certified by a federal district court as a mandatory class action—was decertified on appeal by the Eighth Circuit. But the litigation eventually ended in consensual resolution by way of parallel opt-out class actions certified for settlement purposes by state and federal courts. See Hon. Scott O. Wright & Joseph A. Colussi, *The Successful Use of the Class Action Device in the Management of the Skywalks Mass Tort Litigation*, 52 UMKC L. REV. 141, 142 (1984) (recounting the history of the litigation).

<sup>28</sup> The Fifth Circuit explained the change in attitude in a decision declining to decertify an asbestos class action:

Courts have usually avoided class actions in the mass accident or tort setting. Because of differences between individual plaintiffs on issues of liability and defenses of liability, as well as damages, it has been feared that separate trials would overshadow the common disposition for the class. The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters.

Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986) (citations omitted).

<sup>29</sup> Cimino v. Raymark Indus., 751 F. Supp. 649, 651 (E.D. Tex. 1990).

settlement.<sup>30</sup> Those conflicting rhetorical moves made sense only in light of the courts' fundamentally altered appreciation of the nature of mass tort litigation.

In other words, as the courts dropped their resistance, the class action shifted from a litigation enablement device to a global resolution device. Where once the class action had been viewed chiefly as a procedural tool for efficient litigation of disparate claims in court, lawyers and courts learned to appreciate its value as a procedural tool for ending mass litigation with finality after settlement negotiations.<sup>31</sup> Although cases such as *Agent Orange* settled after protracted, adversarial litigation through the pleading and discovery stages, the real value of the class action lay in assuring a final, rational conclusion to the litigation.<sup>32</sup> It was not surprising when the eventual development of the class action led to the rise of the settlement class.

The settlement class provided a convenient tool to wrap up mass tort litigation. Unlike a class action that settles after the parties have battled through the usual stages of litigating a case in court, the settlement class follows a very different trajectory. The case is certified as a class solely for the purposes of resolving claims through judicial approval of a settlement binding on all class members. Closure, and not contested adversarial litigation, is the hallmark of the settlement class.<sup>33</sup>

The mechanics of the settlement class were straightforward. After a wave of individual tort claims were filed and litigated through their initial stages—usually up to the point when courts and counsel had developed a sense of the key legal and factual inquiries at the heart of the litigation—the litigation would take a turn toward broad-based resolution. At that point, a defendant with mass tort liability would negotiate a global settlement with plaintiffs' lawyers before class certification. In some cases, however, the complaint, answer, and a proposed settlement would be filed simultaneously. The plaintiffs and defendants would then submit to the district court a joint motion for class certification for the sole purpose of settlement. After an opportunity for class members to object, the court would approve notice to the class and rule on the fairness of the settlement as required by Rule

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<sup>30</sup> *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 151 (2d Cir. 1987).

<sup>31</sup> NAGAREDA, *supra* note 1, at 72–73.

<sup>32</sup> SCHUCK, *supra* note 10, at 270 (“The class action permitted a relatively comprehensive litigation remedy (the distribution plan), which assured a controlled, equalized access to the settlement fund and focused public attention on legislative and other possible remedies.”).

<sup>33</sup> See NAGAREDA, *supra* note 1, at 72–75.

23.<sup>34</sup> The time between complaint and judgment might be only a matter of months.<sup>35</sup>

The settlement class offered an assurance of global peace for defendants. Usually the end product of initially scattered litigation (and after counsel for plaintiffs and defendants had become skilled hands during the maturation of the mass tort), the settlement class assisted peacemaking by promising to preclude further litigation. Because class actions are a recognized exception to the prohibition against nonparty preclusion, the settlement class could generate res judicata not achievable by piecemeal litigation.<sup>36</sup> The promise of a conclusive end to litigation in turn provided strong incentives for defendants and plaintiffs' lawyers. For defendants, the settlement class held out the hope of a more certain grasp on the size of their liability and a defined endpoint to further litigation costs. On the other side of the negotiating table, plaintiffs' lawyers able to facilitate defendants' desire for preclusion could do so in return for compensation for class claimants and for themselves. The obvious benefits of the settlement class to counsel on both sides of mass litigation meant that by the mid-1990s, the settlement class had become commonplace.<sup>37</sup>

Although increasingly common, the mass tort class action—and the settlement class in particular—did not escape critical notice. Complaints about the use of the class action in mass tort litigation focused chiefly on the fear of disloyalty by class counsel,<sup>38</sup> who might

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<sup>34</sup> FED. R. CIV. P. 23(e)(2) (requiring the court to direct notice of the settlement to the class and to determine, after notice and a hearing, whether the settlement is “fair, reasonable, and adequate”).

<sup>35</sup> To take one prominent example, the asbestos class settlement in *Georgine v. Amchem Prods., Inc.*, began with the simultaneous filing of a complaint, an answer, a stipulation of settlement, and a joint motion seeking certification of an opt-out class solely for the purposes of settlement. 157 F.R.D. 246, 257–61 (E.D. Pa. 1994) (describing the procedural history of the case). The district court conditionally certified the class two weeks later. *Id.* at 257–58. Nine months later, after entertaining proffers from the plaintiffs and defendant and rejecting the arguments of objectors, the court made a preliminary finding of fairness with respect to the settlement and approved a program of notice to the class. *Id.*

<sup>36</sup> See *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (observing that the judgment in a properly conducted class action may bind nonparties on the ground that they were adequately represented by parties with the same interests).

<sup>37</sup> A Federal Judicial Center study of class action practice in four judicial districts found that of 152 class actions certified, 59 (approximately 39%) were certified for settlement purposes only. WILLGING ET AL., *supra* note 8, at 7.

<sup>38</sup> See Coffee, *supra* note 4, at 371–72 (“[W]here the plaintiffs’ attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney’s own economic self-interest.”). At the same time, there was a good deal of scholarly skepticism as to whether disloyalty by class counsel was a serious problem—or, more precisely, whether it was a more serious problem than disloyalty by lawyers representing plaintiffs outside of the class context. See,

engage in two practices inimical to the interests of the absent class members they represented. First, critics charged that lawyers jockeying for the role of class counsel had incentives to serve as handmaids of defendants by engaging in reverse auctions—the practice of selling the promise of preclusion at a discount in return for defendants’ cooperation in closing the litigation (with the promise of ample fees for class counsel).<sup>39</sup> Second, critics suggested class counsel had incentives to shape a class in ways that did not ensure the equitable treatment of claimants whose interests might diverge. The conflict between present and future claimants is the paradigm case of such divergence. Class members with claims that are fully ripe would conceivably want relief (such as immediate compensation in full) different from that sought by future claimants who had not yet manifested injury (such as a contingent reserve of funds to ensure compensation

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*e.g.*, David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 583 (1987) (suggesting that incentives for plaintiffs’ attorney disloyalty are likely to be lower in class actions than in separate actions).

<sup>39</sup> Professor John Coffee has described the dynamic of defendants choosing among competing plaintiffs’ lawyers and has observed that the fear of collusion might be justified even when there is no bad faith on the part of the lawyers negotiating a settlement. Coffee, *supra* note 27, at 1354 (“Even in the absence of bad faith, suspect settlements result in large measure because of the defendants’ ability to shop for favorable settlement terms, either by contacting multiple plaintiffs’ attorneys or by inducing them to compete against each other.”). Professor Susan Koniak, who testified as an expert against approval of the settlement class that was later upheld by the Supreme Court in *Amchem*, gave perhaps the most full-throated account of the case against the use of the settlement-only class action as a peacemaking device. She suggested that serious conflicts of interest between class members and their lawyers tainted the settlement negotiations in *Amchem*. See generally Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995).

Apart from the concern about “sweetheart” settlements by class counsel who sell out their clients, critics of mass tort class actions asserted that class certification could effectively blackmail a defendant into settling, even if the litigation involved novel or relatively weak claims, for fear of outsized liability and costs from further litigation. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (Posner, J.) (quoting Judge Friendly’s description of “blackmail settlements” in class actions and asserting that class certification creates “intense pressure to settle” for defendants seeking to avoid the risk of outsized liability even on weak claims). *But see* Charles Silver, “*We’re Scared to Death: Class Certification and Blackmail*,” 78 N.Y.U. L. REV. 1357, 1357–60 (2003) (challenging the argument that class certification forces defendants to settle weak claims on generous terms). Whatever the merits of that criticism, it applies with limited force in the world of mature mass tort litigation, in which the parties and their counsel have a well-defined sense of the scope of litigation and the merits of individual claims, and defendants would otherwise bear substantial transaction costs from litigating individual actions until the inventory of claimants is exhausted. To the extent that the blackmail concern is really a concern about the high variance in the expected value of outcomes that may result if liability is fixed in a single trial, the use of statistical sampling or multiple bellwether proceedings in a single proceeding could ameliorate that concern. See generally Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330–37 (2008) (describing the use of bellwether trials in class and nonclass aggregate litigation).

for injuries that occur later). But the dynamics of mass litigation meant plaintiffs' lawyers typically developed large "inventories" of individual cases that defendants would pay off more generously in return for the assistance of those plaintiffs' lawyers in crafting a settlement class to foreclose litigation of all future claims.<sup>40</sup> When the Supreme Court finally took up challenges to the mass tort settlement class action, the Court's decisions echoed these concerns and cast doubt on the continued resort to settlement classes without significant restrictions that would diminish their usefulness as global peace-making devices.

### B. *Amchem, Ortiz, and the Demise of the Mass Tort Class Action*

The first blow fell in *Amchem Products, Inc. v. Windsor*,<sup>41</sup> in which the Court struck down the certification and approval of an opt-out settlement class on the ground that the class departed from strict adherence to the requirements of Rule 23. The proposed settlement class in *Amchem* arose out of an attempt to resolve essentially all the asbestos-related personal injury liability of the defendants.<sup>42</sup> Crucial to the deal was the defendants' insistence that both pending and future asbestos claims had to be resolved. In other words, the defendants sought a broad release of claims and would agree to settlement (and the payment of billions of dollars in compensation) only if they could secure global peace in return. To that end, counsel for plaintiffs with pending asbestos claims agreed to craft a Rule 23(b)(3) opt-out settlement class comprising those exposed to asbestos who had not yet brought suit against the defendants—estimated to number between 250,000 and two million claimants.<sup>43</sup> Some members of the resulting settlement class had already manifested asbestos-related injury, but others had not. The future claimants would be precluded from later

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<sup>40</sup> Professor Koniak attacked the structure of the settlement in *Amchem* on the ground that class counsel had negotiated better terms for their "inventory" clients who had settled outside the class structure at the expense of class members bound by the terms of the class settlement. She labeled class counsel's conduct as collusion with defendants for profit. Koniak, *supra* note 39, at 1048 n.12 & 1078–86; *see also* Coffee, *supra* note 27, at 1373–75 (suggesting that the settlement of inventory claims serves as "an inducement to the plaintiffs' attorney to enter into a non-adversarial settlement of a class action that disadvantages the class members"); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 832 (1995) ("Cases in which defendants make direct payments to lawyers representing the class in exchange for class settlements are nonexistent or rare; the incentives defendants proffer to plaintiffs' lawyers always take the indirect form of attorneys' fee awards in the class action, side settlements of other cases, or both.").

<sup>41</sup> 521 U.S. 591 (1997).

<sup>42</sup> *Id.* at 600.

<sup>43</sup> *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996).

litigating their individual claims against the defendants.<sup>44</sup> In return, they would receive compensation based on a grid-like valuation scheme for various asbestos-related claims, with some assurance of available funds in the future should they develop more serious asbestos-related diseases.<sup>45</sup>

The Court identified two conceptual problems in the settlement class proposed in *Amchem*. First, the Court rejected the proposition that a settlement satisfying Rule 23(e)'s required fairness and adequacy showing could escape Rule 23's basic limitations on all class actions. Second, turning to those basic limitations, the Court found the class fatally flawed because it lacked sufficient cohesiveness—a conceptual hallmark of class actions that animates the requirements of Rule 23.<sup>46</sup> Justice Ginsburg, writing for the majority, derided the proposed class as “sprawling” because the differences in circumstances among class members, including differences in applicable state law, meant that individual issues would swamp the common questions relating to asbestos exposure.<sup>47</sup> The Court's opinion also faulted the class structure because it did not avoid inherent conflicts of interest between class representatives and members of the class. A special concern was that no subclasses had been created to ensure separate representation for present claimants (who already manifested injury) and future claimants (who were currently asymptomatic).<sup>48</sup>

The final blow to the use of the class action for peacemaking in mass tort cases came when the Court decertified another settlement class in *Ortiz v. Fibreboard*.<sup>49</sup> Like the settlement class in *Amchem*, the proposed class in *Ortiz* sought to preclude later litigation by binding future claimants. As in *Amchem*, plaintiffs' lawyers in *Ortiz* leveraged their large inventory of claimants, who had previously filed suit against the defendant, to compel settlement. Relatively generous

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<sup>44</sup> Members of a Rule 23(b)(3) class will be precluded from further litigation of their claims unless, of course, they choose to exercise their right to opt out of the class.

<sup>45</sup> In particular, the settlement tolled the statute of limitations and provided for “come-back” rights, which meant that claimants who received payment for non-malignant conditions would be compensated if they later developed asbestos-related cancer. *Georgine*, 83 F.3d at 620–21.

<sup>46</sup> Rule 23 requires that an opt-out class satisfy two sets of criteria. First, the class, like all class actions under the Rule, must meet the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Second, an opt-out class has to satisfy the predominance and superiority requirements of Rule 23(b)(3). That is, the class must be shown to involve common questions of fact or law that predominate over questions peculiar to individual class members. A class action must also be shown to be superior to other devices for resolution of the dispute. FED. R. CIV. P. 23(a), (b)(3).

<sup>47</sup> *Amchem*, 521 U.S. at 624.

<sup>48</sup> *Id.* at 626–27 (noting that symptom-free individuals both lacked notice and representation within the class).

<sup>49</sup> 527 U.S. 815 (1999).

payments to plaintiffs in those cases accompanied the filing of a settlement-only class action to resolve all remaining claims. This time, however, the parties attempted to structure the settlement as a mandatory class—that is, without opt-out rights for class members—on the theory that a “limited fund” was in contest.<sup>50</sup>

The mandatory nature of a limited fund class is justified on equitable grounds. The denial of opt-out rights relies, in large part, on the view that when the value of claims outstrips the available funds, equitable distribution requires mandatory adjudication of the rights of all potential claimants to the fund. In effect, no claimant has any meaningful ability to recover individually unless all claimants have been brought to the table.<sup>51</sup>

To attempt to fit the settlement into those contours, the defendants established a trust, funded in large part by insurance proceeds, which would serve as the sole source of compensation for any asbestos-related personal injury claims against them. Like the *Amchem* settlement, the *Ortiz* settlement erected a complex administrative scheme to handle the adjudication of individual claimants’ eligibility for relief and the distribution of compensation after the approval of the class settlement.<sup>52</sup> Only after exhausting remedies within that administrative scheme could claimants resort to litigation in court. But even then, the settlement placed limits on the amount of compensatory damages and barred outright any award of punitive damages or interest. The goal of the *Ortiz* settlement class was the same as that in *Amchem*—an attempt to secure global peace by defendants facing large, unliquidated, and potentially long-lasting mass tort liability.

The Court made short work of the parties’ efforts. Recalling its admonition in *Amchem*, it faulted the settlement class in *Ortiz* for failing to assure the necessary level of cohesiveness of interests among absent class members, the named representative plaintiffs, and class counsel so as to justify class treatment. The Court held that the class failed to provide, at the outset of proceedings, structural protections (in the form of separately represented subclasses) against the likely conflicts of interests among class members.<sup>53</sup> The Court noted two

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<sup>50</sup> See FED. R. CIV. P. 23(b)(1)(B) (providing for non-opt-out classes when individual adjudications would be dispositive of the interests of other class members).

<sup>51</sup> *Ortiz*, 527 U.S. 838–40 (describing the conditions necessary to form a Rule 23(b)(1)(B) class); see also Issacharoff, *supra* note 4, at 359–60 (“[T]he individual claimant has no separable claim, and would have no meaningful legal remedy should she attempt to opt out. The presumption is that under a 23(b)(1) limited fund, the corpus would be exhausted by the claimants and nothing would remain for the opt-out.”).

<sup>52</sup> *Ortiz*, 527 U.S. at 827.

<sup>53</sup> *Id.* at 856–57.



potential conflicts: First, present and future claimants may have disagreed on whether to provide high immediate payouts to individuals exhibiting symptoms. Second, the value of a class member's claim depended on the level of the defendant manufacturer's insurance coverage at the time she was exposed.<sup>54</sup>

Fibreboard's attempt to describe the litigation as a limited fund also received little sympathy. In the Court's view, a limited fund class had to demonstrate both necessity and equitable distribution. Without a showing that the fund was truly limited, mandatory class treatment was not necessary. And, without a showing that all potential claimants to the fund were treated equitably, a court could not allow class treatment. Neither requirement for a limited fund class had been satisfied. Because the defendant had retained some of its equity, the presence of "money left on the table" suggested that the parties arbitrarily set a limit to the fund in question.<sup>55</sup> In a similar vein, because the settlement had been predicated on paying off claimants in previously filed cases (and doing so on more favorable terms than settlement class members would receive), the Court expressed deep skepticism that the equitable treatment of claimants that should accompany limited fund treatment had been satisfied.<sup>56</sup>

In dicta, the *Ortiz* Court went even further, strongly suggesting that a trip through the bankruptcy courts was the appropriate route for the kind of mass resolution attempted by the parties.<sup>57</sup> Faced with enterprise-threatening liability, Fibreboard had engineered a settlement that preserved much of its shareholders' equity in the company. But that key feature of the *Ortiz* settlement class raised the specter of an improper end-run around the priority scheme governing creditors in bankruptcy. Under that priority scheme, holders of equity interests in a debtor ordinarily receive nothing from the debtor's bankruptcy estate until all creditors have been paid in full.<sup>58</sup> Class members would

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<sup>54</sup> *Id.*

<sup>55</sup> *See id.* at 850–53 (admonishing lower courts for accepting, without investigation, the litigants' attempt to create a limited fund by discounting the value of assets available for payment to class members).

<sup>56</sup> *Id.* at 854–55.

<sup>57</sup> *Id.* at 860 n.34 (observing that mandatory class settlement would "significantly undermine the protections for creditors built into the Bankruptcy Code" and further noting that Congress had amended the Bankruptcy Code to provide for the reorganization of debtors facing asbestos liability).

<sup>58</sup> The absolute priority rule prohibits shareholders or junior creditors from recovering from a debtor's estate if there exists any impaired class of senior creditors—that is, senior creditors who do not receive the full amount of their claims. *See* 11 U.S.C. § 1129(b)(2) (2006) (codifying the absolute priority rule); *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 115–19 (1939) (describing absolute priority as a "fixed principle" of reorganization law); *N. Pac. Ry. v. Boyd*, 228 U.S. 482, 508 (1913) (announcing the absolute priority rule).

have been creditors in bankruptcy and their claims would have been senior to the interests of shareholders of Fibreboard Corporation. As Justice Souter's opinion for the Court wryly observed, "With Fibreboard retaining nearly all its net worth, it hardly appears that such a regime is the best that can be provided for class members."<sup>59</sup> Thus, the Court surmised that if the class members had been transformed into claimants in a bankruptcy case, they would have been better off, and jury-rigging a contrary result through the use of Rule 23 could not be blessed as an equitable use of the Federal Rules of Civil Procedure. The Court, in other words, acted to protect the integrity of the Federal Rules *and* the integrity of the Bankruptcy Code.

*Amchem* and *Ortiz* brought into stark relief the dilemma presented by the class action as a peacemaking device. As the Court has declared repeatedly, the class action is an exception to the general rule of Anglo-American jurisprudence that no one is bound by a prior judgment *in personam* unless designated as a party and served with process.<sup>60</sup> Courts bend this "day-in-court" ideal if structural safeguards ensured a person was adequately represented in the proceedings leading to the prior judgment. The Court rejected the settlement class actions in *Amchem* and *Ortiz* because the parties discounted structural protections (as embodied in the Federal Rules but informed by the Due Process Clause) necessary for adequate representation. This failure meant, in turn, that the class action could not bind absent class members and extinguish their right to sue individually.

The Court's strict formalism in *Amchem* and *Ortiz* also derived from an unhidden skepticism about the use of the Federal Rules of Civil Procedure as license to undertake essentially legislative reforms. The question presented in *Amchem*, as Justice Ginsburg phrased it, was "the *legitimacy under Rule 23* of the Federal Rules of Civil Procedure of a class action certification sought to achieve global settlement of current and future asbestos claims."<sup>61</sup> The unspoken assumption in both cases, then, was that methods of global resolution that did not invoke the Federal Rules of Civil Procedure could escape the rigid strictures placed on the class action by the Court.

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<sup>59</sup> *Ortiz*, 527 U.S. at 860.

<sup>60</sup> *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (explaining the rule against nonparty preclusion). The Court has reiterated the exceptional nature of the class action since *Hansberry*. See, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (describing the class action as an exception to the rule against nonparty preclusion); *Martin v. Wilks*, 490 U.S. 755, 790 n.2 (1989) (citing the class action as "an exception to the general rule" against nonparty preclusion).

<sup>61</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (emphasis added).

It is highly unlikely that the Court will retreat from the rigidity of its approach in *Amchem* and *Ortiz*, and there are sound arguments that on balance those cases were correctly decided.<sup>62</sup> Nevertheless, something was lost in their aftermath, and not merely the promise of a procedural device with sufficient power to achieve a conclusive end to mass tort litigation. The Court's skepticism of peacemaking through the mass tort class action scuttled schemes—however suspicious the circumstances of their creation—that held some promise of rational compensation for injured tort victims.<sup>63</sup> Justice Breyer, dissenting in both cases, lamented that the overturned settlements would have provided substantial benefits to class members, including some assurance that the most seriously injured claimants would receive the most generous compensation, even if their injuries manifested later.<sup>64</sup> Instead, the breakup of the class actions in each case would lead to irrational compensation driven by the happenstance that a particular claimant made it to court first. The need for piecemeal litigation would also drive up the cost of resolving the mass tort.<sup>65</sup> It was hardly ideal for vast sums of money spent on asbestos litigation to wind up in the hands of lawyers and not injured claimants. Without disregarding the institutional concerns that animated the Court's decisions, the

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<sup>62</sup> See Issacharoff, *supra* note 4, at 351–53 (criticizing the Court for relying on Rules formalism in both cases but arguing that deeper due process concerns more strongly support the outcomes in *Amchem* and *Ortiz*). The Court's most recent treatment of class certification requirements adheres to the rigidity of *Amchem* and *Ortiz*. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2566 (2011) (decertifying a nationwide employment discrimination class action brought under Rule 23(b)(2) because, among other reasons, the class was insufficiently cohesive).

<sup>63</sup> The Court's decisions doomed the possibility of a global settlement on remand in both cases. As one prominent plaintiffs' lawyer observed:

In the case of *Amchem*, the perfect was the enemy of the good: the multibillion-dollar settlement, rejected by the Supreme Court, was lost forever, and thousands of claimants who would gladly have traded their pristine due process rights for substantial monetary compensation have been consigned to the endless waiting that characterizes asbestos bankruptcies. The \$1 billion in contested insurance coverage that *Ortiz* attempted to capture for the benefit of asbestos victims has similarly evaporated.

Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005).

<sup>64</sup> *Ortiz*, 527 U.S. at 870 (Breyer, J., dissenting) (noting that, under the settlement agreement, the most seriously injured plaintiffs were to be paid first in the event of a shortfall of funds); *Amchem*, 521 U.S. at 638 (1997) (Breyer, J., dissenting) (identifying structural protections for future claimants).

<sup>65</sup> As Justice Breyer argued in *Ortiz*, resolution of Fibreboard's asbestos liability through the settlement class would allow the company to avoid spending "most of its money . . . on asbestos lawyers and expert witnesses," thereby benefiting its employees, creditors, and the communities in which it operated. 527 U.S. at 882–83 (Breyer, J., dissenting) (observing that the settlement would reduce the transaction costs of providing compensation to claimants from 61% to 15% of the total amount paid).

disapproval of the mass tort settlement class actions in *Amchem* and *Ortiz* left a large practical problem that demanded some solution.

### C. *The Post-Amchem and Ortiz Turn to Nonclass Aggregation*

The aftermath of *Amchem* and *Ortiz* was swift and pronounced, as the plaintiff and defense bars turned away from the class action to other avenues for resolving mass tort litigation. Bankruptcy became the preferred option for some disputes, particularly the asbestos litigation that had fared so poorly before the Supreme Court in *Amchem* and *Ortiz*. Other litigation moved into the less clearly defined channel of the quasi-class action—that is, aggregation through some mixture of coordination or consolidation of separate actions brought by many individual plaintiffs, followed by a master settlement negotiated among defendants and counsel for plaintiffs.<sup>66</sup>

Both routes had the potential to surmount the obstacles to class treatment by avoiding the doctrinal restrictions placed on class actions. Rather than shoehorn litigation into the usual mold (the class action), counsel found in bankruptcy a different exception to the “day-in-court” rule. In the quasi-class action, they found a complete end run, because a quasi-class action comprises formally separate actions in which each individual claimant is a named party represented by counsel.

#### 1. *The Quasi-Class Action Method of Aggregate Litigation*

The chief nonbankruptcy route for prosecuting and resolving aggregate litigation outside the class action after *Amchem* and *Ortiz* is the quasi-class action. The quasi-class action embraces the very reality that had seemed so problematic in those cases—in many mass torts, individual claimants are concentrated in the hands of a small number of plaintiff-side firms. Leveraging that reality, the quasi-class action’s end point is a private settlement negotiated between plaintiffs’ lawyers on the one hand and defendants on the other. Although mass litigation may arise in both state and federal forums, the federal courts have become the center of gravity of essentially all quasi-class

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<sup>66</sup> See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490–91 (E.D.N.Y. 2006) (describing the procedural background of the litigation and allocating plaintiffs’ attorneys’ fees); see also *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 608–10 (E.D. La. 2008) (giving an overview of multidistrict litigation and settlement); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at \*1–4 (D. Minn. Mar. 7, 2008) (giving an overview of multidistrict litigation and settlement).

actions.<sup>67</sup> There, the path to a quasi-class action resolution begins when the Judicial Panel on Multidistrict Litigation (JPML)—composed of seven judges selected by the Chief Justice<sup>68</sup>—transfers cases from around the country to a single district court for consolidated or coordinated pretrial proceedings.<sup>69</sup>

The Multidistrict Litigation (MDL) statute is a near contemporary of the 1966 revisions to Rule 23, and both provisions responded to the perceived inadequacies of then-available procedures to deal with a changing world of litigation. Congress enacted the MDL statute in 1968 to foster coordination of related proceedings (to reduce the risk of inconsistent treatment) and strong judicial case management (to bring unwieldy litigation to heel).<sup>70</sup> The statute responded to a problem that had appeared after World War II, when patent and anti-trust cases threatened to overwhelm the federal court system.<sup>71</sup> Courts and commentators began to speak of the need for special procedures to deal with protracted litigation or the “Big Case”—those disputes that drew in multiple parties, sometimes across many judicial districts, and that placed intense demands on judicial resources.<sup>72</sup> Beginning in the mid-1950s, the phenomenon garnered much scholarly attention, including seminars sponsored by the Judicial Conference of the United States at New York University, Stanford University, and the

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<sup>67</sup> The Class Action Fairness Act of 2005 (CAFA), which substantially eased the removal of putative class actions and mass actions from state court to federal court, has helped to drive the resort to the federal courts in nationwide aggregate litigation. See Burbank, *supra* note 21, at 1453–59, and 1517–18 (describing CAFA’s jurisdictional provisions and concluding that “CAFA unquestionably changes the balance of power in forum selection”).

<sup>68</sup> 28 U.S.C. § 1407(d) (2006) (authorizing the Chief Justice to appoint a judicial panel on multidistrict litigation, consisting of seven circuit and district judges, and requiring the concurrence of four panel members for any decision).

<sup>69</sup> *Id.* § 1407(a) (allowing transfer, for pretrial proceedings, of civil actions in different districts that involve one or more common questions of fact).

<sup>70</sup> See Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2258–74 (2008) (detailing the evolution of multidistrict litigation).

<sup>71</sup> See John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2226 (2008) (giving a brief history of events leading to passage of the MDL statute).

<sup>72</sup> The phenomenon was described as early as 1950. See, e.g., Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27, 52–57 (1950) (concluding that procedural innovations were necessary in order to deal with protracted litigation); see also Committee to Study Procedure in Anti-Trust and Other Protracted Cases, *Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62, 63 (1951) (describing problems that arise “when a case brought to the court involves, potentially, many issues, many defendants, hundreds of exhibits, thousands of pages of testimony, weeks or months of hearings, and hundreds of thousands of dollars”).

University of Colorado law schools.<sup>73</sup> The catalyzing event leading to the enactment of the MDL statute, however, was the electrical equipment antitrust litigation, in which almost 2000 separate but related actions were filed in thirty-five judicial districts across the country.<sup>74</sup> Using ad hoc procedures that have been described as “perhaps ruthless,”<sup>75</sup> the Judicial Conference sought to coordinate the cases and limit the number of repeated, overlapping pretrial proceedings, leading to a global settlement.

The resulting MDL statute is relatively spare. It contemplates that the JPML will centralize the forum for complex cases that are filed in multiple districts throughout the United States, without regard to personal jurisdiction over the parties or the usual venue requirements.<sup>76</sup> The chosen judicial district will then coordinate pretrial proceedings so as to limit the duplication of work. One goal of the MDL procedure is to limit the possibility of inconsistent decisions on key questions of law or fact during the litigation—a distinct possibility when multiple forums entertain related cases. But there is little in the MDL process that could be considered as formal and rule-bound as the procedures governing the class action in federal court. A hallmark of MDL practice has been its flexibility in the coordination and resolution of widespread litigation. That flexibility arises from the relative simplicity of the statutory authorization for venue transfer in MDL proceedings and from the ability to treat the “litigation” as simply a mass of individual cases. In theory, at least, MDL proceedings remain multiple separate actions brought together for purposes of convenience and not for purposes of entering a single, final judgment disposing of the parties’ claims.

At first blush, the MDL process appears to be a poor vehicle for peacemaking in mass tort cases because it entails few moving parts, and the MDL process is limited to pretrial proceedings.<sup>77</sup> In *Lexecon*,

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<sup>73</sup> See James R. Withrow & Richard P. Larm, *The “Big” Antitrust Case: 25 Years of Sisyphean Labor*, 62 CORNELL L. REV. 1, 1–4 (1976) (tracing the history of judicial, scholarly, and legislative attention to complex litigation).

<sup>74</sup> *Id.* at 2–3 & n.14.

<sup>75</sup> *Id.* at 3.

<sup>76</sup> See *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (explaining that transfers under 28 U.S.C. § 1407 are “simply not encumbered by considerations of in personam jurisdiction and venue”).

<sup>77</sup> The statute provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. . . . Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .

*Inc. v. Milberg Weiss Bershad & Lerach*, the Supreme Court prohibited the practice of some transferee district judges, who “self-transferred” cases to their own dockets for trial after the completion of MDL pretrial proceedings.<sup>78</sup> The Court’s reading of the MDL statute in *Lexecon* contemplates that the transferee court will undertake to resolve pretrial matters—including whether to remand or dismiss cases—and then return cases to the districts from which they were transferred.<sup>79</sup> If the MDL process were little more than a device for reducing the costs of discovery, dispositive motion practice, and other steps in the pretrial stages of litigation, it would not be a viable alternative to the class action or other devices for achieving global resolution of disputes.

In recent years, however, the creative use of MDL practice has meant that the transfer of large numbers of similar cases to a selected district court begins a process leading to a global resolution of the litigation. In the typical quasi-class action, the transferee judge in MDL proceedings takes an active role in choosing counsel to lead the litigation for plaintiffs, shepherding a master settlement agreement to govern the disposition of the cases, and deciding the compensation of plaintiffs’ counsel. Yet all of these steps are taken without class certification. Instead, forum centralization through the MDL proceedings leads to a conclusion of the litigation through a negotiated settlement between defendants and the bulk of plaintiffs, represented by a consortium of lawyers. The quasi-class action mixes the outward appearance of more informal means of aggregation (such as coordination or consolidation) with the active judicial role expected in class actions.<sup>80</sup>

The gravitation toward the MDL-organized quasi-class action is understandable. The Supreme Court’s *Amchem* and *Ortiz* decisions insist upon a restrained, formalist reading of Rule 23.<sup>81</sup> On such a reading, the Rule permits certification of a class only when there is a high level of cohesiveness among the class members, and when the other requirements—manageability and superiority for opt-out classes and the narrowly defined limits of necessity and equitable treatment for mandatory classes—have been satisfied. Particularly in the mass tort context, demonstrating the requisite level of cohesiveness can be

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28 U.S.C. § 1407(a).

<sup>78</sup> 523 U.S. 26, 40–41 (1998) (holding that “the straightforward language [of the MDL statute] . . . bars recognizing any self-assignment power in a transferee court”).

<sup>79</sup> *Id.* at 34–35 (finding that the statutory language requires the return of cases to their original court).

<sup>80</sup> See Silver & Miller, *supra* note 3, at 113 (distinguishing multidistrict litigation from class actions while highlighting the considerable judicial power in multidistrict litigation).

<sup>81</sup> See Issacharoff, *supra* note 4, at 347–52 (suggesting the Court retreated to Rule-based formalism in those cases).

difficult. If the physical condition, behavior, or expectations of individual claimants may have contributed to the level of harm attributable to the defendant, *Amchem* assures that courts will find that the resulting individual liability or damages questions will defeat class certification.<sup>82</sup> Similarly, when class members hail from different states, which is common in mass tort cases involving products distributed nationwide, choice-of-law questions may doom class certification. The need to determine and apply multiple states' laws reduces class cohesiveness and generates manageability concerns.<sup>83</sup>

These restrictions on the settlement class have made the quasi-class action attractive for multijurisdictional disputes in which individual harm questions are at play. In the Vioxx pharmaceutical litigation, for example, plaintiffs unsuccessfully attempted to certify a nationwide opt-out class action of all persons injured by the drug. The effort at class certification failed on *Amchem* grounds—it was impossible to satisfy the requisite showing of cohesiveness, manageability, and superiority for class treatment.<sup>84</sup> In particular, individualized questions abounded because many Vioxx users had preexisting conditions or risk factors for the harms attributed to the drug, such as stroke, heart attack, and pulmonary embolism.<sup>85</sup> Users of the drug also lived across the country, presenting a serious choice-of-law obstacle for a nationwide class action.<sup>86</sup> Other attempts to build personal injury class actions after *Amchem* and *Ortiz* have failed for similar reasons.<sup>87</sup>

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<sup>82</sup> In the words of one commentator, *Amchem* transformed the requirements of Rule 23 “into a mandate of perfection.” Cabraser, *supra* note 63, at 1476.

<sup>83</sup> Courts have not hesitated to reject class certification on manageability grounds when the laws of multiple states must be applied under choice-of-law rules. *See, e.g., In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (“Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable.”).

<sup>84</sup> *See In re Vioxx Prods Liab. Litig.*, 239 F.R.D. 450, 458 (E.D. La. 2006) (denying class certification).

<sup>85</sup> *Id.* at 461–62 (holding that even if class members suffered similar harms, individual issues regarding preexisting conditions and the extent of harm suffered prevented certification).

<sup>86</sup> *See id.* at 461 (placing the burden on plaintiffs to prove that choice-of-law questions do not swamp common questions of fact).

<sup>87</sup> There is a long list of unsuccessful attempts at class certification in mass tort cases in the past decade, each one doomed by an inability to meet the requirements of Rule 23. *E.g., In re Panacryl Sutures Prods. Liab. Cases*, 263 F.R.D. 312, 323–25 (E.D.N.C. 2009) (denying certification of nationwide class under Rule 23(b)(3) and (c)(4) due to variations in state law and the presence of individual fact issues among class members); *In re Conagra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 692–98 (N.D. Ga. 2008) (same); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 207–08 (D. Minn. 2003) (same); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 144–47 (E.D. La. 2002) (denying certification of nationwide class under Rule 23(b)(2)). *But see* Deborah R. Hensler, *Has the Fat Lady Sung? The*



## 2. *Centralization and Settlement in MDL Proceedings*

Under the guise of forum centralization, MDL proceedings permit much of the coordination of litigation that would occur in class actions.<sup>88</sup> The centralization of some 20,000 Vioxx plaintiffs in the Eastern District of Louisiana for consolidated pretrial proceedings gave the presiding district judge a great deal of managerial power to guide the litigation to its end. After a series of bellwether trials, the litigation closed with a global settlement between Merck, the maker of Vioxx, and various plaintiffs' counsel.<sup>89</sup> The agreement settled some 50,000 claims pending in state and federal court and erected a private administrative scheme for determining individual claimants' eligibility for, and the level of, compensation from the settlement fund. Notably, the Vioxx litigation proceeded relatively swiftly and smoothly because of consensual cooperation between the judge presiding over the federal MDL proceedings in Louisiana and judges presiding over related state court proceedings in New Jersey, California, and Texas.<sup>90</sup>

Despite the supposedly preliminary nature of the MDL process, savvy judges and counsel have helped to transform it into a powerful device for generating closure in mass tort litigation. Although the conclusive stage of litigation does not take the form of the judicially supervised settlement found in class actions under Rule 23, only the thinnest fiction conceals the active role MDL judges play in promoting settlement. MDL judges use pretrial rulings to channel the litigation in particular directions and encourage negotiations between counsel.<sup>91</sup> They have selected bellwether cases for trial in order to

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*Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 910–12 (2007) (expressing skepticism that the era of mass tort class actions has ended).

<sup>88</sup> Centralization of forum can serve as a softer means of organizing litigation and stanching repeated relitigation of legal questions common across multiple claimants. See Nagareda, *supra* note 3, at 1126–28 (suggesting that forum centralization can serve as a functional substitute for class certification).

<sup>89</sup> Fallon et al., *supra* note 39, at 2334–37 (recounting the organization of MDL proceedings, selection of bellwether cases for trial, and eventual global settlement of litigation).

<sup>90</sup> Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 543, 564 (2006) (noting the importance of constant cooperation and coordination between federal and state courts in the Vioxx litigation).

<sup>91</sup> The MDL judge may also delay important rulings—such as whether to remand cases to state court or to return cases to the court from which they were transferred—in order to increase the judge's power to shape the settlement of the litigation. See Silver & Miller, *supra* note 3, at 123–24, 150–51 (arguing that MDL judges delay remand to force settlement).

price claims for later settlement negotiations.<sup>92</sup> Indeed, judges who routinely handle complex litigation through the MDL panel may be particularly aggressive in encouraging settlement. MDL transferee judges are selected in part for their experience in expeditiously resolving complex disputes.<sup>93</sup>

In two notable cases, MDL transferee judges have overseen creative settlements and then proceeded to exercise control over the compensation of plaintiffs' lawyers appearing before the courts. In the Vioxx litigation, the settlement took the form of a private agreement between the defendant and plaintiffs' counsel.<sup>94</sup> Plaintiffs' counsel in turn had been hired by thousands of individual plaintiffs in separate retainer agreements. In form, at least, the litigation comprised many individual plaintiffs, each separately contracting for legal services. Nevertheless, Judge Fallon, the MDL transferee judge who oversaw the settlement of the litigation, asserted inherent and equitable authority to set aside the private fee arrangements between plaintiffs' lawyers and their clients.<sup>95</sup> In doing so, Judge Fallon relied on reasoning previously employed by Judge Weinstein in the Zyprexa litigation, another quasi-class action in which an MDL proceeding was followed by a private settlement agreement. Judge Weinstein reasoned that a court has authority to adjust private fee arrangements outside the class action context on several grounds: the common settlement tying claimants together, the extensive judicial control already exerted in MDL proceedings to guide discovery and foster settlement, and necessity—the obligation of a court to protect claimants from individual fee agreements that do not reflect the economies of scale from coordinated mass litigation when a defendant is indifferent to plaintiffs' lawyer fee awards.<sup>96</sup>

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<sup>92</sup> See Fallon et al., *supra* note 39, at 2341 (acknowledging that MDL transferee courts may play an “important role [in global settlement negotiations] through the initiation and management of the bellwether trial process”).

<sup>93</sup> Marcus, *supra* note 70, at 2284–89 (noting that the JPML selects transferee judges, not just districts, and does so in part based on transferee judges' experience and expertise with complex disputes).

<sup>94</sup> Settlement Agreement Between Merck & Co., Inc., and the Counsel Listed on the Signature Pages Hereto 1 (Nov. 9, 2007) [hereinafter Vioxx Settlement Agreement], available at [www.merck.com/newsroom/vioxx/pdf/Settlement\\_Agreement.pdf](http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf).

<sup>95</sup> *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 613–14 (E.D. La. 2008) (justifying equitable review of individual contingent fee contracts based on the court's authority to oversee the administration of the settlement and its inherent authority to exercise ethical supervision over the parties).

<sup>96</sup> *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491–92 (E.D.N.Y. 2006) (“Many of the individual plaintiffs are both mentally and physically ill and are largely without power or knowledge to negotiate fair fees; plaintiffs' counsel have a built-in conflict of interest; and the defendant is buying peace and is generally disinterested in how the fund is divided . . .”).

Thus, although MDL proceedings without the endgame of a class action may appear to provide an opportunity for enhanced coordination without meaningful finality, the reality of recent developments suggests otherwise. The power of MDL transferee judges to delay dispositive motions, dismiss cases, price claims through bellwether trials, and set plaintiffs' lawyer compensation in many ways resembles the power of judicial supervision in class actions.

#### D. *The Uncertain Status of the Quasi-Class Action*

Nevertheless, the status of the emerging quasi-class action remains uncertain. That uncertainty flows from the often jury-rigged and experimental nature of the quasi-class action, leading prominent scholars in the field to label procedures central to the device as "rudimentary and opaque."<sup>97</sup> To take one example, judicial control over attorney compensation, a procedure central to the effectiveness of coordination in recent quasi-class actions, is a relatively novel creation without clear support in the MDL statute.<sup>98</sup> More seriously, there is a haphazard quality to how individual quasi-class actions have developed. A good deal of the success of the Vioxx litigation, the largest of the quasi-class actions so far, is due to the cooperative relationship between the federal MDL judge in New Orleans and the state court judges responsible for cases pending in their courts.<sup>99</sup> Nothing formal prevented intersystem or interpersonal rivalries from destroying coordinated control of the litigation.<sup>100</sup>

Flexibility and experimentation should be preserved in any system that aims to govern mass litigation.<sup>101</sup> The class action, although now considered stable and rule bound, was not a static concept for much of its life after 1966. More fundamentally, courts accustomed to the common law method will inevitably try on and discard new ways of managing litigation in response to legal or sociolegal

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<sup>97</sup> Silver & Miller, *supra* note 3, at 109.

<sup>98</sup> See *id.* at 120 (noting that the source of an MDL judge's power over compensation of counsel is "not obvious").

<sup>99</sup> See Cabraser, *supra* note 90, at 564 (describing the "ongoing coordination and cooperation between the federal and state courts in the conduct of the Vioxx litigation").

<sup>100</sup> Oddly, Hurricane Katrina also played a role in crafting one of the features of the Vioxx litigation: the use of bellwether trials overseen by the MDL judge. Ordinarily, *Lexecon* would have required the MDL judge to return transferred cases to their original districts for trial, but the displacement of Judge Fallon from New Orleans after Hurricane Katrina permitted him to try the first federal bellwether case in its home district. See Fallon et al., *supra* note 39, at 2335 ("The first federal trial was held before a jury in Houston, Texas, while the transferee court was temporarily displaced during Hurricane Katrina.").

<sup>101</sup> See Nagareda, *supra* note 3, at 1114–15 (arguing that restrictions on the deployment of the class action have led to the opening of greater conceptual space for experimentation in the field of aggregate litigation).

change. But the quasi-class action stands at a stage of development in which foundational issues about the shape of the procedure and the power of actors in litigation (lawyers, judges, and claimants) are open and unresolved.

### 1. *The Problem of the Class Action as a Reference Model*

The question, therefore, is not whether courts should continue experimentation in aggregate litigation, but whether they have selected the correct model on which to base their experimentation. There remains a need for a reference model to guide the development of mass tort litigation. For the past decade, the class action has been the de facto model, with courts handling quasi-class actions in a manner that aims to replicate class actions.<sup>102</sup> The class action, however, is a poor model in key respects.

First, heavy reliance on the class action analogy risks unintentionally shackling courts in their attempts to coordinate litigation by intermingling different conceptions of commonality. The MDL statute speaks of coordinating or consolidating “civil actions involving one or more common questions of fact.”<sup>103</sup> In other words, commonality is one requirement for triggering MDL procedures. The JPML has traditionally taken a pragmatic view of that requirement. It generally has not placed a high threshold of cohesiveness in the way of coordination of related cases arising out of the same mass tort. But commonality is a feature of Rule 23 as well, and the Supreme Court’s treatment of the requirement in the class action context has been far more exacting.<sup>104</sup> Taking the class action as the model for judging commonality could severely restrict the grouping of cases for MDL purposes in light of the high degree of cohesiveness required for commonality under Rule 23.<sup>105</sup> Indeed, there is evidence that MDL practice has sometimes referenced the strict commonality requirements from Rule 23 in recent

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<sup>102</sup> The very sobriquet “quasi-class action,” of course, represents an acknowledgement of the attempt to model the device after the class action.

<sup>103</sup> 28 U.S.C. § 1407(a) (2006).

<sup>104</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (requiring plaintiffs to demonstrate, after “rigorous analysis,” the existence of a common contention resolvable on a class-wide basis (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982))).

<sup>105</sup> The gap between MDL transfer practice, which has taken a liberal view of commonality, and the treatment of commonality in class actions has been noted by various commentators. See, e.g., 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3863 (3d ed. 2007) (“Most frequently the Panel simply identifies the common questions of fact that exist, concludes that they are sufficient, and orders transfer of the individual cases without analyzing to any great degree their relation or significance to the overall litigation.”); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2209 (2008) (“In contrast to the stringent rules that govern class actions, MDL is a

years. In some cases, the JPML has suggested a view of commonality taken from Rule 23 practice—that is, whether common questions predominate over individual ones—for purposes of deciding whether to centralize cases through MDL assignments.<sup>106</sup> That suggestion, which has garnered little attention, may be inadvertent, but it shows the pitfalls of implicitly turning to the class action as the reference model for aggregate litigation.<sup>107</sup> There is no reason to equate the commonality requirement of the MDL statute with commonality under Rule 23. Indeed, each standard developed independently, and the MDL standard, which arose out of the electrical equipment anti-trust cases, predates the 1966 revisions of Rule 23 (even though the MDL statute came two years later).<sup>108</sup>

Second, there is also tension between the usual working of the MDL process and the right—recognized in class actions involving claims for predominantly money damages—of individuals to exit collective proceedings and litigate alone.<sup>109</sup> Individual cases transferred in an MDL are typically retained there and rarely allowed to exit.<sup>110</sup> To the extent that courts and commentators implicitly rely on the class action to inform the future shape of the quasi-class action, they risk generating greater hurdles to centralization. If the class action is the reference model by which innovation in quasi-class actions should be judged, those features of the quasi-class action that are similar but not the same as their class action counterparts will come under increased pressure.

Third, as Professors Charles Silver and Geoffrey Miller have detailed, MDL judges' practices with respect to the control and com-

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looser and more flexible structure allowing for transfer and consolidation based on pragmatic considerations.”).

<sup>106</sup> See, e.g., *In re Boeing Co. Employment Practices Litig.* (No. II), 293 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) (denying a motion to centralize employment discrimination actions because questions of fact relating to each plaintiff “predominate over any common questions of fact relating to allegations of company-wide racial discrimination”).

<sup>107</sup> For an extended treatment of the issue, see generally Mark Hermann & Pearson Bownas, *An Uncommon Focus on “Common Questions”: Two Problems with the Judicial Panel on Multidistrict Litigation’s Treatment of the “One or More Common Questions of Fact” Requirement for Centralization*, 82 TUL. L. REV. 2297 (2008) (analyzing the problems that arise when the JPML imports the commonality requirement from the class action context into multidistrict litigations).

<sup>108</sup> *Id.* at 2304–07 (tracing the history of the MDL commonality standard).

<sup>109</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3, 812 (1985) (holding that due process requires that absent class members be provided with the opportunity to opt out of class actions concerning claims wholly or predominantly for money damages).

<sup>110</sup> Given the slim chance of an individual’s case exiting MDL proceedings before settlement, Judge Fallon, who presided over the Vioxx litigation, acknowledged that “the centralized forum can resemble a ‘black hole,’ into which cases are transferred never to be heard from again.” Fallon et al., *supra* note 39, at 2330.

penetration of counsel rest on inadequate justifications. MDL judges have selected lead counsel—and, more recently, have exercised control over compensation of plaintiffs’ lawyers—much as judges presiding over class actions might do. Nothing in the MDL statute expressly provides for either practice, which is unsurprising in light of the spare nature of that statute. With respect to the selection of lead counsel, the practice is a transplant from the class action world, but it has taken root in quasi-class actions without much explanation. Indeed, when judges in quasi-class actions have explained their decision to adjust the compensation of plaintiffs’ lawyers to reflect the differing contributions of counsel to the success of the litigation, the grounds invoked have been applicable to class actions but arguably inapplicable to the realities of quasi-class actions.<sup>111</sup>

Admittedly, dissonance between the quasi-class action and the class action model might generate useful innovation and creativity in response to new waves of aggregate litigation, but it presents the prospect that the courts have been building a new form of aggregation on undertheorized foundations. That prospect carries the risk that the quasi-class action will become a procedural device at war with itself. On the one hand, a court conceiving of its role in MDL proceedings must appreciate the aggregate nature of the undertaking and the active role the court is expected to take in bringing the litigation to heel. At the same time, a court managing a quasi-class action does not enjoy the ready-made powers over the litigation and its lawyers that would come with certification of a class action.

Drawing from the class action as the source of doctrinal authority to justify the operation of the quasi-class action presents another, more serious risk. Mismatches between theory and practice are not infrequent and not always fatal in the law. However, the reliance on the class action model as the North Star of the quasi-class action risks unwittingly reenacting history, with eventual development of *Amchem*-like restrictions on quasi-class action practice. To be sure, a sort of Rules formalism has marked the Supreme Court’s treatment of the class action, and it might leave open room for practices that do not purport to be class actions. That is, in part, the promise of the quasi-

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<sup>111</sup> The principal justification for the power of courts to adjust the compensation of lead counsel in the class action context is the common fund doctrine. See Silver & Miller, *supra* note 3, at 120–30 (explaining that the common fund doctrine, typically used to justify judicial control over attorney compensation in class actions, fits poorly with the realities of MDL practice). The criticism of the attorney fee award practices in quasi-class actions has generated spirited debate. See *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 647–49 (E.D. La. 2010) (responding to criticism); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 *FORDHAM L. REV.* 1985 (2011) (replying to Judge Fallon’s response).

class action: aggregation freed from the formal restrictions imposed by the Court on the use of the class action.

But the doctrine developed from *Amchem* and *Ortiz* onward also suggests that free-form attempts to recreate the class action device will be met with intense skepticism by the Court. The Court's recent decision in *Taylor v. Sturgell* lends support for that view. *Taylor* involved a Freedom of Information Act (FOIA) case in which the defendants—the Federal Aviation Administration and a private airplane manufacturer—sought to preclude the plaintiff, Taylor, from seeking judicial review of the denial of his FOIA request for documents about antique aircraft.<sup>112</sup> Another plaintiff, who had some associations with the plaintiff in *Taylor*, had previously litigated (and lost) a similar FOIA request in a separate case. The FAA and the manufacturer invoked the prior judgment as *res judicata* to bar Taylor from litigating his FOIA claim.<sup>113</sup> The D.C. Circuit agreed that the prior judgment barred relitigation by Taylor on the ground that the circumstances demonstrated his “virtual representation” in the first lawsuit.<sup>114</sup>

The Supreme Court flatly rejected the D.C. Circuit's embrace of “virtual representation” as a ground for preclusion. The Court reiterated that nonparty preclusion is the exception and not the rule in American law.<sup>115</sup> It also marked out the finite categories of recognized exceptions to the usual requirement that preclusion reaches only those persons made a party to the litigation and served with process.<sup>116</sup> Outside of those previously recognized exceptions, the Court showed no interest in entertaining an attempt to expand the formal reach of a judgment in a single case. Because the Court reached a

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<sup>112</sup> Taylor was an antique aircraft enthusiast seeking documents that might be helpful in restoring a 1930s-era F-45 airplane. *Taylor v. Blakey*, No. 03-0173 (RMU), 2005 WL 6003553, at \*1 (D.D.C. May 12, 2005).

<sup>113</sup> *Id.*

<sup>114</sup> *Taylor v. Blakey*, 490 F.3d 965, 970–77 (D.C. Cir. 2007). Among other things, Taylor and the prior plaintiff, Herrick, knew each other, belonged to the same antique aircraft club, and had discussed Herrick's interest in restoring an F-45. In addition, Herrick's lawyer in the first, unsuccessful FOIA suit later represented Taylor in his FOIA suit. *Id.* at 974–75.

<sup>115</sup> *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008) (“[O]ur decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party.”).

<sup>116</sup> *Id.* at 893–95 (delineating six recognized exceptions to the rule against nonparty preclusion: (1) a nonparty consents to be bound by a judicial determination involving other litigants; (2) a nonparty is in privity with a party to the prior judgment; (3) a nonparty was adequately represented in the prior litigation by someone with the same interests; (4) a nonparty assumed control over the prior litigation; (5) a nonparty serves as the proxy for a party to the prior litigation; and (6) a special statutory scheme, such as bankruptcy, expressly forecloses successive litigation by nonparties).

unanimous decision in *Taylor*, the case appeared to be an unremarkable reiteration of the oft-repeated commitment to the day-in-court ideal.<sup>117</sup>

The Court's treatment of one of the *Taylor* defendants' arguments, however, merits special attention. The aircraft manufacturer defendant contended that a flexible approach to preclusion was justified.<sup>118</sup> That contention received a particularly harsh reception. The Court characterized the defendant's argument as a sort of free-form borrowing from the class action without adhering to the rules governing the device. Permitting such experimentation could not be justified by the litigation's mere similarity to a class action. As Justice Ginsburg's opinion labeled the argument, the defendant had attempted to cobble together an impermissible "common law" class action.<sup>119</sup>

*Taylor* shows the danger of using class action analogies to justify procedural steps in nonclass aggregate litigation. The rigidity with which the Court views the class action, effectively walling it off from other procedural devices, suggests that serious pause must be taken before relying on the body of doctrines and practices from the world of the class action as justifications for maneuvers in the quasi-class action.

## 2. Consent, Control, and the Class Action Model

The hotly contested issue of claimant consent in the resolution of aggregate litigation also highlights the problem of relying on the class action as the dominant reference point in a post-class action world. When lawyers for Merck entered into a settlement agreement with

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<sup>117</sup> See Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 200–01 (labeling the result in *Taylor* as an "easy holding" in light of prior Supreme Court decisions that rejected attempts to loosen the rule against nonparty preclusion). The apparent doctrinal ease with which the Court disposed of *Taylor*, however, does not mean that the case presented trivial questions about aggregate litigation. See *id.* at 202 ("Rather than reaffirm the application of settled rules of procedure, *Taylor* again exposed the inability of modern procedure to capture litigation over claims that exist only in the aggregate."); see also Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 611–14 (2011) (arguing that *Taylor* was incorrectly decided because the plaintiff had no individual right to relitigate the claim at stake in the case).

<sup>118</sup> Brief of Respondent Fairchild Corporation at 20, *Taylor*, 553 U.S. 880 (2008) (No. 07-371) (arguing that preclusion is justified when two litigants have similar interests, identical motives, and a relationship that is "close enough" to bring the second litigant within the judgment").

<sup>119</sup> *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) ("An expansive doctrine of virtual representation . . . would 'recogniz[e], in effect, a common-law kind of class action.'" (quoting *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 972 (7th Cir. 1998)) (second alteration in original)).



law firms representing plaintiffs in the *Vioxx* MDL proceedings, the deal contained terms intended to ensure effective closure without the benefit of the preclusive effect of a settlement in a certified class action. If 85% of claimants did not accept the terms of the settlement, Merck would withdraw its \$4.85 billion offer and continue defending the litigation on a case-by-case basis. To ensure that the 85% threshold would be reached, Merck's settlement offer required that plaintiffs' firms recommend acceptance of the deal to all of their clients.<sup>120</sup> To make doubly sure, the terms of the settlement initially appeared to require counsel to end their representation of any client who failed to consent to the deal.<sup>121</sup> The mandatory recommendation and mandatory withdrawal provisions sparked heated reaction from the legal commentariat, with a number of scholars criticizing the deal as unethical.<sup>122</sup>

The need to garner broad consent in the *Vioxx* litigation arose from the reality of aggregate litigation outside the class action. Without the benefit of a certified class in which a single judgment could dispose of the class's claims, only the consent of individual plaintiffs (organized by private ordering on a firm-by-firm basis) could provide the promise of closure in the litigation.<sup>123</sup> Otherwise, Merck faced the prospect of having to pay both settlement awards and the costs of continued litigation. The high consent threshold promised that Merck was bargaining for an end to continued litigation on a mass scale.

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<sup>120</sup> See *Vioxx Settlement Agreement*, *supra* note 94, § 1.2.8.1 (providing that counsel for plaintiffs "will recommend to 100% of the Eligible Claimants" represented by counsel that they accept the settlement).

<sup>121</sup> See *id.* § 1.2.8.2 (requiring, "to the extent permitted by the . . . ABA Model Rules of Professional Conduct," that counsel "take . . . all necessary steps to disengage and withdraw from the representation of" nonconsenting claimants). Further explanatory language was later added to soften that aspect of the settlement. See Amendment to Settlement Agreement § 1.2.2 (Jan. 17, 2008), available at [http://www.merck.com/newsroom/vioxx/pdf/Amendment\\_to\\_Settlement\\_Agreement.pdf](http://www.merck.com/newsroom/vioxx/pdf/Amendment_to_Settlement_Agreement.pdf) (providing that each lawyer "is expected to exercise his or her independent judgment in the best interest of each client individually before determining whether to recommend enrollment" in the settlement program).

<sup>122</sup> See, e.g., Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1017 (2010) ("Even more starkly, loyalty questions arise when withdrawal is contractually mandated, as in the *Vioxx* settlement. In that circumstance, the deal's all-or-nothing character is itself a function of a disloyalty requirement."); Daniel Costello, *Vioxx Deal May Cause Pain*, L.A. TIMES, Nov. 15, 2007, at C1 (quoting Professor Stephen Gillers's criticisms of the *Vioxx* settlement: "Clients are not inventory that lawyers can just shed when they become inconvenient. It's forbidden.").

<sup>123</sup> See Issacharoff, *supra* note 117, at 217–18 ("In effect, the settlement tried to use the forces of market aggregation to realize the sort of consensual closure that the formal rules of procedure could not provide.").

The real puzzle about the *Vioxx* controversy is why there was so much controversy in the first place. Obviously, the prospect of lawyers reaching a novel resolution of mass litigation with a price tag of billions of dollars could lead to debate and dissension. But, putting aside the initial mandatory withdrawal provision, why were the consent-conditioned features of the *Vioxx* settlement considered novel in the first place? To be sure, there had been previous cases that raised questions about the duties of lawyers in negotiating the settlement of aggregate litigation on terms that appeared to call for nominal consent of individual claimants.<sup>124</sup> But the nature of the controversy in *Vioxx* was nevertheless puzzling. What could be so suspect about providing for some opportunity for claimants to have a voice in the resolution of their claims?

The debate over the *Vioxx* settlement appeared impoverished due to a lack of some shared conceptual framework or diction to evaluate the matter. The consideration of claimant consent seemed to be so foreign that it left commentators at a loss to find common ground for debate. The debate was framed in terms of the ethical rules governing aggregate settlements.<sup>125</sup> But those rules turn on informed consent, and much of the debate assumed instead that authentic consent by individual claimants was impossible or highly unlikely.<sup>126</sup>

The reaction to the *Vioxx* settlement becomes less puzzling in light of the diminished importance of consent in the class action.

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<sup>124</sup> Before *Vioxx*, perhaps the most controversial case testing the validity of claimant consent in aggregate litigation was the Phillips 66 chemical plant explosion mass tort litigation. The defendant and lawyers for 126 plaintiffs negotiated a settlement amounting to some \$190 million. Forty-nine of those plaintiffs sued their lawyers on the grounds that the litigation had been resolved in an improper aggregate settlement without development or evaluation of their claims individually, and that the plaintiffs had been coerced into accepting the terms of the settlement. Like the *Vioxx* settlement, the Phillips settlement was criticized as stretching beyond ethical bounds. See Lester Brickman, *Anatomy of an Aggregate Settlement: The Triumph of Temptation over Ethics*, 79 GEO. WASH. L. REV. 700, 709–17 (2011) (describing and condemning actions of plaintiffs' lawyers in the case). The Supreme Court of Texas permitted the plaintiffs to pursue forfeiture of attorneys' fees as a remedy for their lawyers' conduct. *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

<sup>125</sup> The American Bar Association's aggregate settlement rule requires informed consent by individual claimants when a lawyer representing multiple plaintiffs in separate actions seeks to settle the cases as part of the same agreement. See MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2010) (forbidding any lawyer who represents multiple clients from making an aggregate settlement without the clients' giving informed consent in writing).

<sup>126</sup> See Erichson & Zipursky, *supra* note 2, at 300–03 (“The ethical concerns about the *Vioxx* settlement largely boil down to this: when claimants consented to the settlement, their consent was inauthentic . . . .”); see also Burch, *Group Consensus, Individual Consent*, *supra* note 5, at 513 (footnote omitted) (“The offer was like *The Godfather's* Don Corleone—‘I’ll make him an offer he can’t refuse’—and thus consent created no moral obligation.”).

Consent in the class action takes on an amorphous shape. In a damages class, consent derives indirectly from a combination of adequate representation, notice to class members, and their failure to exercise the right to exit, or opt out of, the class.<sup>127</sup> It is an “inferred, ephemeral consent”<sup>128</sup> that does not seek individualized approval or disapproval from each claimant except through a claimant’s decision to exit the collective and pursue litigation on her own.<sup>129</sup> Because the doctrinal (and practical) features of class action litigation do not require extended consideration of consent, a large conceptual hole has opened in the post-class action world.

The reliance on the right to opt out of the collective as a second-order proxy for consent makes less sense in nonclass aggregate litigation. The recent practice in quasi-class actions greatly reduces the ability of claimants to untangle their individual action from others gathered in the MDL forum and exit to litigate individually. MDL practice can be frustratingly slow, and judges may effectively block plaintiffs from exiting by postponing adjudication of a motion to remand. Judge Fallon, who presided over the *Vioxx* MDL proceedings, admitted that “the strongest criticism” of the MDL process is that “the centralized forum can resemble a ‘black hole’ into which cases are transferred never to be heard from again.”<sup>130</sup> The result is that a plaintiff drawn into MDL proceedings has little power to opt out in any meaningful sense. Unless the MDL fails entirely, a plaintiff whose case has been consolidated in MDL proceedings will remain there until the parties reach a global resolution of the litigation. MDL litigation may formally model the assumption of autonomy that lies behind the opt-out right in class actions—because no class has been certified and the litigation retains the form of separate actions merely

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<sup>127</sup> See Coffee, *supra* note 4, at 429 (discussing when consent may be inferred from a claimant’s failure to exit the class).

<sup>128</sup> Nagareda, *supra* note 3, at 1162.

<sup>129</sup> To a lesser extent, the class action model also relies on objectors within the class to provide another indirect substitute for individualized consent by class members. Objectors serve in part to police class counsel and to highlight for the courts potentially improper aspects of the action’s resolution. See *Devlin v. Scardelletti*, 536 U.S. 1, 10–11 (2002) (permitting an objecting class member to appeal approval of a settlement, despite his failure to intervene to become a named party, as a “means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate”); see also Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1536 (2004) (“The rights of class members to opt-out and object may be seen as a market check on the propensity of counsel to serve their own interests over those of the class.”).

<sup>130</sup> Fallon et al., *supra* note 39, at 2330; see also Silver & Miller, *supra* note 3, at 123–24 (echoing Judge Fallon’s description).

consolidated for pretrial proceedings—but that assumed autonomy has limited meaning in practice.<sup>131</sup>

The emerging quasi-class action thus operates much like an opt-in mechanism, in which a plaintiff's decision in the first instance to pursue a claim against a defendant facing a mass of similar claims all but guarantees her action will be consolidated with others in a central forum. Once inside the collective proceeding, the claimant has a limited ability to exit. Future waves of mass litigation will involve far more examples of that dynamic, such that plaintiffs are more closely analogized to claimants who have opted in rather than class members deemed (as in the damages class action) to consent to the resolution of the litigation by failing to opt out.<sup>132</sup>

The problem, once again, is that American courts have little experience, and therefore limited comfort, with an opt-in model of class actions.<sup>133</sup> There was no need for such experience during the reign of the class action as the basic model of aggregation in litigation. And the class action has now ossified such that introducing some form of opt-in procedure would be unlikely, in any event, without formal amendments to the Federal Rules of Civil Procedure. Indeed, courts have been hostile to interpreting the rules governing the class action with the flexibility that would permit the use of opt-in procedures.<sup>134</sup> As a result, the default resort to the class action as the touchstone of aggregation in litigation proves to be a handicap in confronting the challenges that will present themselves in future nonclass aggregate litigation.<sup>135</sup>

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<sup>131</sup> The assumption of claimant autonomy also builds on the positive value of the individual claim. See FED. R. CIV. P. 23(b)(3)(A) (setting out as one factor in the decision to certify an opt-out class “the class members’ interests in individually controlling the prosecution or defense of separate actions”). In mass tort litigation in which sizeable personal injury awards are at stake, claimants almost always have positive value claims that—at least in theory—could be litigated independently.

<sup>132</sup> See Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 124 (2012) (arguing that aggregate litigation has moved toward “a new opt-in paradigm for mass tort settlements”).

<sup>133</sup> See John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 302 (2010) (noting “the coolness shown by U.S. courts to the concept of the opt-in class action”).

<sup>134</sup> See, e.g., *Kern ex rel. Estate of Kern v. Siemens Corp.*, 393 F.3d 120, 124–26 (2d Cir. 2004) (holding that Rule 23 did not permit the certification of an opt-in class); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340 (7th Cir. 1974) (observing that opt-in procedures are “contrary to the express language” of Rule 23).

<sup>135</sup> The courts have had experience with an opt-in form of aggregation under the collective action provision of § 16(b) of the Fair Labor Standards Act of 1938 (FLSA), which provides:

An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action

Similarly, any move toward majoritarian control by claimants over the resolution of aggregate litigation runs up against the lack of any analogous feature in the class action. The American Law Institute's (ALI) *Principles of the Law of Aggregate Litigation* attempts to fill that gap by permitting claimants in a nonclass aggregation to consent, in advance, to a process that may result in a binding resolution of the litigation based on a supermajority vote of affected claimants.<sup>136</sup> The ALI proposal rejects the current American Bar

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unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (2006).

The FLSA's opt-in mechanism works in effect as a permissive joinder device rather than a true class action. Other employment-related legislation incorporates the FLSA's collective action provision. *See, e.g., id.* (providing that the same procedures apply to actions brought under the Equal Pay Act of 1963); *id.* § 626(b) (incorporating the FLSA opt-in mechanism into the Age Discrimination in Employment Act of 1967). Widespread resort to the FLSA collective action by litigants, however, is a relatively recent development, with the number of such actions increasing markedly since the 1990s. *See* Daunta Bembenista Panich & Christopher C. Murray, *Back on the Cutting Edge: "Donning-and-Doffing" Litigation Under the Fair Labor Standards Act*, *FED. LAW.*, Mar./Apr. 2011, at 14, 14 (documenting an increase in litigation under the FLSA since the late 1990s, driven by a surge in collective actions); *Wage Hour Collective Actions Jumped 70 Percent Since 2000, Analysis Shows*, *Daily Lab. Rep. (BNA)* (Mar. 26, 2004) (noting, as of 2004, that the number of collective actions brought under the FLSA had increased by more than 70% since 2000). More troubling is that courts have been drawn to the vocabulary of the class action when deciding whether to allow the maintenance of collective actions. Terms such as "conditional certification," "decertification," and the like are frequently used in courts' decisions on whether to permit litigation to proceed as a collective action. *See* Allan G. King & Camille C. Ozumba, *Strange Fiction: The "Class Certification" Decision in FLSA Collective Actions*, 24 *LAB. LAW.* 267, 268 (2009) ("[T]he terms 'conditional certification,' 'decertification,' 'opt-in class action,' and 'conditional notice' are ubiquitous in decisions concerning collective actions . . ."). To be sure, the standard employed by the majority of courts does not copy Rule 23's restrictions. *See* *Villatoro v. Kim Son Rest., L.P.*, 286 F. Supp. 2d 807, 809 (S.D. Tex. 2003) (collecting cases that reject the adoption of Rule 23 class certification standards in collective actions). Nevertheless, although courts have not imported Rule 23 wholesale into the world of the collective action, they have approached the decision to assemble a collective action in ways that resemble the certification process of Rule 23. *See* *Lusardi v. Xerox Corp.*, 747 F.2d 174, 175 (3d Cir. 1984) (affirming a district court's order "conditionally certifying" a "class" under the Age Discrimination in Employment Act of 1967); *see also* Daniel C. Lopez, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 *HASTINGS L.J.* 275, 288–89 (2009) (describing the majority approach to "certification" of collective actions).

<sup>136</sup> *PRINCIPLES OF THE LAW OF AGGREGATE LITIG.* § 3.17 (2010) [hereinafter *ALI Principles*]. The ALI Principles provide in pertinent part:

[I]ndividual claimants may, before the receipt of a proposed settlement offer, enter into an agreement in writing through shared counsel allowing each participating claimant to be bound by a substantial-majority vote of all claimants concerning an aggregate-settlement proposal (or, if the settlement significantly distinguishes among different categories of claimants, a separate substantial-majority vote of each category of claimants).

*Id.* § 3.17(b).

Association (ABA) model rule that disfavors aggregate settlements. The ABA rule requires an attorney to receive the informed consent of each client bound by an aggregate settlement after disclosure of “the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.”<sup>137</sup>

The ALI proposal provoked criticism on a number of fronts. Prominent critics of the proposal attacked it as a lawyer-empowerment device that overemphasized the value of closure in aggregate litigation.<sup>138</sup> Criticism of the ALI proposal seemed to come from a deeply held, if vaguely expressed, view that introducing new consent and voting procedures to nonclass aggregation threatened to depart unacceptably from previous models of litigation.<sup>139</sup> Again, the familiar conceptual framework for aggregate litigation—the class action—does not include a mechanism for group consensus binding individual claimants. Instead, class members gathered into the collective have strictly limited opportunities to voice their approval or disapproval of a settlement. They may object and, if their objection is overruled, they may appeal,<sup>140</sup> but those steps are, as a practical matter, limited avenues that often serve as cover for tactical maneuvering by rival plaintiffs’ law firms.<sup>141</sup> Instead, the law of class actions

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<sup>137</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2010). In practice, Rule 1.8(g) nullifies any agreement in which plaintiffs agree in advance to be bound by the terms of an aggregate settlement. See *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 522 (N.J. 2006) (holding that Rule 1.8(g) “forbids an attorney from obtaining consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement”); *Hayes v. Eagle-Picher Indus.*, 513 F.2d 892, 894–95 (10th Cir. 1975) (reaching the same conclusion under the predecessor disciplinary rule, DR-5-106).

<sup>138</sup> See Sybil L. Dunlop & Steven D. Maloney, *Justice Is Hard, Let’s Go Shopping! Trading Justice for Efficiency Under the New Aggregate Settlement Regime*, 83 ST. JOHN’S L. REV. 521, 544–47 (2009) (arguing that proposals to ease aggregate settlements devalue individual claimant liberty in exchange for efficiency); Erichson & Zipursky, *supra* note 2, at 300–03 (arguing that “the notion that the power to accept [the aggregate settlement] lies with the collective clients rather than with counsel is illusory”); Nancy J. Moore, *The Absence of Legal Ethics in the ALI’s Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 732 (2011) (“[T]he risk remains that the lawyer will favor the interests of some clients over other clients, or that the lawyer will favor his or her own interests by settling cases too quickly.”).

<sup>139</sup> As Richard Nagareda observed, concerns about nonclass aggregation tend to focus on aspects of aggregation that depart from the traditional class action, even in circumstances when class treatment would not be available. See Nagareda, *supra* note 3, at 1112–13 (observing that the law of aggregation finds itself in a “procedural catch-22” in which litigation invites class treatment but cannot be certified as a class).

<sup>140</sup> See *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (holding that an objecting class member had the power to appeal a court’s approval of a class settlement despite failing to intervene as a named party).

<sup>141</sup> Few class members file objections. See Eisenberg & Miller, *supra* note 129, at 1546 tbl.1 (finding, in a sample of 205 class actions, that the mean percentage of objectors is 1.1 and the median percentage is 0.0). Those who object and persist in doing so through an

presumes that the class's named representatives, its judicially appointed counsel, and the court will all serve as fiduciaries protecting the class from unfavorable settlements.<sup>142</sup>

Finally, as the reaction to the ALI proposal suggests, anxiety about the role of lawyers in aggregate litigation animates many of the concerns about claimant consent. Lawyer self-dealing gets exacting attention in nonclass aggregation.<sup>143</sup> Formally, at least, attorneys' fees in a quasi-class action are a matter of private contract between each claimant and her retained counsel. But private agreements in traditional bipolar litigation typically contain fee terms that reflect the costs and risks of pursuing individual litigation. In aggregate litigation, in which economies of scale result from procedural consolidation by the courts and the pooling of information and resources by counsel, the cost of litigation should be much lower on a per-claimant basis. Thus, a contingency fee of 40% in a traditional personal injury case appears too generous when the plaintiff is one of ten thousand claimants whose claims have been resolved in a quasi-class action. Nevertheless, courts managing quasi-class actions have had to grasp for a justification to disregard the fee terms of private contingent fee agreements between individual plaintiffs and law firms. In the Zyprexa litigation, for example, Judge Weinstein reduced the fee award of some plaintiffs' attorneys partly by analogizing the litigation to a class action and partly by invoking the inherent power of courts to regulate the conduct of lawyers who practice before them.<sup>144</sup>

The world of class action litigation certainly has much to say about monitoring and deterring lawyer self-dealing and conflicts of interest. That problem motivates much of the literature on the class action, but the analogy is incomplete. Judicial control over attorneys' fees in the class action is, as Professors Silver and Miller have argued,

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appeal may disrupt settlements and delay the payment of fees to class counsel. For that reason, commentators have expressed concern that many objectors are motivated by the prospect of "go away" payments from class counsel eager to close a settlement (and recover their fee award). That tactic may be used by "professional" objectors or by rival plaintiffs' lawyers seeking a share of class counsel's fee award. See Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1633-40 (2009) (discussing the concerns raised by professional objectors' maneuvers to delay approval of settlements).

<sup>142</sup> Even so, it is not easy for class members to challenge their representation once a court has appointed class counsel. Not even the lead plaintiff can oust class counsel without a court's approval. See *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 590-91 (3d Cir. 1999) (holding that class counsel may continue to represent the class over the objection of a named plaintiff).

<sup>143</sup> See Brickman, *supra* note 124, at 700-09 (discussing ethical issues raised by various aggregate litigations and asserting that "lawyer adherence to ethical rules appears to be inversely related to the financial stakes for the lawyer").

<sup>144</sup> *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491-94 (E.D.N.Y. 2006).

twinned with the common fund doctrine. The requirements of that doctrine, however, may be ill suited for the quasi-class action.<sup>145</sup> Of particular note, the common fund doctrine rests on the premises that claimants have consented to shared attorneys' fee arrangements by failing to exit the collective and that by remaining, those claimants have not hired their own lawyers and are passive recipients of the benefits created by the aggregate proceedings.<sup>146</sup> Those premises make sense in a Rule 23(b)(3) class action, but do not necessarily hold for the typical quasi-class action, in which claimants have limited ability to exit and have retained their own counsel.

Yet courts have relied on the class action as a justification for adjustment of attorneys' fees in quasi-class actions. Once again, the easy reference to the class action as the ideal model of aggregation risks exposing a novel move in quasi-class actions to doubt and later invalidation. My argument, to be clear, is not that judges presiding over MDL proceedings have no basis for adjusting attorneys' fees to reflect more equitable awards. But courts should not be so quick to do so by reference to the class action.

## II

### AGGREGATION THROUGH BANKRUPTCY

Although the quasi-class action became the chief route for resolving mass tort litigation, a portion of that litigation has proceeded through bankruptcy instead. The Bankruptcy Code originally contained no explicit provision for its use as an aggregate litigation device. Nevertheless, soon after the Code was adopted in 1978, courts and counsel began to experiment with bankruptcy as a means of resolving seemingly intractable litigation. At first, the turn to bankruptcy, which became far more pronounced after *Amchem* and *Ortiz*, was challenged as an abuse of a system designed for the rehabilitation of firms burdened by consensual debts and not tort claims.<sup>147</sup> But the logic of bankruptcy as an aggregation device is clear.

Bankruptcy is simply another form of aggregation. It aims to bring together all claims against a debtor in a single forum for collective resolution. Typically, a bankruptcy case involves claims against a

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<sup>145</sup> See Silver & Miller, *supra* note 3, at 121 (arguing that "the attempt to invoke the common fund doctrine in MDLs must fail").

<sup>146</sup> See *id.* at 124, 128 (noting that class members both "lend a degree of consent to the requirement of paying fees" when they voluntarily remain in a class, and "do not have lawyers who contribute in any significant way to the eventual result").

<sup>147</sup> See *In re Johns-Manville Corp.*, 36 B.R. 727, 737-40 (Bankr. S.D.N.Y. 1984) (rejecting the argument that filing a bankruptcy petition to resolve asbestos litigation demonstrated bad faith).



financially distressed entity facing multiple defaults, with the goal of righting the affairs of the debtor through a plan of reorganization.<sup>148</sup> Although bankruptcy sometimes appears to be an arcane area of *substantive* law, it is best understood as a *procedural* device for the recognition, organization, and resolution of nonbankruptcy law entitlements relating to the debtor.<sup>149</sup> The presumption, in other words, is that the bankruptcy process serves to effectuate substantive rights and obligations generated outside of bankruptcy law, and will only alter them for a more pressing bankruptcy-specific policy.<sup>150</sup>

### A. *The Promise of Bankruptcy in Mass Tort Litigation*

The timeline of a bankruptcy case reflects its aggregate procedural nature. A bankruptcy case commences with the debtor's filing of a petition for relief. The filing of the petition brings the debtor and its assets under the jurisdiction of the court. The filing of the petition also calls to the fore institutions that frame and guide the prosecution of the case. The institutional structures include committees of creditors (and perhaps other constituents with some stake in the reorganization of the debtor) and the U.S. Trustee, a representative of the government that serves as a watchdog in bankruptcy cases. Those entities counterbalance the potentially excessive (and possibly conflicted) exercise of power by the debtor and counsel in the case.

The middle life of a bankruptcy case is usually taken up with the process of receiving and resolving claims against the debtor. Individual creditors are able to bring their claims to the central forum entertaining the debtor's bankruptcy case. The case then moves to formation of a plan of reorganization followed by a vote of the debtor's creditors on whether to accept the plan.<sup>151</sup> The plan essentially serves to redefine and control the relationship between the debtor and its creditors. After the confirmation of a plan of reorganization, the debtor and its creditors will be bound by the terms of the plan. The order confirming the plan of reorganization operates as a final judgment that forecloses further litigation of the matters settled in the

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<sup>148</sup> Unless otherwise specified, the term "bankruptcy" throughout this Article refers to cases brought under Chapter 11 of the Bankruptcy Code for the reorganization of a firm.

<sup>149</sup> See generally Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982) (providing a theoretical justification for the proposition that nonbankruptcy entitlements should be recognized in bankruptcy).

<sup>150</sup> See *Butner v. United States*, 440 U.S. 48, 55–57 (1979) (looking to nonbankruptcy law to determine property interests in bankruptcy).

<sup>151</sup> Shareholders may vote on the reorganization plan, but their votes rarely control the outcome of plan acceptance.

plan.<sup>152</sup> Like the approval of a class action settlement, the confirmation of a plan in bankruptcy provides a form of closure for pre-existing disputes.

To understand the attraction of bankruptcy as an aggregation procedure, a typology of aggregate litigation is helpful. Aggregate litigation can involve a variety of very different kinds of disputes. Some cases concern widely dispersed claims of low value, such that the reduction of the transaction costs of litigation provided by aggregation allows the only effective means for seeking private redress and deterring wrongdoing. Other cases may involve claims of greater value but a closed universe of claimants—that is, claimants whose number and identity are relatively easy to discover. The most troubling cases, however, involve “elastic” or “long-tail” mass torts—those in which harm may be widespread, but the number and identity of claimants are difficult to ascertain. Mass torts that are slow to manifest (such as the asbestos cases) are the archetypal elastic tort.

Aggregate litigation of this sort presents multiple complications. First, elastic mass torts involving widespread harm pose problems of coordination. Lawyers representing claimants may resist cooperation with other plaintiffs’ lawyers. Similarly, defendants in multiple cases may cooperate only haphazardly. Despite recognizing the benefits of cooperation, federal and state courts may adjudicate individual cases with limited attention to the overlapping work of other courts.<sup>153</sup>

Second, elastic mass torts present problems of finality.<sup>154</sup> Present tort claimants, who have already manifested injuries, may exhaust the resources available for compensation well before future claimants later manifest injuries. That problem in turn creates related concerns for claimants and defendants. For claimants, a protracted manifestation period threatens to generate inequitable and irrational patterns of compensation, because those who receive the greatest compensation

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<sup>152</sup> See 11 U.S.C. § 1141 (2006). Unless otherwise provided by the court, the confirmation of a plan discharges the debtor’s debts. Even if the terms of a plan are improper, principles of *res judicata* may block attempts to undo those terms. See *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1373, 1380 (2010) (finding that a discharge of debt granted to the debtor was procedurally improper but not subject to collateral attack); *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2198–99, 2206 (2009) (rejecting a collateral challenge to the bankruptcy court’s order confirming a plan of reorganization).

<sup>153</sup> See Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1741–50 (2002) (describing problems of coordination among defendants, plaintiffs, and courts in elastic mass tort cases).

<sup>154</sup> Coordination and finality concepts are not entirely distinct. For instance, the possibility of maintaining overlapping proceedings in competing forums may generate a “race to the courthouse” that privileges the first filer in mass litigation and risks the depletion of assets available for compensating tort claimants equitably before later-filing claimants have had their claims adjudicated.

may simply have manifested their injuries sooner—rather than being the most seriously injured claimants. Defendants, on the other hand, face uncertainty with respect to their total potential liability and defense costs.<sup>155</sup>

### 1. *Coordination: Jurisdiction, Venue, and the Automatic Stay*

The Bankruptcy Code and related jurisdictional statutes provide powerful means of coordination by vesting adjudicatory authority in a single court. The bankruptcy courts have jurisdiction over actions arising under the Code, arising in a bankruptcy case, or related to a bankruptcy case.<sup>156</sup> “Related to” jurisdiction covers an expansive range of matters. Under a widely accepted test for related to jurisdiction, bankruptcy courts have jurisdiction over a proceeding if “the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.”<sup>157</sup> The goal of such a broad grant of power is to provide “comprehensive jurisdiction” so that the bankruptcy court may “‘deal efficiently and expeditiously’” with all matters touching on the debtor.<sup>158</sup>

A strong norm of forum centralization is a hallmark of bankruptcy. The bankruptcy court gains exclusive control over the debtor’s property.<sup>159</sup> Upon the debtor’s filing for protection, a bankruptcy estate is created, comprising all legal and equitable interests of the debtor, wherever located. Property of the estate may include property in the hands of other parties.<sup>160</sup> By controlling a debtor’s interest in property held by others, the bankruptcy court can bring litigation

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<sup>155</sup> See Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2056 (2000) (explaining the benefits of bankruptcy for resolving mass tort litigation).

<sup>156</sup> The statute governing bankruptcy jurisdiction actually vests the district courts with original bankruptcy jurisdiction. 28 U.S.C. § 1334 (2006). District courts routinely refer bankruptcy cases and proceedings to the bankruptcy judges for the district, and every judicial district has a standing order to that effect. District judges may withdraw the reference and adjudicate all or part of the bankruptcy case themselves. 28 U.S.C. § 157(d). But they do so selectively and infrequently. See LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 83–85 (2005). For purposes of this discussion, the distinction between the powers of bankruptcy judges and those powers granted to the district courts sitting in bankruptcy will be ignored unless otherwise noted.

<sup>157</sup> *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).

<sup>158</sup> *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (quoting *Pacor*, 743 F.2d at 994).

<sup>159</sup> 28 U.S.C. § 1334(e)(1) (“The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate . . .”).

<sup>160</sup> See 11 U.S.C. § 541(a) (2006) (“Such estate is comprised of all the following property, wherever located and by whomever held . . .”); see also *United States v. Whiting Pools*, 462 U.S. 198, 209 (1983) (holding that even property in the hands of a creditor at the time the debtor files for bankruptcy may satisfy the definition of property of the estate).

about the debtor's assets into the forum hearing the debtor's bankruptcy case. The court also serves as the gatekeeper that determines how assets of the debtor are distributed among creditors. In the mass tort context, this further buttresses the ability of the bankruptcy court to coordinate actions that lay claim to the defendant's assets.

With exclusive jurisdiction of the debtor's property come other broad grants of jurisdictional authority for bankruptcy courts. The *in rem* foundation of bankruptcy cases is twinned with broad *in personam* jurisdiction over the parties in litigation related to the bankruptcy case.<sup>161</sup> Under the Federal Rules of Bankruptcy Procedure, bankruptcy courts may exercise personal jurisdiction in proceedings related to the main bankruptcy case, even if, but for the debtor's bankruptcy, there would have been no basis for the exercise of personal jurisdiction.<sup>162</sup> The consequence of these provisions is to cut through the usual jurisdictional limitations on the ability of a single court to adjudicate complicated matters touching on a large number of claimants in different jurisdictions.

Once the defendant files for bankruptcy, personal injury and wrongful death tort claims may be adjudicated in the district in which the debtor's bankruptcy case is pending.<sup>163</sup> Even if a personal injury or wrongful death tort case was commenced in state court, the bankruptcy case interrupts the usual allocation of venue in order to centralize administration of the estate and avoid the "multiplicity of forums for the adjudication of parts of a bankruptcy case."<sup>164</sup> In other

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<sup>161</sup> The statute granting the district courts jurisdiction in bankruptcy cases, 28 U.S.C. § 1334(e), has been interpreted to grant *in rem* and *in personam* jurisdiction. *Abramowitz v. Palmer*, 999 F.2d 1274, 1277 (8th Cir. 1993).

<sup>162</sup> Because the bankruptcy courts may issue nationwide service of process, it is easier to maintain personal jurisdiction over parties and other interested persons in bankruptcy litigation than in ordinary civil litigation in state or federal court. *See* FED. R. BANKR. P. 7004(d) (granting nationwide service of process for the summons, complaint, and all other process except a subpoena). Courts have found few meaningful limits on nationwide personal jurisdiction authorized by a federal rule or statute. *See* *Diamond Mortg. Corp. of Ill. v. Sugar*, 913 F.2d 1233, 1244 (7th Cir. 1990) (rejecting a due process challenge to nationwide service of process in bankruptcy litigation).

<sup>163</sup> *See* 28 U.S.C. § 157(b)(5) ("The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose . . .").

<sup>164</sup> *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1011 (4th Cir. 1986) (quoting 130 CONG. REC. H7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier)) (internal quotation marks omitted). Although the language of the statute is ambiguous as to whether the district judge or bankruptcy judge may exercise the authority granted to the district court, the dominant view is that the district judge is granted that power in the first instance. *See, e.g., In re Waterman Steamship Corp.*, 63 B.R. 435, 437 (Bankr. S.D.N.Y. 1986) (holding that a district judge must hear a § 157(b)(5) motion to transfer personal injury and wrongful death cases); *In re UNR Indus., Inc.*, 45 B.R. 322, 324–25 (N.D. Ill. 1984) (same); *cf. In re U.S. Lines, Inc.*, No. 97 CIV. 6727 (MBM), 1998 WL 382023, at \*4–6 (S.D.N.Y. July 9,

words, venue for all trials in mass tort litigation involving the debtor-defendant can be drawn into a single district.

In addition to the tentacular reach of the jurisdictional and venue powers afforded to bankruptcy courts, the Code provides another feature, the automatic stay, that greatly aids the coordination of aggregate litigation. At the moment the debtor files its bankruptcy petition, all actions and proceedings against the debtor or against property of the estate are automatically enjoined.<sup>165</sup> The stay prevents, for example, the continued prosecution (without permission of the bankruptcy court) of a tort case against the debtor. It also prevents a tort claimant who has reduced her claim to judgment from executing against assets of the debtor. By removing time as a factor in determining which creditors recover (and how much they recover) from the debtor's assets, the automatic stay thus addresses the basic problem often faced in enterprise-threatening mass torts: the risk that a claimant who is first in time may receive greater compensation than a future claimant, even if the future claimant is more seriously injured and more deserving of enhanced compensation.

Further aiding coordination, the bankruptcy judge retains an active grasp on the management of the case. The Code empowers bankruptcy judges to hold status conferences regarding any proceeding in the case and to enter appropriate orders to ensure that the case is handled expeditiously and economically.<sup>166</sup> Although the Bankruptcy Reform Act of 1978 created a separation of administrative tasks from judicial functions in bankruptcy cases, the rise of case management as an expected part of the work of judges outside the bankruptcy context, coupled with the often widely dispersed interests in contest in a large Chapter 11 case, have given bankruptcy judges the central role in orchestrating the various pieces of a bankruptcy case, including proceedings that are related to, but not at the core of, a bankruptcy case.<sup>167</sup>

The major element running throughout the architecture of the bankruptcy process is that the judicial system and society benefit from unified proceedings in a single forum in which all interested parties in

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1998) (affirming bankruptcy judge's § 157(b)(5) order requiring claimants to file wrongful death and personal injury actions in district court).

<sup>165</sup> 11 U.S.C. § 362(a). The Code includes enumerated exceptions to the automatic stay, but none is generally applicable in the mass tort context. *See id.* § 362(b) (setting forth the situations in which the automatic stay does not apply).

<sup>166</sup> 11 U.S.C. § 105(d).

<sup>167</sup> *See* Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 433-40 (1995) (describing the changed role of the bankruptcy judge since the adoption of the Bankruptcy Code).

the debtor's fate are represented. For mass tort litigation, that conception of the role of a court in guiding litigation has obvious advantages for the management and equitable resolution of a multitude of claims. The judicial system as a whole benefits from the reduction in duplicative and competing proceedings. Claimants benefit from the greater attention to equitable treatment of claims for compensation. And society benefits from the closer calibration of a defendant's conduct to the compensation the defendant will pay for harms caused by that conduct.

## 2. Finality

The bankruptcy process also facilitates final peace in mass tort cases through the treatment of claims against a debtor's estate. The Code provides a broad definition of a "claim," including debts that have already been liquidated as well as unmatured, contingent, and unliquidated obligations.<sup>168</sup> Along with the broad definition of a claim, the Code provides procedures for dealing with claims that are not yet fixed in their amount.

A bankruptcy court must estimate contingent or unliquidated claims as necessary to avoid undue delay in the administration of the case.<sup>169</sup> Typically, estimation occurs when the contingency on which the asserted liability rests has not occurred (and may not occur until much later in time) or when liquidation will similarly lead to delay. For purposes of the bankruptcy process, claims estimation makes it feasible to allow a claim—that is, to permit the holder of the claim to participate in the distribution of the debtor's assets—so that the claimant may vote on a debtor's plan of reorganization, even if it is not possible to resolve fully the value of the claim. In mass tort cases, estimation of personal injury claims permits a court to allow claimants, including future claimants, to participate in the bankruptcy proceedings, even if they have not yet reduced their claims against the debtor-defendant to judgment. By doing so, the bankruptcy court can craft a plan that will reflect the interests of those claimants and effectively bind them.

The Code also permits a court to discharge debts. In a Chapter 11 case, all property of the debtor's bankruptcy estate returns to the debtor when a plan of reorganization is confirmed at the close of the bankruptcy case.<sup>170</sup> More importantly, upon vesting with the debtor,

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<sup>168</sup> 11 U.S.C. § 101(5).

<sup>169</sup> *Id.* § 502(c)(1) (requiring estimation if the determination of a contingent claim "would unduly delay the administration of the case").

<sup>170</sup> This is the default rule, although a plan of reorganization may provide otherwise. *Id.* § 1141(b).

the property dealt with by the plan is free and clear of all liens, claims, or interests, and confirmation of a plan of reorganization serves to discharge any debt that arose before the commencement of the case.<sup>171</sup> In effect, the debtor's plan of reorganization becomes the governing document setting forth the treatment of the rights and obligations of interested parties after confirmation of the plan.

Crucially for absent claimants, the bankruptcy discharge reaches beyond those who participated in the proceedings through plan confirmation. The discharge is binding even against a claimant who did not submit a proof of claim in the bankruptcy or who submitted a proof of claim and objected to the plan. Confirmation of the debtor's plan of reorganization therefore precludes any further litigation of all questions that could have been raised pertaining to the plan.<sup>172</sup> The res judicata effect of a bankruptcy plan is enhanced by the doctrine of equitable mootness, which bars appellate review if it would disturb transactions that have been consummated during or after a bankruptcy case in connection with the plan.<sup>173</sup> Thus, bankruptcy holds out the possibility of achieving binding resolution of all liabilities of the debtor-defendant, even when future claimants may appear to seek compensation years later.

In addition to the binding effect of a plan of reorganization, bankruptcy courts may enjoin future proceedings against the debtor that seek to collect on debts resolved by the plan. The bankruptcy court in the *Johns-Manville* case expanded on this power by issuing a "channeling injunction" under the general equitable powers of the court.<sup>174</sup> The injunction directed future asbestos claims to a trust

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<sup>171</sup> *Id.* § 1141(c), (d)(1). These provisions are also subject to modification by a plan of reorganization (or the order confirming the plan). *Id.*

<sup>172</sup> See *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1376 (2010). Even a claim that was not litigated, but could have been pursued as a non-core proceeding, has been found by some circuits to be barred from relitigation by claim preclusion after confirmation of a plan of reorganization. See *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 194–98 (3d Cir. 1999) (identifying and explaining the disagreement among the federal courts of appeals on this issue).

<sup>173</sup> The emphasis in the caselaw has been on the equitable, not the mootness, portion of the phrase. The doctrine represents a prudential determination by appellate courts not to unwind consummated transactions rather than any inherent inability to do so under Article III of the Constitution. See *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc) (observing that the doctrine "involves a discretionary balancing of equitable and prudential factors rather than the limits of the federal courts' authority under Article III"); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (Easterbrook, J.) ("We ask not whether this case is moot, 'equitably' or otherwise, but whether it is prudent to upset the plan of reorganization at this late date.").

<sup>174</sup> See NAGAREDA, *supra* note 1, at 163–64 (describing the *Johns-Manville* trust and channeling injunction structure).

created for the benefit of asbestos claimants.<sup>175</sup> The trust, funded in large part by insurance proceeds and shares in the reorganized firm, provided a continuing source of compensation for future claimants while protecting the reorganized firm's value as a going concern.<sup>176</sup> In essence, the trust and channeling injunction system created an administrative structure for reconciling and compensating asbestos injuries that would manifest themselves far into the future. The chief difficulty of asbestos litigation—the long tail of liability that threatened to stretch far into the future after manufacturers had ceased producing the product—could be addressed in this way.

### 3. *Consent*

The approval of a debtor's bankruptcy plan requires democratic input from various constituencies. The Code imposes a series of steps before plan confirmation that canvass eligible holders of claims against, and interests in, the debtor with respect to the proposed plan. The process, although elaborate, aims to generate broad consensus among interested parties with respect to the debtor's fate.

The plan voting process begins with disclosure. The Code requires as a first step that proponents of a plan must draft and circulate a disclosure statement for holders of claims and interests.<sup>177</sup> In essence, the disclosure statement functions like a prospectus in a securities offering. It must lay out the classification of various claims against the debtor, the intended disposition of the debtor's assets, and a description of the debtor's path out of bankruptcy. Crucially, no solicitation of votes in favor of or against the plan may occur until the bankruptcy court approves the disclosure statement as containing adequate information.<sup>178</sup>

The voting process also takes into account differences among creditors. A plan must sort claims that are "substantially similar" into various classes for voting purposes.<sup>179</sup> Substantial similarity means more than similar priority—that is, two claims that are general unsecured claims of the same priority may not necessarily be considered substantially similar. But this test is flexible and pragmatic. Claims do not need to be identical in all respects to be placed in the

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<sup>175</sup> *See id.*

<sup>176</sup> *See id.*

<sup>177</sup> 11 U.S.C. § 1125(a)–(c) (2006).

<sup>178</sup> *Id.* § 1125(b).

<sup>179</sup> *Id.* § 1122(a).



same class for plan voting purposes, and claims that may share similar features do not always need to be put in the same class.<sup>180</sup>

The plan voting process requires the effective consent of claimants before a plan is confirmed. That consent, however, balances the voice of individual claimants with group-based voting rules. First, each class is treated separately for voting purposes, and a class is deemed to accept the plan if those who hold two-thirds in amount and a majority by number of claims duly voted approve it.<sup>181</sup> But dissenting classes may be forced to accept a plan if a court deems that it would not “discriminate unfairly” and would be “fair and equitable.”<sup>182</sup> This “cramdown” procedure serves to prevent dissenting claimants from blocking a plan that serves the interests of claimants more broadly. The cramdown procedure, although infrequently invoked, serves to drive negotiation and bargaining toward consensual plan resolution.<sup>183</sup> While group-based consent lies at the heart of bankruptcy plan approval, the Code protects dissenting individual claimants as well. Even if a creditor’s class votes to approve a plan, the “best interests” test entitles a dissenting creditor to recover at least the amount she would receive in liquidation.<sup>184</sup> The essential protection provided by the best interests test is that every claimant is entitled to do no worse as part of the collective reorganization than if no reorganization occurred.

Although a feature of the 1978 Bankruptcy Code, voting of one type or another is a long-established part of corporate reorganizations in American law. Stretching as far back as the railroad receiverships of the nineteenth century, courts and creative lawyers crafted a system of collective resolution that provided for the consent of disparate claimants.<sup>185</sup> Invoking the equitable powers of the federal courts, the receivership process worked much like the modern Chapter 11

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<sup>180</sup> Although the proponents of a plan of reorganization cannot gerrymander the classes of creditors to sway plan voting, courts have taken a flexible view of the classification of claims. *See, e.g., In re Chateaugay Corp.*, 89 F.3d 942, 949 (2d Cir. 1996) (permitting separate classification of similar claims when the debtor advances “a legitimate reason supported by credible proof”); *In re Woodbrook Assocs.*, 19 F.3d 312, 317–19 (7th Cir. 1994) (rejecting creditor’s objections to classification of its claim).

<sup>181</sup> 11 U.S.C. § 1126.

<sup>182</sup> *Id.* § 1129(b)(1).

<sup>183</sup> *See* Richard F. Broude, *Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative*, 39 BUS. LAW. 441, 450–54 (1984) (observing that the cramdown procedure is rarely invoked but nevertheless encourages parties in interest in a bankruptcy case to reach consensual settlement).

<sup>184</sup> *See* 11 U.S.C. § 1129(a)(7).

<sup>185</sup> *See* Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420, 1448–51 (2004) (describing methods of approval and disapproval of reorganization plans before the modern era of bankruptcy law).

process. A court would serve as the central forum for resolving claims against the debtor, and claimants seeking payment from the debtor would negotiate and then approve a plan to reorder the affairs of debtor and creditor.<sup>186</sup> In other words, a collective resolution system that takes into account group and individual consent is not a new-fangled creation in American law. It is an old and venerable feature of the law that, although now prominently found in the Bankruptcy Code, originates in equitable principles not strictly tied to any language of the Code itself.

#### 4. *Bankruptcy Institutions*

The bankruptcy process counterbalances competing interests through a number of institutional arrangements. The key institutions are committees organized to represent various constituencies within the case. The constituencies often include unsecured creditors, shareholders, or ad hoc groups of claimants with similar interests.<sup>187</sup> The other important institutional player is the U.S. Trustee, which serves as a watchdog or ombudsman for the bankruptcy process.

The committee system serves two functions. First, it provides a voice for various interested parties within the case. An official committee of unsecured creditors, for example, is charged with representing claimants who may be numerous, widely dispersed, and otherwise unable to participate actively in the case. That committee serves to temper the influence of other actors who may be trying to use the Chapter 11 process for purely self-interested purposes to the detriment of the broader estate.<sup>188</sup> And, during the process of formulating a debtor's plan of reorganization, the unsecured creditors' committee will typically have a seat at the negotiating table. Second, the committee system serves to monitor the overall trajectory of the bankruptcy case. That monitoring function comprises multiple tasks. Committees typically ensure that the debtor is running the bankruptcy case appropriately, and they can raise objections to the bankruptcy court if the debtor fails to do so. Committees also monitor professionals—that

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<sup>186</sup> See *id.* at 1440–44 (describing the receivership process).

<sup>187</sup> An official committee of unsecured creditors must be appointed under the Code if there is sufficient interest among creditors to serve on the committee. 11 U.S.C. § 1102(a). Other committees may be formally organized as well. *Id.* Nevertheless, it is not uncommon for groups of creditors to form ad hoc committees that are not officially recognized in order to represent their interests during a bankruptcy case. See, e.g., *In re Wash. Mut., Inc.*, 419 B.R. 271, 274–77 (Bankr. D. Del. 2009) (discussing the creation of ad hoc committees).

<sup>188</sup> See Michelle M. Harner & Jamie Marincic, *Behind Closed Doors: The Influence of Creditors in Business Reorganizations*, 34 SEATTLE U. L. REV. 1155, 1159 (2011) (describing the role of unsecured creditors' committees in Chapter 11 bankruptcy cases).

is, lawyers, financial advisors, and others who assist in the running of the case—to prevent self-dealing and abuse.

The other institutional actor, the U.S. Trustee, is a figure that is unique to the bankruptcy process. The U.S. Trustee monitors the course of a bankruptcy case. That office is tasked with creating official committees of creditors at the outset of the case.<sup>189</sup> But the U.S. Trustee has an ongoing role. The office will object to applications for attorneys' fees in bankruptcy cases if the applications are incomplete or excessive.<sup>190</sup> In short, the U.S. Trustee acts as an additional monitor of the case, but with a special role in checking the lawyers driving the case.

### B. *Limitations of Bankruptcy*

Despite its ability to achieve coordination and finality, the bankruptcy process raises a number of concerns that have hampered its use beyond a limited number of mass tort cases. Those concerns fall roughly into three categories: delay, expense, and uncertainty. Mass tort bankruptcy cases may take years to emerge from the bankruptcy courts. The progenitor of the modern mass tort bankruptcy case, the Johns-Manville asbestos bankruptcy, lingered in court for six years.<sup>191</sup> Bankruptcy cases—and the required submission to the oversight of courts, committees of interested parties, and the U.S. Trustee—can be expensive and can greatly limit the degrees of freedom of debtor-defendants. More worryingly, innovation in mass tort bankruptcy cases is often slow to receive judicial approval, leaving uncertainty about the legitimacy of some uses of bankruptcy as a mass tort resolution device. A related cause for uncertainty is the imperfect track record in bankruptcy cases of providing adequate funds to compensate future claimants. For example, the Johns-Manville future claimants trust proved insufficient and was restructured twice.<sup>192</sup>

Some of these concerns are not specific to the mass tort context, such as the delay and expense in closing bankruptcy cases (a long-

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<sup>189</sup> See 11 U.S.C. § 1102(a) (detailing the statutory responsibilities of the U.S. Trustee).

<sup>190</sup> 28 U.S.C. § 586(a)(3)(A)(ii) (2006) (providing that the U.S. Trustee may “fil[e] with the court comments with respect to such application and, if the United States Trustee considers it to be appropriate, objections to such application”). The U.S. Trustee has standing to be heard on essentially all aspects of a bankruptcy case. See *id.* § 307 (“The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title . . .”).

<sup>191</sup> See Warren Brown, *Surviving ‘Creative’ Bankruptcy: As a Business Strategy, Firms Find That It Exacts a Heavy Price*, WASH. POST, Nov. 6, 1988, at H1, H7 (describing Johns-Manville’s bankruptcy filing and path through bankruptcy court).

<sup>192</sup> See Manville Personal Injury Settlement Trust, History, available at <http://www.mantrust.org/history.htm> (describing creation and restructuring of trust).

standing criticism of Chapter 11 generally).<sup>193</sup> Others are more closely attuned to the mass tort context, such as the low recoveries for claimants that may result (generally from poor estimation of the number and value of future claims).<sup>194</sup> Still others touch more specifically on the architecture of the Bankruptcy Code—chiefly, the disagreement about whether future claimants have “claims” that may be adjudicated under the Code.<sup>195</sup>

One lingering problem is that only a claim, a right to payment that arises before a plan of reorganization is confirmed, may be discharged in bankruptcy.<sup>196</sup> The ability to participate in the bankruptcy case and vote on the plan of reorganization as a creditor is generally reserved to those who hold claims. Courts have not been consistent in their treatment of tort victims whose injuries arise from pre-confirmation conduct but do not manifest until after confirmation.<sup>197</sup> Some courts have adopted the rule that if a tort plaintiff did not have some relationship with the debtor before plan confirmation, then there is no “claim” for bankruptcy purposes.<sup>198</sup> As a result, even in mass tort litigation best suited to treatment in bankruptcy—that is, when “long tail” tort liability threatens the enterprise value of the firm—litigants have been reluctant to resort to bankruptcy.

Another lingering concern is that bankruptcy can be an expensive process. Although the direct costs of a bankruptcy case are subject to debate,<sup>199</sup> the bankruptcy process is commonly perceived to be complicated and potentially costly. That view is shared by defendants in mass tort cases and by the plaintiffs who would become creditors in a

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<sup>193</sup> Delay is also avoidable through the use of prepackaged bankruptcy proceedings—the bankruptcy analogue of the settlement class—in which debtors and claimants negotiate a plan of reorganization before the filing of the actual bankruptcy case. NAGAREDA, *supra* note 1, at 167 (“Prepacks entail invocation of the Bankruptcy Code, but they hold out the promise of a quicker, easier trip through its rigors based on the working-out in advance of a reorganization plan.”).

<sup>194</sup> See Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 Nw. U. L. REV. 1435, 1436 (2004) (describing the limitations of asbestos trust funds).

<sup>195</sup> See Resnick, *supra* note 155, at 2068–70.

<sup>196</sup> 11 U.S.C. § 1141(d) (2006).

<sup>197</sup> See Resnick, *supra* note 155, at 2070–73 (discussing various tests used by courts to determine whether tort victims have “claims” within the meaning of 11 U.S.C. § 101(5)).

<sup>198</sup> See *Epstein v. Official Comm. of Unsecured Creditors (In re Piper Aircraft Corp.)*, 58 F.3d 1573, 1577–78 (11th Cir. 1995) (defining a “claim” as requiring both pre-petition conduct giving rise to liability and a pre-confirmation relationship between the debtor and creditor).

<sup>199</sup> See Stephen J. Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 AM. BANKR. L.J. 509, 511–12 (2000) (challenging the contention by other scholars that the bankruptcy process is more expensive than alternative methods of resolving a firm’s financial distress).

bankruptcy case. Beyond the immediate costs of a bankruptcy filing, firms fear the reputational costs of pursuing bankruptcy relief. Merck, for example, strenuously avoided pursuing a bankruptcy filing when the initial wave of Vioxx litigation began to mount.<sup>200</sup>

The resistance to bankruptcy is not irrational. A bankruptcy filing alters the relationship among various constituencies in a firm. The management of the firm no longer has a fiduciary responsibility solely to its shareholders but owes duties as “debtor in possession” to the entire bankruptcy estate, which includes creditors.<sup>201</sup> Bankruptcy requires managers of a firm to act under the supervision of the bankruptcy court. Major undertakings—and some not-so-major undertakings—require the approval of the bankruptcy court, typically after notice and a hearing.<sup>202</sup> In other words, bankruptcy brings with it the prospect of second-guessing and public exposure for a multitude of corporate decisions.

On the other side of the mass tort litigation equation, plaintiffs’ lawyers typically do not welcome a bankruptcy filing. In addition to concerns about delay, bankruptcy requires the assistance of another group of lawyers versed in the bankruptcy process—a reality that multiplies the number of lawyers who share in any eventual recovery. For plaintiffs’ lawyers, bankruptcy brings with it a loss of control over the direction of mass tort litigation.<sup>203</sup>

### C. *The Political Economy of Bankruptcy Law Reform*

The fundamental attributes of bankruptcy that best fit the problem of peacemaking in mass torts cannot be exported without wholesale change in the civil justice system. Replicating bankruptcy

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<sup>200</sup> See Val Brickates Kennedy, *Merck CEO: Don’t Expect Bankruptcy*, MARKETWATCH (Feb. 3, 2005), <http://www.marketwatch.com/story/merck-ceo-says-no-bankruptcy-merger-on-horizon> (“‘Absolutely not,’ [Merck CEO Raymond] Gilmartin said, when asked if Merck faces bankruptcy.”).

<sup>201</sup> The incumbent management of a firm in a Chapter 11 bankruptcy case is permitted to remain in control of the debtor’s estate and to act with the rights, powers, and duties of a trustee in bankruptcy. See 11 U.S.C. § 1107 (granting these rights, powers, and duties to the debtor in possession). A trustee, in turn, has statutory duties and fiduciary obligations to act for the beneficiaries of the “trust” created by the filing of the bankruptcy petition. See *id.* § 1106 (detailing the trustee’s statutory duties).

<sup>202</sup> To give one common example, a debtor generally may not sell off assets of the firm without court approval. See *id.* § 363(b) (requiring notice and a hearing before assets are sold).

<sup>203</sup> To be sure, plaintiffs’ lawyers also resist the delay in resolving tort claims that may follow a bankruptcy filing. See, e.g., Elizabeth J. Cabraser, *Just Choose: The Jurisprudential Necessity to Select a Single Governing Law for Mass Claims Arising from Nationally Marketed Consumer Goods and Services*, 14 ROGER WILLIAMS U. L. REV. 29, 37 (2009) (criticizing *Amchem* for destroying class settlements and turning class members into “involuntary creditors in interminable asbestos manufacturer bankruptcies”).

jurisdiction would be difficult unless courts started viewing claimants as a collective entity rather than individuals joined solely to produce efficient litigation.<sup>204</sup> Even a court amenable to that view of aggregate litigation would not be armed with the multitude of jurisdictional powers in the hands of bankruptcy courts, and it is unlikely in the foreseeable future that Congress would ever erect another such comprehensive scheme of generalized application.

In an ideal world, bankruptcy law would be able to accommodate mass tort litigation in a way that answers these lingering uncertainties. An amended Code might provide, for example, a chapter specifically addressing the perceived shortcomings that have restricted resort to bankruptcy in mass tort cases. Shorn of the costly features of Chapter 11 practice that are of limited use in mass tort cases, such a chapter would perhaps involve a stripped-down version of the bankruptcy process that does not require submission of the entire firm to the supervision of the court. Or it might provide for a mass-tort specific process with additional safeguards calibrated to the concerns found in mass tort cases—such as a representative appointed to protect the interests of future mass tort claimants.<sup>205</sup> Indeed, proposals of that sort have been mooted in the past.<sup>206</sup> Few have gained any traction.

Why have bankruptcy law reforms failed to adjust the process to improve the treatment of mass tort claims? The answer is that the political economy of change in bankruptcy law disfavors that type of reform. Amendments to bankruptcy law tend to occur during punctuated bursts, rather than through steady trimming and fitting.<sup>207</sup> Indeed, the last major reform of bankruptcy law that addressed mass tort bankruptcy cases came in 1994, together with a raft of other amendments to the Code. The omnibus nature of bankruptcy legislation owes in large part to the coalition building necessary to amend the Code. Because it touches on so many aspects of social and economic policy, bankruptcy law can become highly salient politically, thereby reducing the likelihood of careful, targeted reform. Once

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<sup>204</sup> See Shapiro, *supra* note 4, at 917–18 (proposing an entity model for class actions).

<sup>205</sup> The appointment of a future claims representative, designed to provide sufficient protection for the interests of those claimants and permit their claims to be resolved in the bankruptcy case, was a feature of the Johns-Manville bankruptcy, although nothing in the Code required it. *In re Johns-Manville Corp.*, 36 B.R. 743, 757–59 (Bankr. S.D.N.Y. 1984) (providing for the appointment of a representative for future claimants).

<sup>206</sup> See NAT'L BANKR. REVIEW COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 329–30 (1997) (calling for amendments to the Bankruptcy Code that would explicitly provide for the appointment of future claims representatives in mass tort cases); Resnick, *supra* note 155, at 2078–81 (same).

<sup>207</sup> See DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 3–5 (2001) (describing three “eras” of bankruptcy law).

reforms are enacted, it will then take substantial momentum to revisit or adjust them. The “stickiness” of bankruptcy reform suggests that altering the process in a measured way to provide for adjudication of mass tort cases will be difficult, at least in the near future.

The only significant reform of bankruptcy laws aimed at encouraging the resolution of mass tort litigation demonstrates that dynamic. In 1994, Congress amended the Code to provide for the reorganization of firms facing asbestos liability.<sup>208</sup> Under Code § 524(g), Congress retroactively blessed the maneuvers used to resolve the Manville bankruptcy. The statute features many of the innovations of that case. It requires the appointment of a future claims representative.<sup>209</sup> It imposes specific supermajority voting rules on top of the usual plan confirmation voting requirements.<sup>210</sup> It also permits the imposition of a channeling injunction and a trust for the payment of asbestos injury claims that manifest themselves in the future.<sup>211</sup> To deal with the uncertain question whether a future asbestos injury is truly a “claim,” the statute creates a separate category of “demand[s]” that, although not dischargeable, may be covered by a channeling injunction.<sup>212</sup> After the demise of the settlement classes in *Amchem* and *Ortiz*, asbestos litigation took a marked turn towards bankruptcy in order to take advantage of the procedures permitted by § 524(g).<sup>213</sup>

But § 524(g) remains a singular instance of Code reform for the purpose of dealing with mass tort liability, and it is limited to bankruptcy cases involving asbestos personal injury or property damage claims.<sup>214</sup> The provision came into being because of the convergence of interests seeking to preserve the plan, the trust, and the channeling injunction created in the Manville bankruptcy.<sup>215</sup> By that point, the reorganized Johns-Manville firm, asbestos claimants, insurers who had

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<sup>208</sup> 11 U.S.C. § 524(g) (2006).

<sup>209</sup> *Id.* § 524(g)(4)(B)(i).

<sup>210</sup> *See id.* § 524(g)(2)(B)(ii)(IV) (requiring the vote of 75% of asbestos claimants to confirm a plan).

<sup>211</sup> *See id.* § 524(g)(1) (permitting the imposition of the injunction); *see also id.* § 524(g)(2)(B)(i) (detailing features that the injunction must have, if the court chooses to impose it).

<sup>212</sup> *See id.* § 524(g)(5) (defining “demand”).

<sup>213</sup> NAGAREDA, *supra* note 1, at 167 (“Of the seventy-three asbestos-related bankruptcy filings from 1976 to 2004, more than half occurred after 1997—that is, in the period since *Amchem*.”).

<sup>214</sup> *See* 11 U.S.C. § 524(g)(2)(B)(i)(I) (2006) (limiting the protection of channeling injunctions to asbestos-related claims for personal injury, wrongful death, or property damage).

<sup>215</sup> *See* Mark D. Plevin et al., *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. ANN. SURV. AM. L. 271, 275–80 (2006) (recounting the connection between the Manville bankruptcy and the later enactment of § 524(g)).

participated in the bankruptcy, and other industrial firms facing mounting asbestos liability all had a combined interest in securing explicit statutory authority for the Manville innovations. It is unlikely that a similar coalition will emerge to create a more general mass-tort specific set of bankruptcy procedures.

As a result, bankruptcy is likely to remain an avenue for the resolution of nonasbestos mass tort litigation only when its costs and uncertainties are plainly outweighed by a need to achieve maximal coordination and finality. Few mass torts are likely to satisfy that test—for the most part, only those cases in which the number and duration of claims appears difficult to ascertain and in which the probable liability faced by the defendant exceeds the firm's enterprise value. Asbestos cases, of course, fit those criteria. But less overwhelming mass tort litigation is unlikely to do so.

### III

#### TOWARD A BANKRUPTCY MODEL FOR NONCLASS AGGREGATION

Bankruptcy's limitations ensure that mass tort litigation that cannot be certified as a class action will often be aggregated and resolved through MDL proceedings. But a more robust model for nonclass aggregation is needed. Other scholars have suggested alternative models as guides in understanding aggregate litigation. John Coffee has drawn analogies to the organization of a firm when assessing the governance of aggregate litigation. For example, he has compared the consent of claimants and control of aggregate litigation to the treatment of shareholders of a corporation.<sup>216</sup> More recently, Richard Nagareda called for courts and commentators to move beyond an either/or conception of litigation as a one-on-one individualized process on the one hand or a class-action based process on the other. Instead, he advocated a hybrid model for nonclass aggregation that borrows from and blends aspects of individualized litigation and the class action.<sup>217</sup>

But each proposal is incomplete. Professor Coffee's corporate law analogy, while helpful, leaves open as many questions as it answers. To name one difficulty with the analogy, courts generally exercise minimal control over the affairs of a corporation. This makes it hard to generate intuitive answers to problems in aggregate litigation that center on the role of courts in controlling the litigation and

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<sup>216</sup> See Coffee, *supra* note 4, at 381–82 (discussing implied consent in class actions through a comparison to shareholder derivative litigation).

<sup>217</sup> See Nagareda, *supra* note 3, at 1160–64 (proposing the hybrid model).



the lawyers who are directing it. Professor Nagareda's call for hybridization of procedure in order to take account of the nature of aggregation outside the class action is instructive. But hybridization without a more stable reference model may be too amorphous and ad hoc to give courts guidance in determining how nonclass aggregations should be organized and governed. Bankruptcy provides such a reference model.

### A. *Recasting the Quasi-Class Action*

Viewed from a bankruptcy perspective, the quasi-class action begins to seem more familiar than foreign. In the quasi-class action, plaintiffs who pursue claims against a defendant are drawn into an aggregate proceeding in a single forum that effectively monopolizes the resolution of their claims. After the parties' agents negotiate, an agreement is proposed to end the litigation. Once approved, that agreement will govern the final resolution of claims. Like a bankruptcy case, the quasi-class action is held together by a centralized forum containing individual claims—claims that are not fused into a single collective governed by a representative with delegated authority (as in a class action). What the analogy to the bankruptcy process recognizes is that such a scenario is not at all unprecedented, and that there is nothing strange or corrupt about a hybridization of group-based treatment and individualized considerations in the resolution of an aggregate proceeding.

#### 1. *Bankruptcy and Claimant Consent*

The treatment of consent in bankruptcy provides particularly useful lessons for the world of nonclass aggregation. In some respects, a bankruptcy case begins as an opt-in procedure. Creditors who wish to pursue a claim against a debtor may submit their claim for resolution in the case. But the debtor or another party in interest may also bring them into the forum.<sup>218</sup> Once in the bankruptcy forum, however, a creditor's claim—much like the claim of an individual plaintiff brought into an MDL proceeding—generally cannot be extricated and litigated elsewhere without the court's blessing.<sup>219</sup> The bankruptcy process, like the MDL process, places far greater weight on the need

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<sup>218</sup> The debtor may file proofs of claim on behalf of a creditor if the creditor has not done so. FED. R. BANKR. P. 3004.

<sup>219</sup> The automatic stay generally bars the continuation of any litigation against the debtor outside the bankruptcy forum. 11 U.S.C. § 362(a) (prohibiting, among other things, "the commencement or continuation" of judicial proceedings against the debtor). This effectively gives the bankruptcy forum a monopoly over litigation involving the debtor, because relief from the stay can be granted only by the court exercising jurisdiction over

to limit the number of forums resolving claims against the debtor than on the autonomy of a claimant to pursue litigation in her preferred forum.<sup>220</sup> But in bankruptcy the creditor has a substitute for her loss of autonomy—an individualized say in the resolution of the case. Any proposed plan of reorganization must be described in a detailed disclosure statement and then put to a vote of affected creditors.<sup>221</sup>

Group-based voting rules within the bankruptcy process, however, temper individualized consent. Unanimity is not needed to confirm a plan of reorganization. Under the Code, acceptance of a plan by a class of creditors requires supermajority approval (by value of claims).<sup>222</sup> Even if the class votes down the plan, the Code permits overriding their objections if the court determines that the plan does not discriminate unfairly against the holdouts and is fair and equitable to them.<sup>223</sup> This procedure attempts to balance the benefits of individualized claimant consent, group consensus, and an overall systemic interest in tempering the power of strategic holdouts.

Why not introduce a similar type of voting process when “confirming” a negotiated settlement to resolve nonclass aggregate litigation? The ALI’s *Principles of the Law of Aggregate Litigation* proposal essentially models itself on bankruptcy plan voting rules in permitting binding acceptance of a settlement in a nonclass aggregation by a supermajority vote of claimants.<sup>224</sup> Yet the proposal sparked heated debate and critical commentary. Perhaps from the perspective of traditional class action litigation the ALI proposal represents a radical departure from settled practices. But from the perspective of another equally well-established form of aggregation—bankruptcy—it appears unremarkable.

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the debtor’s bankruptcy case. See *Constitution Bank v. Tubbs* 68 F.3d 685, 691–92 (3d Cir. 1995).

<sup>220</sup> See *In re White Mountain Mining Co.*, 403 F.3d 164, 169–70 (4th Cir. 2005) (rejecting enforcement of an arbitration clause on the ground that bankruptcy policy favors centralization of disputes concerning the debtor’s legal obligations).

<sup>221</sup> See *supra* notes 177–78 and accompanying text.

<sup>222</sup> See *supra* note 181 and accompanying text.

<sup>223</sup> See *supra* note 182 and accompanying text. These terms, which essentially codify judicial decisions that predate the Code, comprise two requirements. First, similarly situated claims must be given equal treatment barring some justification for different treatment. Second, the plan must satisfy the absolute priority rule—that is, no junior class of claims (or equity) may recover before the claims of more senior classes are paid in full. See *supra* note 58.

<sup>224</sup> The ALI suggests that one model for its proposed supermajority voting requirement would be the special voting rules in § 524(g). ALI Principles, *supra* note 136, § 3.17 cmt. (c)(2). Under § 524(g), a plan that resolves asbestos personal injury claims by the creation of a trust to administer and pay such claims must be approved (in addition to the ordinary bankruptcy plan voting requirements) by at least three-fourths of the individuals in the asbestos claimant class. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

One possible objection to the bankruptcy analogy could be that mass tort plaintiffs are generally less savvy than creditors in a bankruptcy case. Professors Howard Erichson and Benjamin Zipursky, two leading critics of the ALI proposal, raise this concern.<sup>225</sup> As they term it, consent of the sort contemplated by the ALI proposal runs a high risk of being inauthentic, because unsophisticated clients must rely on their counsel for advice.<sup>226</sup> But bankruptcy cases routinely involve large numbers of relatively unsophisticated creditors, including workers pressing unsecured wage claims and small vendors seeking to collect unpaid bills. The presence of those unsophisticated creditors does not negate the value of consent in the bankruptcy plan voting process. Instead, it places greater emphasis on other aspects of the process that offset the disadvantages of unsophisticated claimants. The institutions of bankruptcy—committees representing various groups and a monitor (the U.S. Trustee)—counterbalance the limited power of dispersed and potentially unsophisticated claimants.<sup>227</sup> Erichson and Zipursky, then, should not reject the possibility of giving claimants greater voice in the collective resolution of their claims. Rather, other features of a well-designed mass tort litigation scheme should be added to counter the perceived conflicts and distortions attributable to excessive lawyer power in the process.

Another possible objection is that bankruptcy only provides an abstract justification for group-based consent in aggregate litigation. Brought down to a more practical level, the objection might go: The basic foundation of bankruptcy is too different from the world of non-class aggregation to provide much useful guidance. To be sure, bankruptcy, like the limited fund class action,<sup>228</sup> historically derived many of its features—forum centralization, pervasive jurisdiction, and the power of finality—from a court’s control of the *res* consisting of the debtor’s property.<sup>229</sup> But it is easy to overstate that derivation in modern bankruptcy law. As an initial matter, the limited fund analogy goes only so far, because the Code generally does not limit bankruptcy to insolvent debtors. Bankruptcy courts are open to debtors even

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<sup>225</sup> See Erichson & Zipursky, *supra* note 2, at 301–03.

<sup>226</sup> *Id.* (explaining how unsophisticated clients are likely to enter into advance-consent agreements).

<sup>227</sup> See *supra* Part II.A.4.

<sup>228</sup> See *supra* notes 50–51 and accompanying text (discussing the justification for denying opt-out rights in limited fund class actions).

<sup>229</sup> See *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004) (“A bankruptcy court’s *in rem* jurisdiction permits it to determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is one against the world.” (alteration in original) (internal quotation marks omitted)).

when there are sufficient funds to pay all claimants.<sup>230</sup> More importantly, bankruptcy (despite often-repeated statements about its *in rem* nature) blends *in rem* and *in personam* powers. Bankruptcy courts exercise both, and little in bankruptcy practice today turns on the characterization of a proceeding as one or the other.<sup>231</sup> Lessons on aggregation can be drawn from bankruptcy without hesitating to consider those jurisdictional distinctions.<sup>232</sup> My aim, ultimately, is to offer an alternative model of aggregation not for the purpose of one-for-one adoption, but to challenge the conventional view of what features of nonclass aggregate litigation should rightly be considered exceptional or problematic.

## 2. *Lawyers, Judges, and Control in Bankruptcy Cases*

Rather than reject wholesale a hybrid form of individualized consent and group consensus in the resolution of aggregate litigation, it makes much more sense to focus attention on other aspects of non-class aggregate litigation that could be augmented. One aspect that deserves attention, and that could benefit from a bankruptcy model of governance in aggregate proceedings, is the role of lawyers. The regulation of lawyers' conflicts in the quasi-class action would be better served by reference to bankruptcy law than the class action.

Bankruptcy law has a deep and at times troubled history of conflicts about the proper role of lawyers. Indeed, concerns about the role of lawyers in the bankruptcy process have driven much of the modern history of reform in American bankruptcy law.<sup>233</sup> In the years leading up to the adoption of the Bankruptcy Code in 1978, anxiety about overempowered bankruptcy lawyers was common. Frequent charges that bankruptcy practice amounted to a corrupt "ring" tainted the

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<sup>230</sup> Only Chapter 9, which governs restructuring of municipal debts, imposes an insolvency requirement before a debtor may seek bankruptcy protection. See 11 U.S.C. § 109(c)(3); Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 455 (1993) ("[O]nly a municipality faces a statutory requirement of insolvency.").

<sup>231</sup> For example, bankruptcy courts are able to exercise personal jurisdiction over any person or entity with minimum contacts with the entire United States. See FED. R. BANKR. P. 7004(d) (allowing nationwide service of process).

<sup>232</sup> Cf. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312–13 (1950) (declining to rest the Court's decision on whether the proceeding was characterized as *in rem* or *in personam*).

<sup>233</sup> See SKEEL, *supra* note 207, at 75–80, 132–36 (discussing the concerns about corruption and self-dealing in bankruptcy practice as a motivation for bankruptcy law reform in the 1930s and 1970s). As Professor Skeel explains, bankruptcy lawyers have taken the laboring oar in much of the development of bankruptcy law since the enactment of the Bankruptcy Act of 1898. *Id.* at 44–47 ("Since 1898, bankruptcy professionals have been the single most important influence on the development of bankruptcy law.").

field.<sup>234</sup> The ring, it was feared, permitted bankruptcy lawyers to wield disproportionate power over cases for their own benefit, unchecked by disorganized creditors or any meaningful oversight by disengaged or co-opted courts.<sup>235</sup> Reading mid-twentieth century indictments of bankruptcy practice brings to mind the most unfavorable descriptions of plaintiffs' lawyers in nonclass aggregate litigation.<sup>236</sup>

Modern bankruptcy law responded to the problem of excessive lawyer influence by creating institutional structures to monitor potential self-dealing. First, the largest creditors are appointed to form an official committee of unsecured creditors, and committees—official or ad hoc—representing other constituencies (such as equity holders) also may be formed.<sup>237</sup> Creditors' committees, which may retain their own counsel and other professionals with court approval, serve as monitors of the debtor and the debtor's handling of the case.<sup>238</sup> This structure ensures that the lawyers appearing before the court represent claimants who hold a significant stake in the bankruptcy case.

Second, the bankruptcy process includes a permanent institutional actor to monitor each case. The U.S. Trustee is tasked with policing the bankruptcy case, and that role is largely shaped by concerns about self-dealing by lawyers. For example, the U.S. Trustee appoints creditors to official creditors' committees, a power meant to reduce the risk that the committees will not be representative of the claimants with the most at stake in the case and thus be subject to self-appointment and excessive control by lawyers. More significantly, the U.S. Trustee may object to fee applications by counsel for debtors or creditors' committees, who are paid out of the debtor's estate by the bankruptcy court.<sup>239</sup> Congress granted that power to the U.S. Trustee

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<sup>234</sup> See David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 *FORDHAM L. REV.* 497, 516 & n.102 (1998) (recounting that the drafters of the 1978 Bankruptcy Code took "active steps to improve the reputation of bankruptcy").

<sup>235</sup> See SKEEL, *supra* note 207, at 76–77, 133 (discussing the longstanding concern about the collusive practices described as the "bankruptcy ring").

<sup>236</sup> See, e.g., Brickman, *supra* note 124, at 702–03 (asserting that the lucrative nature of nonclass aggregate litigation leads to the risk that plaintiffs' lawyers will act disloyally to their clients and collude with defendants).

<sup>237</sup> 11 U.S.C. § 1102 (2006).

<sup>238</sup> See *id.* § 1103 (describing the powers and duties of committees created under § 1102).

<sup>239</sup> See *id.* § 330(a) (providing that the court may award compensation to professionals retained by debtors or creditors' committees). The U.S. Trustee has standing to object to a fee application. See *supra* note 190.

as a check against the risk that bankruptcy judges might be reluctant to resist unreasonable fee requests by counsel.<sup>240</sup>

The recent proposal by Professors Silver and Miller that judges presiding over quasi-class actions should appoint a plaintiffs' management committee comprising lawyers with the most valuable client inventory parallels the bankruptcy committee structure.<sup>241</sup> Under their proposal, the plaintiffs' management committee would have a say in the appointment of lead counsel in the MDL proceedings, with counsel compensated by taxing the MDL recovery.<sup>242</sup> One risk presented by the proposal, however, is that it relies on judges to appoint the committee rather than an outside and neutral party, and there is reason to criticize the process by which judges have previously selected lead counsel in MDL proceedings.<sup>243</sup> Judicial appointments of lead attorneys in MDL proceedings rarely garner challenges, but that is not because the appointments are always ideal.<sup>244</sup> To the contrary, the lack of challenges indicates that other interested actors have few incentives—or great disincentives—to object to suboptimal appointments of counsel. If appointment to the committee should be determined by, for example, a lawyer's client inventory and not more subjective factors, it stands to reason that the composition of the committee could be assigned to some outside actor.

Perhaps MDL proceedings would benefit from the creation of a standing institution like the U.S. Trustee in bankruptcy. Like the U.S. Trustee, the MDL officer could play the role of monitor in aggregate litigation. Such an institution could be housed within the judiciary and serve as an adjunct of the MDL panel. To be sure, bankruptcy lawyers often criticize the performance of the U.S. Trustee program (especially lawyers whose fee awards draw an objection from the office). But the program has taken much of the intrigue and suspicion out of the most heavily criticized aspects of the pre-Code bankruptcy process. The standing monitor in MDL proceedings would make the initial, default appointment to a plaintiffs' management committee. The

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<sup>240</sup> See SKEEL, *supra* note 207, at 181 (noting that one role of the U.S. Trustee is “occasionally intervening on matters such as approval of attorneys fees for the debtor’s lawyers”); Richard B. Levin & Kenneth N. Klee, *The Original Intent of the United States Trustee System*, 1 NORTON BANKR. L. ADVISER 2, 4 (1993) (describing the roles of the U.S. Trustee).

<sup>241</sup> See Silver & Miller, *supra* note 3, at 161–62.

<sup>242</sup> See *id.*

<sup>243</sup> See *id.* at 118–19 (noting the relatively limited guidance given to MDL judges in selecting lead attorneys).

<sup>244</sup> See *id.* at 119 (“In theory, the dearth of challenges to judicial appointments could indicate that lawyers are satisfied with judges’ selections. In fact, anyone with experience in MDLs knows this is not so.”).

monitor might also be given the power to weigh in on attorneys' fees in the MDL proceedings, much as the U.S. Trustee in bankruptcy may do. Given the similarity of concerns between bankruptcy and the quasi-class action—such as lawyer overempowerment and lack of adversarial testing at key stages of the formation of the litigation—turning to a neutral, standing institution to monitor the process, as bankruptcy practice has done, would be a natural improvement to the quasi-class action.

### B. *Monitoring and Controlling Attorneys' Fees*

Bankruptcy as a reference model for the quasi-class action presents helpful insights for courts attempting to justify the adjustment of attorneys' fee awards in MDL proceedings. As Professors Silver and Miller have explained, the justifications used by courts to adjust the fees of plaintiffs' counsel in quasi-class actions rest on assumptions that echo the law of class actions. In class actions, the common fund doctrine is typically invoked to explain the power of courts to set the fee award of counsel. That doctrine permits a departure from the general presumption against fee shifting in litigation.<sup>245</sup> But the requirements for the applicability of the common fund doctrine fit poorly with the realities of the quasi-class action.<sup>246</sup> The requirements that a claimant impliedly consent to the award of fees or that the claimant is a passive beneficiary of the fund created by the attorney's efforts are hard to satisfy in MDL proceedings. Claimants are unable to exit, but all have their own attorneys who, in theory, could actively represent them.<sup>247</sup> Under those circumstances, the practice of downgrading the award of certain attorneys in favor of greater recoveries for others is problematic.

Bankruptcy offers a related, but different, approach to the award of fees. Individual creditors in bankruptcy are entitled to recover their attorneys' fees from the debtor's estate only if they provide a "substantial contribution" to the case.<sup>248</sup> The substantial contribution requirement is not defined by the Code but derives from the "direct benefit" rule of the Bankruptcy Act of 1898.<sup>249</sup> The purpose of the

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<sup>245</sup> See John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1598, 1601 (1974) (describing the common fund doctrine as a departure from the usual rule regarding attorneys' fees).

<sup>246</sup> See *supra* note 111 and accompanying text.

<sup>247</sup> See Silver & Miller, *supra* note 3, at 124–30 (explaining the inapplicability to MDLs of the implied consent, bargaining, and passive beneficiary requirements for recovery under a common fund theory).

<sup>248</sup> 11 U.S.C. § 503(b)(3)(D), (b)(4) (2006).

<sup>249</sup> See *In re* 9085 E. Mineral Office Bldg. Ltd., 119 B.R. 246, 249 n.7 (Bankr. D. Colo. 1990) (noting that the legislative history of the Code indicates that the substantial

substantial contribution requirement is to sift out those creditors whose attorneys have rendered significant assistance in the case—by, for example, recovering assets that are brought into the estate for the benefit of other creditors.<sup>250</sup> Committees of creditors, on the other hand, need not make such a showing in order to recover attorneys' fees. Attorneys' fees for counsel to creditors' committees are reimbursed so long as they constitute expenses for "actual, necessary services rendered."<sup>251</sup> In short, the bankruptcy process privileges the fee reimbursement of those claimants who have organized and taken on the added responsibility of monitoring the case through a committee. Outside of creditors on a committee, only those creditors whose efforts are extraordinary are permitted to share an award of fees out of the debtor's estate. In the background, of course, stands the U.S. Trustee to raise objections to fee awards that are excessive or incompletely justified.

Bankruptcy courts do not routinely override the contractual agreements between individual creditors and their lawyers. But the recognition that attorneys who have taken a laboring oar in the prosecution of an aggregate proceeding—whether as part of an organized committee or as representatives of individual claimants who have made a substantial contribution to the resolution of the case—is instructive. It is another feature of the bankruptcy process that seems unremarkable even though attempts at creating a similar separation among lawyers in the quasi-class action have proven controversial.

The adoption of a formalized system of committees of counsel to steer MDL proceedings should carry with it a method of distinguishing those attorneys—and perhaps others outside the committee who provide substantial contributions to the litigation—from attorneys who do little more than maintain an inventory of claimants. The recognition that, ultimately, the recovery going to claimants comes from the benefit contributed by attorneys who have undertaken the greatest efforts at shaping the litigation should similarly be unobjectionable.

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contribution rule is derived from the 1898 Act); *see also* Edward A. Stone, Note, *Encouraging Creditor Participation: Integrating the Allowance of Administrative Expenses with the Common Fund Theory*, 15 EMORY BANKR. DEV. J. 223, 230–32 (1998) (discussing origins of the substantial contribution test in the pre-Code direct benefit rule).

<sup>250</sup> *See* Gregg D. Johnson, *Recovering a Creditor's Expenses and Legal and Accounting Fees as an Administrative Claim*, 5 EMORY BANKR. DEV. J. 463, 470–79 (1988) (discussing judicial approaches to awarding an administrative payment of creditors' expenses and attorneys' fees).

<sup>251</sup> 11 U.S.C. § 330(a)(1).



## CONCLUSION

The movement of mass tort claims away from the class action toward other procedural devices presents an opportunity for the generation of novel approaches to the resolution of aggregate litigation. The law, however, abhors true novelty. Courts and counsel always seek some authority from familiar past practices to justify legal innovations. The proper choice of that authority, in turn, can guide those innovations toward more useful paths, just as misplaced reliance on inapposite authority can leave innovations unmoored and vulnerable to attack.

The quasi-class action presents a procedural innovation in search of the appropriate authority to justify and guide it. This Article has made the case that the class action is poor authority to justify the novel approaches taken in coordinated MDL proceedings under the guise of the quasi-class action. In particular, reference to the class action risks importing the formal strictures on class certification that have no place outside the class action world. Similarly, the class action, which leaves little room for claimant consent, gives poor guidance to those who wish to incorporate some form of claimant voice in quasi-class actions.

Instead, bankruptcy serves as a better reference model to provide guidance for the quasi-class action. From bankruptcy, courts, counsel, and commentators seeking to develop the quasi-class action can learn that collective resolution of aggregate disputes may embrace claimant consent. Bankruptcy also provides a model for the incorporation of standing institutions to monitor real and perceived conflicts and lawyer overempowerment in aggregate litigation. That is not to say that bankruptcy provides a perfect model for further development of the quasi-class action, but it does provide a counterweight to show that the class action is not the only venerable source of guidance in judging the proper shape and scope of aggregate litigation.