The Review of Litigation

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ARTICLES

Large-Scale Litigation Issues: Class Actions and Mass Tort Cases in 2012 and Beyond
Ettie Ward.....747

A New Model of Plaintiffs' Class Action Attorneys
Morris Ratner.....757

Mass Tort Funds and the Election of Remedies: The Need for Informed Consent
Linda S. Mullenix.....833

Secret Class Action Settlements
Rhonda Wasserman.....889

Separation of Powers and Second Opinions: Protecting the Government's Role in Developing the Law by Limiting Nationwide Class Actions Against the Federal Government
Michelle R. Slack.....943

Beyond Transfer: Coordination of Complex Litigation in State and Federal Courts in the Twenty-First Century
Catherine R. Borden & Emery G. Lee III.....997

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Large-Scale Litigation Issues: Class Actions and Mass Tort Cases in 2012 and Beyond

Ettie Ward*

I. INTRODUCTION 747
II. COMMON THEMES 748
III. OVERVIEW OF THE PAPERS 750
A. *Professor Morris Ratner's New Model of Plaintiffs' Class Action Attorneys* 750
B. *Professor Linda Mullenix Critiques Mass Tort Funds* 751
C. *Professor Rhonda Wasserman Explores Secret Class Action Settlements* 752
D. *Professor Michelle Slack Argues for Limiting National Class Actions Against the Federal Government* 753
E. *Catherine Borden and Emery Lee Examine Coordination of Complex Litigation in State and Federal Courts* 754
IV. CONCLUSION 755

I. INTRODUCTION

In connection with the January 2012 Annual Meeting of the Association of American Law Schools (AALS) held in Washington, D.C., the AALS Section on Litigation (Litigation Section) sponsored a panel entitled "Large-Scale Litigation Issues: Class Actions and Mass Tort Cases in 2012 and Beyond." The program was co-sponsored by the AALS Sections on Alternative Dispute Resolution and Civil Procedure. One of the presentations was selected from a call for papers.

Large-scale litigation, whether in the form of class actions, multi-district litigation, or mass tort cases, continues to raise important concerns within the legal community and society at large. Large-scale litigation affects large numbers of claimants, utilizes extensive institutional and private resources, and establishes legal and process norms applicable in all cases.

The papers submitted in connection with this Litigation Section panel explore five separate but significant issues, all of which raise serious process concerns and highlight a continuing and inherent tension between efficiency and fairness at the institutional

* Professor of Law, St. John's University School of Law and the 2011 Chair of the American Association of Law Schools Section on Litigation.

level and among the various players engaged in large-scale dispute resolution.

II. COMMON THEMES

The five papers that follow each examine class actions and other complex litigation through a different lens—and a lens focused on a slightly different point on the horizon. Professor Morris Ratner[1] focuses on the principal–agent problems identified in connection with plaintiffs' counsel in class actions.[2] Professor Linda Mullenix[3] examines and critiques mass tort funds set up to deal with the BP Gulf Oil claims and the World Trade Center claims after 9/11 and focuses on the pressures on claimants to make decisions waiving their right to litigate in court and instead receive compensation through a fund, arguably without adequate information and legal advice.[4] Both Professor Ratner and Mullenix focus on information asymmetry and the inability or lack of incentives of claimants to make informed decisions about their own claims and options, whether the issue is monitoring their own attorneys in class actions or assessing whether to seek compensation from the fund option or the courts. Professor Ratner suggests an altered paradigm of the plaintiffs' class action firm that might shed light on class attorney incentives and how those incentives might be managed to avoid potential conflicts between class plaintiffs and counsel. While Professor Ratner examines the interplay and conflicting incentives among class members, class counsel, and the court, Professor Mullenix focuses on the interplay and conflicting incentives among claimants, the fund administrator, and the courts managing those claims not paid through the fund.

---

1. Morris Ratner served as a Visiting Assistant Professor at Harvard Law School in the 2011–12 academic year and joined the faculty at U.C. Hastings College of Law in July 2012 as Associate Professor of Law.

2. Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 747 (2012).

3. Linda Mullenix holds the Morris and Rita Atlas Chair in Advocacy at the University of Texas School of Law.

4. Linda S. Mullenix, *Mass Tort Funds and the Election of Remedies: The Need for Informed Consent*, 31 REV. LITIG. 747 (2012).

Professor Rhonda Wasserman[5] focuses on the frequency and appropriateness of secret settlements in class actions.[6] Although she touches on the impact on absent class members of such settlements, her focus moves from a particular case to the impact on the courts and absent parties. What are the interests and incentives favoring or disfavoring secret settlements in class actions, and how do they affect the judicial system and the development of law?

Professor Michelle Slack[7] looks at class actions brought against the federal government and examines the impact of national class action certifications and collateral estoppel on the development of law and our constitutional structure of separation of powers.[8] She argues that current case law allowing national certification impedes executive branch decisions on litigation and administrative matters and freezes the law on particular issues after a single decision without the opportunity for development in different courts. Like Professor Wasserman, Professor Slack is looking beyond the impact on individual claimants to the perhaps unintentional consequences to our institutional structures that are affected by decisions in class action cases.

Catherine Borden and Emery Lee[9] focus on federalism concerns rather than separation of powers—they discuss what coordination exists and is permissible when there are parallel or related actions in federal and state courts.[10] In addition to the federalism concerns about impinging on another jurisdiction's proceedings and discretion, judicial ethics constraints potentially limit coordination between state and federal judicial officers.

Each of the papers acknowledges the economies and efficiencies realized by coordination of claims, whether in class

---

5. Rhonda Wasserman is Professor of Law at the University of Pittsburgh School of Law.

6. Rhonda Wasserman, *Secret Class Action Settlements*, 31 REV. LITIG. 747 (2012).

7. Michelle Slack is Visiting Associate Professor of Law at the University of Memphis School of Law.

8. Michelle R. Slack, *Separation of Powers and Second Opinions: Protecting the Government's Role in Developing the Law by Limiting Nationwide Class Actions Against the Federal Government*, 31 REV. LITIG. 747 (2012).

9. Catherine R. Borden and Emery G. Lee III are researchers at the Federal Judicial Center.

10. Catherine R. Borden & Emery G. Lee III, *Beyond Transfer: Coordination of Complex Litigation in State and Federal Courts in the Twenty-First Century*, 31 REV. LITIG. 747 (2012).

actions, in mass torts, or in an alternative compensation system. Whether the focus is on the claimants, adjudicators, and counsel in the particular case, or on the interplay between coordinate systems or the broader questions of constitutional structure and development of law, the issues being balanced involve the perhaps inevitable tensions between efficiency and savings in time and dollars on the one hand and broader concerns about fairness, transparency, and institutional integrity on the other.

III. OVERVIEW OF THE PAPERS

A. Professor Morris Ratner's New Model of Plaintiffs' Class Action Attorneys

Professor Ratner responds to the work of Professor John C. Coffee, Jr.,[11] who described the principal–agent problems endemic in class action litigation: class members lack either the necessary information or financial incentives to monitor the actions and decisions of class counsel.[12] This lack of effective involvement by class members leads to a potential disconnect between the interests of the class members and the interests of class counsel.

Courts are similarly ineffective at monitoring the actions and decisions of class counsel even though the federal rules,[13] various statutes,[14] and the Manual of Complex Litigation[15] impose obligations on judges to screen and monitor class counsel, to set the fees to be paid to counsel, and to assess the fairness of any proposed settlement brought before the court.

Professor Ratner challenges the class lawyer paradigm of a solo practitioner or small firm that forms the basis of Professor Coffee's analysis and suggests a more nuanced and complex

---

11. Ratner, *supra* note 2, at 758–59.

12. *See id.* (stating that Coffee used agency cost theory to illustrate class members' inability to monitor class counsel). *See also* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 81 (2007).

13. *E.g.*, FED. R. CIV. P. 23(a)(4), (d), (e), (g), (h).

14. Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. §§ 780-4(a)(3) (2006).

15. MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 21.27, 21.6, 21.7 (2004).

conception of class action attorneys and firms as they exist today. As distinct from the conventional description of the class action firm, Professor Ratner determines that the leading firms today are relatively large and internally complex.[16] Accordingly, that complexity creates diverse incentives other than maximization of law firm profit.[17]

Professor Ratner does not dispute that the system may create financial incentives for class action lawyers that diverge from the interests of class members, but he suggests that a more accurate depiction of the class firm as it exists may provide a better understanding of the diverse incentives other than maximization of law firm profits that motivate class counsel.[18] These findings can be used to explore the nature and extent of agency problems and to suggest possible reforms to manage agency costs through judicial oversight of class action litigation.[19]

B. Professor Linda Mullenix Critiques Mass Tort Funds

Professor Linda Mullenix examines and compares the Gulf Coast Claims Fund (GCCF) and the World Trade Center (WTC) Victim Compensation Fund.[20] Both of these funds were established in response to unprecedented events that gave rise to demands from large numbers of potential claimants and the need for a quick response to the potentially enormous numbers of claims. Professor Mullenix recognizes the attraction of establishing a no-fault alternative compensation system—claimants are likely to get compensation sooner, claims can be processed and evaluated more efficiently, and fewer legal resources are expended.[21] She argues, however, that principles of informed consent and knowing and intelligent waiver should be applicable to claimants' selection of compensation through a fund instead of the court system.[22] The differences between the GCCF and the WTC Victim Compensation Fund highlight the likelihood that, without pro bono legal assistance,

16. Ratner, *supra* note 2, at Part III.A.
17. *Id.* at Part III.B.
18. *Id.* at Parts III and IV.
19. *Id.* at Part IV.
20. Mullenix, *supra* note 4.
21. *Id.* at Part I.
22. *Id.* at Parts II, III and IV.

claimants will be unable to evaluate effectively their choices between litigation and fund compensation.[23] Reliance on the integrity of the fund administrator or the particular courts handling related litigation to provide necessary information and advice to claimants is problematic as confidential information is withheld and individual claimants lack the knowledge to understand the difficult legal issues and the perspective to fit their individual claims within the range of claims and settlements being sought. In short, claimants, the courts, and the fund administrator operate under different incentives and imperatives.

C. *Professor Rhonda Wasserman Explores Secret Class Action Settlements*

After learning about a class action settlement that had been filed under seal, Professor Wasserman began a preliminary investigation to ascertain how often secret settlements occur in class actions.[24] Although her self-described "modest" empirical study did not find a large number of such settlements,[25] it is troubling that any such settlements were uncovered.

Professor Wasserman reviews the conflict and debate that occurred in the 1970s and again in the mid 1990s on the role of the courts in approving sealed settlements in cases.[26] The earlier discussions did not involve class actions, but rather private settlements in which the parties wanted the courts' imprimatur on the settlement, often for enforcement purposes, but wished to keep the terms of the settlement secret.[27] The arguments in favor of disclosure focused on the role of courts in developing law, setting norms, providing open access, as well as on more specific concerns about potential detrimental effects on other potential claimants or on the public when health and public safety might be compromised by sealing the records of litigation.[28]

Professor Wasserman then considers the additional concerns that should be considered in the class action context where the

23. *Id.* at Parts II.F and III.E.
24. Wasserman, *supra* note 6.
25. *Id.* at 899–900.
26. *Id.* at Part IV.
27. *Id.*
28. *Id.*

Federal Rules of Civil Procedure[29] and statutes[30] impose affirmative obligations on the courts or parties to provide notice and a hearing to determine the fairness of a proposed settlement. Unlike a private settlement between individual parties, in these representative actions, the court plays an important role in ensuring that the large number of absent claimants who will be bound by a settlement are treated fairly.[31] Professor Wasserman notes that the agency problem (discussed by Professor Ratner[32]) coupled with the court's potential bias in favor of approval of settlements (also noted by Professor Mullenix[33]) militate against insulating class settlements from public and press scrutiny by allowing them to be filed under seal.[34]

D. Professor Michelle Slack Argues for Limiting National Class Actions Against the Federal Government

Professor Slack recognizes that nationwide class actions provide an efficient means of achieving nationwide uniformity, but she argues that nationwide class actions against the federal government inhibit the federal government's role in development of the law in a way that may be an unconstitutional constraint on separation of powers.[35] Specifically, Professor Slack suggests that creating a narrowly focused and rebuttable presumption against the certification of nationwide class actions against the federal government would avoid foreclosing the interbranch dialogue provided by allowing different lower courts to consider an issue, especially an issue which may have a significant impact on the operations of the Executive Branch, before it reaches the Supreme Court.[36] Professor Slack identifies the problem as "balancing the tension between nationwide uniformity and development of the law through lower court debate."[37] Efficiency and uniformity should not necessarily trump institutional interests in the development of law.

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29. FED. R. CIV. P. 23(e).
30. Class Action Fairness Act (CAFA), 28 U.S.C. § 1715(b) (2006).
31. Wasserman, *supra* note 6, at Part V.
32. Ratner, *supra* note 2.
33. Mullenix, *supra* note 4, at 838.
34. Wasserman, *supra* note 6, at Parts IV and V.
35. Slack, *supra* note 8, at Part I.
36. *Id.* at Part VI.
37. *Id.* at 995.

E. *Catherine Borden and Emery Lee Examine Coordination of Complex Litigation in State and Federal Courts*

Catherine Borden and Emery Lee, researchers at the Federal Judicial Center, explore state–federal coordination in multi-jurisdictional litigation.[38] Increasingly, not all cases, claims, and parties in a matter can be combined, by transfer or otherwise, in a single federal court proceeding. Coordination between federal and state judges managing parallel or related litigation is encouraged,[39] but there are practical and ethical constraints that limit the nature and extent of the communications between courts and judges. The increase in multi-jurisdictional litigation coupled with budget constraints and increased institutional coordination has focused attention on developing best practices. Borden and Lee present the results of a survey of federal judges involved in multi-district litigation and compare the results with a survey of state judges conducted by the National Center for State Courts.[40] The results highlight areas where coordination has been occurring and others where it has not.

Here again, "economy, efficiency, and consistency"[41] concerns at the institutional level may very well have important implications for litigants who have chosen to litigate in either state or federal court. Parties to multi-jurisdictional litigation do not determine the extent of coordination between state and federal courts, but can facilitate such coordination. The variation in practices among courts in different jurisdictions suggests that development of clearer guidelines or best practices would serve both institutional and party interests.

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38. Borden & Lee, *supra* note 10.

39. *See generally id.* at 1005 ("By 2004, the [Federal Judicial Center]'s guidance was to think about coordination or, at a minimum, identify parallel litigation as an essential part of the case management of complex litigation.").

40. *Id.* at Part III.

41. *Id.* at 1029.

IV. CONCLUSION

Whether the large-scale litigation problem is relatively new (utilization of no-fault compensation funds), relatively rare (secret settlements), relatively intransigent (agency problems with class counsel), or constrained by our constitutional structure and legal system (coordination between state and federal courts and nationwide class actions against the federal government), it is imperative that public confidence in the fairness and transparency of the legal system be maintained. Each of the following papers focuses on a different problem that arises in large-scale litigation and either proposes a solution or suggests a direction for further research to lead to a solution that will take into account fairness and transparency without abandoning the laudable goals of efficiency and cost effectiveness.

A New Model of Plaintiffs' Class Action Attorneys

Morris Ratner*

I. INTRODUCTION 758
II. THE CONVENTIONAL UNDERSTANDING OF THE PLAINTIFFS' CLASS ACTION ATTORNEY 762
III. WHY THE CONVENTIONAL UNDERSTANDING FAILS AND THE NEW MODEL THAT REPLACES IT 773
A. *The Plaintiffs' Class Action Bar Is Highly Stratified; the Leading Firms Are Relatively Large* 773
B. *Law Firm Organizational Complexity Creates Incentives Other Than Maximization of Law Firm Profit* 780
1. Firm Ownership May Not Track Case Management Authority 784
2. A Lawyer's Perceived Self-Interest Is Shaped by Law Firm Practices 786
a. *Equity Allocation Schemes* 786
b. *Compensation and Promotion Schemes for Non-Equity Attorneys* 787
c. *Case Financing* 790
d. *Resource Allocation Mechanisms* 791
e. *Degree of Firm Attachment* 793
f. *Law Firm Structure, the Conventional Understanding of Plaintiffs' Class Counsel, and a New Model* 793
C. *Plaintiffs' Class Action Attorneys Invest Time in Cases for Complex Reasons Beyond Just Expected Fees* 796
1. Fees Are Difficult to Predict 796
2. Factors Alien to the Conventional Account May Dictate Case Investment 801

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* Associate Professor, University of California, Hastings College of the Law. B.A. 1988, Stanford University; J.D. 1991, Harvard Law School. I wrote this Article while serving as a Visiting Assistant Professor at Harvard Law School. I spent much of my litigation career at the plaintiffs' firm Lieff, Cabraser, Heimann & Bernstein, LLP, where I was a partner from 1996 until 2007, before going of-counsel. Though I rely in a general way on my professional experience and on my direct observations of other plaintiffs' class action firms, I do not purport to reveal details of any particular firm's internal structure or business model. I am grateful for helpful feedback from William Rubenstein, John C. Coffee, Jr., Samuel Issacharoff, Charles Silver, David Shapiro, Richard Marcus, Andrew Kaufman, Martha Minow, Bruce Hay, David Rosenberg, and David Wilkins. The opinions and conclusions expressed herein are solely mine, as are any errors.

IV. WHY THE NEW MODEL IS IMPORTANT 813
A. *The New Model Is More Descriptively Accurate* 813
B. *The New Model's Complexity Underscores the Need for Better Empirical Research on the Actual Agency Problems that Exist in Class Action Litigation* 814
C. *The New Model's Complexity Enables Us to Identify the Best Tools for Reducing Agency Costs* 817
1. The New Model's Complexity May Enable Tailoring of Incentive-Based Reforms 820
a. Firm Structure Reveals New Levers to Align Class Counsel's and Class Members' Interests 820
b. Why Tailored Incentives May Fail 822
2. Complexity Counsels in Favor of Rehabilitating the Trial Court Judge to Minimize Agency Costs 824

I. INTRODUCTION

The class action mechanism is designed to harness the plaintiffs' class action attorney's self-interest, typically framed as the desire to maximize fees, to further the equitable goals of Rule 23 (e.g., enabling litigation that would not be economically viable absent certification).[1] In a series of influential articles over the past several decades, Professor John C. Coffee, Jr. identified a problem

1. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 220 (1983) [hereinafter Coffee, *Rescuing the Private Attorney General*] ("In theory, the private attorney general is induced by the profit motive to seek out cases that otherwise might go undetected."); William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2136–37 (2004) [hereinafter Rubenstein, *On What a "Private Attorney General" Is*] (describing the emergence of a fee-driven concept of the private attorney general).

with this design.[2] Professor Coffee used agency cost theory[3] to

2. *See* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice"*, 30 CARDOZO L. REV. 407, 408 (2009) [hereinafter Coffee, *Accountability and Competition*] ("[T]his benefit [of class action litigation] comes at the cost of creating principal agent problems that remain intractable despite repeated efforts by Congress and the courts to curb highly visible abuses."); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Torts Class Action*, 95 COLUM. L. REV. 1343, 1349 (1995) [hereinafter Coffee, *Class Wars*] ("Although agency costs are inevitably high in all class actions, the mass tort class action is uniquely vulnerable to the danger of collusion, and thus needs special safeguards."); John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 296 (2010) [hereinafter Coffee, *Litigation Governance*] ("In particular, this Essay will focus on the concept of 'agency costs' and the tradeoffs between exit and voice as tools by which to regulate the behavior of agents in aggregate litigation."); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–83 (1987) [hereinafter, Coffee, *Entrepreneurial Litigation*] ("High agency costs characterize class action litigation and permit opportunistic behavior by attorneys. As a result, it is more accurate to describe the plaintiff's attorney as an independent entrepreneur than an agent of the client."); Coffee, *Rescuing the Private Attorney General*, *supra* note 1, at 229 ("Put simply, the hallmark of the private attorney general is that as a practical matter he is unconstrained by the dictates or interests of a specific client."); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L. J. 625, 628 (1987) [hereinafter Coffee, *Rethinking the Class Action*] ("It is no secret that substantial conflicts of interest can arise in class action litigation between attorney and client."); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 671–72 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*] ("[C]onflicts . . . arise between the interests of these attorneys and their clients in class and derivative actions . . . ."); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 11–12 (1985) [hereinafter Coffee, *The Unfaithful Champion*] ("[W]e are at the stage where the real need is not for more, inherently ambiguous empirical data, but instead for a clear model by which to predict how changes in legal rules enhance or reduce the ability of private enforcement to reduce agency costs.").

3. Agency theory is concerned with problems that arise in agency relationships when the principal and agent have different risk-preferences and goals, and it is difficult or costly for the principal to monitor the agent. *See generally* Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. OF MGMT. REV. 57, 58–59 (1989) (discussing agency theory and its applicability in a variety of contexts). *See also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12

demonstrate that class members' inability or unwillingness to monitor class counsel gives the plaintiffs' attorney license to pursue his own interests without effective restraint. That, then, begged important subsidiary questions: what does class counsel want, and how does he achieve it? The answers to these questions inform our understanding of the nature of agency costs in class litigation and of how we should manage such costs. Professor Coffee provided one answer, by way of illustration, imagining class counsel as a solo practitioner or small law firm, cohesive in its desire to maximize law firm profit and capable of pursuing that one overriding interest by pegging case investment to expected fees.[4] This understanding of the plaintiffs' class action attorney gained currency in the 1980s and became conventional;[5] however, there is little consensus regarding

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(1991) (noting that agency theory stems from the work of, among others, Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), and Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) [hereinafter *Theory of the Firm*]). "Agency costs" are the sum of monitoring expenditures by the principal, bonding expenditures by the agent, and the loss in welfare experienced by the principal due to the "divergence between the agent's decisions and those decisions which would maximize the welfare of the principal." *Id.* at 308.

4. *See e.g.*, Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 712 ("In effect, such attorneys may restrict their investment of time and money in any individual case just as intelligent speculators may adopt self-imposed trading rules that limit their investment in any one stock.").

5. *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 801–03 (3d Cir. 1995) (reversing the trial court's order certifying a settlement class; finding representation to be inadequate; and noting that "[s]ome commentators blame the system of compensating class action lawyers in a manner that fails to confront fully the differences between class action litigation and classical bipolar litigation for creating incentives that diverge markedly and predictably from their clients' interests") (citing as the leading critic on this issue, Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 671–72); Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 953–54 (Tex. 1996) (finding that the class notice inadequately disclosed fee provisions of the proposed class settlement; noting the growing concern expressed regarding conflicts between class lawyers and their clients; and citing, among others, Coffee, *Rethinking the Class Action*, *supra* note 2, at 628–29, who listed "several factors that have contributed to entrepreneurial class action litigation, including the relatively low cost of filing dubious class action suits, the large amounts defendants are willing to pay in settling these suits, and the incentive for class counsel to invest little time and effort in protecting absent class members"); Macey & Miller, *supra* note 3, at 7–8

the solution to the agency cost problem the conventional understanding defines.[6]

This paper introduces a new perspective to the literature, namely that the conventional account of the plaintiffs' class action attorney that was developed in Professor Coffee's early work nearly a quarter of a century ago reflects a different practice regime than today's. It thus does not correctly identify class counsel's characteristics, interests, or capabilities. Specifically, there is no one entrepreneurial lawyer at the heart of class litigation. Instead, there are varieties of lawyers and law firms working on different types of cases, each combination of which produces a distinct array of incentives. Moreover, class counsel invest time in cases for complex reasons other than the effect on expected fees, which are exceedingly difficult to predict. The goal of this Article is to add depth and complexity to our understanding of plaintiffs' class counsel to enable a clearer assessment of and more tailored responses to principal–agent problems in class actions.

Part II of this Article outlines the conventional understanding of the plaintiffs' class action lawyer. Part III explores how variations in law firm size and internal architecture[7] affect individual attorney incentives, and thus provide a new basis for modeling plaintiffs' class counsel. Specifically, Part III identifies the organizational features of firms that are most likely to fit the conventional account of fee-maximizing class counsel, and it juxtaposes that list of features against a new model of plaintiffs' class counsel. This new model describes the internal structure of the dominant plaintiffs' firms today and explains their relative lack of cohesion in pursuit of law firm profit. Part III also calls into question the emphasis that has

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(describing how attorneys in these cases act "largely according to their own self interest").

6. *See infra* notes 31–34 (identifying, by way of example, disparate solutions to the agency cost problem Professor Coffee framed).

7. "Organizational architecture" includes key features of firm design, including, among others, "the assignment of decision-making authority, the reward system, and the performance-evaluation system." JAMES A. BRICKLEY, CLIFFORD W. SMITH & JEROLD L. ZIMMERMAN, MANAGERIAL ECONOMICS AND ORGANIZATIONAL ARCHITECTURE VI, 5 (5th ed. 2009) (examining the variation in law firm size and attorney incentives). *See also infra* note 68 (explaining organizational architecture's importance as a reference point in organizational theory and organizational economics).

been placed on expected fees as the driver of attorney case-investment decisions. Part IV explores the implications of this inquiry: a more complete account of class counsel reveals new opportunities for empirical research, identifies new levers with which to possibly better align class counsel's and class members' (actual) interests, and provides new impetus in support of direct regulation of class action outcomes at the time courts evaluate proposed settlements.

II. THE CONVENTIONAL UNDERSTANDING OF THE PLAINTIFFS' CLASS ACTION ATTORNEY

There is a popular perception of plaintiffs' class action lawyers that is not rooted in a particular model, and is, instead, an intuition: they are greedy.[8] Anecdotal reports of bad settlements receive a great deal of attention and are referenced as proof of class counsel's essential character flaw.[9] But without a model to define

8. *See* Editorial, *Going After Wal-Mart*, INVESTOR'S BUSINESS DAILY, April 1, 2011, at A12 ("If there was ever such a thing as junk justice, the suit against Wal-Mart now in the Supreme Court is exhibit A. By claiming that evidence is no longer needed to prove discrimination, what's proven is the greed of lawyers."); Peter Bronson, *Don Corleone Would Tip His Fedora to the Fen-Phen Class Action Lawyers*, CINCINNATI ENQUIRER, June 22, 2008, at 3D ("Yes, it happens all the time . . . . Greedy class-action lawyers shake down corporations, often on flimsy evidence."); Susan Milligan, *Senate Battles Put Democratic Pair on the Spot*, BOSTON GLOBE, July 8, 2004, at A1 (noting, in regard to the then-proposed Class Action Fairness Act (CAFA) (eventually enacted as Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in various sections of Title 28 of the United States Code)), that backers of the bill asserted it would restrain "greedy lawyers who make millions suing businesses on what they view as questionable grounds").

9. One of the most notorious settlements involved claims against Bank of Boston Corporation, relating to its alleged practices of posting interest to escrow accounts. Those claims were settled in an Alabama state court in such a way as to generate an $8 million fee for class counsel, while leaving some class members actually owing money (to pay the fee award). *See* Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1349–50 (7th Cir. 1996) (Easterbrook, C.J., dissenting) (describing the settlement terms and arguing for rehearing en banc). *See also* Jennifer Brooks, *Consumers Caught in Drive to Rein in Class Action Lawsuits*, GANNETT NEWS SERVICE, Feb. 16, 2005, *available at* Factiva, Doc. No. GNS0000020050218e12g00001 (discussing arguments floated in favor of the Class Action Fairness Act; listing a number of settlements that appeared to pay

the parameters of class counsel's greed, the problem has no boundaries; nor does the solution. That is, we have no way of knowing whether the problem is structural (and, if so, its contours and remedy), or, alternatively, whether the occasional bad egg is at fault (and, if so, how to identify and restrain bad eggs). This Article addresses this popular intuition about class counsel only indirectly. My primary subject is what I have alternatively termed the "conventional understanding" or "conventional account" of the plaintiffs' class action attorney, one which presents a more systematic and, thus, more damning critique of the class action plaintiffs' bar.

In a series of articles, Professor Coffee provided an authoritative account of the plaintiffs' class action attorney,[10] one grounded in agency cost theory.[11] There are two related aspects of this account. First, in the broadest possible terms, Professor Coffee's contribution was to recognize that principal–agent problems may be particularly acute in class actions because class members have little

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large fees while leaving class members with little or nothing of value; and specifically discussing the Bank of Boston settlement); Sherman Joyce, *Class Action Clients Often Fleeced by Greedy and Unscrupulous Lawyers*, KNIGHT RIDDER/TRIBUNE, May 5, 1998 (discussing the Bank of Boston and other unfair class action settlements); David Wessel, *Class Action Lawyers*, WALL ST. J., Mar. 24, 2005, at A2 (discussing the Bank of Boston settlement).

10. *See supra* note 2 (identifying representative articles by Professor Coffee).

11. Professor Coffee's attraction to the agency lens is not surprising; as an expert in corporate law, where principal–agent problems are deemed central, he was nicely positioned to see the parallels between class counsel and corporate officers, as agents, and class members and shareholders, as principals. *See* AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE, "Analysis and Recommendations," pt. VII ch. 1 Intro. Note, 14 (2008) ("a central concept in modern institutional economics is that of 'agency cost'"); BRENT A. OLSON, PUBLICLY TRADED CORPORATIONS: GOVERNANCE & REGULATION § 2:3 (3d ed. 2011) (noting that "the current structure of laws governing publicly held corporations establishes the respective roles of shareholders, directors, and officers so as to balance these twin objectives of flexibility and accountability. In defining these respective roles, corporate law seeks to minimize the 'agency costs' resulting from the separation of ownership and control"); Charles Silver, *Class Actions—Representative Proceedings*, *in* 5 ENCYCLOPEDIA OF L. & ECON. 194, 199 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) ("[I]t is useful to think of classes as litigation groups in which ownership and control of assets are in different hands . . . . In this respect, classes resemble stock companies . . . in which investors play relatively passive roles." (citations omitted)).

incentive or ability to restrain their agent, class counsel, who is thus able to pursue his own interests, even at the expense of the class members' interests.[12] What are those interests, and how do they diverge? The answer to that subset of questions is particularly important, both to measure and manage agency costs. This brings us to the second aspect of Professor Coffee's account, which this Article seeks to update and revise. In his early writings, Professor Coffee illustrated how agency costs manifest in class litigation by relying upon three core clusters of simplifying assumptions.

First, class counsel is either a sole practitioner ("the plaintiff's attorney," singular),[13] or a cohesive group, such as a small firm,[14] without internal structural complexity, such that the interests of the attorneys and the firm are indistinguishable.

Second, behaving as a rational decision-maker who acts "according to the same utility-maximizing criteria as do other businessmen,"[15] the entrepreneurial plaintiffs' attorney's paramount interest is the pursuit of his own profit, which is, as noted, indistinguishable from his firm's profit. Even if class counsel seeks to maximize profits, it is not immediately obvious why his interests

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12. *See* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 685 (noting that a "serious" principal–agent problem is "likely" in class actions "where the number of clients is large and the individual injuries [are] small").

13. *See, e.g.*, Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 676 (describing the plaintiff's attorney as an individual entrepreneur); Coffee, *The Unfaithful Champion*, *supra* note 2, at 12 (repeatedly referring to the plaintiff's attorney as a singular individual).

14. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 706 n.102 (noting the small size of plaintiffs' firms but omitting consideration of firm structure's effects on attorney incentives).

15. Coffee, *The Unfaithful Champion*, *supra* note 2, at 12 ("The claim that we should view the plaintiff's attorney as a risk-taking entrepreneur will seem offensive to some and must be explained in greater detail . . . . It assumes neither that we should tolerate substantial conflicts of interest between the attorney and the class he represents, nor that all attorneys will act in a purely self-interested fashion. Rather, the only assumption underlying this perspective is that economic incentives will have a marginal impact upon the behavior of private enforcers and that therefore the law should seek to fashion the incentives that it holds out so as to align better the interests of the plaintiff's attorney with those of his clients."). Professor Coffee has also described the plaintiff's attorney as a "utility-maximizing entrepreneur who manages a portfolio of actions and thus makes litigation decisions in an individual case based upon their overall impact on the portfolio." Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 677.

would not be aligned with those of the class; typically class counsel is paid a percentage of the class's return, so for every new dollar the class makes, class counsel should continue to make his percentage and hence to push for that next dollar. But, Professor Coffee explained, class counsel and the class have asymmetric litigation stakes: class counsel bears the expenses of litigation, yet it turns out that his fee is a declining percentage of the fund, such that he always has more at stake, and more to lose, than do class members.[16] For these reasons, class counsel is willing to invest less in the litigation than the clients would want[17] and, moreover, is tempted to settle prematurely and sub-optimally.[18]

Third, class counsel not only has the opportunity, but also has the capacity to pursue his own interests, so defined.[19] That is, he can ably modulate his case-investment and settlement decisions to maximize his law firm profit. To do that on a marginal basis, he must have a meaningfully definite estimate of the relationships among additional investment (e.g., additional hours spent litigating), the effect of that investment on case value (the likely outcome by litigation or settlement, and the resulting fee), and his opportunity costs (e.g., what he would earn by investing the same additional increment of time in another matter). In sum, what I refer to in this Article as the conventional understanding of class counsel imagines him as small, cohesively interested in firm profit, and capable of pursuing that overriding interest at the expense of the class.

Those three clusters of assumptions give content to the agency cost problem Professor Coffee identified. Professor Coffee graphically illustrated the manner in

16. Coffee, *Accountability and Competition*, *supra* note 2, at 413–14.

17. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 685 ("[L]itigation must be viewed as a continuing investment decision, and plaintiff's attorneys have reason to be more hesitant to invest in an action than do their clients.").

18. Coffee, *Accountability and Competition*, *supra* note 2, at 412–13 ("*Absent client control, the plaintiff's attorney will predictably deviate from the clients' preferences to pursue the attorney's own interests* . . . . In the simplest and most extreme case, the plaintiff's attorney might exchange a cheap (or below-market) settlement for a lucrative (and above-market) attorney's fee . . . ." (emphasis in original)); Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 687–90 ("[P]laintiff's attorneys have an incentive to settle prematurely and cheaply when they are compensated on the traditional percentage of the recovery basis.").

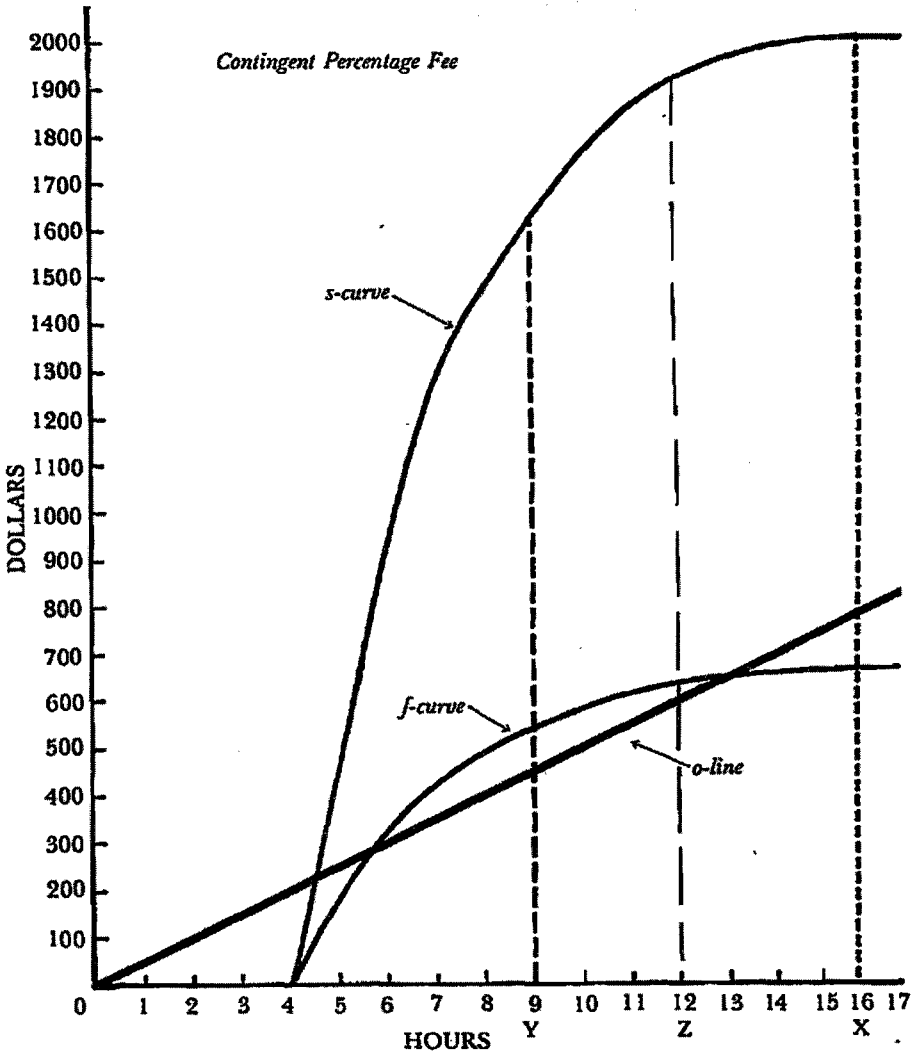
19. *Id.*

which agency costs may manifest in class litigation, using additional assumptions borrowed from a 1978 article by Kevin Clermont and John Currivan,[20] as set forth in Figure A.[21]

20. Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 537–46 (1978). This classic article is not specific to class actions; it addresses contingency fees in general. Its illustration of divergent interests takes on particular importance in the class setting, given the monitoring problems in class litigation that Professor Coffee highlighted. *See supra* note 2 (describing Professor Coffee's long work on the monitoring problem).

21. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 689. Coffee has used the same chart on more than one occasion to illustrate attorney marginal investment and settlement decisions. *See* Coffee, *The Unfaithful Champion*, *supra* note 2, at 42 (using the same chart).

FIGURE A



In Figure A, the "s-curve" represents the settlement amount, on the assumption that settlement is assured and increases in size as a direct function of the attorney's time, "until a point is reached where further efforts produce little or no return."[22] Assuming that the plaintiffs' attorney will be compensated on a percentage basis, the "f-curve" represents the expected attorney's fee, which is a

22. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 688.

predictable function of the settlement's size.[23] The "o-line" represents the attorney's opportunity costs, which are assumed to increase at a constant rate over the period of case investment in proportion to the aggregate time invested by class counsel.[24] The client's interest is in a settlement at point X, which is the point of greatest distance between the settlement and fee curves; at that point, the clients' net recovery—the difference between the settlement and the fee—is maximized, which occurs, in Figure A, at that particular number of hours where the tangents to the s-curve and the f-curve become parallel.[25] Whereas, it is in the attorney's interest to settle much earlier at point Y, which is the point of greatest distance between the fee curve and the line representing attorney opportunity costs, after which point the o-line rises more rapidly than the f-curve, so the lawyer's opportunity cost (i.e., the amount he would earn investing the additional hour on another matter) exceeds the corresponding fee increase.[26] The attorney's expected return is maximized at a much earlier point in the litigation investment continuum than is the client's.[27] Given Professor Coffee's vision of class counsel as a profit-maximizing economic actor, who is distinctly unconstrained by a capable or interested client, class counsel will predictably invest too little (only up to point Y) in class

23. *Id.*

24. *Id.* It is assumed that the plaintiffs' attorney "has no idle time and each hour he devotes to the plaintiff's case he would otherwise have devoted to matters handled at his certain hourly wage—i.e., time that the lawyer allocates to the plaintiff's case causes him to forgo earning his certain hourly wage." Clermont & Currivan, *supra* note 20, at 538. *See also* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 688 (describing the assumption that each hour spent on the case is a forgone opportunity for other involvement). Plaintiffs' counsel's "interests suggest that he should continue to devote hours to this case only as long as each additional hour increases his fee by at least as much as his opportunity cost. When the hourly increase in his fee drops below his opportunity cost, he would do better to settle and then to shift his efforts to other matters." Clermont & Currivan, *supra* note 20, at 545.

25. Clermont & Currivan, *supra* note 20, at 543.

26. *Id.* at 545–46.

27. Point Z—the point of greatest distance between the attorney's opportunity costs and the settlement amount—represents the socially optimal settlement point, assuming that only the client and the lawyer have an interest in the action, because any further marginal investment of costs will be greater than the marginal increase in settlement size at that point. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 688–90.

action litigation.[28]

Professor Coffee's writings are, of course, more nuanced than this short summary of decades of his work product suggests. But the basic understanding of class counsel described in his writings, and distilled above, has remained one of his most consistent themes.

A few commentators have raised doubts about the conventional understanding of class counsel, adding new features,[29] or questioning its significance.[30] But in general, the account is

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28. It can be argued that Professor Coffee never intended Figure A to be taken literally. It is, the argument goes, designed merely as a visual aid, to enable "us to see how the interests of client and attorney diverge." Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 688. But for Figure A to map anything, it has to at least represent quantities that can be sufficiently ascertained to be placed in relation to each other, and to meaningfully guide attorney decision-making. There are two main types of principal–agent problems in class litigation, a typology of which may be useful at this juncture: Professor Coffee's illustration of agency costs in Figure A, above, describes one common principal–agent problem, which I label "shirking," where class counsel invests less time in class litigation than class members would prefer, and settles prematurely. Although Figure A does not map it, Professor Coffee's more general description of agency costs in class litigation also encompasses another problem, where class counsel, regardless of the amount of time invested in a case, "sells out" the class during settlement discussions, by for example trading class member settlement benefits in exchange for attorneys' fees. The two types of principal–agent problems overlap; "shirking" is arguably a particular instance of the broader "sell-out" phenomenon. The presentation in Part III, below, of a new model of plaintiffs' class action attorneys that acknowledges the effects of intra-firm structure on individual attorney incentives is equally relevant to both shirking in particular and to the "sell out" problem writ large, to the extent some lawyers, within some firm structures, are driven by incentives other than maximizing fees. However, the discussion, below, of the difficulty class counsel has pegging case investment to expected fees pertains specifically to shirking.

29. *See* Rubenstein, *On What a "Private Attorney General" Is*, *supra* note 1, at 2137 (supplementing the conventional account of the entrepreneurial lawyer by devising a new taxonomy of types of "private attorneys general," organized around the extent of publicness or privateness involved, rather than around the sole axis of attorney incentives); Charles M. Yablon, *A Dangerous Supplement?: Longshot Claims and Private Securities Litigation*, 94 NW. U. L. REV. 567, 589–93 (2000) (suggesting that Coffee's account may be insufficient to explain the large percentage of low-dollar settlements).

30. *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104–06 (2006) (arguing that class counsel, in the limited context of negative value suits, should be forgiven for pursuing his own interest in fees at the

unchallenged. Professor Coffee is repeatedly cited in support of schemes to restrain class counsel by, among other things: manipulating the selection, payment, and/or monitoring of class counsel;[31] inserting more adversarialism into or otherwise enhancing the effectiveness of the settlement-approval process;[32] facilitating

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expense of payments to class members, on the ground that deterrence, not compensation, is the primary goal of such suits).

31. *See* Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 71–72 (2004) (proposing as a solution to the agency cost problem in class actions a compulsory auction mechanism for appointing counsel and for awarding fees, designed to reduce both shirking and collusion); Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1432 (1997) (examining judicial regulation of class counsel's fees as a means of addressing acute principal–agent issues in class action litigation); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 61–80 (2002) (recommending the use of independent private monitors to select, supervise, and pay class counsel, subject to court approval; the monitor would be appointed pursuant to an auction and would be paid a percentage of the total class recovery); Macey & Miller, *supra* note 3, at 6 ("We draw on the economic theory of agency costs to suggest that the special problems of entrepreneurial litigation could be substantially overcome if the legal system were to allow some form of auction for plaintiffs' claims, under which attorneys (and others) could bid for the right to bring the litigation and gain the benefits, if any, that flow from success. A pure form of auction would simply sell the plaintiffs' claim outright to the winning bidder, with the proceeds to be distributed immediately to the class or corporation."); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2105–09 (1995) (proposing reforms that eventually inspired the Private Securities Litigation Reform Act (Pub. L. No. 104-67, 109 Stat. 737 (codified in various sections of Chapters 15 and 18 of the United States Code)), including the creation of "a procedural environment that facilitates service by institutional investors as lead plaintiffs," such as a presumption that the named plaintiff or group of plaintiffs with the largest financial stake in the outcome, and thus the greatest incentive to monitor class counsel, is adequate to represent the class).

32. *See* J. Brendan Day, Comment, *My Lawyer Went to Court and All I Got Was This Lousy Coupon! The Class Action Fairness Act's Inadequate Provision for Judicial Scrutiny over Proposed Coupon Settlements*, 38 SETON HALL L. REV. 1085, 1121–26 (2008) (suggesting a rebuttable presumption against all coupon settlements as one solution to the agency problem); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1438–39 (2006) [hereinafter Rubenstein, *The Fairness Hearing*] (proposing, among other fixes to the principal–agent problem in class actions, use of a court-

class member participation;[33] and increasing the scope of potential liability for plaintiffs' lawyers.[34] Three things are particularly noteworthy about these proposals. First, many of the proposed solutions that have actually been adopted involve market- or incentive-based efforts to, ex ante, align the perceived interests of class counsel and class members. Second, these reforms are perceived either as having had mixed results (e.g., auctions),[35] or as having failed to solve the agency cost problem in class action litigation (e.g., moving from a lodestar[36] approach to calculating

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appointed "devil's advocate" during settlement evaluation to argue against approval of the settlement).

33. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 407 (considering expanded participation by settlement objectors as one remedy for the monitoring problems that plague class actions); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 125–33 (2007) (suggesting both increased communication between the trial court and the class and elimination of the presumption that the absence of objections from class members necessarily implies support for proposed settlements).

34. *See, e.g.*, Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056–57 (1996) (proposing civil and criminal penalties for class counsel who act contrary to the interests of the class during settlement negotiations).

35. *See* Edward R. Becker, C.J., *The Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689, 696, 740 (2001) [hereinafter Becker, *Third Circuit Task Force*] (noting that the "goal of all the procedures surrounding the appointment of class counsel and the setting of fees is to establish appropriate structures and monitoring mechanisms to substitute for the ordinary attorney-client relationship and to assure performance of the fiduciary responsibilities owed by both the lawyer and the lead plaintiff to the class" and expressing skepticism about auctions because the "class recovery generally can be maximized more effectively by using the traditional methods of appointing counsel: private ordering where that is possible, court selection on the basis of quality of counsel if private ordering is not workable, and court control over the fee award in all cases"); Jill E. Fisch, *Aggregation, Auctions and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 LAW & CONTEMP. PROBS. 53, 96 (2001) (criticizing the use of auctions in securities class actions).

36. Under the "lodestar" formula for calculating attorney's fees, fee awards are primarily the product of the number of hours reasonably expended in an action and the attorney's billing rate, adjusted if appropriate by a multiplier to account for risk and quality of work. *See* Becker, *Third Circuit Task Force*, *supra* note 35, at 706 ("The lodestar method requires a calculation of the hours spent in conducting the litigation, multiplied by an appropriate hourly rate, and adjusted, if appropriate,

attorney's fees to a percentage of fund methodology,[37] or promoting the appointment of institutional investors as lead plaintiffs in securities class actions).[38] Third, though the class action mechanism

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by a multiplier factor for quality and risk."); Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 675 n.16 (explaining key decisions adopting the lodestar formula as specified in the MANUAL FOR COMPLEX LITIGATION). The percentage of fund method for calculating attorney's fees gives the attorney "a portion of the fund that his efforts have 'salvaged,'" by multiplying the fund created by the attorney's efforts by a percentage, the benchmark for which usually declines as the size of the fund increases, and which some jurisdictions still cross check against lodestar to assess reasonableness. *Id.* at 678–79 n.26. *See also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 49 (2004) [hereinafter Eisenberg & Miller, *Attorney Fees*] (noting that fees awarded in common fund cases are now often calculated using the percentage of fund methodology).

37. *See* Coffee, *Litigation Governance*, *supra* note 2, at 292 (asserting that principal–agent problems in the class setting "remain intractable despite repeated efforts by Congress and the courts to curb highly visible abuses"); Coffee, *The Unfaithful Champion*, *supra* note 2, at 48 (finding the percentage of fund methodology "less imperfect" than the lodestar approach at aligning the interests of class counsel and class members); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1699 (2008) ("One widely shared insight in the literature is that even fee-calculation methods that reward class counsel for additional increments of settlement value obtained for the class—as does the dominant method, which casts the fee award in terms of a percentage of the common fund recovered for the class—still do not perfectly align the incentives of class counsel with those of class members.").

38. *See* Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1489–90 (2006) [hereinafter Choi & Thompson, *Securities Litigation and Its Lawyers*] (finding "substantial continuity in the plaintiffs' bar in securities class actions; the legislation did not dislodge the dominant plaintiff law firms nor did it encourage substantial new entrants"); James D. Cox, Randall S. Thomas & Dana Kiku, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1636 (2006) (finding that lead plaintiffs who are institutional investors do add value, but perhaps they add less value to securities litigation than was expected by the architects of the PSLRA's lead plaintiff provision and appear less often than had been hoped: "Our real concern about institutions is that they do not seem to be able to increase dollar recoveries at the same pace as Provable Losses. This is disappointing and facially inconsistent with institutional lead plaintiffs' beliefs that they can double or triple recoveries overall."). *Cf.* James D. Cox, Randall S. Thomas & Lynn Bai, *There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 385 (2008) ("The lead plaintiff provision sought to attract institutions and others who have a significant stake in

continues to generate anxiety, as evidenced by the richness of the reform literature it inspires, there is no consensus on how best to further reduce agency costs. Acknowledging the complexity that the conventional understanding of class counsel obscures provides new insight and direction.

III. WHY THE CONVENTIONAL UNDERSTANDING FAILS AND THE NEW MODEL THAT REPLACES IT

The conventional understanding of plaintiffs' class counsel assumes the existence of a uni-dimensional plaintiffs' attorney: a small firm, without internal complexity, that cohesively and capably seeks to maximize law firm profit. However, the leading class action firms today are relatively large. The trend to large-firm dominance of the class action bar is well-known to modern observers, though the effect of firm size on the incentives of individual class action attorneys, discussed below, has not been fully appreciated. Large firms possess internal structural complexity that creates diverse incentives other than law firm profit. And they make case-investment decisions by reference to complex factors not considered in the conventional account. Acknowledging this complexity creates opportunities to construct a new model of plaintiffs' class action attorneys, and thus to more precisely map and address agency costs.

A. The Plaintiffs' Class Action Bar Is Highly Stratified; the Leading Firms Are Relatively Large

The small firm has historically been characterized by fewer than ten attorneys.[39] Such firms are more likely to adopt forms of

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the litigation to become the suit's plaintiff. Our findings not only reflect that nearly eighteen percent of securities class actions settlements in suits initiated after the PSLRA are prosecuted by institutional plaintiffs of the type desired by Congress, but also, more importantly, that they add substantial value to the outcome.").

39. Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593, 596 (2002) ("While the vast majority of American lawyers continued to practice as solos or in very small firms until the 1950s, the traditional pattern held even greater sway abroad. Until quite recently, firms with more than a handful of lawyers remained

organization that tend to enhance cohesion. When Professor Coffee first popularized the use of agency cost theory in the class setting, he described a landscape dotted with small plaintiffs' firms, which he predicted would remain static, in terms of size, due to various constraints.[40] But larger firms have in fact come to dominate the plaintiffs' class action bar.[41] For example, a few large plaintiffs' firms are present in most securities class action lawsuits.[42] Many of the largest plaintiffs' firms in this field are also the busiest:[43] Robbins Geller Rudman & Dowd (formerly known as Coughlin, Stoia, Gellar, Rudman & Robbins), with 180 attorneys in eight offices nationwide,[44] served as lead or co-lead counsel on an estimated 30% of all securities class action settlements in 2009–

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uncommon in England and virtually non-existent on the Continent and in Latin America, India, and Japan. The large law firm is an American invention and export."); *id.* at 597 (identifying ten as a number below which a firm should be considered "small," based on the likelihood that firms with more than ten attorneys are more likely to adopt "bureaucratic" internal structures); Richard H. Sander & E. Douglass Williams, *A Little Theorizing About the Big Law Firm: Galanter, Palay, and the Economics of Growth*, 17 LAW & SOC. INQUIRY 391, 391 (1992) ("A century ago, no law firm outside of New York City had as many as 7 attorneys.").

40. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 706–11.

41. *See* Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 230–32 (2001) (describing how larger firms tend to handle the larger class action cases and identifying leading firms based on reputation, firm size, and the size of the cases the firms tackle). The leading plaintiffs' firms today are generally larger than they were two decades ago, even if they are still smaller than the large mega-firms that have, in the same period, dominated corporate defense practice. *See* Brian Cheffins, John Armour & Bernard Black, *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 456 (2012) [hereinafter Cheffins, Armour & Black, *Delaware Corporate Litigation*] (explaining that plaintiffs' firms are smaller than large corporate defense firms).

42. *See* Coffee, *Accountability and Competition*, *supra* note 2, at 442 (noting that "[a]s a practical matter today, three plaintiffs' firms dominate the securities class action industry: Bernstein, Litowitz, Berger & Grossmann; Coughlin, Stoia, Geller, Rudman & Robbins; and Grant & Eisenhofer," which currently employ 56, 180, and 60 attorneys, respectively, according to the firms' web sites, last visited June 19, 2011).

43. The rest of this analysis of firm size matches present firm size with securities class action settlement data from 2009–2010, unless otherwise noted.

44. ROBBINS GELLER RUDMAN & DOWD LLP, http://www.rgrdlaw.com (last visited June 19, 2011).

2010;[45] Bernstein Litowitz Berger & Grossman, with 56 attorneys,[46] served as lead or co-lead counsel in 10% of all securities class action settlements in 2009–2010;[47] and Topaz Kessler Meltzer & Check (formerly Barroway Topaz Kessler Meltzer & Check), with 110 attorneys,[48] Milberg, with 76 attorneys,[49] and Labaton Sucharow, with 62 attorneys,[50] were each named as lead or co-lead counsel in 7% of securities class action settlements in the same two-year time period.[51]

This phenomenon has persisted since the Private Securities Litigation Reform Act (PSLRA) was enacted in 1995.[52] Before splitting in mid-2004 into Milberg Weiss Bershad & Schulman (now Milberg) and Lerach Coughlin Stoia & Robbins (now Robbins Geller Rudman & Dowd), the large Milberg Weiss Bershad Hynes & Lerach had served as lead or co-lead plaintiff counsel in approximately 50% of all securities class action settlements since the passage of the PLSRA.[53] After that split, the two successor firms

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45. ELLEN M. RYAN & LAURA E. SIMMONS, CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2010 REVIEW AND ANALYSIS 14 (2011) [hereinafter SCAS 2010 Review], *available at* http://www.cornerstone.com/files/News/029b31a7-ff84-4000-b1ff-d177014ced27/Presentation/NewsAttachment/fd13e1e4-5564-4d46-86a3-882f232147a9/Cornerstone_Research_Settlements_2010_Analysis.pdf. These figures reflect a firm's percentage (as either counsel or lead counsel) of all security class action settlements.

46. BLB&G, http://www.blbglaw.com/attorneys/index (last visited June 19, 2011).

47. SCAS 2010 Review, *supra* note 45, at 14.

48. KESSLER TOPAZ MELTZER & CHECK, LLP, http://ktmc.com/about_attorneys.php (last visited June 19, 2011).

49. MILBERG LLP, http://milberg.com (last visited June 19, 2011).

50. LABATON SUCHAROW, http://www.labaton.com (last visited June 19, 2011).

51. SCAS 2010 Review, *supra* note 45, at 14.

52. *See* Choi & Thompson, *Securities Litigation and Its Lawyers*, *supra* note 38, at 1514 (referring to data sets confirming that the largest firms dominate class action suits post-PSLRA); Coffee, *Litigation Governance*, *supra* note 2, at 323–24 (discussing studies showing the persistence of market concentration in the securities plaintiffs' class action bar following enactment of the PSLRA).

53. LAURA E. SIMMONS & ELLEN M. RYAN, CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2006 REVIEW AND ANALYSIS 16 (2006) [hereinafter SCAS 2006 Review], *available at* http://www.cornerstone.com/files/Publication/d13a9e1f-b320-4884-9f25-13542dd2bed8/Presentation/PublicationAttachment/a3a3d386-3e02-4f66-904d-14e30a134e80/Cornerstone_Research_Settlements_2006.pdf.

continued their predecessor's dominance, and through 2006 they together accounted for over half of all securities class action settlements each year.[54] After the indictment of Milberg Weiss in mid-2006, its market share declined from 23% in 2006, to 7% in 2009–2010.[55] Over the same period, the other plaintiffs' firms commanding the highest market shares remained relatively constant; their percentages of all settled cases and comparative rankings have fluctuated, but the same large firms continue to dominate the securities class action field.[56]

While similar data regarding plaintiffs' firms in other practice areas are more elusive, the information that is available suggests that the leading plaintiffs' class action firms are large. Only one firm on the Legal 500's 2011 ranking of five leading plaintiffs' labor and employment firms has fewer than 10 attorneys, and, on average, the firms on this list have approximately 27 lawyers.[57] For example, Lieff Cabraser, which handles employment litigation, among other

54. *Id.*

55. *See* James McDonald, *Milberg's Monopoly: Restoring Honesty and Competition to the Plaintiff's Bar*, 58 DUKE L.J. 507, 532–33 (2008) (stating that as of 2006, Milberg commanded 23% of all settled cases). *See also* ELLEN M. RYAN & LAURA E. SIMONS, CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2010 REVIEW AND ANALYSIS 14 fig. 13 (2010), *available at* http://www.cornerstone.com/files/News/029b31a7-ff84-4000-b1ff-d177014ced27/Presentation/NewsAttachment/fd13e1e4-5564-4d46-86a3-882f232147a9/Cornerstone_Research_Settlements_2010_Analysis.pdf (citing to the 7% market share of settlements in 2009–2010).

56. *Compare* SCAS 2006 Review, *supra* note 53, at 16, *with* SCAS Review 2010, *supra* note 45, at 14 (reporting the same large firms in both reviews).

57. *See* THE LEGAL 500, http://www.legal500.com/c/united-states/litigation/mass-tort-and-class-action-plaintiff-representation-labor-and-employment (last visited June 19, 2011) (listing five leading plaintiff firms: Altshuler Berzon (21 attorneys); Goldstein, Demchak, Baller, Borgen & Dardarian (15 attorneys); Lieff Cabraser Heimann & Bernstein, LLP (60 attorneys); Outten & Golden LLP (32 attorneys); Rudy, Exelrod, Zieff & Lowe, LLP (5 attorneys) (firm size data compiled from firm websites, last visited June 19, 2011)). The Legal 500 lists represent practices gaining nationwide recognition, and thus, while the lists do not indicate the market share of each firm, we treat them as representative of the leading firms in these practice areas.

categories of litigation, was founded in 1972, and has grown steadily over time to 60 lawyers in three offices.[58]

The dominance of large plaintiffs' firms is also evident in the antitrust class action context. Again looking to the Legal 500's 2011 list of the top eight leading plaintiffs' firms in this field, we see large firms with a national presence—the firms on this list range from 15 attorneys to just over 200.[59] A few of these firms have experienced significant growth over the past decade: Boies, Schiller & Flexner LLP, for example, grew from approximately 100 attorneys in 2001 to 202 attorneys at present,[60] and Susman Godfrey LLP increased from approximately 50 attorneys in 2001 to around 90 today.[61] Both firms handle a wide array of cases in addition to antitrust litigation.

There is yet another way to demonstrate the supremacy of larger firms in class litigation: randomly selecting nearly any case-management order appointing plaintiffs' attorneys and firms to leadership positions in high-profile MDL litigation[62] matters reveals that, when presented with a choice, judges gravitate toward

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58. *Compare* Kritzer, *supra* note 41, at 232 ("Lieff Cabraser . . . with 45 attorneys based in San Francisco"), *with* LIEFF CABRASER, http://www.lieffcabraser.com/ (last visited February 29, 2012) (providing more recent firm data).

59. *See* THE LEGAL 500, http://www.legal500.com/c/united-states/litigation/mass-tort-and-class-action-plaintiff-representation-antitrust (last visited June 19 2011) (listing eight leading plaintiff firms: Berger & Montague, P.C. (69 attorneys); Cohen Milstein Sellers and Toll LLP (60 attorneys); Hausfeld LLP (19 attorneys); Boies, Schiller & Flexner LLP (over 200 attorneys in 11 offices nationwide); Heins Mills & Olson PLC (12 attorneys); Labaton Sucharow LLP (more than 60 attorneys); Susman Godfrey LLP (90 attorneys in 5 offices nationwide); Zelle Hoffman Voelbel & Mason LLP (71 attorneys nationwide) (firm size data from firm websites, last visited June 19, 2011)). This list includes firms that self-identify as litigation firms due to their defense work, in particular Susman Godfrey, Boies, Schiller & Flexner, and Zelle Hoffman Voelbel & Mason.

60. Only a fraction of the Boies, Schiller & Flexner attorneys regularly prosecute plaintiffs' class actions.

61. *Compare* Kritzer, *supra* note 41, at 232 ("Boies, Schiller & Flexner . . . with one hundred lawyer[s] . . . in ten cities, and Susman Godfrey with more than fifty lawyers...."), *with* BOIES, SCHILLER & FLEXNER LLP, http://www.bsfllp.com/lawyers (last visited June 19, 2011) (listing current firm size data) *and* Susman Godfrey LLP, http://www.susmangodfrey.com/ (last visited June 19, 2011) (same). Both firms self-identify as litigation firms, rather than as plaintiffs' class action firms.

62. "MDL litigation" refers to cases transferred and coordinated by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407.

established, big plaintiffs' firms. For example, in *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL-2179, Judge Carl Barbier appointed a fifteen-member steering committee, and a four-member executive committee (with two persons overlapping with the steering committee), for a total of seventeen lawyers, out of 121 applicants.[63] Most of the appointed lawyers are from relatively large firms, and all of the executive committee members hail from larger firms.[64] The BP litigation has produced class action settlements which are currently under review by the trial court.[65]

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63. Case Mgmt. Order No. 8 at 1–2, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, 747 F. Supp. 2d 704 (E.D. La. 2010) [hereinafter *In re* Oil Spill], *available at* http://www.mslitigation review.com/uploads/file/MDL%20Steering%20committee%20order.pdf.

64. The fifteen lawyers initially selected by Judge Barbier to serve on the PSC are Brian H. Barr of Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A. (approximately 38 attorneys); Jeffrey A. Breit of Breit, Drescher, Imprevento & Walker (6 attorneys); Elizabeth J. Cabraser of Lieff, Cabraser, Heimann & Bernstein, LLP (60 attorneys); Philip F. Cossich Jr. of Cossich, Sumich, Parsiola & Taylor (9 attorneys); Robert T. Cunningham of Cunningham Bounds LLC (17 attorneys); Alphonso Michael Espy (associated with Morgan & Morgan, with over 100 attorneys); Calvin C. Fayard Jr. of Fayard & Honeycutt, A.P.C. (3 attorneys); Ervin A. Gonzalez of Colson, Hicks, Eidson (14 attorneys); Robin L. Greenwald of Weitz & Luxenberg, P.C. (72 attorneys); Rhon E. Jones of Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. (more than 60 attorneys); Matthew E. Lundy of Lundy, Lundy, Soileau & South, LLP (8 attorneys); Michael C. Palmintier of deGravelles, Palmintier, Holhaus & Fruge; Paul M. Sterbcow of Lewis, Kullman, Sterbcow & Abramson (4 attorneys); Scott Summy of Baron & Budd, PC (more than 60 attorneys); and Mikal C. Watts of Watts, Guerra, Craft, LLP (about 20 attorneys). In addition, four lawyers were appointed to the Plaintiffs' Executive Committee: James Parkerson Roy of Domengeaux Wright Roy & Edwards (11 attorneys); Stephen J. Herman of Herman, Herman, Katz & Cotlar, LLP (19 attorneys); Brian Barr of Levin, Papantonio, Thomas, Mitchell, Eschner; and Scott Summy of Baron & Budd, PC (39 attorneys). *Id.* at 1–2. All firm data in this paragraph is from firm web sites, where available, which were last visited July 17, 2011.

65. *See* Preliminary Approval Order [Economic] at 19, 29, 33, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010 (E.D. La. May 2, 2012) (provisionally certifying Economic and Property Damages Settlement Class; preliminarily approving of the proposed settlement; and appointing the counsel previously appointed as Liaison Counsel and appointed to serve on the Plaintiffs' Steering Committee as settlement class counsel), *available at* http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order(EconomicSettlement).pdf (last visited July 25, 2012); Preliminary Approval Order [Medical] at

The foregoing data reflect the stratification of the class action plaintiffs' bar by showing that the largest firms dominate. Though it is hard, especially at the margins, to characterize each firm that prosecutes class actions as a particular "type" of law firm, crude categorizations, with some descriptive value, are in circulation. These categorizations turn in large part on law firm size and dominant litigation strategy. The largest class action firms predominate. They tend to get appointed to leadership positions in the most significant cases, and, as demonstrated below, are more likely to possess relatively greater internal complexity.

Smaller firms that routinely participate in class litigation are generally of three types:

- First, there are small firms with big aspirations, often started by lawyers who exit larger partnerships. They tend to follow the larger firms' business models, growing in size and internal complexity over time, and pursuing leadership roles in larger cases, often by joining forces with other plaintiffs' firms, in ad hoc firms that function as would a very large, internally complex plaintiffs' firm (though with even less cohesion).

- Then, there are small firms with small aspirations: they lack internal complexity, rarely get appointed to leadership positions in large cases, tend to file "copycat" complaints[66]

15–16, 18, 22–23, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010 (E.D. La. May 2, 2012) (provisionally certifying Medical Benefits Settlement Class; preliminarily approving the Medical Benefits Class Action Settlement; and appointing as settlement class counsel attorneys previously appointed to serve as Liaison Counsel and as members of the Plaintiffs' Steering Committee), *available at* http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order(MedicalSettlement).pdf (last visited July 25, 2012).

66. "Copycat" cases are actions "alleging the same injuries on behalf of the same class of plaintiffs" often in multiple (state court) jurisdictions, a form of jurisdictional gamesmanship CAFA was designed in part to address. *See* Tanoh v. Dow Chem. Co., 561 F.3d 945, 954 (9th Cir. 2009) (addressing Dow's argument that Plaintiffs should not be allowed to 'game' jurisdiction statutes by filing copycat cases). Copycat cases may be filed for reasons other than jurisdictional advantage; for example, they are often filed by law firms seeking to free-ride off of other firms' pre-filing investigations of new cases, and, also, may be used

(which they have no intention of prosecuting through trial), rarely have a case in their case portfolio that is capable of funding firm operations individually, and, of necessity, are more likely to be driven at any given moment and to the extent practicable by hoped-for attorneys' fees.

- Finally, there are "outsider" firms, including, for example, professional objectors, often solo practitioners, who intervene in class litigation at specific points, often just to hold up larger firms for a share of the fee, by threatening to delay finality, and thus payment.

These last two categories of small firms are commonly described within the plaintiffs' class action bar, colloquially, as "bottom feeders." Of course, few if any lawyers or firms would so self-identify; they are best identified by the pattern of their behaviors over time. There is a bridge between law firm size and the business models or practices that tend to be pursued by lawyers within firms: law firm internal structure, discussed below. While small firms (with internal structures that support the conventional account of class counsel) exist, they are not the focus of this Article. Instead, this Article primarily explores the characteristics of the largest, most significant firms that dominate various practice areas, and are thus more representative of today's practice regime.

B. Law Firm Organizational Complexity Creates Incentives Other Than Maximization of Law Firm Profit

The conventional understanding of class counsel as possessing a singleness of purpose in pursuit of maximizing law firm profit abstracts out from the picture of the plaintiffs' attorney the organizational architecture of the firm in which he practices and the diverse incentives firm complexity produces. That is why Professor Coffee and other commentators can alternate—often without explanation—between referring to class counsel as "the plaintiff's

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strategically to create support within administratively aggregated proceedings for firms vying for leadership positions.

attorney" or as a small firm: they see the law firm itself as irrelevant, a black box that transforms inputs (attorney labor) into outputs (firm revenue).[67] While organizational theorists, economists, and other commentators have, in general and for some time, challenged models of the firm incorporating black box assumptions,[68] and while legal

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67. *See* BRICKLEY ET AL., *supra* note 7, at 6 ("Traditional economic analysis generally characterizes the firm simply as a 'black box' that transforms inputs (labor, capital, and raw materials) into outputs. Little consideration normally has been given to the internal architecture of the firm."); Jensen & Meckling, *Theory of the Firm*, *supra* note 3, at 306–07 ("While the literature of economics is replete with references to the 'theory of the firm,' the material generally subsumed under that heading is not a theory of the firm but actually a theory of markets in which firms are important actors. The firm is a 'black box' operated so as to meet the relevant marginal conditions with respect to inputs and outputs, thereby maximizing profits . . . ."); Timothy F. Malloy, *Regulating by Incentives: Myths, Models, and Micromarkets*, 80 TEX. L. REV. 531, 532–33 (2002) [hereinafter Malloy, *Regulating by Incentives*] ("Although no single, authoritative description of the black-box model exists, most formulations include three major components. First, the model assumes that the organization is a monolithic entity that essentially makes decisions as a natural individual would. Thus, the collective nature of the firm and its internal features are largely ignored. Second, the model assumes that the unitary firm makes decisions rationally . . . . Third, the traditional formulation of the black-box model assumes that the firm has one dominant goal: maximizing profits." (citations omitted)).

68. Organizational theory and organizational economics explore internal firm characteristics to explain organizational form and behavior. *See, e.g.*, Michael C. Jensen, *Organization Theory and Methodology*, 58 ACCT. REV. 319, 325 (1983) (describing the emergence of the field of organizational theory, with its emphasis on key organizational characteristics "which can explain why various organizations function as they do," including "the performance measurement and evaluation system . . . , the reward and punishment system," and "the system for partitioning and assigning decision rights among participants in the organization"). *See also* Sarah Kaplan & Rebecca Henderson, *Inertia and Incentives: Bridging Organizational Economics and Organizational Theory*, 16 ORGANIZATIONAL SCI. 509, 509 (2005) ("Organizational theorists have long acknowledged the importance of the formal and informal incentives facing a firm's employees, stressing that the political economy of a firm plays a major role in shaping organizational life and firm behavior. Yet the detailed study of incentive systems has traditionally been left in the hands of (organizational) economists, with most organizational theorists focusing their attention on critical problems in culture, network structure, framing and so on—in essence, the social context in which economics and incentive systems are embedded." (citations omitted)). The organizational theory literature has influenced legal commentary on firms generally. *See* Malloy, *Regulating by Incentives*, *supra* note 67, at 534 ("In some areas, the legal literature has begun to relax the black-box assumptions. For

commentators have moved past black box assumptions specifically with regard to large corporate law firms,[69] these same assumptions have enjoyed uncritical acceptance in class action scholarship.

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example, writers using principal/agent theory and other concepts of organizational theory have breached the walls of the blackbox in the fields of corporate crime and securities regulation. Yet in other areas, the black–box remains essentially intact." (citation omitted)); Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451, 457–58 (2003) (describing firm "routines"—which refers to "a wide range of formal and informal regular patterns of behavior that coordinate the activities of the firm members," including "communication routines," as well as "standard operating procedures that control production activities, budgeting and resource allocation procedures"—as driving firm behavior with regard to regulatory compliance).

69. *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM, 3, 9–10 (1991) [hereinafter GALANTER & PALAY, TOURNAMENT OF LAWYERS] (attributing the growth of large corporate law firms to the fundamental structure of the law firm "that crystallizes around the exchange between senior and junior lawyers" structured by the "promotion-to-partner tournament"); Robert L. Nelson, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 38 (1988) ("My argument is that a fundamental shift in the market for corporate legal services has resulted from the expanding functions of law in the affairs of major corporate actors . . . thus creating new tensions in the traditional law firm structure. The resulting 'new structure' of firms is marked by the emergence of a distinctive managerial elite and increasing disparities in the status and income of partners," as well as "a new managerial ideology"); Edward A. Bernstein, *Structural Conflicts of Interest: How a Law Firm's Compensation System Affects Its Ability to Serve Clients*, 2003 U. ILL. L. REV. 1261, 1261 (2003) (considering the relationship between income allocation schemes and the possibility that a corporate attorney's advice will be tainted by self-interest, in possible violation of Model Rule of Professional Conduct 1.7); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 320 (1985) ("In turn, recognition of the central importance of the method of income division in a law firm suggests a number of hypotheses concerning other important aspects of firm organization, including hiring and partnership selection policies. Our principal concern is thus to use a different theoretical framework to study an important social phenomenon—the large firm."); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1707 (1998) (considering effect of ethics rules on firm structure); S. S. Samuelson, *The Organizational Structure of Law Firms: Lessons from Management Theory*, 51 OHIO ST. L.J. 645, 645–46 (1990) ("Management theory and the impact of structure on organizational problems are foreign topics to most lawyers. Moreover, scholars have offered little practical guidance. Although management theory is rich in literature on

Internal firm structure shapes decision-making in ways the conventional account of class counsel does not address.[70] Lawyers serving as class counsel have interests that diverge from the interests of the class members. But to appreciate that divergence we must go beyond the simplifying assumptions animating the conventional understanding of the entrepreneurial lawyer. To identify the incentives potentially affecting attorney behavior in a given class action, it is not enough to know that the attorney works in a for-profit law firm. We also want to know precisely who within the firm will manage the litigation, how he is compensated and promoted, the extent to which he directly bears the risk of funding the litigation, his level of firm attachment, and his ability to direct firm resources to the litigation. We need to know, in short, both how a firm is organized, and how the attorney managing a particular case is situated within the firm's architecture. Such information does not allow us to precisely predict an attorney's case-management decisions; but consideration of these factors does test the reasonableness of the black box assumption of cohesion, which in turn tells us something about whether efforts to regulate attorney behavior premised on that core assumption are likely to be successful.

Larger firms tend to have complex internal structures. Such complexity undermines cohesion in two primary ways: by creating a wedge between firm ownership and control of case-investment decisions[71] and by creating incentives for case managers other than maximization of firm profit.[72] To understand agency costs in class

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generic organizational structures, academic researchers have largely neglected the application of this literature to the internal organization of law firms.").

70. The rest of this discussion assumes that class counsel is essentially self-seeking, to squarely meet the conventional account of class counsel on its own terms (i.e., without contradicting the conventional understanding that fiduciary models of class counsel are descriptively inaccurate).

71. *See* Jensen & Meckling, *Theory of the Firm*, *supra* note 3, at 308 (arguing that agency conflicts can distort a firm's investment decisions if ownership and control interests do not reside in one person). The situation is in fact even more complicated, because many cases are prosecuted by consortiums of law firms functioning in effect as ad hoc firms, where cohesion is arguably even more elusive. The effect on attorney incentives of inter-firm coordination and collective action is a separate topic not explored herein.

72. The opportunity of individuals within a firm to pursue their own distinct interests is an agency issue. *See* George M. Cohen, *When Law and Economics Met*

actions, we must first understand what class counsel really wants, and how he achieves it.

1. Firm Ownership May Not Track Case Management Authority

Most law firms are partnerships, in which ownership is measured in percentage points.[73] Each equity partner's annual income is a product of his equity stake (percentage) and the firm's profit. The spread of equity by percentage point, rather than by case, creates a wedge between the interests of the firm and the particular

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Professional Responsibility, 67 FORDHAM L. REV. 273, 284 (1999) ("Agency problems may be compounded by the fact that clients, their lawyers, and third parties may all have agency problems within themselves . . . . The paradigmatic agency problem 'within the lawyer' is the law firm in which the lawyer practices. Lawyers are agents of their firms as well as of their client, and difficulty of monitoring poses problems in the lawyer-firm relationship similar to those in the lawyer-client relationship."). Recognition of this issue traces, in part, to Jensen and Meckling's work conceptualizing the firm as a "nexus for a set of contracting relationships among individuals." Jensen & Meckling, *Theory of the Firm*, *supra* note 3, at 310 ("Contractual relations are the essence of the firm, not only with employees but with suppliers, customers, creditors, etc. The problem of agency costs and monitoring exists for all these contracts . . . ."). Jensen and Meckling's analysis, which is not focused on law firms in particular, undoubtedly inspired law-firm-specific analyses. *See, e.g.*, Gilson & Mnookin, *supra* note 69, at 333 ("The potential for each participant in the organization to maximize his self-interest at the expense of that of the other participants . . . can greatly reduce or even eliminate the potential for gain from organization. An agency theory of organization focuses on how organizations maximize the gains from cooperation by adopting structures which reduce the potential for participants to pursue their individual, rather than their collective, self-interest.").

73. *See* Christel Walther, *LLC and Lawyers: A Good Combination?*, 50 LOY. L. REV. 359, 366–67 (2004) (defining partnerships, limited partnerships, limited liability partnerships, and limited liability companies, and noting: "The partnership is the default format for all associations of two or more persons who carry on a business or profession for profit as co-owners. For the creation of a partnership, a written agreement and filings are generally not required, but there can be agreements, for example, on how the profits shall be shared or who shall manage the partnership. If there are no agreements on profit-sharing or management powers, all partners share profits and losses equally and render decisions together . . . [An LLP] shields the partners from liability for the professional conduct of their fellow partners in most of the states. Some newer LLP statutes go even further and provide a shield against personal liability for partnership obligations much the same as for shareholders in a corporation . . . .").

attorneys working on any one litigation matter; the outcome of any case that an equity partner manages may have only a negligible and indirect impact on his income.

This decoupling of ownership and control can occur even in smaller firms. Assume we have a three-lawyer firm with two equity partners, A and B, with equity stakes of 80 percent and 20 percent, respectively. C is a senior non-equity attorney. Each attorney manages one-third of the firm's case portfolio and makes case-management decisions on his own cases. Assume, further, that one of the cases, managed by B, is expected to bring in revenue of $10 million (in attorney's fees and cost reimbursement) before the end of the accounting year. A, B, and C know the firm's total annual expenses and are aware of the fee expected in B's big case. Assume the annual expenses of the firm are projected to be $4 million, including C's salary, firm overhead and case investments (hard costs). Assume the firm distributes 50 percent of firm profits each year and has no outstanding credit line. For the current year, A expects an income of $2.4 million ($3 million multiplied by .80), and B expects an income of $600,000, even if no other case produces revenue. In this hypothetical, one case funds the entire firm's operations and produces income for the equity partners, allowing the attorneys to focus on their other cases without regard to meeting the firm's bottom line or, depending on their personal preferences, their own perceived needs for direct income. The hypothetical is designed to avoid placing financial pressure on the case managers; but it reflects the reality that a fraction of any class action law firm's case portfolio at any given time may satisfy the revenue needs for the firm, creating spaces where individual attorneys managing other cases feel no direct or immediate link between the short-term outcome in any case and their own financial well-being. Also, the example highlights that, within law firms, case control may not track firm ownership. A, with 80 percent equity, has the greatest stake in any fee, but, in our hypothetical, has only a one-third chance of actually making case-management decisions.

2. A Lawyer's Perceived Self-Interest Is Shaped by Law Firm Practices[74]

The assumption of cohesion (the uniform pursuit of the single or predominating goal of maximizing law firm profit) is most credible if class counsel are either solo-practitioners (so the lawyer's interest and the firm's interest are co-extensive) or are embedded in firms that are organized to maximize each attorney's sense that his standing in the firm—with regard to equity, compensation, promotion, ability to direct firm resources to his cases, or expected longevity with the firm—is directly tied to the expected value of his mix of cases, individually, and relative to the net expected value of the cases managed by other attorneys in the firm. To the extent a self-interested attorney sees his interests as resting on factors other than firm profit, the assumption of cohesion is not credible.

a. Equity Allocation Schemes

Equity is typically fixed for some contractually established period of time as set forth in a partnership agreement. Usually, the agreement specifies the procedure for revising equity spreads, e.g., by unanimous consent, or majority or supermajority vote, either by the partnership or by a committee to which equity allocation decision-making is delegated. Two primary models of law firm partner equity allocation have been described in the literature: the merit system, based on some measure of contribution to firm income, and the seniority or "lockstep" system, based primarily on longevity in the partnership.[75] Many law firms, in general, and plaintiffs' firms, in particular, allocate equity based on both merit and seniority.

Equity allocation schemes that rest on factors other than each partner's relative contribution to law firm profit are inconsistent with the black box assumption of cohesion. Senior partners with a substantial and protected equity stake may not perceive their income

74. Except where additional citations are provided, I base my comments regarding structural characteristics of plaintiffs' class action firms on my direct observations of such firms while practicing and working closely with many of the leading plaintiffs' firms, nationally.

75. *See, e.g.*, Bernstein, *supra* note 69, at 1262 (defining the two primary models of income allocation in large law firms).

as being tied to the performance of the individual cases they happen to manage. Where partner equity is fluid, self-seeking lawyers may make case-investment and settlement decisions designed to game the partnership equity allocation process, rather than to maximize law firm profit. For example, if equity calculations rest on revenues and losses, an equity partner angling for a greater stake may have a disincentive to record disappointing outcomes in any particular year, leading him to continue to litigate less promising cases that, from the perspective of the firm, do not warrant continued investment. Similarly, a partner who believes his equity allocation each year rests on his perceived "value" to the firm may believe his value is a function of factors other than the annual revenues his cases generate, including his ability to generate new business, handle oral argument, or conduct trials. He may thus make case-investment decisions designed to emphasize these tasks to demonstrate his worth and jockey for a larger equity position. The conventional account of class counsel leaves no room for this kind of self-seeking.

b. Compensation and Promotion Schemes for Non-Equity Attorneys

The leading plaintiffs' firms have a mix of equity and non-equity lawyers. "Non-equity" attorneys do not own a percentage of the firm. They are employees, from junior associates to relatively senior and seasoned litigators, who happen not to have (and may not want) an equity stake. While equity partners may be nominally associated with or may at least loosely supervise every case, cases may in fact be managed by non-equity lawyers. Non-equity attorneys are typically compensated with a mix of a base salary and bonuses. The market for labor among plaintiffs' firms is fluid; lateral movement among firms is common. Senior lawyers capable of running cases are valuable resources. Attorneys often negotiate individualized compensation packages, which may vary by non-equity attorney within a single firm.

The compensation and promotion of non-equity attorneys has been the subject of extensive commentary and analysis in the context of large corporate law firms. For example, Galanter and Palay identified the "tournament-to-partnership" as the engine of growth for large corporate defense firms in the latter half of the twentieth

century.[76] While some aspects of the tournament undoubtedly exist in many of the larger plaintiffs' class action firms, it is rarely as systematic or predictable as the tournament conducted by the big corporate firms studied by Galanter and Palay. For purposes of this Article, a theory of the growth of the plaintiffs' class action firm is not needed; instead, it is sufficient to note that whatever compensation or promotion system is used creates incentives for non-equity partners to game the system, rather than to maximize firm profit. The more the system of compensation or promotion considers factors other than contribution to firm net revenues as a result of case-management decisions by non-equity attorneys, the more it creates a wedge between the interests of the individual attorney and the firm, undermining the assumption of cohesion.

Guaranteed compensation unaffected by each non-equity attorney's contribution to law firm profit, combined with either an elongated track to partnership or a closed partnership with no room for advancement, creates the greatest divergence between the perceived self-interest of such attorneys and the firm's interest in maximizing law firm profit. Case managers whose income and position in the firm are relatively detached from firm profit would presumably have less motivation to deviate from client or other interests. Layering a bonus component into the attorney's

76. GALANTER & PALAY, TOURNAMENT OF LAWYERS, *supra* note 69, at 102 ("Firms can conduct the tournament in various ways, so long as in the end they promote a fixed percentage of associates and they offer a total compensation package competitive in the market for associates. Some firms may eliminate associates at given intervals (say, yearly); others may make decisions more randomly; while still others, at least in theory, might wait until the end of the tournament to notify the losers. The precise rules are dependent upon the incentives the firm wants to maintain, the structure of its compensation package, and firm culture . . . . Growth occurs because, at the end of the tournament, the firm must replace not only the losing associates who depart, but also all those who win and are promoted."). The tournament-to-partnership explanation of law firm growth has critics. *See* George Rutherglen & Kevin A. Kordana, *A Farewell to Tournaments? The Need for an Alternative Explanation of Law Firm Structure and Growth*, 84 VA. L. REV. 1695, 1704 (1998) ("In order to come to a more satisfactory understanding of intra-firm structure, we need to turn to an analysis of inter-firm competition for top associates."); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1586–89 (1998) (offering a revised version of the tournament, as a metaphor).

compensation package only partially aligns the attorney's and firm's interests. For example, non-equity attorney bonuses may be structured with an upside for revenue, but little or no downside for losses. Similarly, where bonus programs are linked to the revenues from the cases handled by an individual attorney, rather than to overall firm revenue, that attorney's incentive is to invest sufficiently in his own cases to maximize the fees they produce, without considering the relative value of cases within the firm's portfolio.

Promotion opportunities also only partly close the gap in interests between owners and non-owners. Promotion within the firm often depends on factors other than just the revenue produced by the cases on which a particular attorney works. As is the case with equity partners, non-equity attorneys may see their value to the firm as connected to their ability to demonstrate competence at specific tasks, which could conceivably prompt them to focus on those tasks when litigating (rather than on expected fees, as the conventional account assumes). Partnership elevation may depend, too, on relationships within the firm, causing non-equity lawyers to focus on the cases they handle with or for partners whose votes are considered key (again, without regard to the effect on law firm profit). Similarly, promotion may encourage attorneys to continue litigating cases that should be voluntarily dismissed after they present no reasonable opportunity for success, because those attorneys do not want blemishes on their records before promotion decisions are made (an option the conventional account does not consider when mapping the divergence of interests between class counsel and the class members).

Finally, the track to partnership—especially in larger firms—may be so elongated that non-equity attorneys do not see their immediate case-management decisions in particular cases as having a direct effect on their prospects, in the long term, to be elevated to partner. Or there may be, at least as to some senior attorneys, no reliable track to partnership because the attorneys are never promised an equity stake. These attorneys may have less of an incentive to consider the firm's profit when making case-management decisions, absent other mechanisms to tie their interests to the firm's, such as a compensation system that effectively links their salary to the firm's performance or to the outcome of the cases on which they work.

c. *Case Financing*

The conventional understanding is that the plaintiffs' class action attorney making case-management decisions is identical to his firm in terms of his perceptions of the rewards and risks associated with litigation. Solo practitioners who self-fund their cases directly experience the risk their case-management decisions impose on their law firms. In multi-attorney firms, that experience of risk can be maintained by, for example, requiring individual partners to fund their own case costs, sharing only firm overhead with other law firm partners, to achieve economies of scale[77] with respect to firm operational expenses. But most leading firms finance litigation in such a way as to distance or insulate individual case managers from the experience of risk. Some attorneys who make case-management decisions do not contribute at all to the financing of litigation. These non-equity attorneys may experience an upside for successful case outcomes, for example, as a result of the compensation or promotion scheme applicable to them, but they rarely, if ever, directly experience risk associated with the firm's investments in litigation. Equity partners typically bear responsibility for case costs in proportion to equity stake, rather than in proportion to liability inflicted upon the firm as a result of each partner's relative contribution to the firm's liability for case costs. Just as with the discussion of equity, above, this creates a wedge between the interests of the persons making case-investment decisions and the interests of the firm as a whole. The attorneys with the lowest potential liability (and corresponding equity stake) may have the greatest incentive to undertake risk, all other things being equal, because they are bearing relatively less risk than their partners. The conventional understanding is that attorneys making case-investment decisions are relatively risk-averse; but, in fact, depending on the

77. Ronald J. Daniels, *The Law Firm as an Efficient Community*, 37 MCGILL L.J. 801, 810 (1992) ("Economies of scale arise when the fixed costs required to produce a single unit of output can be reduced by increasing the output of the good, thereby spreading these costs among a greater number of goods produced. In the case of legal services, economies of scale can result from the cost savings that can be generated by spreading the costs of certain fixed inputs, like libraries, accounting, time-recording, data collection, and word processing facilities, over a greater number of lawyers.").

firm's internal structure and the case manager's place within it, the opposite may be true.

d. Resource Allocation Mechanisms

There are several types of resources within a firm to be allocated, including: (1) attorney time, (2) paralegal time, (3) case costs (e.g., expert fees, travel expenses), and (4) overhead (e.g., secretaries, file room staff). Firms easily monitor expenses in categories 1–3, because relevant records are often maintained electronically, and thus can be generated easily.[78] Category 4 (overhead) expenses are not typically tracked by case.

A firm that is most cohesive in its pursuit of the goal of maximizing law firm profit would allocate resources, to the extent possible, based on regularly adjusted assessments of relative case value, however defined, so that the "best" cases receive a greater share of firm resources. In practice, however, many firms use some variant of the "squeaky wheel" approach to allocating resources,

78. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.213 (2004) (explaining the importance of accurate time records in calculating fees based on the lodestar and requiring counsel to maintain contemporaneous records showing "name of the attorney, the time spent on each discrete activity, and the nature of the work performed" and suggesting that any such records be maintained in an electronic format); *id.* at § 22.62 (recommending that when selecting lead counsel or members of a steering committee, judges set forth their expectations regarding number of attorneys to be assigned to particular tasks, the use of paralegals and associates, and recordkeeping and time and expense reporting). Though the percentage of the fund method is the preferred method for determining fees in class actions, courts often use counsels' lodestar as a cross-check. *See also In re* AT&T Corp., 455 F.3d 160, 164 (3d Cir. 2006) (noting that the percentage method is generally favored in common fund cases, while the lodestar method is used to check the reasonableness of the percentage fee award); *In re* Qwest Commc'ns Int'l, Inc. Sec. Litig., 625 F. Supp. 2d 1143, 1149 (D. Colo. 2009) (utilizing the lodestar cross-check as one of the factors used in determining the reasonableness of the percentage award); Loudermilk Servs., Inc. v. Marathon Petroleum Co., 623 F. Supp. 2d 713, 717 (S.D. W. Va. 2009) (employing a so-called "hybrid" approach to the determination of attorneys' fees, applying the percentage of the fund method and using the lodestar figure as a cross-check); *In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 586 F. Supp. 2d 732, 766–67 (S.D. Tex. 2008) (applying the percentage of the fund methodology to a securities class action under the PSLRA when approving an award of 9.25% of the fund, using the lodestar method as a cross-check).

which makes resource allocation, to the extent there is a gatekeeper at all, a function of some combination of attorney seniority and desperation.[79] Most firms do not have an effective gatekeeper ex ante analyzing the flow of resources within the firm; instead, case staffing decisions are often made haphazardly with attorneys managing cases negotiating with each other on an ad hoc basis. That is not surprising. The larger the firm, the more polycentric the case-management structure (with individual or small groups of attorneys running their own cases, and having relatively exclusive knowledge of the elements of case value) and the less likely it is that any one individual within the firm can mediate resource allocation disputes by reference to the "value" (i.e., the likely contribution to firm profit) of each case.

Less senior attorneys, as well as staff, often feel caught in the middle of firm power struggles. Ironically, though, they often independently determine who gets their time. In many instances, it is the low-level associate or the staff member who decides how to allocate his time, based on such factors as his feelings about competing senior attorneys or particular cases.

Precise resource management calibrated to the expected return on cases is exceedingly rare. This is partly because—as discussed below—case value is often indeterminate. Even where value can be estimated, knowledge of it is often not in the hands of the persons making resource allocation decisions within the firm. Moreover, that value itself is often dependent upon these very staffing decisions, if it is assumed that greater investment in a case correlates with better outcomes.[80]

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79. Some firms have gatekeepers responsible for allocating resources within the firm, who can be either an attorney or a senior staff member. Other firms simply require the attorneys competing for firm resources to negotiate with each other over scare resources.

80. Some commentators assume that greater investment predictably produces better outcomes. *See, e.g.*, David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 401 (2000) ("In general, the unequal investment incentive for defendants and plaintiffs in mass tort cases translates into a much greater chance that the defendant, who aggregates all classable claims automatically, will prevail on the common questions over the plaintiffs' attorney who acquires fewer than all claims."); Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 689 (demonstrating, to a point, the additional return generated by greater investment). But value sometimes rests as much on the lucky find—such as a helpful former employee of a defendant with

e. *Degree of Firm Attachment*

Firm attachment or identification is one way of characterizing the extent to which a lawyer internalizes the interests of the firm as his own. That attachment may be a product of a number of intangibles, including a law firm's culture and work environment, the extent to which a lawyer likes or seeks the approval of his colleagues, and the degree to which the firm, internally, disseminates a clear and consistent formulation of the firm's interests. Even within the two-dimensional world of the conventional account of class counsel—which assumes that the firm's interest is maximizing profit and that information regarding it is meaningfully shared internally—firm attachment can be significantly influenced by one particular factor: an individual attorney's expectation of continued employment with the firm. The more fluid a firm's roster of attorneys, the more likely it is that attorneys will calculate utility in ways that diverge from the firm's interest in maximizing profit. Attorneys who feel detached from the firm are more likely to make case-management decisions to enhance their personal interests, including: (1) reputation, (2) standing in the plaintiffs' bar or within a particular jurisdiction or practice area, and (3) contacts with organizations that can provide access to clients and future cases.

f. *Law Firm Structure, the Conventional Understanding of Plaintiffs' Class Counsel, and a New Model*

The foregoing analysis enables the identification of elements of plaintiffs' law firm architecture relevant to (and implicit in) the conventional understanding of plaintiffs' class action attorneys and the juxtaposition of that understanding against a new model of plaintiffs' class counsel addressing the current characteristics of the leading class action firms. The conventional account, when

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inside knowledge who is willing to testify truthfully, or a particular document that is discovered—as it does on the resources devoted to the case. Moreover, there is, at some point in every case, a decreasing marginal utility of investment of attorney time and resources, because cases are ready for trial after a finite amount of investment, and because not every task performed to prepare a case is equally important to the outcome.

characterizing the plaintiffs' class action attorney's interests, looks only at firm size and assumes that all plaintiffs' class action attorneys are solo practitioners or small firms without internal structural complexity of any significance. However, implicit in the conventional understanding of plaintiffs' class counsel as cohesive in pursuit of the one overriding goal of maximizing law firm profit are the internal firm structural characteristics presented below. The existence of firms with internal structures consistent with the conventional understanding of plaintiffs' class action attorneys suggests that accounting for law firm internal architecture does not undermine the conventional account's usefulness with regard to every lawyer or firm. Where the conventional understanding of class counsel fails is with regard to the leading class action firms, which are more likely to possess characteristics identified in the new model and summarized in the chart below. The conventional account does not correctly map the way the most significant attorneys' and firms' interests diverge from the interests of the class members they represent; and the conventional understanding of class counsel is thus unreliable as a foundation for reform. As discussed in Part IV, below, accounting for law firm internal architecture confronts that problem.

The Conventional Understanding and the New Model of Plaintiffs' Class Counsel

	The Conventional Understanding	**The New Model**
Firm Size	Small (one to five attorneys)	Relatively larger (more than five attorneys)
Equity Concentration	All case managers are equity partners.	Relatively fewer case managers are equity partners.

Equity Allocation Schemes	Equity is regularly adjusted to reflect net expected fees anticipated in each partner's cases.	Equity allocation is infrequently modified and rests on factors other than expected fees, including, among other things: (a) seniority, (b) historical performance, and (c) wins but not losses, etc.
Non-equity Compensation/Promotion Schemes	Non-equity attorney pay is tied to contribution to firm profit; eligibility for elevation to partnership turns on contribution to firm profit.	Non-equity attorney pay does not depend on contribution to firm profit; partnership eligibility turns on factors other than contribution to firm profit, such as demeanor, special skill sets, or relationships with existing partners.
Financing	Attorneys making case-management decisions front their own case costs.	Attorney contributions to financing of firm operations and case costs are not fully dependent on the risks and costs each attorney imposes on the firm.
Resource Allocation	Marginal case-investment decisions turn on regularly updated assessments of the net expected fees in each case.	Resource allocation decisions rest on factors other than the relative value (in terms of expected fees) of each case, including, among other things, partner seniority.
Attorneys' Firm Attachment/Loyalty	Firm attachment is high, in that attorneys expect to remain with the firm.	Firm attachment is low, in that attorneys expect to leave the firm.

These law firm structural models or archetypes are not presented to suggest that one can more reliably determine whether suspicion of class counsel is warranted in any given case merely by accounting for internal firm architecture. Instead, the models show that the situation on the ground is more complicated and less predictable than much of the academic literature suggests. Law firm internal structure creates diverse incentives other than maximization of law firm profit.

C. *Plaintiffs' Class Action Attorneys Invest Time in Cases for Complex Reasons Beyond Just Expected Fees*

The conventional understanding of class counsel predicts that he will be disloyal at a particular point in time—namely, when his next dollar of investment will not be adequately compensated by the fee he will recover for that dollar. This characterization of class counsel's disloyalty therefore relies on the idea that class counsel can predict his fees with some certainty. This is unrealistic because fees are often difficult to estimate. In addition, class counsel makes case-investment decisions for complex reasons unrelated to expected fees. The existence of asymmetric interests is of little significance if the potentially disloyal agent cannot know when the asymmetry exists and effectively act on it.

1. Fees Are Difficult to Predict

The conventional understanding is that the value of a case to class counsel is the expected fee.[81] In Figure A, above, the f-curve—class counsel's expected fee—is a constant function of the settlement's size, which is itself just a function of class counsel's investment of resources. Commentators more typically discuss class counsel's expected fee as a function of the expected outcome for the class (by trial or settlement) and the formula for calculating

81. *See* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 2, at 686 ("The key point is that the litigation stakes are asymmetric, with the defendant focusing on the judgment or settlement and the plaintiff's attorney focusing on the fee, which is typically a declining percentage of the recovery.").

attorney's fees (e.g., percentage of the fund).[82] In fact, expected fees are far more indefinite and involve additional contingencies merely implied by the conventional account, including: class certification, appointment of the plaintiffs' attorney as class counsel, success on the merits or by settlement, and the court's award of a particular fee upon application by class counsel under Fed. R. Civ. P. 23(h). The following paragraphs examine each of these variables, highlighting the sources of their indeterminacy. However the formula for expected fees is stated, it is too imprecise to carry the weight it has been given in the conventional account of how plaintiffs' attorneys litigate and settle class actions.

Fees are typically a percentage of a case's total settlement value, but quantification of actual damages is often more of an art than a science. Except for the simplest of cases, the actual damages involved in a lawsuit may depend on factors that are not susceptible to precise calculation. Some components of injury may be difficult to quantify, or unknown at the time of suit, either because all injuries have not yet manifested or because the injuries, even if they have manifested, can only be roughly estimated, producing a range of possible values.

Class certification—another element of the expected fee calculus—is often determined only after substantial case investment, leaving plaintiffs' counsel in a position of uncertainty regarding both the fact and scope of class certification (e.g., certification as to all claims, or only as to particular issues or subclasses, etc.).[83] Class

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82. *See, e.g.*, Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 348–50 (1998) (identifying as determinants of class counsel's expected fees in a class case both the amount of the class recovery and the method by which any fee is calculated). *Cf.* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1394–97 (2000) (characterizing the "expected fee" as the "average" fee award in "similar" cases).

83. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (noting the "rigorous analysis" that a trial court must undertake when resolving a class certification motion will "frequently" entail "some overlap with the merits of the plaintiff's underlying claim"); *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 39 (2d Cir. 2006) (noting that amendments to Rule 23 in 2003 precluding "conditional" certification orders and delaying the expected timing on class certification determinations support the need for "a more extensive inquiry into whether Rule 23 requirements are met than was previously appropriate," including

certification is granted if plaintiffs demonstrate, on a proper record, that all of the prerequisites of Rule 23 are satisfied, including 23(a) and at least one sub-section of Rule 23(b).[84] The exact scope of the class certified and the identity and number of class counsel dictate the size of the case and the degree to which a plaintiffs' attorney controls it and can thus seek a fee for whatever benefit he confers on the class. Class certification is often only one of several aggregation devices potentially applicable to a given category of litigation, including both contractual and administrative aggregation in state and federal courts.[85] The more fragmented the litigation, the more jurisdictions that may provide the vehicle for a litigated judgment or settlement, and the more difficult it is to estimate either the likelihood of certification or of a particular firm being appointed as class counsel. The probability that a particular attorney seeking appointment as class counsel will achieve a desired level of aggregation in his chosen forum may depend on factors that change, too, over time, including evidence developed in pre-certification discovery, the schedule in competing cases, and the outcome of administrative aggregation efforts.

Estimates of the probability of success on the merits are similarly mostly guesswork. Expected outcomes on the merits are dependent upon procedural developments, including the outcome of disputes regarding jurisdiction, the pleadings, discovery, and summary judgment. These developments may not be foreseeable. For example, a race discrimination class action lawsuit against Texaco settled in 1996 for what was then a record amount—$176 million—after the plaintiffs obtained an audio-recording in which top company executives admitted to destroying documents responsive to discovery requests and used racial slurs to refer to the

findings regarding satisfaction of the elements of Rule 23 that happen to overlap with the merits).

84. *See* Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010) ("By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria [of Rule 23] to pursue his claim as a class action.").

85. Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 329 (1996).

class action plaintiffs.[86] Similarly, in Holocaust-era class action litigation against several Swiss banks, described more fully below, the value of the litigation was dramatically enhanced after a night-watchman rescued documents from the shredder that were arguably related to the plaintiffs' claims.[87] It is impossible to quantify and, at the same time, difficult to overstate how the evidence of the defendant's document destruction added to the value of the litigation. Expected outcomes hinge, too, on post-trial developments, long after the most significant case investments are made, including appeals.[88]

The likely fee associated with any hoped-for outcome is even more indeterminate than the expected outcome at trial.[89] Fees are subject to court approval[90] and cannot be predicted based only on the value of the benefit class counsel's efforts confer upon the class.[91] Fees are commonly calculated as a percentage of the common fund, though the precise percentage can vary dramatically, depending on

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86. Roberts v. Texaco, Inc., 979 F. Supp. 185, 189–90 (S.D.N.Y. 1997). *See also* André Douglas Pond Cummings, *Pushing Weight*, 33 T. MARSHALL L. REV. 95, 111–12 (2007) (describing the events of the *Texaco* case).

87. *See In re* Holocaust Victim Assets Litig., 319 F. Supp. 2d 301, 316 (E.D.N.Y. 2004) (describing incident).

88. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 512–15 (2008) (finding a punitive damages award resulting from a class action jury trial to be excessive after nearly fifteen years of appeals from the 1994 jury verdict); Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 855 (Ill. 2005) (decertifying plaintiff class and reversing trial court judgment after approximately five years of appeals from the 1999 class action jury verdict and trial court judgment).

89. MDL judges can reduce some of the ex ante uncertainty in that setting by issuing case management orders providing for compensation to counsel for doing common benefit work. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 78, at App. A (reproducing Pretrial Order No. 127, the Amended Case Management Order, from *In re* San Juan Dupont Plaza Hotel Fire Litig., 768 F. Supp. 912 (D.P.R. 1991), and stating, in regards to fees for attorneys doing MDL work: "Once any settlement approved by the Court is finalized, a percentage amount (to be determined later but probably less than ten percent (10%)) of the gross settlement amount will be ordered deposited into a special account and will be used to pay PSC [Plaintiffs' Steering Committee] members a fee for their services as well as to reimburse the PSC for authorized expenditures")).

90. FED. R. CIV. P. 23(h).

91. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 78, § 14.121 (describing the variation in percentage awards and noting emerging judicial resistance to the use of "benchmark" percentages); Becker, *Third Circuit Task Force*, *supra* note 35, at 705–07 (recommending that courts avoid rigid adherence to percentage benchmarks).

the size of the fund, the type of case, the judge's views of fees generally and of the particular plaintiffs' counsel involved in the case, and the response of class members to the notice of the anticipated fee application. The range of fees awarded in big fund cases, from the low single digit percentages to over one-third,[92] makes fee-driven marginal investment unreliable; class counsel's best basis for achieving a substantial fee is to get the maximum common benefit for the class.[93]

Attorneys can and do attribute a working "hunch" of a value to cases, based on prior experience with similar claims and on experience litigating in particular jurisdictions, or against specific defendants, law firms, or insurers. But these hunches—often expressed as broad possible ranges rather than as precise figures—can vary dramatically over time and, separately, among different lawyers. Until sufficient discovery is conducted, these hunches may not even be expressed in dollar figures; characterizing a case as "big" may be as precise as it gets.

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92. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 832–33 (2010) [hereinafter Fitzpatrick, *An Empirical Study*] ("Not only do district courts often have discretion to choose between the lodestar method and the percentage-of-the-settlement method, but each of these methods leaves district courts with a great deal of discretion in how the method is ultimately applied," which partly explains the range of fees found in a study of cases settled in federal court in a two-year window, "from 3 percent of the settlement to 47 percent of the settlement."). *See also In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 586 F. Supp. 2d 732, 776–77 (S.D. Tex. 2008) (listing, in a chart, the percentage fee awards for post-PSLRA securities fraud class actions with settlements of $400 million or more and finding awards ranging from 1.73% to 21.4%); Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1210–11 (S.D. Fla. 2006) (citing the percentage attorney fees award in recent mega-fund settlements with awards ranging from 25.4% to 35.5%); WILLIAM RUBENSTEIN, ALBA CONTE, & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 17:25 (4th ed. 2008) ("To avoid depleting the funds available for distribution to the class, an upper limit of 50 percent of the fund may be stated as a general rule, although even larger percentages have been awarded."); Stuart J. Logan, Dr. Jack Moshman & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION REP. 167 (2003) (surveying fee awards in 1,120 cases representing aggregate class recoveries of about $41 billion in common fund cases between 1973 and 2003 and documenting variability in percentage awards).

93. MANUAL FOR COMPLEX LITIGATION, *supra* note 78, § 21.71 ("Compensating counsel for the actual benefits conferred on the class members is the basis for awarding attorney fees.").

The difficulty of estimating case value could be thought to make class counsel generally less likely to invest in cases, or at least less likely to invest in cases where fees are more uncertain, due to risk aversion. That may be especially true in smaller cases, as explained below. The point here is not that class counsel should make the "correct" level of investment in every case without regard to fees, but, instead, that marginal case-investment decisions are rarely pegged to expected fees with anything close to the level of precision necessary to say that expected fees, alone, explain such investment choices. Expected fees shape case investment in a relatively attenuated and rough fashion, at best.[94]

2. Factors Alien to the Conventional Account May Dictate Case Investment

"Case value" is simply too amorphous to produce anything other than the crudest relationship between it and attorney case-investment choices. If we assume that lawyers are self-interested—cabining, for now, the diversity of interests produced by law firm structural complexity, discussed above—how do lawyers make marginal case-investment decisions (e.g., whether to invest additional time in a case or to settle)? To begin to answer that question, it is helpful to identify two general categories of class cases: large and small. Large possible recoveries dilute the meaningfulness of case value, such as it is, as a determinant of marginal case investment. Even with relatively indeterminate or low probabilities of success, very large cases present sufficient incentive to fund litigation through a final judgment, without necessitating fee-driven marginal case investments. The smaller the expected

94. As discussed in note 28, *supra*, the difficulty pegging case investment to fees is particularly relevant to one particular form of agency cost problem, i.e., shirking, where class counsel invests too little in litigation. It is not a counter to the "sell out" principal–agent problem, where, at the time of settlement discussions, in exchange for an agreement regarding a substantial fee, class counsel agrees to accept less relief for the class. The arguments regarding firm structure, discussed above, relate more squarely to the "sell out" problem that arises at the moment of settlement; to the extent a particular lawyer is less focused on maximizing law firm profit, he is less likely to trade class benefits for fees (though, as noted, may still pursue selfish interests at the expense of the class that the conventional account of class counsel does not acknowledge).

recovery, the more likely it is that lawyers, however inefficiently, will attempt to tailor investment and settlement decisions to anticipated results.

Three case examples are worth mentioning here to illustrate both valuation difficulties and the absence of a precise relationship between, on the one hand, expected fees and opportunity costs, and, on the other, marginal case-investment decisions, at least in larger class actions.[95] For each case example, it is possible to loosely reconstruct early estimates of case value using the elements implicit in the conventional account, including, as discussed above, actual damages, the likelihood of class certification, the likely outcome at trial, and the possible range of attorney's fees that could be awarded; mapping that formula for case value against the case-investment decisions actually made by class counsel demonstrates that—except at one point, in one instance, when case value was essentially reduced to zero—estimated case value did not determine counsel's marginal case investments. Further—as it turned out—the weakest case produced the best outcome (for class members and also for class counsel), turning attorney estimates of case value and likelihood of success on their heads and underscoring the imprecise nature of investment in class action litigation.

Case Example 1: In *Avery v. State Farm Mutual Automobile Insurance Company*, named plaintiffs, on behalf of a proposed nationwide class of more than four million State Farm automobile insureds, sued State Farm for breach of contract and statutory fraud because of its practice of specifying non-original equipment manufacturer ("non-OEM") crash parts instead of OEM parts on damaged vehicles.[96] Plaintiffs alleged that non-OEM parts were—by virtue of being manufactured by reverse engineering—categorically of lower quality than what plaintiffs were promised under their allegedly uniform insurance contracts.[97]

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95. These cases were selected for their size, because I have direct knowledge of the case-investment decisions associated with them and because they have all been finally resolved.

96. 835 N.E.2d 801, 810–11 (Ill. 2005).

97. *Id.* I served as one of the Court-appointed plaintiffs' class counsel in this litigation and pursued a number of other "imitation parts" cases against other automobile insurance companies in state courts across the country, some of which settled while *Avery* was pending, but none of which provided a value benchmark

Ex ante, at the time early and major case-investment decisions were made, what was the value of the litigation? There were millions of class members, a sampling of whom appeared to have incurred losses in the range of at least a few hundred dollars, on average. Still, no one knew the exact value of the litigation, and it is unlikely that any of the attorneys who prosecuted the litigation shared a precise estimate. When *Avery* commenced, the likelihood of class certification was relatively high, given plaintiffs' theory of the case, which emphasized manifestly common questions, and favorable law on certification of similar claims in Illinois at that point in time.[98] The merits of plaintiffs' claims were untested[99] because they were, individually, negative value suits and because plaintiffs had only recently uncovered the alleged wrongdoing. The aggregate dollar value of class plaintiffs' injuries was not known at the time the litigation was commenced, at the time of certification, nor before substantial fact and expert discovery was completed. Plaintiffs' damages expert ultimately testified at trial to a broad range of possible damages for the class, from several hundred million dollars to well over one billion dollars;[100] the variability was the result of missing data regarding whether non-OEM parts specified by State Farm were actually installed on class members' vehicles.[101] If plaintiffs could prove that State Farm violated the Illinois Consumer Fraud Act, there was a possibility that punitive damages would be awarded, though, again, a numerical estimate of the likelihood of success would have been misleadingly precise and without foundation; it could safely be assumed that—if awarded—

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for *Avery*, given the absence of any momentum toward settlement in the *Avery* case.

98. At the time *Avery* was filed, Illinois state courts were accustomed to certifying multistate classes involving breach of contract and statutory fraud claims, applying Illinois law to the claims of all class members where the defendants were headquartered in Illinois. *See, e.g.*, Miner v. Gillette Co., 428 N.E.2d 478, 485 (Ill. 1981) (reversing trial and appellate courts' rejection of a multi-state class asserting Illinois breach of contract and statutory fraud claims).

99. The legal claims, based on contract principles as well as the Illinois state consumer fraud statute, were both well-established and relatively straightforward.

100. *See Avery*, 835 N.E.2d at 833 (indicating that damages as a result of non-OEM parts could range from $658.5 million to over $1.2 billion).

101. *Id.* at 833–34.

punitive damages would likely be either a fraction or a single-digit multiple of compensatory damages.[102]

At any point between commencement of the litigation and the moment the jury rendered its verdict, reasonable estimates of the expected outcome at trial ("actual damages" discounted by the possibility that the class would not be certified, and that plaintiffs would not prevail on the merits), ranged from tens of millions of dollars to several billion dollars. It would have been impossible to reliably translate those possible trial outcomes into a likely fee, other than to note that, in Illinois, at the time of the trial in *Avery*, courts regularly used the percentage methodology to calculate fees in class cases and often awarded such fees as a percentage of the common fund.[103]

The *Avery* litigation lasted approximately eight years, from commencement in July 1997 through the conclusion of appeals.[104] In that period, plaintiffs' counsel conducted pre-certification discovery, successfully moved for class certification, paid for nationwide class notice, completed full fact and expert discovery, and conducted a trial in 1999 that lasted nearly two months, resulting in a $1.18 billion judgment for plaintiffs.[105] Defendants appealed. At the intermediate appellate level, the judgment was reduced by $130 million, but was otherwise affirmed, as was the order granting class certification.[106] The Supreme Court of Illinois ultimately reversed the portions of the appellate court decision that affirmed the trial court on the certification issue and on the merits.[107]

At no procedural point in *Avery* did class counsel calibrate case investment along the lines implied by the conventional account

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102. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (surveying typical punitive damage awards).

103. *See, e.g.*, Ryan v. City of Chi., 654 N.E.2d 483, 491–92 (Ill. 1995) (affirming the lower court's award of a one-third fee due to counsel's efforts, the risk assumed, and the success of the litigation).

104. *See Avery*, 835 N.E.2d at 812 (noting that plaintiffs' original complaint was filed in July 2007).

105. Avery v. State Farm Mut. Auto Ins. Co., No. 97-L-114, 1999 WL 955543, at *1 (Ill. Cir. Ct. Oct. 8, 1999), *aff'd*, 746 N.E.2d 1242 (Ill. App. Ct. 2001), *aff'd in part, rev'd in part*, 835 N.E.2d 801 (Ill. 2005).

106. Avery v. State Farm Mut. Auto. Ins. Co., 746 N.E.2d 1242, 1248, 1262 (Ill. App. Ct. 2001), *aff'd in part, rev'd in part*, 835 N.E.2d 801 (Ill. 2005).

107. *Avery*, 835 N.E.2d at 863–64.

or illustrated by Figure A above. Settlement was never presented as a serious option; there was no "s-curve." Case value was never determinate, so the "f-curve," to the extent it was considered, was just a number deemed capable of dwarfing all anticipated litigation investments. Similarly, contrary to the calculus suggested in Figure A above, counsel's opportunity cost was, at no point, a meaningful determinant of counsel's marginal case investment; the expected outcome in *Avery* was never sufficiently definite to permit particularly useful comparisons to the hypothetical next best use of counsel's time except in the most broad-brushed way.

Instead, once the decision to proceed with the *Avery* litigation was made, the level of investment was dictated principally by the scope of the class certified by the court, the demands of trial preparation, and, post-judgment, the appellate briefing schedule. In terms of fact discovery, plaintiffs' counsel reviewed the documents and deposed the witnesses necessary to prove each element of the class members' claims. In terms of class notice, plaintiffs' counsel paid for that level of notice that the court deemed to be warranted under the relevant legal standards and the facts of the case. Plaintiffs' counsel developed the expert testimony required to support the class claims without more or less investment. The trial's contours were shaped by the evidence, the length of time it took to present and cross-examine witnesses, and counsel's sense of what was needed to prove plaintiffs' claims or test the defendant's defenses. Similarly, time invested in the (ultimately unsuccessful) defense of the class judgment on appeal was dictated by the arguments raised by State Farm and the schedules set by the appellate courts, rather than by plaintiffs' counsel.

Case Example 2: A second case example is the original MDL proceeding, *In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*.[108] Plaintiffs—owners of residential water wells contaminated or threatened with contamination by the gasoline additive MTBE—sought certification of a multi-state plaintiff class against twenty oil companies for injunctive relief (testing and remediation).[109] The key hurdle was the motion for class

108. 209 F.R.D. 323 (S.D.N.Y. 2002). I served as a Court-appointed Plaintiffs' Liaison Counsel in the MDL proceeding.

109. *Id.* at 328–29.

certification. Individually, most of the private well-owner cases were seen as negative value lawsuits because the cost of proving liability, including causation, was close to the value of the relief sought. Given the presence of individual issues and variations in state law, certification was always deemed to be a low probability event; the trial court described plaintiffs' counsel's approach to certification as "creative" when denying class certification.[110] Still, if certification had been granted, the value of the claims for injunctive relief was substantial and could easily have reached billions of dollars. So even discounted by the possibility that class certification would be denied and that the cases would then not be economical to litigate, the MTBE litigation had a net expected value, ex ante, that justified the necessary investment of attorney time and costs to undertake the litigation.

Until certification was denied, case investment was dictated by factors other than those implied by the conventional understanding of class counsel. Pre-filing informal discovery, ultimately successful motion practice before the Judicial Panel on Multidistrict Litigation, and the organization of a leadership structure in the transferee district were all undertaken as a matter of course and pursuant to the schedules set by the Panel and by the trial court. Thereafter, time invested to successfully defeat defendants' motions to dismiss[111] was dictated by the scope of the briefs defendants filed, and, again, by the schedule set by the court. Plaintiffs then sought to conduct the level of discovery necessary to permit an informed consideration of class certification. The scope of pre-certification discovery was a function of: the proposed class definition (including private well-owners in four states, seeking primarily injunctive relief); the Rule 23 criteria; the class certification discovery and briefing schedule set by the court; the available evidence (which was substantial); and the court's orders on motions to compel. Expenses associated with working the case up to the certification decision, though significant, were a small fraction of the value of the relief sought. When the court denied plaintiffs' motion for class certification, the case became uneconomical to litigate. It was at that

110. *Id.* at 329.

111. *See In re* MTBE Prod. Liab. Litig., 175 F. Supp. 2d 593, 635 (S.D.N.Y. 2001) (indicating that the defendants' motion to dismiss the strict liability, negligence, failure to warn, public nuisance, and conspiracy claims were denied).

extreme point, only, that the expected value of the litigation (i.e., zero) directly shaped case-investment decisions; after certification was denied, the private well-owner class actions were voluntarily dismissed.

Thus, as with *Avery*, in *MTBE*, the conventional account of plaintiffs' class counsel predicts or explains very little about how class counsel chose to litigate the case. More specifically, Figure A is completely inapposite; in *MTBE*, settlement was never an option, and expected fees could not be estimated with any kind of precision. As with *Avery*, *MTBE* was a high-risk investment that plaintiffs lost, one that could not be meaningfully compared to any hypothetical next best use of counsel's time, at least until the value of the litigation was reduced to zero. At all points during which the litigation was economically viable—i.e., until the court denied plaintiffs' motion for class certification—case-investment decisions were dictated, instead, by counsel's assessment of what was necessary to properly advance the claims to a successful resolution and by the case schedule established by the trial court.

Case Example 3: A final example is *In re Holocaust Victim Assets Litigation*,[112] a settlement administration which is just now winding down, in 2011, after a class settlement was reached, in principle, in 1998, and granted final approval in 2000.[113] Beginning in mid-1996, plaintiffs—including victims and targets of Nazi persecution, and their heirs—prosecuted class actions alleging that, in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally-obtained Nazi loot, and transacting in the profits of slave labor, the Swiss bank defendants collaborated with and aided the Nazi regime in violation of New

112. 105 F. Supp. 2d 139, 166 (E.D.N.Y. 2000) (granting final approval to the proposed settlement of $1.25 billion for five settlement classes). I served as a member of the plaintiffs' steering committee responsible for prosecuting the litigation, and was ultimately appointed as one of the settlement class counsel for the plaintiff classes defined in the settlement agreement.

113. *See* Holocaust Victim Asset Litig. Case, No. CV 96-4849, *available at* http://www.swissbankclaims.com/Documents_New/DistributionStats 2010.pdf (last visited May 24, 2011) (indicating the amount of Swiss bank settlements through 2010).

York, Swiss, and international law.[114] Plaintiffs sought, among other relief, an accounting and disgorgement of dormant accounts and other ill-gotten gains.[115] The cases were consolidated before Judge Edward R. Korman in the Eastern District of New York.

In nearly every respect, the Swiss litigation was more difficult (and had a lower probability of success) than either the more conventional *Avery* insurance litigation, or even the *MTBE* matter. At the time of the filing of the complaints, actual damages were not known, partly because the quantification of plaintiffs' injuries was part of the relief sought, in the form of an accounting, and partly as a result of the passage of time and destruction of records.[116] The cases presented novel issues regarding choice of law, statutes of limitations, the applicability and effect of Swiss banking secrecy laws, and plaintiffs' entitlement to an accounting and disgorgement for—not just dormant accounts, but also—profits from the Swiss banks' alleged activities laundering looted assets and transacting in profits from slave labor.[117] Defendants asserted multiple possible grounds for dismissal of the litigation; though motions to dismiss were briefed and argued, the court had not ruled on them by the time a settlement in principle was reached in August 1998.[118] If claims survived motions to dismiss, it was not at all clear that the court was inclined to certify multinational plaintiff classes; however, it is not

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114. *See* Morris A. Ratner, *The Settlement of Nazi-era Litigation Through the Executive and Judicial Branches*, 20 BERKELEY J. INT'L L. 212, 212 (2002) [hereinafter Ratner, *The Settlement of Nazi-era Litigation*] (indicating the plaintiffs' determination to seek an accounting and disgorgement of perceived ill-gotten gains).

115. *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d at 141–42.

116. It was not until the completion of an agreed-upon audit, which was folded into the settlement of the claims, and the conclusion of work by various historical commissions that it became clear that provable actual damages, at least in regards to the dormant accounts, were roughly in line with the ultimate settlement amount. *See In re* Holocaust Victim Assets Litig., 302 F. Supp. 2d 59, 61 (E.D.N.Y. 2004) (rejecting Swiss bank objections to valuation presumptions regarding dormant accounts and describing audits and historical investigations of bank conduct during and after World War II).

117. *See generally* Morris A. Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview*, 58 N.Y.U. ANN. SURV. AM. L. 623 (2003) (highlighting many of the issues present in these cases).

118. *Id.* at 642–47.

possible to more specifically quantify the possibility of certification. Because actual damages were not known, it was not possible to even crudely estimate an expected outcome at trial; it was clear, though, that if key pre-trial hurdles could be successfully negotiated, including Rule 12 and 23 motion practice, whatever claims were ultimately tried would have tremendous value that would likely dwarf case costs. It is highly doubtful that any lawyer making marginal case-investment decisions had a more refined sense of the expected outcome of the litigation on the merits.

The Swiss litigation was unusual in terms of the attorneys' fees. Several of the lead plaintiffs' firms prosecuted the litigation on a pro bono basis. Those lawyers who declined to waive fees did so with the knowledge that any fees awarded would likely be less than those typically awarded in other class actions.[119] So the net expected value to counsel making investment decisions was clearly lower in the Swiss case, ex ante, than in *Avery* and *MTBE*. That lower net expected recovery did not dictate how the case was litigated. On the one hand, it could be argued that the Swiss Holocaust-era cases were "cause litigation," and that the cases, too, had value to the participating firms that went beyond any anticipated fee, including the value that comes from working on high profile litigation. However, if case-investment decisions are meaningfully shaped by expected fees (to counsel) and by perceived opportunity costs, then one would expect to see, on balance, less effort in the Swiss litigation than in the other categories listed above by way of example. That did not happen. The Swiss case was litigated as aggressively as possible by the attorneys who had leadership roles in it, with investment decisions basically determined by the court's briefing schedules and rulings limiting discovery, rather than by counsel pegging marginal investment decisions to expected fees.

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119. *In re* Holocaust Victim Assets Litig., 270 F. Supp. 2d 313, 315 (E.D.N.Y. 2002) (noting that certain counsel had agreed to either prosecute the litigation pro bono, or to donate their fees, and refusing to award risk-multiplier on lodestar-based fee award to one of the firms seeking a fee). Lieff, Cabraser, Heimann & Bernstein, LLP donated the fee awarded to it in the Swiss banks litigation to endow a clinical human rights chair at Columbia University Law School. Karen W. Arenson, *Bulletin Board; Human Rights Law at Work*, N.Y. TIMES, Oct. 9, 2002, at B8, *available at* http://www.nytimes.com/2002/10/09/nyregion/bulletin-board-human-rights-law-at-work.html (last visited Apr. 15, 2012).

Unlike *Avery* and *MTBE*, the Holocaust-era class actions against the Swiss banks resulted in a settlement. However, the conventional account of class counsel provides little insight into the timing or nature of the settlement. As a result of the combination of the efforts of counsel, the trial judge's personal involvement in settlement discussions, the political and extra-judicial movement that coincided with the litigation, and the Swiss banks' interest in achieving closure on the issue, the litigation resulted in the largest human rights class action settlement in history, at $1.25 billion.[120] That settlement point was a consensus figure, reached with the participation of victim advocates and the judge presiding over the litigation, rather than a figure selected by plaintiffs' counsel to maximize fees.

These three examples illustrate that—in cases with relatively larger possible values, however imprecisely measured—case-investment decisions are not typically made on a marginal basis by reference to a meaningfully definite estimate of expected fees. Instead, such cases represent rough calculated bets, where aggressive case development of even novel or difficult claims can pay off handsomely for the class, and, through that common benefit, for the class counsel. In such cases, calibration of marginal case investments to expected fees is not necessary to make the litigation viable; moreover, plaintiffs' counsel quite regularly lacks the opportunity to select the end point of the investment continuum via settlement.

It is in comparatively smaller cases that class counsel's case-investment calculus is more likely to be shaped, however crudely, by counsel's rough estimate of the likely case outcome. It would not make sense to litigate a case involving only, say, $5 million in actual damages the way plaintiffs prosecuted the *Avery*, *MTBE* and the Swiss banks litigation, each of which involved an investment of lodestar and hard costs by class counsel, collectively, well in excess of $5 million. The expected fee in the hypothetical case involving $5 million in actual damages would be, at most, some fraction of that

120. *See* JOHN AUTHERS & RICHARD WOLFFE, THE VICTIM'S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST 350–64 (2002) (noting the involvement of all parties, including the trial judge, in reaching a settlement); Ratner, *The Settlement of Nazi-Era Litigation*, *supra* note 114, at 215–16 (describing key settlement negotiations supervised by Judge Korman).

amount. Of relatively lower value, smaller cases more clearly require counsel to at least attempt to calibrate case-investment decisions. Even as to that subset of class actions, however, law firm internal architecture may influence the case-management decisions of individual attorneys in ways that the conventional account of class counsel does not capture.

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One might respond to the catalogue of "interests" other than firm profit provided in the preceding section and to the discussion of case investment and expected fees in this section by invoking the concept of natural selection in markets, whereby, over time, firms that more effectively maximize firm profit presumably edge out firms that are, for whatever reason, less profitable.[121] By this logic, firms that are closer to the new model in the preceding chart—i.e., those that adopt forms of internal organization that make their constituent elements less cohesively pursue the goal of maximizing law firm profit—will eventually be overtaken by more profitable firms, and will disappear. Even if we accept the natural selection thesis in general, we need not accept it in the context of plaintiffs' class action law firms, which operate in the absence of a competitive market. Plaintiffs' class action law firms are different from firms that manufacture goods or services and compete with each other primarily on the basis of price. An inefficient class action plaintiffs' law firm may never be "edged out" because there are no consumers choosing between the price of its "product" and any other more efficient firm's product.[122] The client of a class action plaintiffs' law

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121. *See* Malloy, *Regulating by Incentives*, *supra* note 67, at 587 ("Even scholars who reject the black-box conception of the firm, such as Williamson and Jensen and Meckling, use market selection to justify the assumption that firm structure moves inexorably to the most efficient state.") (citing Michael C. Jensen & William H. Meckling, *Rights and Production Function: An Application to Labor-Managed Firms and Codetermination*, 52 J. BUS. 469, 473 (1979)); *see also* Sidney G. Winter, Jr., *Economic "Natural Selection" and the Theory of the Firm*, 4 YALE ECON. ESSAYS 225, 225 (1964) (describing the assertion of "survival of the fittest" arguments in response to critiques of the assumption of profit maximization by firms).

122. *But see* Cheffins, Armour & Black, *Delaware Corporate Litigation*, *supra* note 41, at 467 ("During the 2000s there was increasingly vigorous jockeying among law firms who brought securities class actions for the lead counsel role."). It is important to distinguish competition for control of litigation from competition that is based on price of services; firms jockey for position

firm never directly experiences the inefficiency described above because the lawyer's fee is awarded by the court, typically as a percentage of the total recovery, normally at the end of the case, without any basis for comparison shopping for a cheaper deal ex ante.

Why do plaintiffs' law firms tolerate inefficiency? The absence of a truly competitive market allows plaintiffs' class action attorneys to be satisficing (content with making *a* profit, rather than profit maximizing). This then allows the partners to organize their firm internal architecture to achieve goals other than maximizing firm profit by, for example, constructing a reward system within the firm that benefits particular partners or elements of the partnership (e.g., a reward system that is focused on seniority, rather than on relative contribution to law firm profit, or that rewards attorneys who are loyal to the particular partners who establish firm reward routines). In addition, there are information problems associated with structuring the reward and resource allocation routines within the firm around the one dimension of relative contribution to law firm profit. For example, it may be difficult to ascertain, on a case that lasts multiple years, which of several different attorneys within the firm make case-management decisions and whose decisions contributed to the profit, if any, ultimately generated by the case. So attorneys structuring reward systems may use proxies for relative contribution to law firm profit that feel more reliable, such as an attorney's work ethic, or the skills possessed by an attorney, reference to which in the reward system creates the very distortions that are the subject of this Article.

It could be argued that lawyers would tend to flee inefficient firms for more profitable firms in pursuit of greater profits, assuming they could somehow identify them (a tough project, given the fact that most plaintiffs' firms do not publish data showing profits per partner). In fact, lawyers maintain their association with firms for any number of reasons, one of which may very well be that they appreciate or prefer a work environment that is more analogous to the new model in the chart above. This is especially true among class action plaintiffs' attorneys generally, who are a relatively

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mainly through strategic moves unrelated to the price of the services they offer, such as the choice of venue. Competition for position in cases thus does not translate into an emphasis on efficiency.

independent and colorful lot, and plaintiffs' firms that specialize in complex or aggregate litigation in particular, which can, by virtue of the pursuit of very large cases, generate enormous revenues for partners who need not devote much effort to achieving the kind of efficiency that economists deem paramount in other settings.

IV. WHY THE NEW MODEL IS IMPORTANT

Complicating the conventional account of class counsel has three virtues. First, it is more descriptively accurate. Second, and relatedly, it directs our attention to the need for particular empirical work that has, to date, been largely overlooked. This empirical work will shed light on what agency problems actually infect class action litigation today. Finally, a more accurate account of plaintiffs' class counsel and the particular agency problems at work in class actions better positions us to assess the likely efficacy of reform measures, particularly the choice between direct regulation versus market or incentive-based approaches to managing agency costs.

A. The New Model Is More Descriptively Accurate

The new model of plaintiffs' class action attorneys presented in this Article is more descriptively accurate than the conventional understanding of class counsel, at least with regard to the large firms that dominate the plaintiffs' class action bar. Descriptive accuracy presents a real rather than a fictive target for both understanding and managing agency costs in class litigation. What do plaintiffs' class action attorneys want, and how do they achieve it? The answer is: it depends on, among other things, the peculiar position of each lawyer within his law firm's internal structure. As firm size and complexity increase, the likelihood is greater that any particular attorney managing cases from within that firm will face relatively dampened pressures to maximize law firm income when making case-investment and settlement decisions. At the same time, complexity creates new incentives relating to, among other things, the compensation and promotion structures within the firm. For example, a non-equity attorney from a large firm who is managing a particular case, whose income is not tied directly to the case outcome

and who does not contribute at all to case costs and thus personally experiences virtually no direct risk, but who believes, perhaps because of the way promotion decisions are made, or perhaps because he is thinking of switching firms, that his personal interests would best be served either by getting the largest win possible for the class, or, alternatively, by avoiding an outright loss during his stewardship of the case, may actually over-invest in litigation. Alternatively, his position in his firm's architecture or his inability to peg case investment to expected fees, may, quite haphazardly, prompt him to invest at a level the clients would consider optimal, e.g., point X on Figure A. This Article commences the project of mapping the plaintiffs' class counsel's actual incentives created by law firm architecture; as it advances, the project should be guided in part by further empirical research.

B. The New Model's Complexity Underscores the Need for Better Empirical Research on the Actual Agency Problems that Exist in Class Action Litigation

Empirical work measuring agency costs in class actions is limited.[123] Recent empirical work on class action outcomes and fees, though rich and detailed, is not designed to specifically measure agency costs, either as conventionally understood or as suggested by the new model of plaintiffs' class counsel this Article provides. For example, Professor Brian T. Fitzpatrick's excellent empirical study attempting to gather all class action settlements approved by federal judges during the period 2006–2007[124] revealed a total of 688 class settlements approved by federal courts in that window.[125] Professor Fitzpatrick found that the average and median time to settlement was approximately three years;[126] eighty-nine percent of the settlements

123. Fitzpatrick, *An Empirical Study*, *supra* note 92, at 812 ("Despite all the attention showered on class actions, and despite the excellent empirical work on class actions to date, the data that currently exists on how the class action system operates in the United States is limited."). Professor Fitzpatrick's empirical work is among the most comprehensive in the literature. *Id.* at 812–13 ("As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year.").

124. *Id.* at 812.

125. *Id.* at 817.

126. *Id.* at 820.

provided "cash relief," as opposed to just in-kind relief such as coupons, injunctive relief, or declaratory relief (a telling figure, given that the stereotypical "sell out" settlement, involving coupons for the class and relatively large cash fees for class counsel, appears to be implicated in, at most, a small fraction of federal court settlements);[127] the settlements had a value of more than $33 billion,[128] or roughly ten percent of the wealth transferred as a result of all non-class tort actions during the same period;[129] and the settlements involved an average percentage fee award of approximately fifteen percent, well below the roughly one-third contingency percentage considered standard in non-class tort cases.[130]

What does this tell us about whether agency cost problems systematically and predictably plague class actions? In fairness, Professor Fitzpatrick did not ask this precise question. It is thus not surprising that we cannot tell from his data how the settlement amounts compare to actual case value or whether the lawyers invested time and costs in the cases at a level that is consistent with their clients' best interests. Nor can we measure the extent to which law firm internal structure affects case outcomes or enables distinct kinds of principal–agent problems based on the data as it has been presented thus far. We can say, grounding our conclusions in Professor Fitzpatrick's data, that class litigation involves substantial, long-term investments by class counsel that generate significant value to class members. But how that value compares to the value that would have been created in the absence of agency costs—either those mapped by the conventional account or by the new model—is not known.

Other recent empirical studies similarly provide only tantalizing hints about the nature and extent of agency costs in class litigation; though, again, in fairness, they were not designed to specifically measure such costs. Professors Eisenberg and Miller found that the class recovery and risk undertaken by counsel significantly shaped fee awards, while class certification for

127. *Id.* at 824.
128. *Id.* at 826.
129. *Id.* at 830.
130. *Id.* at 830–31.

settlement purposes only did not.[131] Professors Eisenberg and Miller updated their empirical study in 2010, with similar results.[132] The Eisenberg and Miller data is particularly helpful to courts seeking information about trends in class action attorneys' fee awards. As presented, the data does not permit measurement of agency costs as conventionally framed, or as suggested by the new model presented above.

To assess the true nature of agency costs in class litigation, we can, using a more complete account of class counsel, search for data that tracks the properly-defined divergence of interests between class counsel and the class. If my more complete description of the plaintiffs' attorney is correct, then it may be possible, by accounting for variations among law firms, lawyers, and cases, to obtain more refined information. Do firm size and internal complexity affect case-investment strategies? Does the relationship of an attorney with case-management authority to his firm's internal architecture affect his case-investment and settlement decisions? Do lawyers in class

131. *See* Eisenberg & Miller, *Attorney Fees*, *supra* note 36, at 76 ("The single most important factor determining the fee is the size of the client's recovery."); *id.* at 77 ("Risk is also usually significant: fees as a percentage of the recovery tend to be higher in high-risk cases than in other cases, and lower in low-risk cases."); *id.* ("Settlement classes were not robustly significantly associated with fee levels."); *id.* at 67 ("We could not reject the null hypothesis as to the presence of a settlement class in non-fee shifting cases. This result casts some doubt on the common perception that settlement classes are suspect because they can be vehicles for collusion between defendant and class counsel."). For this empirical study, Professors Eisenberg and Miller surveyed state and federal class actions with reported fee decisions between 1993 and 2002, inclusive, in which the fee and class recovery could be ascertained, along with additional class action data from a previous empirical study. *Id.* at 28 (identifying data used for their analysis and citing Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION REP. 169 (2003), as one of their sources for data); *id.* at 44–46 (describing data and coding conventions).

132. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 250 (2010) ("We find, regardless of the methodology for calculating fees ostensibly employed by the courts, that the overwhelmingly important determinant of the fee is simply the size of the recovery obtained by the class . . . . Although the size of the class recovery dwarfs other influences, significant associations exist between the fee amount and both the fee method used and the riskiness of the case . . . . Fees were not significantly affected by the existence of a settlement class . . . .").

cases in fact have the capacity to meaningfully peg case investment to expected fees? These are all questions that can and should be asked. Professor Deborah Hensler's prior work suggests one way to gather such data: ask the lawyers who are involved in class litigation. She and her colleagues did so, profitably, in their survey of ten class cases from the mid-1990s,[133] though without focusing on the organization structure of the individual law firms that prosecuted such cases.[134] The outcome may not be scientific, but the case studies were revealing, partly because they did not precisely track the conventional understanding of class counsel. Professor Hensler reports that by peering "into the class action fishbowl, we found a murky picture of Rule 23(b)(3) damage class actions. In the ten class actions we studied closely, plaintiff attorneys seemed sometimes to be driven by financial incentives, sometimes by the desire to right perceived wrongs, and sometimes by both."[135] Asking more precise questions about motive would no doubt expose yet additional fault lines, including those relating to firm structure, as discussed above.

C. *The New Model's Complexity Enables Us to Identify the Best Tools for Reducing Agency Costs*

Proposals for reducing agency costs can be roughly divided into two categories: first, market-based or incentive-based reforms that are designed to better align class counsel's perceived interests with those of the class, and, second, direct regulation approaches, including, for example, the formulation of generally applicable

133. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 5 (2000) [hereinafter HENSLER ET AL., CLASS ACTION DILEMMAS] ("The best sources of information on class action litigation practices are the parties, lawyers, and judges involved in class action lawsuits."). Professor Hensler and her colleagues selected ten class action lawsuits for "case studies," focusing on consumer and mass tort damages class actions. *Id.* at 138–39. One major source of information for the case studies was interviews with key participants, including outside defense and corporate counsel, plaintiff class counsel, judges, special masters, and, in some of the cases, objectors. *Id.* at 142. They also studied case-specific documents. *Id.* at 143.

134. *Id.* at 79 (discussing collusion by reference to the conduct of law firms handling case portfolios, without regard to the complicating factors discussed above, including firm structure).

135. *Id.* at 401.

standards governing the conduct or resolution of class actions, which typically require the court to police class counsel's faithfulness (e.g., by more effectively identifying and rejecting settlements that appear to be collusive).

The question regarding how best to address agency costs in the class setting is reminiscent of an ongoing debate in the regulatory compliance setting between proponents of "command-and-control" or direct regulation (in which regulatory agencies establish not only standards but, also, the means by which they will be achieved, imposing penalties when the means are not adopted)[136] and proponents of market or incentive-based regulations (which, as the name implies, typically hold out the promise of increased profits or reduced costs to induce desired behavior).[137] Attempts to align the incentives of class counsel and the class members by reference to class counsel's perceived interest in maximizing his profit are analogous to incentive-based regulations. In their favor, such regulations generally require less monitoring than command-and-control regulations. Incentive-based regulations also allow for more flexibility by the regulated entity to develop its own processes for meeting announced targets.[138] "Command-and-control" regulation is loosely analogous to direct regulation by the courts of the adequacy of class settlements, such as when class settlement evaluation standards are imposed under Rule 23(e), discussed below (with the rejection of a proposed settlement amounting to a penalty for failure

136. *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 97 (1995) ("Command-and-control regulation is a dominant part of American government in such areas as environmental protection and occupational safety and health regulation. In the environmental context, command-and-control approaches usually take the form of regulatory requirements of the 'best available technology' . . . ."); *see also* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 1017 (1995) ("Rules that specify end-states are common in modern regulation, in the form of 'command and control' regulation that says exactly what people must do and how they must do it.").

137. *See* Malloy, *Regulating by Incentives*, *supra* note 67, at 531–32 (explaining that market-based regulations create an opportunity to comply with specific obligations by offering the positive incentive of increased profits or reduced costs).

138. *See, e.g.*, Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 622 (1997) ("The use of economic-incentive-based regulatory tools can further loosen the grip of federal regulators and give broad scope to private actors to determine how best to meet environmental goals.").

to comply with counsel's obligations). In its favor, this approach to regulation, in general, does not depend on incentives to be properly formulated or calibrated; the regulated entity either complies or faces the risk of a penalty.[139] To some extent, command-and-control and incentive "regulation" in the class setting overlap.[140] For example, a fee award could be characterized as direct regulation in a particular class action if it penalizes plaintiffs' counsel in that case for having agreed to a barely-adequate settlement; that same award, however, may also affect the incentives of other lawyers prosecuting other class actions if they monitor fee awards in class cases. Broadly framed, the policy question is: do we trust the "market" or the regulator (here, the court)?[141] In the class setting, the answer to this question—assuming we want to emphasize one form of "regulation" of class counsel over another—depends in part on the characteristics of class action litigation and firms, highlighted in the preceding sections of this Article. The more complete account of class counsel, outlined above, provides a new basis on which to tentatively formulate specific recommendations; reform measures are most likely to succeed if they reflect and respond to current conditions and

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139. *See* Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and 'Fine-Tuning' Regulatory Reforms*, 37 STAN. L. REV. 1267, 1330–31 (1985) (concluding that while command-and-control regulation may not be "efficient," more tailored approaches have not proved to be as effective).

140. *See* Sunstein, *Problems with Rules*, *supra* note 136, at 1017 ("The line between privately adaptable rules and commands is one of degree rather than one of kind.").

141. To help mediate this debate, Professor Malloy has developed a "resource-allocation" model that peers inside the firm to determine whether command-and-control or incentive-based regulations are more likely to encourage innovation by firms attempting to comply with environmental regulations. Malloy, *Regulating by Incentives*, *supra* note 67, at 535–36. Building on the work of organizational theorists and considering such factors as the role of employee attention as a scarce resource to be allocated within a firm, *id.* at 556–58, the subgoals (other than maximizing firm profit) communicated by the firm's formal and informal operating procedures and by routines of individuals or subdivisions within the firm, *id.* at 560–61, and the way firm structure (e.g., specialization of tasks) affects the distribution of information within a firm, *id.* at 565, Professor Malloy suggests that regulatory choice and application should be guided in part by our understanding of the internal structure of firms, *id.* at 604. I adopt this proposal in this Article, below, without, however, relying upon the specific technical language developed by Professor Malloy.

practices.

1. The New Model's Complexity May Enable Tailoring of Incentive-Based Reforms

a. Firm Structure Reveals New Levers to Align Class Counsel's and Class Members' Interests

To reduce agency costs, courts and commentators have promoted reforms designed to more closely align the interests of class counsel and class members, focusing on two moments in class litigation: the appointment of class counsel (e.g., ensuring that subclasses with distinct interests are separately represented by class counsel[142] or conducting auctions[143]) and the award of fees to successful counsel (e.g., the methodology used to calculate fees).[144] The more complete account of class counsel outlined in this Article presents at least the opportunity to better tailor these incentives.

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142. In *Amchem*, confronting a mass tort settlement class involving asbestos claims, the Supreme Court added its imprimatur to several years of efforts by various lower courts to better define the limits of Rule 23, by describing the (limited) relevance of settlement to the certification determination. 521 U.S. at 621 ("[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed."). In the process, the Court also refashioned the adequacy of representation determination under Rule 23(a)(4), to focus more squarely on class counsel's economic interests. *Id.* at 626 (finding representation to be inadequate when presently-injured and exposure-only settlement class members were lumped together in a single class). The Court took a similar approach to assessing adequacy of representation by reference to class counsel's perceived economic interests in *Ortiz v. Fibreboard Corp.*, another proposed asbestos settlement class. 527 U.S. 815, 855–56 (1999) ("[E]ven ostensible parity between settling nonclass plaintiffs and class members would be insufficient to overcome the failure to provide the structural protection of independent representation as for subclasses with conflicting interests," including persons with present and future injury claims, who should have been divided into separate subclasses "with separate representation to eliminate conflicting interests of counsel.").

143. *See supra* notes 31 and 35 (citing journal articles discussing the use of auctions in class action cases).

144. *See supra* notes 31 and 36–37 (citing journal articles discussing attorney fees in class action cases).

Three examples illustrate approaches that could be explored in reliance upon a more complete account of class counsel.

First—though, as noted, more data is needed to verify this hypothesis—it is possible that the natural instinct of many MDL judges to gravitate toward larger firms when selecting counsel for leadership positions is more than mere bias. As discussed in Section III, above, that strategy or preference may actually increase the likelihood that lawyers working on those cases will feel less pressure to make case-investment and settlement decisions driven predominantly by their interest in maximizing their law firm's profit. That preference could be converted into a presumption when courts are selecting among firms competing for appointment as class counsel.

Second, to refine the project of interest alignment and thus reduce possible agency costs, courts could appoint individual attorneys, rather than firms, and, moreover, could restrict the appointed attorneys' opportunity to delegate case-management authority within the firm. In the BP MDL, Judge Barbier did just that.[145] He effectively pierced the firm and required that it make internal case staffing decisions in accordance with his dictates.[146] A more complete account of class counsel suggests that Judge Barbier's instinct was correct. However, by disproportionately

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145. *See* Case Mgmt. Order No. 8 at 2, In re Oil Spill, 747 F. Supp. 2d 704 (E.D. La. 2010), *available at* http://www.mslitigationreview.com/uploads/file/MDL%20Steering%20committee%20order.pdf ("The appointment to the PSC and/or Executive Committee is of a personal nature. Accordingly, the above appointees cannot be substituted by other attorneys, including members of the appointee's law firm, to perform the PSC's exclusive functions, such as committee meetings and court appearances, except with prior approval of the Court.").

146. *See* Malloy, *Regulating by Incentives*, *supra* note 67, at 536 ("[W]hat goes on inside the firm matters, and regulators should pay attention to this point in designing and implementing regulation."); Malloy, *Regulation, Compliance and the Firm*, *supra* note 68, at 460 ("Admittedly, the notion that regulators should reach within the firm to purposefully and directly alter the management function challenges the longstanding presumption in the compliance literature against such intervention. Given, however, what we now know about the internal workings of firms and other organizations, the time has come to revisit that presumption. Research on bounded rationality, organizational inertia, and cognitive biases demonstrates that firms and the individuals within them are much less efficient and adaptive than is typically assumed.").

appointing senior partners who presumably have greater equity stakes in their firms, he may have exacerbated the agency cost problems predicted by the conventional account of class counsel. Cabining considerations like experience and skill (factors relevant to appointment to a leadership position, but not necessarily relevant to reducing agency costs), the "best" lawyer may be one who is likely to be less identified with the firm in which he practices, and thus less focused on maximizing its fees.

Third, when considering the effects of fees on lawyer incentives, courts and commentators can, equipped with a more complete account of plaintiffs' class counsel, be mindful of the ways law firm internal structure may enhance or detract from expected fees as an effective lever for aligning interests of class counsel and the class. Is a particular fee award methodology likely to induce plaintiffs' attorneys to make the "correct" investment in a particular class action? The answer is that it depends, at least in part, on who is running the case and on his particular relationship with his firm; it also depends on the extent to which case value is capable of reasonably precise estimation at the time case-investment decisions are being made. In a large class action, where case value is indeterminate and the lawyer making case-management decisions does not perceive his own interests to appreciably turn on the fee calculation methodology, the fee lever may not have the desired effect.

b. Why Tailored Incentives May Fail

There are a number of reasons to doubt the effectiveness of tailored incentive-based efforts to better manage agency costs in class actions. First, to the extent such reforms seek to control how law firms allocate intra-firm case-management authority, they may unduly invade law firm autonomy; after all, the law firm, as a whole, presumably bears the costs of prosecuting litigation and should arguably have the opportunity to influence the case-management decisions made by individual attorneys (even if, as I argue above, that rarely happens in practice). Moreover, case staffing changes over time and is exceedingly difficult for a court to police. In short, it is not clear that any one lawyer's incentives will or should shape all case-investment and settlement decisions in each case.

Second, complexity may provide more insight, but it does not necessarily identify a more effective lever for reducing agency costs by manipulating incentives. As noted, the factors suggesting an absence of cohesion within a firm regarding the presumed goal of maximizing firm profit do not necessarily suggest that the interests of lawyer and clients are better aligned; instead, they may simply diverge in ways the conventional account of class counsel does not contemplate. A lawyer may over-invest or under-invest in litigation, or pursue his own interests at the expense of the class, in any number of ways unrelated to maximizing law firm profit.

Third, there are costs associated with too nuanced an approach to either attorney selection or to fees, in terms of court time, as well as errors. Courts will need to evaluate much more information to select and pay counsel involved in litigation when attempting to factor into their analysis the effects of law firm structure on attorney incentives or on attorney sensitivity to fee-driven incentives, in particular. To the extent courts attempt to direct internal firm case staffing, courts may need to police the staffing of class cases, a time-consuming and possibly futile task. Courts also lack information about the way each attorney working on a case is positioned within his law firm structure, something that changes over time. For these reasons, courts are likely to make errors or likely to resist this kind of micromanaging.

Finally, reducing agency costs is just one goal of court intervention in both the selection and payment of class counsel; Fed. R. Civ. P. 23(g), addressing selection of class counsel, considers multiple factors—such as experience—which are not designed to align interests, but are, instead, designed to promote competent representation.[147] Rule 23(h), authorizing a court to award "reasonable" attorney's fees in class actions,[148] requires courts to consider factors—including the reaction of the class, or the "skill and efficiency of the attorneys involved"—that, at best, only tangentially relate to the project of reducing agency costs by better aligning the

147. *See* FED. R. CIV. P. 23(g)(1)(A) (listing, among other factors to be considered when a court selects class counsel, class counsel's "knowledge" and "experience").

148. FED. R. CIV. P. 23(h).

interests of class counsel and the class.[149] Those competing goals may not be served by an undue focus on ex ante interest alignment.

2. Complexity Counsels in Favor of Rehabilitating the Trial Court Judge to Minimize Agency Costs

How can we best address the problem of agency costs in class litigation, such as it is? It may not be by constructing a better hypothetical plaintiffs' class action attorney, ascribing to him limited incentives, and then manipulating those incentives to ever-more-closely align his presumed interests with those of the class members. Because of the variety of incentives potentially influencing class counsel's case-investment and settlement calculus, it is easy to rely too heavily on market-based (interest alignment) approaches to reducing agency costs. Instead, though commentators have generally low opinions of the ability of judges to directly regulate class counsel and weed out bad settlements,[150] the trial court judge—

149. *See, e.g.*, Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (listing factors to be considered by courts when determining a "reasonable" fee in class cases).

150. *See, e.g.*, Coffee, *Accountability and Competition*, *supra* note 2, at 413 (noting that the need for judicial approval of class settlements has had "only marginal success at best" in reducing agency costs); *see also* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997) ("The same problems that confront courts in the settlement context are present throughout class action litigation. No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members."); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 348–49 (providing a particularly nuanced analysis of the trial court's ability to serve a gatekeeper function generally, and noting: "The detail provided by amended Rule 23(e) does not alter the reality that judges performing this task [of reviewing proposed class settlements] are doing a job quite different from traditional adjudication . . . . Ultimately, what they must do is become regulators, sensitive both to the dynamics of litigation activity and the underlying concerns of the body of law that give rise to the claims asserted."); Rubenstein, *The Fairness Hearing*, *supra* note 32, at 1438 (arguing that the fairness hearing deserves "more, not less, attention," and noting that some commentators have "essentially given up on the judiciary's ability to provide real class action oversight; indeed the [agency cost and collateral attack] literature is

properly guided by better-articulated settlement evaluation standards and by better evidence regarding case value—may be worth rehabilitating. That is, direct regulation of class counsel, especially at the final approval hearing stage of class litigation, may have a greater role to play in the ongoing project of managing agency costs.

Courts currently assess the substantive fairness of proposed class settlements by reference to criteria that are too loose to properly weed out bad settlements, whether such settlements are caused by misaligned interests not captured by the conventional account of class counsel, or even, just by ineffective lawyering.[151] The Second Circuit's test, articulated in *City of Detroit v. Grinnell Corp.*[152] in 1974, remains good law in that jurisdiction[153] and is typical.[154] The "*Grinnell* factors" include: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the class settlement notice; (3) the stage of the proceeding;

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largely motivated by this failure. Market-focused scholars locate monitoring outside of the judiciary and then rarely ponder what effect their proposals ought to have on the fairness hearing that will inevitably take place; it appears implicit that if the monitoring mechanism works, it does not really matter what the judge does at the end of the show, so long as she simply lowers the curtain").

151. *See* Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 168 (2009) ("Review of class action settlements takes the form of a list of factors uncertain in scope, ambiguous in meaning, and undefined in weight.").

152. 495 F.2d 448 (2d Cir. 1974).

153. *Grinnell* remains good law on the issue of the settlement approval factors. The Second Circuit has retreated, however, from the position it staked out in *Grinnell* favoring the lodestar approach on fees. *See* Goldberger v. Integrated Res., Inc., 209 F.3d 43, 49–50 (2d Cir. 2000) (embracing percentage methodology for calculating class action fees as an option).

154. *See, e.g.*, Sullivan v. D.B. Invs., Inc., 667 F.3d 273, 319 (3d Cir. 2011) (citing as the doctrinal core of the settlement approval analysis the test articulated by the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153, 156–57 (3d Cir. 1975) (directing trial courts faced with proposed class action settlements to consider, under Rule 23(e), when assessing the settlement's adequacy: "(1) The complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation")).

(4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the defendant's ability to withstand a greater judgment; (8) the "range of reasonableness of the settlement fund in light of the best possible recovery"; and (9) the "range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation."[155] These approval criteria are too vague in both formulation and application. In formulation, the factors fail to specifically identify the recurring settlement structures that generate hostility to class aggregation. In application, the class settlement final approval criteria deployed in most Circuits rely too heavily on ex ante indicia of structural fairness to justify settling counsel's determination of settlement value, presuming fairness, in many jurisdictions, of class settlements "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery."[156]

Patently unfair settlement structures can easily be identified, and either presumptively disfavored—such that a much higher showing would be needed in order to justify either preliminary or final approval—or barred. CAFA already disfavors coupon settlements, though it seeks to curb abuse using market incentives by requiring that the fee award in such settlements "shall be based on the value to class members of the coupons that are redeemed."[157] The Federal Judicial Center's MANUAL FOR COMPLEX LITIGATION lists settlement red flags, though it does not suggest that judges necessarily presume the inadequacy of settlements with these provisions.[158] Another recent list of inappropriate settlement

155. *City of Detroit*, 495 F.2d at 463.

156. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116 (2d Cir. 2005) (quoting MANUAL FOR COMPLEX LITIGATION § 30.42 (3d ed. 1995)). *See also In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004) (reaffirming the Circuit's commitment to requiring a "presumption of fairness when reviewing a proposed settlement where: '(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected'" (quoting *In re* Cendant Corp. Litig., 264 F.3d 201, 232 n.18 (3d Cir. 2001))).

157. 28 U.S.C. § 1712 (2006).

158. MANUAL FOR COMPLEX LITIGATION, *supra* note 78, § 22.923 (identifying as "things to avoid in mass tort settlement," among others: (1) treating similarly situated persons differently, (2) splitting claims of class members via

provisions comes from federal trial court Judge William Alsup, who, in his "Notice Regarding Factors to Be Evaluated for Any Proposed Class Settlement," which he has issued in a number of pending class cases,[159] expresses skepticism of specific settlement structures, like overly-broad releases,[160] reversionary funds married to unduly difficult claims programs,[161] or, even, agreements between the settling counsel as to class counsel's fees.[162] The point here is not that Judge Alsup's list is perfect, but that it heads in the correct direction: obviously-unfair settlement provisions can and should be expressly identified and either barred or disfavored. Judge Alsup's list of factors goes well beyond Rule 23(e)'s "fair, reasonable, and adequate" standard for final approval,[163] and, also, is much more specific than the multi-factor tests for settlement approval that have been articulated by various appellate courts.

Judge Alsup's "Notice" provides useful guidance, too, on the evidentiary support that could be required in every class action case to establish the adequacy of a proposed settlement's value. Judge Alsup suggests, specifically, that class counsel should prepare a "final expert class damage report" as part of his "due diligence" on behalf of the class, and, presumably, before settling the class

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settlement, (3) disparate treatment of inventory or future-injury claims, (4) overly-strict eligibility criteria, and (5) restrictions on opt outs).

159. *See, e.g.*, Thoms v. Officemax N. Am. Inc., No. C 11-02233 (N.D. Cal. June 8, 2011), *available at* http://docs.justia.com/cases/federal/district-courts/california/candce/3:2011cv02233/241512/13 (showing an example of Judge Alsup's application of his "Notice Regarding Factors to Be Evaluated for Any Proposed Class Settlement" to a pending case); Xavier v. Philip Morris USA Inc., No. C 10-02067, (N.D. Cal. Mar. 21, 2011), *available at* http://docs.justia.com/cases/federal/district-courts/california/candce/3:2010cv02067/227577/84 (explaining factors Judge Alsup expects counsel to consider in structuring class action settlements). All further references herein are to the version of the Notice Judge Alsup issued in *Xavier*.

160. *Xavier*, No. C. 10-02067 at 2.

161. *Id.* at 3.

162. *Id.* at 3–4.

163. FED. R. CIV. P. 23(e) was helpfully amended in 2003 to provide direction to trial courts which earlier iterations of the Rule lacked. In addition, the Committee Note to Rule 23 now provides additional useful guidance. However, even the amended Rule 23 lacks the kind of specificity that could be considered as part of the next step in guiding the exercise of trial court discretion with respect to proposed class settlements.

claims.[164] Recognizing the limits of the project of interest alignment as a way of ensuring fair settlements, courts could also insist upon some acceptable method of non-binding sampling (for settlement purposes), conducted by or before a competent neutral, to be developed as a rough proxy for the value of the litigation, prior to and as a basis of settlement discussions in damages class actions.[165] Giving more precise content to what constitutes a fair and adequate settlement, including the use of sampling or formulas to create a comparison point for settlement value, may enhance the likelihood that class action settlement values will more closely reflect case value: in every case, there would at least be a fixed start for purposes of assessing the adequacy of settlement amount, something that current practices and doctrine do not create or require.[166] Identification of the precise sampling procedures best able to generate reliable figures for case value is a separate topic, in and of itself, and one that has already been the subject of some inquiry.[167]

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164. *Xavier*, No. C. 10-02067 at 2.

165. MDL courts (to which related cases on file in the federal system are transferred pursuant to 28 U.S.C. § 1407) routinely use bellwether trials designed for a similar purpose. *See* Eldon Fallon, et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332–42 (2008) (describing the mechanics and benefits of using the modern "informational approach" to bellwether trials, i.e., individual cases within the aggregate selected for trial because they involve representative facts, claims or defenses). However, the use of bellwether trials or of other sampling methods is not currently required to justify settlement value in aggregate litigation.

166. Settling parties who wish to deviate from case value by settlement could be required to justify any such variance. For example, sampling variability, the parties' risk preferences, and litigation transaction costs could all justify some level of deviation from the values produced by whatever formula is ultimately employed to assess case value.

167. *See, e.g.*, Luke McCloud & David Rosenberg, *A Solution to the Choice of Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. 374, 378 (2011) ("Our principal contribution is a basic, straightforward point: the average of the differing state laws is, as a practical matter, the actual law that governs the choice a business will make. It expresses the choice that the multiple states involved expect, and presumably want, a business to make regarding whether and how safely it should engage in activities involving interstate risk."); *see also* Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 839 (1992) ("We already have noted one flaw in the imagery of the archetypal civil trial: The verdict appears precise and individualized, but in reality it is only a sample of one from a wider population of

The rough contours of possible sampling procedures can easily be imagined; "settlement by formula" would at most require the universal application of current best practices, rather than the invention of wholly new procedures.

In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court, confronting an expansive Title VII gender discrimination class asserting pay and promotion claims, rejected the use of statistical sampling in lieu of additional individual proceedings to calculate the amount of any back pay owed to class members asserting pattern-or-practice claims.[168] The Ninth Circuit, addressing manageability and due process concerns, had suggested that the *Dukes* trial court could determine a back pay award using procedures analogous to those approved by the Ninth Circuit in *Hilao v. Estate of Marcos*,[169] a class action involving approximately 10,000 victims of torture and other abuse, where the court appointed a special master under Federal Rule of Evidence 706 to select a statistically valid sampling of claims for purposes of calculating aggregate damages.[170] The Supreme Court in *Dukes* characterized that approach as "Trial by Formula," and rejected it as a violation of the Rules Enabling Act, 28 U.S.C. § 2072(b).[171] Other courts, faced with similar proposals in different substantive law settings, have rejected the use of statistical sampling to prove and allocate class damages (often called "fluid recovery") on Constitutional grounds, as a violation of defendants' Due Process rights.[172]

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possible outcomes. The illusion that individualized adjudication provides a precision that aggregation lacks is nothing more than that, an illusion."); Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 TEMP. L. REV. 1013, 1044–51 (2007) (surveying legal commentary on the use of statistical sampling in mass torts).

168. 131 S. Ct. 2541, 2545–46 (2011).

169. 103 F.3d 767, 782–87 (9th Cir. 1996).

170. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 625–26 (9th Cir. 2010).

171. *Dukes*, 131 S. Ct. at 2561 (stating that the Rules Enabling Act, 28 U.S.C. § 2072(b), provides that federal rules of procedure cannot be used to "abridge, enlarge, or modify any substantive right").

172. *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231–32 (2d Cir. 2008) (rejecting use of statistical sampling and averaging to both calculate and allocate aggregate class damages as a violation of the Rules Enabling Act and of defendants' due process rights: "When fluid recovery is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation").

None of these doctrinal concerns impedes "settlement by formula," i.e., the use of statistical sampling to connect settlement and case value. Requiring specific evidence as a condition of approval of proposed class settlements neither violates the Rules Enabling Act, nor poses a threat to any party's Constitutional rights. It does, however, squarely address one of the most troubling difficulties with regard to the evaluation of any class settlement, i.e., the relative indeterminacy of case value. The exact content of a valuation process could be tailored to the size and nature of a case or category of litigation. The only real requirement is that the valuation method be reliable. For example, settlement by formula could involve the use of court-appointed experts to sample and value claims, as the trial court did in *Hilao*,[173] or bellwether trials[174] of a statistically valid sampling of relevant categories of individual claims, or the adjudication of a sampling of representative claims before a neutral arbitrator. While any procedure would be subject to strategic behavior by settling parties, trial courts would at least have a target category of evidence on which to insist, the quality of which the courts could regulate.

Settlement by formula sets a benchmark for case value against which any settlement can be compared, and thus takes pressure off of ex ante structural interest-alignment or market-based approaches to ensuring fair process and outcomes. A properly conducted sampling would also address allocation issues within settlement classes, taking pressure off of courts concerned about conflicts within classes, under Rule 23(a)(4) or 23(g). Requiring this kind of procedure could also have ancillary benefits, such as reducing the effectiveness of reverse auctions[175] among competing groups of plaintiffs' counsel. In addition, the requirement of specific kinds of proof of case value would enable legitimate (non-professional) objectors to more meaningfully participate in the settlement evaluation process; currently, settlement value is one of

173. *See supra* note 169 and accompanying text.

174. *See supra* note165 and accompanying text.

175. *See* Negrete v. Allianz Life Ins. Co. of N. Am., 523 F.3d 1091, 1099 (9th Cir. 2008) ("A reverse auction is said to occur when 'the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant.'" (quoting Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 282 (7th Cir. 2002))).

the hardest things for a class member to assess, or for a potential objector to criticize, because it is so difficult to ascertain, and because case value, at the moment, tends to be deemed to be whatever the settling parties say it is, after arm's-length negotiation. This notion results from the widespread use of a presumption of fairness, one which should be abandoned in favor of a more rigorous inquiry regarding the fairness of class settlements.

By giving specific, clear content to the approval criteria for class settlements, in the form of specifically-enumerated disfavored settlement terms, and by reducing uncertainty at the settlement evaluation stage regarding case value, we can better equip the trial court to facilitate class action settlements that are truly fair and adequate without placing undue emphasis on whether, in any given case, class counsel's and class members' interests may or may not have been formally aligned.

Mass Tort Funds and the Election of Remedies: The Need for Informed Consent

Linda S. Mullenix*

I. INTRODUCTION 833
II. THE WTC VICTIM COMPENSATION FUND, ELECTION OF REMEDIES, AND WAIVER OF THE RIGHT TO SUE 840
A. *Timing of the Election of Remedies* 842
B. *Statutes of Limitations Issues* 844
C. *Applicable Law Considerations* 846
D. *Potential Defendants* 851
E. *Viability of Future Claims* 854
F. *Assistance of Counsel* 856
G. *Implementation of the WTC Litigation Option* 859
III. THE GCCF, ELECTION OF REMEDIES, AND WAIVER OF THE RIGHT TO SUE 864
A. *Timing and Scope of the GCCF Release* 866
B. *Statutes of Limitations Issues and Applicable Law* 868
C. *Potential Defendants* 872
D. *Viability of Future Claims* 873
E. *Assistance of Counsel* 875
F. *The BP Gulf Oil Litigation Options* 879
IV. CONCLUSION: THE NEED FOR INFORMED CONSENT TO ACCEPT A MASS DISASTER FUND AWARD AND WAIVE THE RIGHT TO SUE 884

I. INTRODUCTION

The twenty-first century may very well mark both the advent and triumph of fund approaches to resolving mass tort litigation. After more than forty years of attempted class action resolution of mass tort claims—with often controversial and problematic results—the use of no-fault alternative compensation systems styled as "funds" may emerge as the most efficacious, if not the most preferred, technique for settling aggregate litigation. The fact that various actors involved in mass tort disasters have converged in

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support of fund approaches to resolving aggregate claims heralds a new chapter in the resolution of mass tort litigation.[1]

The unprecedented attacks on the World Trade Center towers on September 11, 2001 gave rise to the creation and implementation of the equally unprecedented World Trade Center (WTC) Victim Compensation Fund.[2] The WTC Victim Compensation Fund was the first large-scale use of a no-fault, non-litigation fund approach to resolve massive tort claims in the United States,[3] apart from previous class action settlements, such as the "Agent Orange" fund.[4] Less than a decade later, following the explosion of the *Deepwater Horizon* oil rig in the Gulf of Mexico,[5] the BP oil company, in loose

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1. *See generally* Prof. John Goldberg, Harvard Law School, Prof. Robert Rabin, Stanford Law School, Hon. Jack Weinstein, United States District Court for the Eastern District of New York, Roger Parloff, FORTUNE MAGAZINE, Sheila Birnbaum, Skadden Arps and the mediator for 9/11 tort claims, Marc Moller, plaintiffs' attorney for 9/11 tort claims, Ken Feinberg, special master for the 9/11 World Trade Center Victim Compensation Fund, Conference at Cardozo School of Law: The Lessons of 9/11 Mass Tort Litigation (Sept. 12, 2011) (all commentators generally endorsed the creation and use of funds as the most efficient method to resolve mass tort claims).

2. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) ("ATSSSA").

3. *See* Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153, 2158–61 (1997) (discussing foreign use of funds to resolve Thalidomide birth defect claims). *See also* Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 908–13 (2011) (discussing European and Japanese funds as precursors to American funds and limited examples of prior American funds to resolve mass tort claims); Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 793–96 (2003) (discussing foreign compensation models for mass tort and terrorist events) [hereinafter Rabin, *September 11th Victim Compensation Fund*].

4. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 174 (2d Cir. 1987) (upholding the "Agent Orange" class action settlement and creation of the Agent Orange fund).

5. BRITISH PETROLEUM, *DEEPWATER HORIZON* ACCIDENT INVESTIGATION REPORT—EXECUTIVE SUMMARY, Sept. 8, 2010, *available at* http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/gom_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report_Executive_summary.pdf. *See also* Michael Cooper, *Two Funds, Same Goal: Compensate*, N.Y. TIMES, Aug. 22, 2010, at A14 (comparing events giving rise to WTC Victims' Compensation Fund and GCCF). *See generally* Thomas C. Galligan, Jr., *Death at Sea: A Sad Tale of Disaster, Injustice, and Unnecessary Risk*, 71 LA. L. REV. 787 (2011) (arguing that the Limitation of

coordination with the government, set up the Gulf Coast Claims Facility (GCCF),[6] patterned after the WTC Victim Compensation Fund.[7]

The WTC Victim Compensation Fund and the GCCF have both been widely praised[8] as well as criticized on various grounds, ranging from detailed critiques of implementation criteria to more wide-ranging discussions of fundamental fairness and justice.[9] The

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Liability Act and maritime punitive damages rule do not effectively compensate tort victims); Patrick H. Martin, *The BP Spill and the Meaning of "Gross Negligence or Willful Misconduct,"* 71 LA. L. REV. 957 (2011) (providing a framework for interpretation of the terms "gross negligence" and "willful misconduct"); Kenneth M. Murchison, *Liability Under the Oil Pollution Act: Current Law and Needed Revisions*, 71 LA. L. REV. 917 (2011) (analyzing federal liability standards and advocating the elimination of the limits on liability included in the Oil Pollution Act).

6. *See* Mullenix, *supra* note 3, at 833–37 (chronicling the events leading up to the creation of the GCCF).

7. *See id.* at 820–21 (citing authorities, including special master Ken Feinberg, stating that GCCF would draw heavily upon Feinberg's experience in creating and implementing the WTC Victim Compensation Fund).

8. *See, e.g.*, KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 1 (2004), *available at* http://www.usdoj.gov/final_report.pdf. ("I am pleased to report that, in my view, the Fund was an unqualified success . . . ."); Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 224–25 (2005) (praising the September 11th Victims' Compensation Fund); Kenneth R. Feinberg, Administrator, GCCF, Speech at the Washington University School of Law: Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation (September 14, 2004), in 19 WASH. U. J.L. & POL'Y 21, 29 (2005) (discussing the success of the September 11th Victim Compensation Fund); Mike Steenson & Joseph Michael Sayler, *The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 WM. MITCHELL L. REV. 524, 559 (2009) ("By almost all measures, the Fund was a success.").

9. *See, e.g.*, Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 689–91 (2003) (criticizing WTC Victim Compensation Fund and suggesting that future fund endeavors should focus on institutional design to ensure substantive and procedural fairness); Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51, 79 (2003) (criticizing the WTC Victim Compensation Fund for failure to reflect a consistent social vision or coherent compensation philosophy); Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 766–67 (2003) (questioning the use of a presumptive award schedule and procedural

purpose of this paper is not to revisit that commentary and those debates,[10] of which assessments undoubtedly will continue to emerge over time as scholars produce more considered analyses of the success and failure of the WTC Victim Compensation Fund and the GCCF.

Instead, this article focuses on a narrower, but perhaps more fundamental issue inherent in fund approaches to resolving mass tort claims. Both the WTC Victim Compensation Fund and the GCCF operated alike in requiring potential claimants, at some fixed deadline, to make an election of remedies: either to participate in the Fund and waive the right to litigate in the tort system, or to decline to receive remediation through the Fund and thereby preserve any rights to adjudicate claims in the future.[11]

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fairness); Jean Macchiaroli Eggen, *Toxic Torts at Ground Zero*, 39 ARIZ. ST. L.J. 383, 386 (2007) (proposing management plans for future mass tort exposure claims); George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527, 527 (2003) (noting that the WTC Victim Compensation Fund generated remarkable controversy); Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831, 1834 (2002) (noting that "Congress could (and should) have provided for exposure only victims as well as those suffering immediate physical harm, assuming that a compensation plan was warranted in the first instance.") [hereinafter Rabin, *Indeterminate Future Harm*]; Robert L. Rabin & Stephen D. Sugarman, *The Case for Specially Compensating the Victims of Terrorist Acts: An Assessment*, 35 HOFSTRA L. REV. 901, 913–15 (2007) (stating that compensation fund should be premised on the traditional legislative no-fault model of recognizing basic needs rather than on the hybrid tort and social welfare model); Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 358 (2003) (discussing how the WTC Victim Compensation Fund failed to create distributive justice or procedural fairness among recipients of the fund).

10. *See* Mullenix, *supra* note 3, at 823–25, 913–16 (discussing the praise and criticism of these funds).

11. ATSSSA, Pub. L. No. 107-42, §§ 405(c)(2)(A)(ii), 405(c)(3)(B)(ii), 115 Stat. 230, (2001). The Fund only compensated for personal injury and death. Claimants were required to waive their rights to sue for all damages, including property damages. *See also* Alexander, *supra* note 9, at 671–72 ("[ATSSSA] attempted to force claimants to choose between government compensation and tort litigation against the airlines and others . . . upon waiver of the right to sue anyone who did not participate directly in the terrorist act."). Criticizing the essentially coercive nature of the Act's election of remedies provision, Professor Ackerman has suggested:

> Had the Fund simply been an option that the victims and their families could pursue, it would have been hard to complain about its legal

This election of remedies and waiver of the right to sue is, obviously, essential to the success of the fund alternative; the very purpose of the fund resolution of mass tort claims is to avoid the tort litigation system. As will be discussed, close to 97% of eligible WTC claimants agreed to a Fund award and therefore signed a waiver of their right to sue.[12] Similarly, thousands of Gulf Coast claimants who received final awards from the GCCF also waived their rights to sue.[13] Moreover, the very essence of the fund approach to resolving mass tort claims theoretically has been grounded on the *voluntary* nature of the funds; or, as their advocates urge, no one is *forcing* anyone to take an award from a fund.[14]

This article discusses the election-of-remedies requirement inherent in fund approaches to resolving mass tort claims and takes issue with the argument that the fund resolution of mass tort claims is in no way coercive or involuntary. Instead, this article argues that more consideration ought to be given to whether mass tort claimants—often under pressure or physical or psychological distress[15]—have received sufficient neutral, dispassionate

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> consequences. Instead, the Act forced victims and their families to choose between the Fund and what appeared to be a whittled down tort remedy, thereby adding strength to arguments that the Fund was inadequate in substance or deficient in procedural protections.

Ackerman, *supra* note 8, at 183. The GCCF waiver may be found at http://www.bpoilspilllawblog.com/SAMPLE%20RELEASE.pdf (last visited Mar. 31, 2012). For a detailed discussion of the WTC Victim Compensation Fund and GCCF waivers of the right to sue, see *infra* Parts I.F, II.

12. FEINBERG ET AL., *supra* note 8, at 1.

13. *See infra* Part II (discussing the GCCF waiver and release). Because adjustment of *final* claims in the GCCF is still ongoing, the total number of claimants who have released litigation rights under the GCCF is still in flux. However, the numbers of persons releasing the right to sue runs into the thousands of eligible claimants.

14. *See* Kenneth R. Feinberg, Administrator, GCCF, Address at The University of Texas School of Law: Unconventional Responses to Unique Catastrophes: Tailoring the Law to Meet the Challenges (Oct. 3, 2011) (suggesting that fund mechanisms for resolving mass tort claims are entirely voluntary and non-coercive, and explaining that nobody is making victims take an award from a fund in lieu of alternative options).

15. *See* Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 457, 457–500 (2003) (describing how grief and other psychological factors impaired the ability of many claimants to act, resulting in paralysis and deferred decision-making on whether to elect a fund award or sue in the tort system); Tyler & Thorisdottir,

information to make an informed judgment concerning whether they should elect to receive compensation from the fund and forgo litigation or other alternative dispute resolution options. The experience of the WTC Victim Compensation Fund and the GCCF present interesting, contrasting examples concerning how potential claimants were situated to make their election of remedies and execute a waiver of their right to sue.

As will be discussed, although WTC Victim Compensation Fund claimants seemingly had relatively good information and assistance of counsel available to make an informed decision about their election of remedies, an overwhelming number of claimants instead chose to delay making this decision until the latest possible deadline.[16] Moreover, strong inertial pressures emanating from the Fund's special master, Kenneth Feinberg, in concert with the federal judge (Hon. Alvin Hellerstein) presiding over the WTC litigation, ultimately prodded many WTC claimants into electing their awards from the Fund rather than choosing to litigate.[17] The somewhat controversial role of the WTC Fund special master, his surrogates, and the presiding federal judge in urging claimants to elect Fund relief bears some critical scrutiny.

The GCCF election-of-remedies provision and its implementation raise even more compelling concerns about the waiver of the right to sue. Unlike WTC claimants, Gulf Coast claimants did not have counsel readily available to provide assistance in making an informed decision, against a background

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supra note 9, at 375–91 (describing psychological implications of mass disasters and election of remedies).

16. Schneider, *supra* note 15, at 498–99.

17. *See* STEVEN BILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 537 (2003) (describing interaction between special master Ken Feinberg and Judge Hellerstein in counseling claimants to elect to receive an award from the WTC Fund, rather than litigate); Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1, 27 (2006) (heavily criticizing the role of the special master Feinberg and his coordination of efforts with Judge Hellerstein to induce claimants to elect to take award from the Fund); Milo Geyelin, *Judge Wants Victims of September 11th Who Sue to Know Risks of Action*, WALL ST. J., Apr. 12, 2002, at B2 (detailing the involvement of Judge Hellerstein in inducing claimants to elect to take an award from the Fund rather than file suit).

cacophony of misinformation.[18] The GCCF waiver and release was extraordinarily comprehensive, releasing not only BP from potential liability litigation, but the liability of dozens of other potential defendants, as well.[19] In addition, the GCCF administrator, Ken Feinberg, served as the primary conduit for advice about the election of remedies, obviously urging potential claimants to seek relief from the Fund and to eschew litigation.[20] The GCCF administrator's conflicted status, coupled with his extreme efforts at urging claimants to elect relief from the Fund, finally prompted a judicial rebuke and restraining injunction.[21]

Moreover, the potential litigation landscape for Gulf Coast claimants was (and continues to be) much more complicated than after the World Trade Center events; this array of options made it difficult for a layperson to navigate. Finally, the presiding judge over the Gulf Coast MDL litigation has played an entirely different role than the WTC judge in relation to the parallel fund,[22] raising further questions about the intersection of alternative remediation mechanisms.

This article concludes that the examples of the WTC Victim Compensation Fund and the GCCF suggest the need for the requirement of intelligent, knowing, and informed consent prior to a claimant's waiving the right to sue and electing relief from a mass tort fund. The concept of informed, intelligent waivers of rights is well established in many areas of law.[23] Victims of mass disasters

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18. *See infra* notes 196–98 and accompanying text (explaining Feinberg's difficulty in getting counsel support for claimants).

19. *See infra* Part III.A (discussing the scope of the BP release).

20. *See infra* note 17 and accompanying text (describing the pressure Feinberg placed on claimants to pursue the Fund instead of litigation).

21. *See* Mullenix, *supra* note 3, at 871–78 (noting some of the criticisms resulting from potential conflicts).

22. *See infra* note 17 and accompanying text (describing Judge Hellerstein's efforts to encourage claimants to pursue the WTC Fund). *See also infra* note 65 and accompanying text (noting that Judge Hellerstein consistently upheld Feinberg's standards); *infra* note 220 and accompanying text (arguing that Judge Barbier aided the development of litigation when handling issues related to the GCCF).

23. *See generally* Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281 (2003) (discussing waiver and informed consent in various legal contexts); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1994) (discussing the history of doctrines of informed consent in contract and tort law, with a focus on medical informed consent).

ought not, under deadline pressure and without adequate counsel, information, or neutral advice, be tacitly coerced into electing a fund award and waiving any future rights to litigation.

To this end, this article suggests that when funds are created in the wake of future mass disasters, such fund mechanisms ought to include a requirement that neutral counsel be provided to assist potential claimants in assessing the advisability of electing fund relief. Claimants have a right to complete and transparent information in order to make a reasoned decision whether it is better, in their personal circumstances, to receive a fund award or to retain the option to sue culpable parties. This information would include some estimation of the fund award as compared to a potential litigated judgment, incorporating a meaningful risk assessment of either option.

Only after claimants have received adequate information and counsel by which to assess their options should claimants accede to waivers of the right to sue. Although it is not perfect, the WTC Victim Compensation Fund offers an example of *pro bono* legal assistance in the wake of the WTC events. But, as will be discussed below, both the WTC and the GCCF experiences provide problematic examples of coercive efforts to induce claimants to forgo litigation rights. The experience of the GCCF especially—in which many claimants had to make decisions without counsel or helpful information—provides further support for this proposal.

II. THE WTC VICTIM COMPENSATION FUND, ELECTION OF REMEDIES, AND WAIVER OF THE RIGHT TO SUE

The WTC Fund statute required claimants who desired to receive a Fund award to relinquish their right to pursue relief through litigation in the tort system.[24] In the aftermath of the WTC Fund, commentators have variously debated whether this election-of-remedies requirement constituted a benign paternalism on the part of Congress, or rather embodied a stealth tort reform initiative designed to protect corporate defendants from thousands of tort claims.[25]

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24 . ATSSSA, Pub L. No. 107-42, §§ 405(c)(2)(A)(ii), 405(c)(3)(B)(ii), 115 Stat. 230 (2001).

25. *See* Alexander, *supra* note 9, at 672 ("Waiver of tort claims was an essential part of the statutory purpose of protecting the airlines from massive tort

Because the compelling rationale for fund resolutions of mass tort claims is avoidance of tort litigation and its attendant risks and delay, it makes sense that those who would choose to receive a fund award should be required to give up their right to future litigation. Nonetheless, it seems essential that persons ought to be adequately informed about the relative merits and consequences of this decision. Fundamentally, to make this choice intelligently requires accurate, neutral, and transparent information about the alternatives to the fund award. A claimant ought to be able to make a comparative assessment whether, in one's personal circumstances, it makes better sense to elect a certain immediate fund award versus a perhaps less certain future litigated judgment and compensatory award.

Without diminishing the savvy and intelligence of ordinary citizens, laypersons often are not in the best position to assess whether a proffered fund award is preferential to pursuing relief through litigation or alternative dispute resolution auspices. Moreover, in a mass tort context arising out of large-scale injury or death, potential claimants may be physically or psychologically impaired in their immediate judgments.[26] A reasoned approach to comparative alternatives requires an assessment of issues an attorney would evaluate among possible remedial options.

In order to assess options, then, potential mass tort claimants need an array of information and advice, including but not limited to: (1) the deadline for electing remedies, as well as relevant statutes of limitations impelling imminent decision; (2) the scope of the release or waiver, (3) potential claims, defendants, and applicable law, (4) eligibility for, evaluation of, and amount of potential awards, (5) the jurisdiction and venue for potential litigation, (6) a risk assessment of potential litigation, and (7) the status of future claims.

As this article will discuss, the administration of the WTC Victim Compensation Fund embraced the concept that claimants needed counsel to evaluate the initial question of whether to elect relief through the Fund, as well as to further navigate the Fund requirements in order to receive an award. To this end, the WTC Victim Compensation Fund's special master Ken Feinberg

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liability . . . the necessity of shielding the airlines from tort liability in excess of their insurance coverage was deemed more important than preserving victims' right to sue.").

26. *See* Schneider, *supra* note 15, at 457–59 (discussing the role that grief played in the reluctance of victims' families to participate in the WTC Fund).

implemented a program that provided *pro se* counsel for any Fund applicants who desired the assistance of counsel.[27]

Notwithstanding the provision of legal advice, however, claimants' decisions whether to elect the WTC Fund remedy often were clouded by incomplete or variable information that changed over time.[28] In addition, an array of limitations and restrictions incorporated into the implementing statute and its regulations made the litigation option less desirable, and the Fund more so.[29] Finally, the special master, the federal judge presiding over the WTC litigation, and the Fund's bureaucracy all coordinated to urge claimants to elect Fund relief and to eschew litigation.[30] Thus, it is fair to question whether at least some vulnerable WTC claimants elected a Fund award, and waived their right to participate in litigation of their claims, as a result of tacit coercion that impelled this decision.

A. Timing of the Election of Remedies

An important consideration enmeshed in a claimant's decision to elect a fund award and to eschew litigation relates to the mandated timing of that election. Both the WTC Victim Compensation Fund and the GCCF set deadlines for applicants to apply for Fund awards.[31] Thus, in order to make an initial decision

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27. *See infra* note 105 and accompanying text (explaining that Feinberg welcomed the participation of voluntary attorneys).

28. *See infra* notes 50–55 and accompanying text (explaining the confusion caused by the lack of specific choice-of-law principles).

29. *See infra* note 67 and accompanying text (citing to the statute that stipulated that all lawsuits arriving out of September 11th events were to be brought in the U.S. District Court for the Southern District of New York). *See also infra* note 69 and accompanying text (explaining that the law applicable to any litigated claim would be the law of the state in which the crash occurred unless it conflicted with federal law).

30. *See supra* note 17 and accompanying text (describing the coordination between Feinberg and Judge Hellerstein).

31. *See* The Associated Press, *Ground Zero Fund Opens to Applicants*, N.Y. TIMES, Oct. 2, 2011 (late ed.) at 17 (noting WTC Fund deadlines). The WTC started taking applications in the spring of 2002. *See* Press Release, Department of Justice, Final Regulations of Sept. 11th Compensation Announced (Mar. 7 2002), *available at* http://www.justice.gov/opa/pr/2002/March/02_ag_130.htm (announcing the Final Rule for the Fund). The GCCF set up rolling deadlines for emergency quick payments and final settlement awards. *See* Mullenix, *supra* note

concerning whether to seek a Fund award, a potential claimant must understand if they are an eligible claimant, whether a Fund award is desirable under their personal circumstances, and the window in which to apply or be barred from seeking a Fund award. A claimant also needs to understand what events trigger the election of remedies.

Several problems arose in the context of the WTC Fund experience regarding the election of remedies. It was unclear what efforts by potential claimants—such as the filing of an initial application with the Fund—would trigger a waiver of the right to sue. Thus, many WTC Victim Compensation Fund applicants became anxious that the mere filing of a potential claim with the WTC Fund would effectuate election of the Fund remedy and foreclose a subsequent decision to pursue litigation.[32] Because many WTC Victim Compensation Fund claimants initially lacked sufficient information about the Fund's operation, their eligibility to assert a claim, and the potential valuation of any award (including exclusions and deductions from award amounts), many WTC potential claimants hesitated to file applications with the Fund and delayed this decision for several months.[33]

The WTC Fund experience demonstrates that uncertainty surrounding what events triggered an election of remedies caused many potential claimants to delay filing with the WTC Fund out of fear that the decision might result in the election of the Fund remedy, precluding the applicant's ability to file a lawsuit if the applicant subsequently changed his mind.[34] Ironically, this issue was resolved through litigation.[35] As a consequence of a ruling from the Southern District of New York, Special Master Feinberg finally announced

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3, at 856–57 (describing deadlines for applications for GCCF awards). The emergency payment period for GCCF awards closed on November 23, 2010. *Id.*

32. *See In re* September 11 Litig., No. 21 MC 97(AKH), 2003 WL 23145579, at *3 (S.D.N.Y. Dec. 19, 2003) (holding that the mere filing of a preliminary application with the Victim Compensation Fund will not constitute a waiver of the right to sue or to maintain a suit).

33. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645, 645–46 (2008).

34. *Id.* at 659–62.

35. *See In re* September 11 Litig., 2003 WL 23145579, at *1 (holding that the filing of an application with the WTC Victim Compensation Fund does not constitute a waiver of the right to sue).

that the mere filing of a claim with the Fund would not preclude a subsequent decision to abandon the Fund claim and pursue other relief.[36]

Instead, Feinberg developed a standard by which a WTC Fund award application would have to be "substantially complete" in order to trigger the exclusive Fund remedy provision.[37] In this fashion, claimants could decide whether to elect the Fund remedy, armed with particularized information concerning the amount of their award. In accepting and finalizing an award, WTC claimants released any and all claims for future compensation as a consequence of the events surrounding the September 11th disaster.[38]

B. Statutes of Limitations Issues

The process of a claimant making an informed decision whether to elect a Fund award or pursue litigation involves the comparative exercise assessing the alternative litigation options. This evaluation, in turn, requires knowledge and an understanding of potential culpable defendants, relevant jurisdiction, venue, choice-of-law considerations, available claims or causes of action, and the statutes of limitation that might attach to any such available claims. Obviously, the problem of relevant statutes of limitation intersects with Fund deadlines for the election of remedies.

In implementing the WTC Fund, it quickly became apparent to Special Master Feinberg that the WTC Fund's expansive deadlines for filing a Fund claim raised significant statute of limitations problems for potential claimants.[39] Relying on state law statutes of limitation,[40] Feinberg discovered that some local statutes

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36. FEINBERG ET AL., *supra* note 8, at 11.

37. *Id.*

38. FEINBERG ET AL., *supra* note 8, at 85 n.7 ("The Act provides that '[u]pon submission of a claim' to the Fund, a claimant 'waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11th, 2001.'").

39. The deadline for filing a claim with the WTC Fund was December 22, 2003 (an expansive period from the events giving rise to the Fund and its enabling legislation). Archived website, September 11th Victim Compensation Fund of 2001, http://www.justice.gov/archive/victimcompensation (last visited Feb. 25, 2012).

40. *See, e.g.*, *In re* September 11 Litig., No. 21 MC97(AKH), 2004 WL 1320897, at *3 (S.D.N.Y. June 10, 2004) (explanation of statute of limitations

of limitations for certain potential legal claims might expire before potential Fund applicants could decide whether to file a claim with the Fund or with relevant jurisdictions.[41] This threshold problem placed potential claimants between a rock and a hard place—and in a time bind—concerning the decision to elect one remedy over the other.[42]

To avoid the possibility that some claimants might elect judicial remedies in the face of expiring statute of limitations, Special Master Feinberg sought judicial relief from such statutes in order to encourage claimants to participate in the Fund rather than pursue litigation.[43] While this effort notably relieved the pressure on claimants to make a statute-of-limitations-induced election of remedies, it nonetheless represented the special master's assiduous efforts to channel claimants into the Fund resolution of claims rather than litigation.

Those who must choose options need to be intelligently informed about the intersection of Fund deadlines with applicable statutes of limitations for potentially viable legal claims. However, it is entirely uncertain whether the judicial release from relevant statutes of limitations that Judge Hellerstein and Special Master Feinberg accomplished in implementing the WTC Fund provides a precedent for future mass tort disaster funds. As previously mentioned, Judge Hellerstein in the Southern District of New York coordinated his efforts in overseeing the WTC litigation with Special Master Feinberg, in order to encourage maximum participation in the WTC Fund.[44] Consequently, the statute of limitations rulings

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decision); *In re* September 11 Litig., No. 21 MC 97(AKH), 2003 WL 23145579, at *3 (S.D.N.Y. Dec. 19, 2003) (same).

41. *In re* September 11 Litig., 2004 WL 1320897, at *3; *In re* September 11 Litig., 2003 WL 23145579, at *3. *See also* Schneider, *supra* note 15, at 480–84 (discussing the problem of statutes of limitations and various approaches taken in WTC Fund and litigation).

42. *See In re* September 11 Litig., 2004 WL 1320897, at *3 (explaining the difficult decisions facing claimants); *In re* September 11 Litig., 2003 WL 23145579, at *3 (discussing the decision to accept the offers of awards).

43. *See In re* September 11 Litig., 2004 WL 1320897, at *3 (highlighting the decision victims' families face choosing between litigation and the Fund with respect to tolling the statute of limitations); *In re* September 11 Litig., 2003 WL 23145579, at *3 (discussing the policy conflicts between delaying lawsuits and allowing litigants time to accept offers of awards).

44. *See supra* note 17 and accompanying text (discussing the coordination between Judge Hellerstein and Special Master Feinberg).

enabled Special Master Feinberg to encourage potential claimants to seek an award from the Fund and to eschew litigation.

C. *Applicable Law Considerations*

The September 11th events involved claimants from multiple jurisdictions, which raised complicated choice-of-law issues for potential claimants faced with an election of remedies. Persons who died or were injured in the WTC Towers, the Pentagon, or the United Airlines crash in Pennsylvania came from a number of different states and countries.[45] Many victims who died in the WTC building collapses came from the New York, New Jersey, and Connecticut metropolitan area.[46] Similarly, victims of the Pentagon attack were concentrated in the Washington D.C. metropolitan area, embracing claimants from Virginia, Maryland, and the District of Columbia.[47]

In administering the WTC Fund, then, Special Master Feinberg conceivably faced the resolution of personal injury and wrongful death claims pursuant to the state laws of many jurisdictions.[48] Notably, for those opting to pursue compensation from the WTC Fund, the enabling statute limited relief to personal injury and death claims, and excluded all other potential causes of action sounding in property, contract, or other legal theories, except for collateral source obligations.[49] Nonetheless, even with claims cabined to tort relief, the WTC events involved complicated questions relating to the law that might apply to the victims' claims, either if they chose an award from the Fund or attempted to evaluate the litigation option.

Thus, in order to comparatively assess whether it would make sense to choose one option over another, potential claimants would need to know what law might apply to determine whether claims, defenses, and remedies are available under any particular jurisdiction's law. For example, the availability and scope of

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45. FEINBERG ET AL., *supra* note 8, at 54–55.

46. *Id.*; Alexander, *supra* note 9, at 630 n.7; Eggen, *supra* note 9, at 387–89.

47. David Hill, *Occasion Somber for Kin of 9/11 Victims: Closure Remains Elusive for Many*, THE WASH. TIMES, May 2, 2011, at A17, *available at* http://www.washingtontimes.com/news/2011/may/2/occasion-somber-for-families-of-911-victims/?page=all.

48. *See, e.g.*, Chamallas, *supra* note 9, at 63–67 (describing the varying states' laws relating to the status of unmarried and same-sex couples).

49. ATSSSA, Pub. L. No. 107-42, § 405(c), 115 Stat. 230 (2001).

economic and non-economic damages—as well as exemplary damages—varies widely among state laws;[50] in addition, such matters as collateral source set-offs also vary by jurisdiction.[51] For a claimant to choose a Fund award in absence of being able to evaluate claims and remedies under jurisdictional alternatives would be a meaningless exercise. Furthermore, the task of analyzing choice-of-law issues is a complicated legal problem beyond the grasp of most laypersons; the impact of applicable law questions quintessentially requires the advice of knowledgeable counsel.

The statute that authorized the WTC Fund embodied two different approaches to the choice-of-law problems inherent in the September 11th events.[52] The statute, in effect, created one choice-of-law regime for persons who elected compensation through the WTC Fund and another choice-of-law regime for claimants who elected to seek relief through litigation in the court system.[53] Evaluation of these potential applicable law alternatives, therefore, became an important factor in choosing whether to accept a Fund award or pursue litigation.

The WTC enabling legislation did not mandate any choice-of-law principles to guide Feinberg's implementation of the Fund.[54] Because the overriding purpose of the WTC Fund was to avoid tort litigation and provide expeditious claim resolution, it made no sense to complicate the Fund's administration by applying different legal standards depending on where claimants were from, or on the happenstance of their presence at a particular disaster site.

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50. *See* Laura Hines, *The Dangerous Allure of the Issue Class Action,* 79 IND. L.J. 567, 578–79 (2004) (describing how state law variations can complicate mass tort actions).

51. *See* Jacob A. Stein, 2 STEIN ON PERSONAL INJURY DAMAGES TREATISE §13:5 (3rd ed.) (comparing collateral sources among different jurisdictions).

52. ATSSSA, Pub. L. No. 107-42, § 408(b)(2), 115 Stat. 230 (2001).

53. *See* FEINBERG ET AL., *supra* note 8, at 3 (noting that, while litigants choosing the court system would have to go through the rules of the Southern District of New York, the administrator of the WTC Fund would be allowed to create a different set of rules). *See also* Eggen, *supra* note 9, at 440–43 (describing choice-of-law issues raised by the WTC Victim Compensation Fund).

54. *See* ATSSSA, Pub. L. No. 107-42, §§ 401–409, 115 Stat. 230 (2001) (authorizing the creation of the victim compensation fund without mandating any choice of law principles); FEINBERG ET AL., *supra* note 8, at 92 n.164 ("Rather than looking to the specific law . . . of domicile and negotiating the complexities and distinctions between various states' choice of law rules, the Special Master adopted special criteria for the determination of domicile.").

Therefore, the WTC statute gave the special master relatively free rein to design a compensation model without being tethered to any state's legal principles. Special Master Feinberg used this broad authorization essentially to create and apply his own vision of a federal common law to resolve applicants' claims.

During Special Master Feinberg's administration of the WTC Fund, commentators and claimants frequently raised the issue of what law would apply to resolve various issues relating to the design and implementation of the Fund,[55] including but not limited to eligibility criteria,[56] statutes of limitation,[57] claim valuation,[58] collateral sources,[59] and award allocation among competing claimants.[60] In response to these various challenges, Feinberg indicated that he would be guided by, but not bound by, state law principles.[61] In some instances—for example, with regard to award allocation issues—Feinberg refused to resolve the problem but instead informed WTC Fund recipients to litigate such disputes in state court pursuant to state legal standards.[62]

During the administration of WTC Fund awards, Special Master Feinberg never clearly indicated to claimants which states' laws (if any) he relied on in making various decisions affecting the Fund's standards and implementation.[63] In an exercise not unlike the

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55. *See* Schneider, *supra* note 15, at 480–84 (discussing statutes of limitation issues).

56. *See id.* at 478–79 (explaining the difficult process of identifying appropriate claimants).

57. *See id.* at 480–84 (discussing statutes of limitation issues).

58. *See id.* at 474 (describing Feinberg's decision to have flat add-on damages in order to avoid comparing ways people died).

59. *See id.* at 462–63 (describing the collateral sources available through the Air Transportation Safety and System Stabilization Act).

60. *See id.* (detailing the economic damages and allocation methods).

61. *See, e.g.*, Kenneth R. Feinberg, *Speech: Negotiating the Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation*, 19 WASH. U. J.L. & POL'Y 21, 22 (2005) (referring to the fact that in calculating economic loss he vaguely would look to general principles of state tort law: "That is simply tort law, a surrogate for what juries in St. Louis do every day").

62. *Id.* at 24–25. For example, Feinberg refused to decide allocation issues among contending family members, instead telling them that they would have to resolve such disputes in state court. *Id.*

63. *See* Chamallas, *supra* note 9, at 75–76 (noting that the availability of survival damages differs among states). *See also* George W. Conk, *Will the Post-9/11 World Be a Post Tort-World?*, 112 PENN. ST. L. REV. 175, 186 (2007) ("Rather there was a sense of rough equity, informed by tort and by legislative

creation of federal common law, Feinberg essentially created his own common law standards to govern implementation of the WTC Fund, based loosely on unidentified principles and precedents. Thus, given the fluid nature of the WTC Fund's administration and the special master's unilateral choice-of-law decisions, WTC claimants never really had a firm, concrete understanding of what law applied as the basis for comparatively assessing whether they possibly had a better available alternative pursuant to litigation under known state-law principles.

Furthermore, the federal district court with jurisdiction over WTC-related litigation did not otherwise oversee or review the special master's various decisions relating to the implementation and administration of the Fund.[64] Judge Hellerstein consistently upheld the legality of Special Master Feinberg's standards for the administration of the Fund, and indicated that he would not review any individual challenges relating to the application of those standards and rules.[65]

The WTC Fund's enabling statute more clearly resolved the applicable law issue for those claimants who chose the litigation option in the court system.[66] In the first instance, the enabling statute mandated that any lawsuits arising out of the September 11th events were to be brought in the U.S. District Court for the Southern District of New York.[67] In so doing, the WTC enabling statute cabined any potential litigation to one federal district court and

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reference points"); Brian Walker, *Lessons That Wrongful Death Law Can Learn from the September 11 Victim Compensation Fund*, 28 REV. LITIG. 595, 602–03 (2009) (describing how Feinberg departed from state law in defining who was an eligible personal representative to receive an award from the Fund: "Unlike the states, the Fund combined the role of Personal Representative and beneficiary").

64. Mullenix, *supra* note 3, at 869.

65. *Id.* *See also* Schneider v. Feinberg, 345 F.3d 135, 143 (2d Cir. 2003) (upholding Judge Hellerstein's decision to allow Feinberg's standards); Colaio v. Feinberg, 262 F. Supp. 2d 273, 301 (S.D.N.Y. 2003) (holding that "methodologies and policies of the Special Master are reasonable and proper" implementations of the Act).

66. ATSSSA, Pub. L. No. 107-42, § 408(b)(2), 115 Stat. 230 (2001). *See also* Alexander, *supra* note 9, at 673–74 (discussing ATSSSA); Eggen, *supra* note 9, at 440–43 (discussing ATSSSA); James P. Kreindler & Brian J. Alexander, *September 11 Aftermath: A Perspective on the VCF and Litigation*, 18 AIR & SPACE LAWYER 1, 18–19 (2004) (discussing Colaio v. Feinberg and the issues surrounding the Victim Compensation Fund).

67. ATSSSA, Pub. L. No. 107-42, § 408(b)(2), 115 Stat. 230 (2001).

deflected potential litigation in an array of other alternative federal or state courts that might have some connection with the victims of the WTC events. Pursuant to this statutory mandate, the lawsuits of the claimants who elected the litigation option were consolidated in the Southern District of New York, subject to the case management of Judge Alvin Hellerstein, and largely subject to New York law.[68]

In addition, the WTC enabling statute further mandated that the law applicable to any litigated claim would be the law of the state in which the crash occurred, unless that applicable law was inconsistent with or preempted by federal law.[69] In essence, the statute limited applicable law to the state law of New York, Pennsylvania, or Virginia.[70] Although providing clarity to prospective claimants, the statutory limitation of litigants' choice of jurisdiction, venue, and applicable law also cabined conventional litigation strategy and served as an additional deterrent to electing the litigation option.[71]

The WTC Fund experience raises many questions concerning the ability of WTC victims to make an informed decision whether to elect an award from the Fund or instead choose the litigation option. The two approaches incorporated in the WTC enabling legislation did not provide adequate guidance to allow claimants to make an informed decision about either course of action. On the one hand, the Fund option presented potential claimants with a blank slate that permitted the relatively unguided discretion of the special master to make award determinations, untethered from any known law.

On the other hand, the enabling statute cabined the litigation option to one federal court and a narrow array of possible applicable law. Although the federal court could have applied state choice-of-law principles in order to apply other states' law, that was not the approach Judge Hellerstein ultimately applied in overseeing the

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68. *See* Conk, *supra* note 63, at 189 (describing the array of September 11th cases assigned to Judge Hellerstein).

69. *Id. See also* Eggen, *supra* note 9, at 440–43 (discussing the statute and applicable law).

70. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 7–14 (2004), *available at* http://govinfo.library.unt.edu/911/report/911Report.pdf.

71. *See* Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11 Victim Compensation Fund*, 24 YAL L. & POL'Y REV. 1, 24–26, 29 (2006) (analyzing how the ATSSSA statute served as a deterrent to litigation).

WTC litigation. Instead, Judge Hellerstein seemed entirely sympathetic with the goal of the WTC legislation to resolve claims through the Fund, rather than through the court system.[72]

D. Potential Defendants

Among many factors guiding the election of remedies, potential claimants need to be able to make a reasoned assessment concerning the existence of a viable defendant or defendants from whom to pursue relief. Clearly, the absence of viable defendants—or the presence of largely judgment-proof defendants—renders the election of a fund award an easier choice.

The attack on the WTC towers implicated unique events and actors that complicated the potential litigation landscape. For example, it quickly became evident that identifying culpable defendants, in a traditional sense, would raise challenging problems.[73] Clearly, the Saudi Arabian and other foreign national terrorists who seized and piloted the airplanes that crashed into the World Trade Center towers, the Pentagon, and Shanksville, Pennsylvania, would not be defendants.[74] Because of sovereign immunity defenses, the terrorists' countries of origin also raised difficulties as prospective defendants.

Moreover, the fundamental purpose of the WTC Fund legislation was to eliminate the airlines' liability for suit in the aftermath of the attacks,[75] so Congress quickly immunized these major potential defendants from litigation.[76] While the WTC enabling legislation circumscribed airline liability, the airport screening companies were potential defendants.[77] In the immediate

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72. *See supra* note 17 and accompanying text (detailing Judge Hellerstein's urging of claimants to elect to take an award from the fund).

73. *See* Alexander, *supra* note 9, at 637 (explaining the elimination of potential solvent tort defendants).

74. *See id.* ("[claimants] could not recover damages from the real culprits, the hijackers and their accomplices, who were either dead or out of reach.").

75. FEINBERG ET AL., *supra* note 8, at 3; Ackerman, *supra* note 8, at 143; Alexander, *supra* note 9, at 630–31; Berkowitz, *supra* note 71, at 1; Conk, *supra* note 63, at 181.

76. *See* Alexander, *supra* note 9, at 630–31 (explaining the limit on the airlines' liability).

77. *See* William Glaberson, *A NATION CHALLENGED: CIVIL ACTIONS; 4 Suits Filed, Despite Call for Restraint by Lawyers*, N.Y. TIMES, Jan. 15, 2002, at A13, *available at* http://www.nytimes.com/2002/01/15/us/nation-challenged-civil-

aftermath of the attacks, other potential defendants such as the Twin Tower architects, builders, the Port Authority, and other agencies seemed remote possible defendants. In addition, causation problems relating to the possible universe of potential defendants loomed large.

Thus, several scholars have commented that one factor that made the WTC Fund an attractive alternative to the tort litigation system was the problem—especially in the early weeks following the WTC events—of identifying potential defendants to sue.[78]

As a consequence, Special Master Feinberg used the problematic nature of identifying culpable defendants—coupled with the difficulty of establishing legal liability for tort (or other) claims—as a wedge argument to persuade WTC victims that their better remedy was through the WTC Fund.[79] Although this contention proved persuasive for many, several commentators subsequently have argued that the WTC Fund was unique in regard to the potential dearth of viable defendants.[80] Consequently, some have argued, the fund approach should not be replicated where there are known, identifiable defendants who are allegedly responsible for a mass tort disaster.[81]

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actions-4-suits-filed-despite-call-for-restraint-lawyers.html (demonstrating that airport security companies were still possible defendants).

78. *See* Alexander, *supra* note 9, at 637 ("Although the victims of September 11 appeared as 'deserving' of large recoveries as anyone could possibly be, they could not recover damages from the real culprits, the hijackers and their accomplices, who were either dead or out of reach."). As it turned out, the WTC plaintiffs who pursued litigation in federal court were able to identify and name numerous defendants, and Judge Hellerstein upheld their potential liability in the litigation. *See infra* note 82 and accompanying text (discussing the WTC plaintiffs' ability to identify defendants).

79. *See infra* notes 84 and accompanying text (citing Feinberg as saying that the Fund was the "only game in town").

80. *Compare* Alexander, *supra* note 9, at 637–38 (discussing the scarcity of defendants for reasons including the fact that the real WTC culprits were either dead or out of reach, Congress had limited the tort liability of the airlines to the amount of insurance coverage for the four planes involved, and the federal government likely could not be held liable for security failures), *with* GCCF, *infra* note 156 and accompanying text (discussing the wide array of potential defendants that were released from liability by the GCCF waiver and release).

81. *See, e.g.*, Rabin, *September 11th Victim Compensation Fund*, *supra* note 3, at 780–81, 798, 799–803 (suggesting that "responsible" defendants ought to be charged with the losses reflecting what is required to make a "deserving" plaintiff whole). As will be discussed below, this also is a powerful argument against the

In addition, as the subsequent parallel September 11th litigation demonstrated, the plaintiffs who chose to litigate their claims *were* able to identify an array of defendants in their lawsuits, including the private airport security firms (denominated the "Aviation Defendants"), building architects and construction firms, the Port Authority, and other entities.[82] Moreover, in a challenge brought by the Aviation Defendants, Judge Hellerstein denied their motions to dismiss on the grounds that they owed no duties to the plaintiffs, and that the defendants could not reasonably have anticipated that several terrorists would hijack jumbo jet aircrafts and crash them, killing passengers, crew, and others on the ground.[83] Thus, exercising the litigation option against a universe of WTC defendants actually proved viable for those WTC claimants who chose not to waive their right to sue.

The WTC experience suggests that the premature or incomplete assessment of the litigation landscape, including the availability or viability of potential defendants, may skew a claimant's evaluation of potential remedies in favor of electing relief from an alternative fund. In the WTC context, this information deficit was exacerbated by a special master so committed to the fund resolution of claims that he consistently informed WTC victims that the WTC Fund "was the only game in town," implying that there really was no one out there to successfully litigate against.[84]

Such hyperbolic, repeated communications to WTC claimants played a role in inducing victims to choose the WTC Fund

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GCCF Fund, where there is a very large array of potential defendants, who already are subject to litigation in many different federal and state jurisdictions. *See infra* Part III.C (discussing all of the potential GCCF defendants).

82. *See* Eggen, *supra* note 9, at 411, 432 (describing the different defendants identified by plaintiffs). *See also infra* Part II.G (discussing the plaintiffs' abilities to identify defendants).

83. *In re* September 11 Litig., 280 F. Supp. 2d 279, 287, 289 (S.D.N.Y. 2003). *See also* Ackerman, *supra* note 8, at 188 ("Still, by surviving the motions to dismiss, the plaintiffs had surmounted a significant hurdle in the § 408 litigation."); Kreindler & Alexander, *supra* note 66, at 18 (commenting on defendants in the September 11th litigated cases).

84. Terry Carter, *Master of Disaster: Is Ken Feinberg Changing the Course of Mass Tort Litigation?*, A.B.A. J., Jan. 1, 2011, *available at* http://www.abajournal.com/magazine/article/master_of_disasters/ (last visited Apr. 9, 2012). *See also* M. Nell McCarty, Comment, *Remembering Those Still with Us: Protecting September 11th Survivors from Their Future*, 153 U. PA. L. REV. 1348 n.41 (2005) (citing other sources for the "only game in town" quote).

in lieu of litigation. Instead, had WTC claimants awaited various judicial decisions, and observed the course of parallel litigation, they might have opted to pursue litigation rather than take an award from the Fund. As it turned out for some percentage of eligible claimants, it was possible to pursue litigation against an array of defendants and to receive negotiated settlements as a consequence.[85]

E. Viability of Future Claims

The resolution of future claims—for example, for persons exposed to toxic substances who have not yet manifested injury, but may do so in the future—has been a central problem in resolving mass tort litigation.[86] Generally, defendants involved in mass tort litigation desire "global peace" or the complete resolution of all current and potential future claims that might be asserted against them.[87] The estimation and valuation of future claims, representation for future claimants, and waiver issues have complicated the resolution of many latent injury mass torts.[88]

In order for a potential claimant of a toxic mass disaster to be able to make a meaningful choice between accepting an immediate fund award and not waiving the right to pursue litigation, a claimant needs to understand several crucial facts. First, a claimant needs to understand the fund's eligibility rules for seeking and obtaining a fund award. Is everyone exposed to a toxic event eligible to seek relief from the fund? If a potential claimant does not have a manifest injury, is that person permanently barred from a fund award? Moreover, "exposure-only" claimants need to evaluate whether they might have a more valuable tort claim in the future after serious

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85. *See infra* Part II.G (discussing the plaintiffs' ability to identify numerous defendants).

86. *See, e.g.*, Rabin, *Indeterminate Future Harm*, *supra* note 9, at 1861–65 (surveying case law on latent injury claims). *See also* George Rutherglen, *Future Claims in Mass Tort Cases: Deterrence, Compensation, and Necessity*, 88 VA. L. REV. 1989, 1989 (2002) ("Future claimants have been, until recently, the neglected stepchildren of mass tort litigation.").

87. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 824 (1999) (noting that the defendant desired a settlement of all claims); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997) (explaining that the parties involved in asbestos litigation sought a full settlement of all potential claims).

88. *See, e.g.*, Stephenson v. Dow Chemical Co., 273 F.3d 249, 251 (2d Cir. 2001) (citing some of the various issues complicating the settlement process).

injury manifests itself to the claimant. Also, a claimant needs to understand the contract of a fund award, including the scope of the waiver of any potential future claims.

Both the WTC Fund and the GCCF facility implicated issues relating to future claimants.[89] The WTC Fund made no provision for future claimants.[90] Hence, the only claimants eligible to pursue a Fund award were the legal representatives of those who died or were injured in the twenty-four hours after the Twin Towers were struck,[91] or rescue workers within ninety-six hours after the crashes.[92] Moreover, for the most part the WTC Fund compensated eligible claimants only for physical injury and death; the Fund did not compensate for claims of psychological injury or trauma.[93] The WTC Fund also made no provision for the future claims of first responders to the disasters, or persons who worked at the disaster sites during the extensive clean-up operations afterwards.[94]

After closure of the WTC Fund, various individuals came forward with classic latent injury claims, chiefly consisting of an array of respiratory impairments alleged as a consequence of

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89. *See infra* Part III.D (detailing the settlement details within the GCCF and their lack of provision for future claimants).

90. *See* Alexander, *supra* note 9, at 684–85 ("The most serious issue in ATSA's definition of eligible claimants, however, was its limitation of eligible claimants to those who had suffered physical harm or death at the scene of the crashes, or aboard the plane, at the time or in the 'immediate aftermath' of the crashes . . . . It excluded people who did not report their injuries within twenty-four hours . . . ."); Eggen, *supra* note 9, at 415–16 (explaining that "physical harm" as stated in the statute only related to harm realized within a short period of time); Rabin, *Indeterminate Future Harm*, *supra* note 9, at 1850–53 (explaining that Feinberg's statement accompanying the Interim Final Rule discusses Congress's use of the term physical harm to exclude those who face only a risk of future injury).

91. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11, 245 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104(c)(1)) (amended by 76 Fed. Reg. 54120 (Aug. 31, 2011)); Rabin, *Indeterminate Future Harm*, *supra* note 9, at 1850–53.

92. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11, 245 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104(b)) (amended by 76 Fed. Reg. 54120 (Aug. 31, 2011).

93. Alexander, *supra* note 9, at 685 ("There may be other types of injuries that should be compensated as well—people who were held hostage but not physically injured, or persons who were not physically injured but suffered emotional trauma."); Eggen, *supra* note 9, at 415–16.

94. Alexander, *supra* note 9, at 684–85; Rabin, *Indeterminate Future Harm*, *supra* note 9, at 1849–53.

exposure to the toxic soup of substances generated when the Twin Towers collapsed, and in the months of ensuing site clean-up. Included among these claimants were first responders, construction workers, and individuals who were present in lower Manhattan on September 11th.[95]

Several commentators criticized the WTC Fund for its failure to address the future claimant problem generally, for the Fund's narrow eligibility criteria, and for the Fund's exclusion of certain types of future claims.[96] Because the eligibility criteria for the WTC Fund were so narrowly drawn, an array of future claimants by default were excluded from this alternative remediation mechanism. On the other hand, among the universe of eligible claimants, those with potential future claims have insufficient information upon which to base a reasoned decision whether those future claims might be compensable and more valuable if pursued through litigation.

F. Assistance of Counsel

As this article argues, perhaps the two most important requirements for victims of mass tort disasters to make an informed decision whether to elect a fund award or to pursue litigation are full and transparent information, coupled with the reasoned advice of neutral advisers—preferably legal counsel. The implementation of the WTC Fund and the GCCF provide contrasting examples of the availability of neutral and detached assistance to guide the choices of claimants.

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95. *In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 360–61 (S.D.N.Y. 2003); Eggen, *supra* note 9, at 417; Rabin, *Indeterminate Future Harm*, *supra* note 9, at 1842–44.

96. Alexander, *supra* note 9, at 685. *See* Eggen, *supra* note 9, at 453–59 (proposing alternative options to address the concerns of victims exposed to toxic substances and dust in similar scenarios to the WTC events). The increasing public demands of various affected constituent groups eventually caused Congress to address these claims through legislation enacted in December 2010. *See* 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 111th Cong. 2d Sess. (2010) (providing medical monitoring and treatment to responders, residents, building occupants, and area workers who were directly impacted and adversely affected by the September 11th attacks). *See also* Eggen, *supra* note 9, at 456–57 (discussing possible legislation to compensate persons exposed to toxic substances).

A much-noted and admired complement to the WTC Fund was the actions of the plaintiffs' bar to the September 11th events.[97] In the immediate aftermath of the disaster, the Association of Trial Lawyers of America (ATLA) notified its membership and requested that plaintiffs' attorneys not exploit the tragic events as an opportunity to solicit potential clients.[98] One day after the disaster, ATLA called for a moratorium on all lawsuits.[99] This organizational self-restraint by ATLA stood in marked contrast to the reaction of the plaintiffs' bar in the aftermath of the mass toxic disaster at the Union Carbide plant in India,[100] when hundreds of American lawyers descended on the scene in an attempt to retain as many clients as possible—which solicitation brought considerable worldwide disrepute on the American bar.[101]

Not only did ATLA immediately counsel restraint among its membership after September 11th, but ATLA also sponsored an enormous effort to organize the voluntary participation of hundreds of attorneys in providing legal assistance to claimants who wished to pursue a fund award.[102] ATLA incorporated the "Trial Lawyers Care" (TLC) program to provide *pro bono* representation to claimants who wished to seek a fund award.[103] The TLC program opened offices in New York and trained hundreds of volunteer attorneys to represent claimants.[104]

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97. *See* FEINBERG ET AL., *supra* note 8, at 70–73 (noting that the "legal community was extraordinarily helpful to the Fund").

98. Robert S. Peck, *The Victim Compensation Fund: Born from a Unique Confluence of Events Not Likely to Be Duplicated*, 53 DEPAUL L. REV. 209, 214–15 (2003).

99. *Id.* at 214; Carrie Johnson, *Lawyers Group Wants Moratorium on Attack Lawsuits*, WASH. POST, Sept. 14, 2001, at E3; Abdon M. Pallasch, *For Once, Lawyers Reluctant to Sue: Victims' Relatives Seek Legal Action, but Moratorium Urged*, CHI. SUN-TIMES, Sept. 17, 2001, at 22. Robert Peck notes that the moratorium held for a long time and was only breached by a handful of lawsuits. Peck, *supra* note 98, at 215.

100. *See generally* DAVID WEIR, THE BHOPAL SYNDROME (1987) (discussing the chemical disaster at the Union Carbide plant in Bhopal, India).

101. *See* David T. Austern, *Is Lawyer Solicitation of Bhopal Clients Ethical?*, LEGAL TIMES, Jan. 21, 1985, at 16 (describing the solicitation of Bohpal clients by American attorneys). *See also* Deborah L. Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 322 (1986) (noting that California trial lawyers voted to censure attorneys who solicited clients in the wake of the Bhopal disaster).

102. Peck, *supra* note 98, at 225–26.

103. FEINBERG ET AL., *supra* note 8, at 71.

104. *Id.* at 71–72.

Special Master Feinberg welcomed the participation of these voluntary attorneys, who assisted any claimant who desired an attorney to help prepare the paperwork necessary in filing a claim.[105] From the outset of his efforts, Feinberg widely publicized the availability of free counsel to any potential WTC Fund claimant who desired an attorney.[106] Feinberg stressed the fact that no potential WTC claimant would go without counsel if they desired an attorney.[107] Feinberg's Final Report to Congress documented thousands of hours of *pro bono* work performed by voluntary attorneys in assisting WTC fund claimants.[108] In addition to ATLA attorneys, Feinberg worked *pro bono* and contributed the assistance of the attorneys at his firm, which recouped only its expenses in implementing the WTC Fund.[109]

On balance, the WTC Fund experience provides a positive example of attorneys voluntarily providing legal counsel to assist claimants confronted with a complicated bureaucratic claims process during a stressful period. The plaintiffs' bar largely eschewed any campaign to discourage WTC victims from pursuing relief through the WTC Fund, and did not attempt to persuade claimants to file lawsuits in the civil justice system instead.[110] Rather, the special master and his surrogates, including Judge Hellerstein, made a concerted effort to induce all claimants to seek a Fund award.

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105. Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV., 719, 762–65 (2003) (analyzing the role of *pro bono* and non-*pro bono* attorneys in assisting claimants in the Fund).

106. *See* Ackerman, *supra* note 8, at 156 (explaining that Feinberg established a website and general claims assistance sites).

107. *See* Feinberg, *supra* note 8, at 29 (quoting Feinberg as saying, "Over 1400 families were represented by lawyers pro bono. Another 800 were represented by lawyers who took five to ten percent . . . . [If] anyone wants to examine what a noble profession we're engaged in, just examine this program"). *See also* FEINBERG ET AL., *supra* note 8, at 77 ("A primary reason for the Fund's ultimate success can be attributed to Trial Lawyers Care (TLC) and other lawyer organizations which met the challenge of providing legal assistance and counseling to claimants."). *But see* Schneider, *supra* note 15, at 479 (suggesting that the Fund's processes actually were very complex and intimidating, requiring not only lawyers to assist them, but also economists in many cases).

108. FEINBERG ET AL., *supra* note 8, at 71.

109. *Id.*

110. *See supra* notes 97–109 and accompanying text (discussing plaintiffs' attorneys' role in aftermath of WTC events).

The provision of voluntary legal counsel for WTC claimants was not entirely without criticism. In addition to the repeated and concerted efforts to urge all eligible claimants to seek their remedy only through the Fund, several commentators also have noted that over time there developed a "market" for "fund expertise," which was used to benefit some claimants to the disadvantage of others.[111] Moreover, in absence of claimant interviews, it is difficult to assess whether legal counsel merely assisted fund claimants in filing their applications, or whether these voluntary counsel engaged with claimants in meaningful assessments of claim options.

G. Implementation of the WTC Litigation Option

An essential question for victims of mass tort disasters, when faced with an election of remedies, ultimately centers on whether the litigation option is preferable to seeking a fund award. This assessment involves a complicated calculus that compares these options, filtered through the lens of personal issues and preferences.

The WTC litigation experience provides some information with which to assess how claimants who chose the litigation option fared with this choice. However, because the WTC litigation settlement awards have been sealed, it is impossible to compare Fund awards to the settlement awards achieved in the WTC litigation. It also is impossible to assay claimant satisfaction with the comparative election of remedies.

The WTC litigation experience also illustrates the way in which tandem remediation systems may or may not influence one another. As will be discussed, the federal judge supervising the WTC litigation had a preference for the Fund, and exercised his managerial authority to steer claimants away from the courthouse and into the Fund. The WTC experience also illuminates how a close working relationship between a managerial judge and a fund's

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111. *See* Diller, *supra* note 9, at 762–65 (suggesting that Feinberg's controversial role in administering the Fund created a "market for expertise" in the operation of the Fund, benefiting some claimants but not others. In addition, Diller critically notes that attorneys with personal relationships to Feinberg were able to favorably trade on those connections for the persons they represented). *See also* Schneider, *supra* note 15, at 477 (noting that Feinberg's unbridled discretion led to perceptions of unfairness: "it [led] to a sense that he will make individualized 'deals,' and indeed, he does. Lawyers can claim to trade on 'insider' access to, or contact with, him").

special master may be deployed to encourage maximum participation in the fund. The interrelationship of the judge overseeing the litigation with the special master implementing the fund, then, raises at least a few troubling questions about the tacit coercion of claimants as they make their election of remedies.

In the final analysis, 97% of eligible claimants elected compensation relief through the WTC Fund and only 3% of claimants retained private counsel and pursued litigation arising out of the September 11th events.[112] In all, ninety-five suits were filed, seeking recoveries for ninety-six claimants.[113] As required by statute, the WTC Fund cases were filed in the Federal District Court for the Southern District of New York and consolidated before Judge Hellerstein.[114] Thirteen lawsuits settled quickly;[115] and 72 cases were settled through the auspices of experienced mass tort litigator Sheila Birnbaum, whom Judge Hellerstein appointed to serve as a mediator to resolve the remaining suits.[116] In order to spur settlements, Judge Hellerstein ordered bifurcated bellwether trials.[117]

The claimants who pursued litigation were confronted with a federal judge who exercised close managerial supervision over the course of the litigation. In his administration of the September 11th cases, Judge Hellerstein kept a fairly tight rein over the advocacy efforts of the plaintiffs' lawyers.[118] And, in concert with Special Master Feinberg, as a condition of continuing litigation, Judge Hellerstein required that all individual plaintiffs discuss with their

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112. *See* FEINBERG ET AL., *supra* note 8, at 1 (discussing the number of plaintiffs who chose to file suit in lieu of a settlement from the fund).

113. *In re* September 11 Litig., 600 F. Supp. 2d 549, 559 (S.D.N.Y. 2009).

114. *See id.* at 551 (upholding exclusive jurisdiction of Southern District of New York for claims for damages arising out of Sept. 11th terrorist attacks). For a description of the array of types of cases consolidated in Judge Hellerstein's court, see Conk, *supra* note 63, at 189.

115. *In re* September 11 Litig., 600 F. Supp. 2d at 559.

116. *Id.* at 549, 551, 553, 559. *See also* Mark Hamblett, *9/11 Mediator Wraps up Work; Only 3 Cases Left Unsettled*, N.Y. L.J. (Mar. 9, 2009), *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?germane=1202515159034&id=1202428884428&slreturn=1 (describing the mediator's role in winding up the remaining lawsuits).

117. *In re* September 11 Litig., No. 21 MC 97(AKH), 2007 WL 1965559, at *3 (S.D.N.Y. July 5, 2007).

118. *See supra* notes 66–71 and accompanying text (describing limitations placed on litigation). *See also infra* note 132 and accompanying text (citing to Judge Hellerstein's review of the individual proposed settlements).

attorneys the alternative remedy in the WTC Fund and weigh the risks and transaction costs of proceeding in the litigation process.[119]

The WTC victims who elected the litigation option had some advantages in comparison to claimants who elected to accept an award from the Fund.[120] For example, the plaintiffs' attorneys were able to identify a universe of defendants to sue.[121] Because the Fund was a no-fault payment system, the existence of defendants had been irrelevant to the WTC Fund's settlement of claims.

The plaintiffs' attorneys named as party-defendants the security firms at the airports where the terrorists had boarded the aircraft, the building architects and firms involved in the design and construction of the World Trade Center towers, the Port Authority, the owners of the Twin Towers, and numerous other defendants.[122] In an interim MDL ruling, Judge Hellerstein upheld the designation of these entities as legitimate defendants,[123] thereby strengthening the plaintiffs' litigation posture.[124] Judge Hellerstein also issued an

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119. STEVEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 537 (2003); Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1, 7 (2006); Milo Geyelin, *Judge Wants Victims of September 11th Who Sue to Know the Risks of Action*, WALL ST. J., April 11, 2002, at B2.

What we cannot know is the nature and extent of the counseling and risk assessment provided to claimants who elected Fund awards, and who presumably had access to voluntary counsel.

One also wonders at the neutrality of retained counsel advising their clients on the risks of proceeding with litigation as opposed to taking an immediate certain award from the Fund. One may only assume that, consistent with professional responsibility obligations, this judicial mandate was carried out in good faith.

120. *See* Ackerman, *supra* note 8, at 186–88 (describing the reduction of victims' barriers to suit); Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 586–87 (2001) (weighing the relative risks and benefits of the litigation option, including no collateral source offsets and the possibility of a punitive damage recovery).

121. *See supra* note 82 and accompanying text (describing the possible defendants).

122. *See* Ackerman, *supra* note 8, at 185–86 (suggesting that a finding of negligence on the part of the airlines, security firms, airports, or aircraft manufacturers was anything but certain in the private litigation).

123. *In re* September 11 Litig., 280 F. Supp. 2d 279, 293 (S.D.N.Y. 2003).

124. *See* Ackerman, *supra* note 8, at 188 ("Still, by surviving the motions to dismiss, the plaintiffs had surmounted a significant hurdle in the § 408 litigation."). *See also* Conk, *supra* note 63, at 212 (noting that Judge Hellerstein denied defendants' motions to dismiss).

interim order enabling discovery from the Transportation Security Administration.[125] Judge Hellerstein's orders effectively spurred the settlement of several WTC lawsuits.[126]

In assessing whether the litigation option made sense for many claimants—or might have made sense for many others who chose not to litigate—other considerations bear on this analysis. Thus, for those WTC claimants who chose to sue, the collateral source rule did not apply to reduce claimants' awards by the amount provided through these benefits.[127] In theory, then, WTC victims who chose the litigation option received both a settlement award and were able to retain their collateral source benefits, which was not true for claimants who elected to take a Fund award.

On the other hand, the WTC claimants who elected civil litigation were constrained by factors that had no relevance to those who elected compensation through the Fund—factors that ordinarily would not constrain civil litigation.[128] Thus, the WTC statute limited the plaintiffs' venue to the federal district court in New York City and also limited applicable law.[129] In addition, the plaintiffs had to pay attorneys' fees, and thus their settlement awards were reduced by this transaction cost, which was not a factor for WTC Fund claimants.[130] Finally, the plaintiffs' lawsuits took longer to resolve by settlement than if these claimants had elected to receive compensation from the WTC Fund.[131]

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125. *In re* September 11 Litig., 236 F.R.D. 164, 165 (S.D.N.Y. 2006).

126. *See* Conk, *supra* note 63, at 213 (claiming Judge Hellerstein's orders spurred a new impulse to settle WTC cases). *See also In re* September 11 Litig., 600 F. Supp. 2d 549, 552 (S.D.N.Y. 2009) (explaining that Judge Hellerstein had transferred three wrongful death cases in order to conduct discovery).

127. Rabin, *Indeterminate Future Harm*, *supra* note 9, at 1839–40.

128. Ackerman, *supra* note 8, at 183.

129. *See In re* September 11 Litig., 600 F. Supp. 2d at 551 (upholding exclusive jurisdiction of Southern District of New York for claims for damages arising out of Sept. 11th terrorist attacks).

130. *See infra* note 204 and accompanying text (supporting the assertion that a claimant's compensation is not diminished by the attorney-fee award).

131. The last mediated case was resolved in 2011. *See* Bella English, *Mass. Kin, Airline Settle Nation's Last 9/11 Suit: Family Wanted Trial to Show Security Gaps*, BOSTON GLOBE, Sept. 20, 2011, at B1, *available at* 2011 WLNR 18647704 (stating that the "family was the lone holdout among the thousands that either accepted money from the $7 billion Victim Compensation Fund or settled their lawsuits").

In addition, Judge Hellerstein reviewed the individual proposed settlements to assure consistency with previous WTC awards.[132] In at least four hold-out cases, Judge Hellerstein rejected settlements he believed provided for excessive awards and attorneys' fees inconsistent with previous awards and settlements.[133] The parties renegotiated and reduced the settlement terms to Judge Hellerstein's final satisfaction.[134]

As indicated above, Judge Hellerstein in his court opinions,[135] and Mediator Birnbaum in her report to the court[136]—citing privacy concerns—declined to divulge information relating to individual settlement awards.[137] Also citing privacy concerns, Feinberg's Final Report to Congress only indicates aggregate settlement valuations, rather than individual awards.[138] Consequently, there is no available data to evaluate whether claimants who elected to retain counsel and pursue litigation in the aftermath of the September 11th disaster received a financially more favorable outcome than claimants who elected relief through the WTC Fund.[139]

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132. *See In re* September 11 Litig., 600 F. Supp. 2d at 552 (noting the need for consistency among previous awards).

133. *See In re* September 11 Litig., 567 F. Supp. 2d 611, 618 (S.D.N.Y. 2008) (rejecting $28.5 million settlement and disapproving $7,125,000 in contingent attorneys' fees).

134. *See In re* September 11 Litig., 600 F. Supp. 2d at 562 (noting settlement reductions).

135. *In re* September 11 Litig., 600 F. Supp. 2d at 561.

136. *Id.*

137. *See In re* September 11 Litig., 600 F. Supp. 2d at 555 (noting that this report could not go into individual awards).

138. *See* FEINBERG ET AL., *supra* note 8, at 64–65 (declining to disclose details about individual cases).

139. In spite of the absence of comparative data, one commentator nonetheless maintains that the option of electing the Fund remedy was preferable to pursuing litigation in the tort system. *See* Ackerman, *supra* note 8, at 190–91 ("Even so, when measured against the likely (rather than theoretical) outcome of a conventional tort action, even absent the constraints of [the MDL litigation], the Fund looks like an excellent option for the overwhelming majority of eligible claimants.").

III. THE GCCF, ELECTION OF REMEDIES, AND WAIVER OF THE RIGHT TO SUE

The GCCF had a very different genesis than the WTC Fund, most notably because the GCCF was not created or implemented pursuant to statutory authority.[140] However, in administering the GCCF, its administrator, Feinberg, made clear from the outset that the GCCF would operate in the same fashion as the WTC Fund and would require claimants to waive their rights to litigate in the judicial arena.[141] Similar to his administration of the WTC Fund, Feinberg repeatedly urged claimants to participate in the GCCF and to forgo filing lawsuits in the courts,[142] much to the irritation of the plaintiffs' bar in the Gulf Coast region.[143]

As will be discussed, the GCCF problem of the waiver of the right to sue raises even more troubling questions in the context of the Gulf oil spill. The potential universe of Gulf Coast claimants was substantial and geographically dispersed.[144] Many potential claimants lived in depressed or precarious economic situations, which exerted inertial pressures on these victims to seek financial

140. *See* Mullenix, *supra* note 3, at 833–37 (describing the creation of the GCCF).

141. *See* Charles E. Lavis, *Interview with Ken Feinberg, the Independent Administrator of the BP Oil Spill Victim Compensation Fund*, BP OIL SPILL L. BLOG (June 20, 2010), http://www.bpoilspilllawblog.com/2010/06/ken-feinbergs-interview-on-mee.html (drawing on lessons of the WTC Fund to guide implementation of the GCCF; implies that claimants will be required to give up their rights to sue to receive full compensation).

142. *See* Kimberley A. Strassel, *Mr. Fairness: The Pay Czar, BP Claims Administrator, and 9/11 Victims Fund Manager Talks About How He Makes Decisions That Alter Lives*, WALL ST. J., Aug. 7, 2010, at A11, *available at* http://online.wsj.com/article/SB10001424052748703309704575413404427445314 76.html (noting that the urging of potential claimants to sign up with the GCCF riled the tort-law community; citing Feinberg's comments about how the tort bar and state attorneys general raised "very legitimate" policy issues about releasing BP from liability before all damage from the spill is known).

143. *Id.*

144. Mullenix, *supra* note 3, at 848.

relief quickly.[145] The educational and sophistication level of Gulf Coast claimants varied and was complicated by language barriers.[146]

Significantly—and unlike in the aftermath of the WTC events—the plaintiffs' bar in the Gulf Coast region refused to supply voluntary free counsel to Gulf Coast victims and largely resisted cooperating with Feinberg. In addition, Feinberg made numerous whirlwind trips throughout Gulf Coast towns and parishes, exhorting victims to seek an award from the Fund because—like the WTC fund—the GCCF was "the only game in town."[147]

Moreover, Administrator Feinberg's ties with BP raised significant issues of his own neutrality in implementing the GCCF on behalf of BP.[148] This lack of neutrality tainted the ability of claimants to obtain accurate information to make an informed judgment to seek relief from the GCCF or to retain the right to sue. Finally—and unlike the WTC events—the Gulf Coast oil spill events implicated a significant array of legal theories and claims, as well as collection of possible culpable defendants.

Thus, many Gulf Coast victims had to make an election of remedies in a relatively narrow time window, under a comparative information deficit, and without the ability to make an informed, balanced, and knowledgeable assessment of the alternative legal landscape. BP and Feinberg fostered a crisis environment and, in the classic economic sense, largely controlled disbursement of asymmetrical information to the detriment of Gulf Coast victims who had to make an election of remedies.

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145. ALLIANCE FOR JUSTICE, ONE YEAR AFTER THE GULF OIL SPILL: IS JUSTICE BEING SERVED? 27, 31 (2011), *available at* http://www.afj.org/connect-with-the-issues/the-corporate-court/crude_justice/oneyearreport.pdf.

146. *See* Louis Sahagun, *Oil Spill Takes Toll on Cambodian, Vietnamese Fishermen*, L.A. TIMES, May 7, 2010, *available at* http://articles.latimes.com/2010/may/07/nation/la-na-oil-spill-cambodians-20100507 (discussing how language barriers have made it more difficult for Cambodian and Vietnamese fishermen to remain informed about available assistance).

147. *See supra* note 84 and accompanying text (listing sources for "only game in town" quote).

148. *See* Mullenix, *supra* note 3, at 863–68 (discussing the appointment of Feinberg as administrator of the GCCF and the ethical challenges raised by his relationship to BP).

A. Timing and Scope of the GCCF Release

The timing and scope of the required waiver attached to a GCCF award differed from the WTC experience. The economic crisis for many Gulf Coast residents created by the oil spill exerted immediate pressure on many Gulf Coast victims to seek Fund relief quickly. On the other hand, as of April 2011, thousands of potential litigation claimants had rushed to file claims with the Federal District Court in New Orleans before a court-issued deadline for preserving the right to sue companies involved in the oil spill.[149]

In addition, the scope of the GCCF waiver for final awards was significantly more comprehensive than that of the release of WTC claims. This combination exerted tacit influence on many Gulf Coast victims to make an election of remedies quickly, coupled with a vastly expansive release of the right to sue a long list of potential defendants.

The GCCF implemented an awards process staged over time; claimants could seek emergency payment for a small sum of money, but if a claimant wished to make a more substantial claim, the claimant had to apply for a final award.[150] A Gulf Coast claimant's waiver of the right to litigate did not apply to emergency payments in the first phase of the GCCF;[151] the waiver was a requirement of a final settlement award.[152]

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149. Dionne Searcey, *Potential Plaintiffs Race to Hit Deadline*, WALL ST. J., Apr. 20, 2011, at A6, *available at* http://online.wsj.com/article/SB10001424052748704740204576273021033990198.html.

150. Mullenix, *supra* note 3, at 856–57 (describing the emergency and final payment programs).

151. *See* Ian Urbina, *BP Settlement Likely to Shield Top Defendants*, N.Y. TIMES, Aug. 20, 2010, at A1, *available at* http://nytimes.com/2010/08/20/us/20spill.html (discussing BP's involvement with drafting the settlement waiver and release as early as August 20, 2010).

152. *See* Dionne Searcey, *Want to Be Part of the BP Fund? Better Be Prepared to Drop Claims*, WALL ST. J., Aug. 20, 2010, *available at* http://blogs.wsj.com/law/2010/08/20/want-part-of-the-bp-fund-better-be-prepared-to-drop-claims/ (noting that oil spill victims compensated from the Fund will have to waive all legal claims against not only BP but against other defendants such as rig-owner Transocean and explaining that critics howl about how other companies besides BP can be shielded from suit when they are not contributing to the Fund).

The GCCF published a sample of the waiver and release form for final settlement of claims.[153] The GCCF waiver is more far-reaching and extensive than the release used in the WTC Fund; the GCCF release extends to any and all claims arising out of the *Deepwater Horizon* explosion, spill, and consequent contamination.[154] Public reports have suggested that BP had a hand in drafting and reviewing the nature and scope of the GCCF release,[155] thereby contradicting assertions that BP played no role in the GCCF's administration.

Although the GCCF release has not yet been subjected to judicial scrutiny, the release waives claims under an expansive array of statutory and common law causes of action.[156] In addition, the GCCF waiver and release includes an attachment listing an extensive collection of corporate entities, individuals, and business associations that are released from liability, in addition to BP.[157]

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153. *See* Gulf Coast Claims Facility, *Gulf Coast Claims Facility Sample Release and Covenant Not to Sue*, BP OIL SPILL L. BLOG, http://www.bpoilspilllawblog.com/SAMPLE%20RELEASE.pdf (last visited Mar. 31 2012) [hereinafter, *GCCF Sample Release and Covenant Not to Sue*] (sharing the important documents associated with the waiver). *See also* David Hammer, *New Gulf Oil Spill Claim Rules Announced by Ken Feinberg*, TIMES-PICAYUNE, Nov. 23, 2010, *available at* http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/01/most_bp_oil_spill_claimants_op.html (noting harsh criticism of proposed release; stating that Gulf Coast attorneys criticize Feinberg for making process more confusing with release of new payment protocols; including two page release form); Bryan Walsh, *Oil Spill: Kenneth Feinberg Makes the Final Rules for Spill Settlement, But Are They Fair?*, TIME ECOCENTRIC BLOG (Nov. 24, 2010), http://ecocentric.blogs.time.com/2010/11/24/ (discussing plaintiff's lawyers' criticisms of release).

154. *See GCCF Sample Release and Covenant Not to Sue*, *supra* note 153 (proving the breadth of the release).

155. *See* Daniel Fisher & Asher Hawkins, *BP's Legal Blowout*, FORBES.COM (July 14, 2010), http://www.forbes.com/2010/07/14/bp-oil-spill-settlement-business-energy-lawsuits.html (reporting that Feinberg asked BP to draft releases that exempt BP from any future liability for the spill, but not to include other defendants). *See also* Urbina, *supra* note 151 (citing a letter from BP's attorney).

156. *GCCF Sample Release and Covenant Not to Sue*, *supra* note 153.

157. *See* Urbina, *supra* note 151 (reporting on extensive scope of defendants' waiver and release of claims in future litigation). In yet another problem relating to the lack of transparency in implementation of the GCCF, this long list of released entities raises questions concerning why non-parties to the GCCF are included in the release, as well as how these entities came to be included.

B. *Statutes of Limitations Issues and Applicable Law*

As indicated above, the federal court overseeing the WTC litigation resolved by judicial order the problem of the intersection of state statutes of limitations with WTC Fund deadlines.[158] In implementing the GCCF, Administrator Feinberg failed to address the intersection of federal and local statutes of limitations with the GCCF's final deadlines for filing a final settlement claim. And, although the federal district court in New Orleans overseeing the BP Gulf oil spill litigation issued no orders relating to limitations problems for potential GCCF claimants,[159] it did set a deadline for thousands of claimants to file claims to participate in the litigation in that court.[160]

With regard to applicable law, GCCF claimants confronted with an election of remedies should have had access to sufficient information about applicable law in order to make an informed decision whether it might be more desirable or advantageous to pursue litigation. Information about applicable law would have included an assessment of potential legal and equitable claims, defenses, and remedies under both federal and state law.

The GCCF was created pursuant to only vague and ambiguous statutory authority under the Oil Pollution Act (OPA), and therefore the issue of which federal or state legal rules apply in the administration of the GCCF Fund has been murky.[161] The applicable law problem in the context of the BP disaster, moreover, is much more complicated than the legal landscape presented by the

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158. *See supra* Part II.B (discussing the methods used by Feinberg and Judge Hellerstein to resolve the intersection of deadlines and state statutes of limitations). *See also GCCF Sample Release and Covenant Not to Sue*, *supra* note 153 (noting that the final deadline for submission of final claims to the GCCF is August 2013). This expansive window would seem to raise the same problem of state and federal statutes of limitations expiring in advance of a claimant's decision to elect Fund relief.

159. However, the facility's website suggests that claimants may withdraw their claims at any time from the GCCF facility, and seek a remedy in the judicial system. GCCF, *GCCF Protocol for Interim and Final Claims*, at 9 (Nov. 22, 2010), *available at* http://www.afj.org/connect-with-the-issues/the-corporate-court/crude_justice/gccf-protocol-for-interim-and-final-claims-2010.pdf.

160. *See* Searcey, *supra* note 149 (reporting on a deadline by which victims had to choose whether to participate in the litigation).

161. GCCF, *GCCF Protocol for Emergency Advance Payments* (Aug. 23, 2010), *available at* http://www.gulfcoastclaimsfacility.com/proto_1.

September 11th events. Unlike the September 11th claims, no statute determines applicable law for those Gulf Coast claimants who elect litigation remedies, and therefore applicable law in the litigated cases will be determined by the MDL court presiding over the consolidated lawsuits.[162]

Moreover, the BP disaster implicated a broader array of possible federal and state statutory claims, including claims under the OPA,[163] securities laws,[164] the Jones Act,[165] various federal

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162. The MDL court determines applicable law for the cases transferred and consolidated before it. *See, e.g.*, Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993) (explaining that "a transferee federal court should apply its interpretations of federal law, not the constructions of federal law of the transferor circuit"); *In re* Lou Levy & Sons Fashions, Inc., 988 F.2d 311, 313 (2d Cir. 1993) (determining that New Jersey law applied).

163. Feinberg sought the expert advice of Professor John C.P. Goldberg concerning limitations of recovery under the OPA and parallel state laws. Professor Goldberg concluded that under the OPA and parallel state laws, only some economic losses were recoverable from those responsible for the spill. Thus, to recover under the OPA for economic losses caused by the spill, a claimant must establish that his or her loss was due to damage of loss of property or resources, and that the damage or loss prevents the claimant from exercising the right to put that property or those resources to commercial use. John C.P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill*, 30 MISS. C. L. REV. 335, 348 (2011). *But see* Bryan Walsh, *Oil Spill: Kenneth Feinberg Makes the Final Rules for Spill Settlement, But Are They Fair?*, TIME ECOCENTRIC BLOG (Nov. 24, 2010), http://ecocentric.blogs.time.com/2010/11/24/oil-spill-kenneth-fineberg-makes-the-final-rules-for-spill-settlements-but-are-they-fair/ (noting that hotel groups might attempt to sue BP rather than go through the claims process, but that Feinberg believed they would not have much luck, relying on the expert opinion of Professor John C.P. Goldberg of Harvard Law School regarding applicable law).

164. *See In re:* BP P.L.C Sec. Litig., 734 F. Supp. 2d 1376 (J.P.M.L. 2010) (a case alleging violations of the Sherman Antitrust Act of 1934). *See also* Daniel Fisher & Asher Hawkins, *BP's Legal Blowout*, FORBES.COM (July 14, 2010), http://www.forbes.com/2010/07/14/bp-oil-spill-settlement-business-energy-lawsuits (commenting on securities cases).

165. *See* 46 U.S.C. § 30104 (2006) (providing a cause of action for personal injury to or the death of a seaman). *See also* Christopher Bauer, *Injured Deepwater Horizon Oil Rig Workers and Widow File Jones Act Personal Injury Wrongful Death Lawsuit Against BP in Galveston*, EMERGING ISSUES LAW COMMUNITY BLOG (May 6, 2010), http://www.lexisnexis.com/community/emergingissues/blogs/gulf_oil_spill/archive/2010/05/06/injured-deepwater-horizon-oil-rig-workers-and-widow-file-jones-act-personal-injury-and-wrongful-death-lawsuit-against-bp-in-galveston.aspx (detailing a lawsuit alleging violations of the Jones Act as a result of the *Deepwater Horizon* explosion).

environmental statutes,[166] general maritime law,[167] as well as state common law causes of action.[168] In an omnibus order issued on August 26, 2011, Judge Barbier determined that jurisdiction was proper pursuant to admiralty law and the Outer Continental Shelf Lands Act. [169] The court additionally held that federal maritime law preempted state statutory and common law claims, dismissing such claims.[170] Judge Barbier also established the presentment requirements for claims under OPA, and the ability to assert claims against responsible and non-responsible parties under that statute.[171] The court further held that claims for punitive damages were available for general maritime claimants against responsible and non-responsible parties.[172]

The breadth of potential bases for recovery in the Gulf Coast disaster, then, would have had bearing on a claimant's evaluation of the election of remedies. Unlike the WTC Fund, which involved only personal injury and death claims,[173] Gulf Coast victims conceivably had multiple theories of recovery for an assortment of personal, property, business, contract, tort, and environmental injuries. Several securities lawsuits also have been filed as a consequence of the BP disaster.[174] There are compelling reasons,

166. *See, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006) (providing various causes of action).

167. Judge Barbier ruled that the states of Alabama and Louisiana were permitted to bring general maritime claims for negligence and products liability, and to seek punitive damages against a group of defendants regarding the *Deepwater Horizon* oil spill in the Gulf. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, 808 F. Supp. 2d 943, 962 (E.D. La. 2011) (allowing general maritime remedies as well as punitive damages).

168. *See* Paul H. Rubin, *A Gulf Spill Primer: Why BP Should Be Held Fully Liable for All Economic Damages*, WALL ST. J., Aug. 2, 2010, *available at* http://online.wsj.com/article/SB10001424052748703995104575389050148617176.html (analyzing possibly applicable tort law and arguing that there is little justification for limiting economic or punitive damages).

169. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, 808 F. Supp. 2d at 968.

170. *Id.* at 958.

171. *Id.* at 962, 964.

172. *Id.* at 962–63.

173. *See supra* note 49 and accompanying text (citing to the enabling statute, which limited relief to personal injury and death claims).

174. *See* Fisher & Hawkins, *supra* note 155 (commenting on securities litigation resulting from the spill).

then, why Gulf Coast claimants might sensibly choose to litigate their claims rather than seek an award from the GCCF.[175]

Finally, the embedded applicable law problems in relation to the GCCF raise important questions concerning the adequacy of notice that GCCF claimants receive about applicable law in making an informed decision about their election of remedies, as well as implications in agreeing to a comprehensive release upon a GCCF final settlement.

In the GCCF experience, then, many victims most likely were tacitly pressured into making an election of remedies substantially in the context of an informational vacuum concerning applicable law. In media interviews, Administrator Feinberg vaguely indicated that the standards and criteria governing implementation of the GCCF would be derived with reference to state law,[176] the same position Feinberg employed in the WTC Fund.[177] The GCCF protocol for emergency advance payments merely stated that the GCCF would evaluate all claims "guided by

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175. *But see* Walsh, *supra* note 163 (noting that hotel groups might attempt to sue BP rather than go through the claims process, but that Feinberg believed they wouldn't have much luck, relying on the expert opinion of Professor John C.P. Goldberg regarding applicable law).

176. *See* Brian Baxter, *Feinberg Talks of Criteria for Gulf Claims, Says Lawyers Not Needed*, THE AMLAW DAILY (June 21, 2010), *available at* http://amlawdaily.typepad.com/amlawdaily/2010/06/feinberg-bp-claims.html (citing his 9/11 experience, Feinberg stated that he would look to state law where a claimant lives to determine applicable law). *See also* Anna Fifiled, *Mediator Puts Fairness at Centre of BP Fund*, FINANCIAL TIMES (June 25, 2010), *available at* http://www.ft.com/intl/cms/s/0/f39cf900-807d-11df-be5a-00144feabdc0html#axzz1mqwdk4M2 (citing 9/11 experience; indicating that Feinberg would look to state law to recognize claims; commenting on how he might deal with different states' laws); Fisher and Hawkins, *supra* note 137 (quoting Feinberg as indicating that he plans to rely on state tort principles); Neil King Jr., *Feinberg Ramps Up $20 Billion Compensation Fund*, WALL ST. J., June 21, 2010, at A6, *available at* http:// http://online.wsj.com/article/SB10001424052748704256304575321072301455004.html (indicating that Feinberg stated that he would turn to state law for guidance on which types of claims to honor and which to dismiss). *See, e.g.*, Neil King Jr., *Feinberg Criticized for Spill-Compensation Terms*, WALL ST. J., Aug. 24, 2010, *available at* http://online.wsj.com/article/SB10001424052748704340504575447802502224486.html (last visited Apr. 9, 2012) (noting that Feinberg suggested that deductions for BP clean-up payments weren't unusual under state law); Strassel, *supra* note 142 (suggesting that payout rules would be broadly based on federal oil-spill law and Gulf-state tort law).

177. *See supra* note 61 and accompanying text (explaining that Feinberg said he would be guided, but not bound, by state law principles).

applicable law."[178] And, similar to his administration of the WTC Fund, Feinberg has not indicated what state law, if any, applies to administration of the GCCF.

This lack of available information about applicable law, claims, and remedies placed Gulf Coast victims in a double bind. Not only did they lack information about what law or principles, if any, guided implementation of the GCCF, but they also lacked information about applicable law governing litigation alternatives. In order to make a knowing, intelligent, and informed election of remedies, GCCF claimants should have had access to an understanding of applicable law.

C. Potential Defendants

An important characteristic that distinguishes the BP spill events from the September 11th disaster is the universe of potentially culpable defendants,[179] including, but certainly not limited to, BP. Indeed, the GCCF final waiver lists several dozen entities seeking release from litigation as a consequence of settling with the GCCF.[180] Not only is there a substantial list of potentially liable parties,[181] but the legal theories that might support such claims are less attenuated than in the WTC litigation. Hence, the "problematic defendant" argument, in support of the WTC Fund claims resolution, has scant relevance in the context of the GCCF claims. Consequently, in order to make an informed waiver of their right to

178. *GCCF Protocol for Emergency Advance Payments*, *supra* note 161.

179. The Coast Guard's immediate identification of BP as a responsible party under the OPA supports this contention.

180. *GCCF Sample Release and Covenant Not to Sue*, *supra* note 153, Attachment A.

181. BP has sought and obtained contribution from other companies potentially liable for the *Deepwater Horizon* events, which BP indicates it will use to settle individual and governmental claims and to pay for the costs of the oil spill. *See* Guy Chazan, *Anadarko to Pay BP $4 Billion*, WALL ST. J., Oct. 18, 2011, at B3, *available at* http://online.wsj.com/article/SB10001424052970204346104576636264279485124.html (noting settlement between Andarko and BP over Gulf oil spill). *See also* Julia Werdinger, *Contractor on Oil Spill Has Settled With BP*, N.Y. TIMES, Dec. 16, 2011, at B6, *available at* www.nytimes.com/2011/12/17/business/global/bp-to-get-250-million-in-gulf-of-mexico-oil-spill-settlement.html (discussing Cameron International's settlement with BP).

sue, GCCF claimants needed to be apprised that many of them had potentially viable claims against numerous real, viable defendants.

Moreover, in order to have made a knowing and intelligent waiver of the right to sue, Gulf Coast claimants, at a minimum, ought to have had both information and advice concerning the identity and potential responsibility of entities other than BP. It seems highly likely—especially in the absence of assistance of counsel—that many Gulf Coast claimants became aware of the universe of other potential party-defendants only when confronted with the litigation waiver, which included a lengthy attached list of released entities.

D. Viability of Future Claims

Similar to the WTC experience, the GCCF also did not address how future claimants might be compensated for latent injuries or, in the alternative, precluded from recovery for latent injuries because of a waiver and release in a final GCCF settlement.[182] In the aftermath of the spill, BP hired many Gulf Coast workers—especially fishermen and boat owners who were idled—to assist in clean-up efforts in Gulf waters and on land.[183] During the clean-up, numerous clean-up workers were not afforded sufficient health and protective measures.[184] Similar to the claims by WTC first responders and construction workers, many Gulf Coast cleanup workers complained that they were not supplied with

182. *See* Michael Cooper, *Two Funds: Same Goal: Compensate*, N.Y. TIMES, Aug. 22, 2010, at A14 (noting long-term effects of spill might be much worse than anticipated, creating problems in the future). *See also* Campbell Robertson, *As Claims for Spill Losses Shift to Administrator, Queries Follow*, N.Y. TIMES, Aug. 23, 2010, at A14 (describing how a skeptical crowd at a bingo hall expressed concern over August 2013 deadline for final settlement of claims; explaining that deadline may fall before true extent of damage is known); John Schwartz, *For Kenneth Feinberg, More Delicate Diplomacy*, N.Y. TIMES, July 16, 2010, at A11 (discussing that Feinberg indicates he plans to work with experts to project long-term effects, but noting that most people will accept a lump-sum payment once it is offered) [hereinafter Schwartz, *More Delicate Diplomacy*].

183. Fisher & Hawkins, *supra* note 155.

184. *See* Dionne Searcey, *Round Two of BP Litigation: The Clean-Up Suits Begin*, WALL ST. J., July 20, 2010, *available at* http://blogs.wsj.com/law/2010/07/20/round-two-of-bp-litigation-the-clean-up-suits-begin/ (reporting on a state suit seeking medical monitoring for volunteers and workers).

sufficient respirator equipment and other protective gear to insulate against toxic fumes and substances.[185]

In seeking a final settlement of their claims, GCCF participants are required to sign an all-encompassing waiver and release, which conceivably embraces any future personal injury claims.[186] Consequently, some Gulf Coast claimants who filed claims for property and business loss compensation may subsequently manifest future illnesses or disease from exposure to toxic substances because of participation in the cleanup efforts. Hence, participation in a final GCCF settlement may preclude these claimants from subsequently seeking further recovery.

Some Gulf Coast claimants, then, were put to a hard choice between accepting compensation and waiving future recovery, or declining immediate payment and preserving the right to pursue relief for future injury. Because potential Gulf Coast claimants are required to file for final GCCF awards before August 2013, many may not have manifested any latent injury or know the extent of their damages before this deadline. Hence, many claimants in desperate need for immediate compensation may forgo relief for future claims, while others may opt out of the process and sue.[187]

Finally, the problem of future latent injury relief is further complicated by notice and due process issues.[188] It is entirely unclear the extent to which GCCF claimants are advised, either by GCCF staffers or by independent attorneys, of the potential waiver of their claims for future latent injury if they seek final settlement of their current claims. The GCCF website is unclear on this issue,[189] and to date many Gulf Coast claimants have not received

185. *See id.* (noting lack of proper gear and respirators for clean-up workers).

186. *See* Strassel, *supra* note 142 (noting that Feinberg's urging potential claimants to sign up with the GCCF riles tort-law community and that tort bar and state attorneys general raise very legitimate policy issues about releasing BP from liability before all damage from the spill is known).

187. Robertson, *supra* note 182 (noting that claimants may opt out and sue due to uncertain nature of extent of damage).

188. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 260–61 (2d Cir. 2001) (discussing the difficulties associated with latent future injury in the context of class action suite for "Agent Orange" exposure).

189. *See Information Regarding Free Legal Assistance*, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/probono (providing toll-free numbers for state-by-state legal assistance).

independent counsel in seeking interim emergency relief.[190] Again, lack of transparency frustrates efforts to determine whether adequate due process measures are in place to educate Gulf Coast claimants concerning the full consequences of their election of remedies through the GCCF, and the possible forfeiture of future latent injury claims.

E. Assistance of Counsel

The GCCF presents a striking contrast to the WTC Fund experience regarding the role of counsel in assisting victims in pursuing relief. Unlike the WTC experience, the Gulf Coast plaintiffs' bar did not issue any communiqué counseling restraint in the aftermath of the oil spill similar to ATLA's public pronouncement after September 11th. Furthermore, the plaintiffs' bar did not organize to provide voluntary, *pro bono* assistance to claimants requesting legal advice in navigating the GCCF requirements to seek Fund awards. And significantly, the plaintiffs' bar publicly protested various actions by the GCCF and Feinberg in implementing the Facility.[191]

Administrator Feinberg found himself in conflict with Gulf Coast attorneys, rather than working in tandem with the bar as he had done with the WTC Fund. Thus, during the initial administration of the GCCF, Feinberg publicly announced that claimants would not need lawyers to help them navigate the claims

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190. Mullenix, *supra* note 3, at 892.

191. *See* John Pacenti, *Plaintiffs' Attorneys Knock BP Fund Administrator*, DAILY BUSINESS REVIEW, July 26, 2010, *available at* http://www.law.com/jsp/article.jsp?id=1202463865302&slreturn=1 (noting various complaints about Feinberg). *See also* Dionne Searcey, *Lawyers Scramble for BP Claim Funds*, WALL ST. J., July 1, 2010, *available at* http://online.wsj.com/article/SB10001424052748704334604575339181601240578.html (noting that attorneys were "scrambling" to remain part of the claims process after being frozen out by the claims process). *Cf. Gulf Claims Piñata*; *Blaming Ken Feinberg for Doing What Everyone Asked Him to Do,* WALL ST. J., Nov. 26, 2010, *available at* Factiva, Doc. No. WSJO000020101125e6bq009f (noting plaintiffs' lawyers criticism of Feinberg and his administration of the GCCF); *Mr. Feinberg and the Gulf Settlement*, N.Y. TIMES, Aug. 29, 2010, at A18, *available at* http://www.nytimes.com/2010/08/30/opinion/30mon1.html (criticizing private attorneys' actions as against the GCCF).

process[192] and consistently urged potential claimants to seek awards from the GCCF.[193] In response to Feinberg's seeming discouragement of retaining counsel, many Gulf Coast attorneys advocated that oil spill victims not seek relief through the GCCF.[194]

While attorneys voluntarily worked with the special master in administering the WTC Fund, tension and controversy between Feinberg and Gulf Coast attorneys escalated. Spurred on by Feinberg's purported representation of himself as a neutral arbiter, plaintiffs' attorneys involved in the parallel Gulf Coast Oil Spill MDL litigation successfully enjoined Feinberg from advocating that victims seek spill relief exclusively through the GCCF.[195] No

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192. *See* Baxter, *supra* note 176 (quoting Feinberg as stating that "this will be a very transparent process where you will walk into one of numerous offices throughout the gulf, file a claim, even electronically if you want, and we will immediately be able to process that claim"). *See also Feinberg Says BP Fund Will Be Generous, Better Than Lawsuits*, BLOOMBERG NEWS (July 15, 2010) (discussing Feinberg's assertion that it is not necessary to hire an attorney because his office will have attorneys on staff to provide free legal services).

193. *See* Schwartz, *supra* note 182 (reporting that Feinberg urged claimants to sign up: "It's my opinion you are crazy if you don't participate;" and stating that Feinberg discouraged potential claimants from litigation because of years of uncertainty in the courts and "big cut for the lawyers"). *See also BP Creates Special Team to Speed Up Claim Payments to Businesses*, TIMES-PICAYUNE, Aug. 3, 2010, *available at* http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/bp_creates_special_team_to_spe.html (reporting that BP was encouraging businesses to contact their adjuster or BP to process claims); Campbell Robertson & John Schwartz, *Rethinking the Process for BP Spill Claims*, N.Y. TIMES, Sept. 15, 2010, at A16, *available at* http://www.nytimes.com/2010/09/16/us/16feinberg.html (reporting that Feinberg announced that lawyers around the country could play an important role in the GCCF by helping claimants package their claims); Strassel, *supra* note 142 (quoting Feinberg as stating that the overall message is this: "If we're not going to pay, nobody's going to pay. That's my philosophy on this thing").

194. *See* Amanda Bronstad, *Spill Fund Won't Deter Litigation*, NAT'L LAW J., Aug. 30, 2010, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202471192987&Spill_fund_wont_deter_litigation&slreturn=1 (describing plaintiffs' attorneys views on the GCCF versus the litigation option).

195. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, MDL No. 2179, 2011 WL 323866, at *8 (E.D. La. Feb. 2, 2011) (ordering Feinberg not to communicate with victims who retained counsel, and to refrain from appearing neutral; granting plaintiffs' motion to supervise ex parte communications with putative class). *See also* Tom Hals, *Judge Finds Feinberg Not Independent of BP*, REUTERS, Feb. 2, 2011, *available at* http://www.reuters.com/article/2011/02/03/us-oil-spill-feinberg-independence-idUSTRE7120EG20110203 (reporting on the case); John Schwartz, *Comments By*

similar efforts were made to enjoin Feinberg in his administration of the WTC Fund.

Building on his experience in administering the WTC Fund, Feinberg made several efforts to enlist the assistance of volunteer attorneys to assist claimants in seeking GCCF awards.[196] Unlike the WTC Fund experience, though, few Gulf Coast attorneys volunteered to supply *pro bono* legal assistance to claimants.[197] Faced with this failure, Feinberg made repeated announcements that the GCCF would provide counsel to any person needing legal assistance.[198] It is uncertain the extent to which this promise has been fulfilled.[199] However, many claimants filed for GCCF awards without the assistance of counsel, because many victims could not afford to retain counsel, and the Facility did not make counsel available.[200]

Overseer of BP Fund Irk Lawyers, N.Y. TIMES, Dec. 21, 2010, at A18 (reporting plaintiff lawyers' motion to enjoin Feinberg from communicating with putative class claimants); Brian Skoloff & Harry Weber, *Judge to Gulf Claims Czar: Don't Say You're Independent*, MSNBC NEWS, Feb. 2, 2011, *available at* http://www.msnbc.msn.com/id/41397181/ns/us_news-environment/t/judge-gulf-claims-czar-dont-say-youre-independent-bp/#.T0w9NnJSSFc (reporting on a federal judge's ruling which instructed Feinberg to stop telling potential claimants that he was independent from BP).

196. *See* David Hammer, *New Gulf Oil Spill Claim Rules Announced by Ken Feinberg*, TIMES-PICAYUNE, Nov. 23, 2010, *available at* http://www.nola.com/news/gulfoilspill/index.ssf/2010/11/new_gulf_oil_spill_claim_rules.html (noting Feinberg's desire for a network of national attorneys to assist claimants).

197. *Id.*

198. *See* John Schwartz, *Administrator of BP Fund Offers Bonuses to Spill Victims Who Bypass Suits*, N.Y. TIMES, Dec. 12, 2010 (late ed.) at 16, *available at* http://www.nytimes.com/2010/12/13/us/13fund.html (reporting that Feinberg's team would make free legal advice available and would add staff at local centers for the Fund to help people fill out their forms for final claims).

199. *See Gulf Coast Claims Facility Announces Next Phase of the Compensation Program for Victims of the BP Oil Spill*, GCCF (Dec. 13, 2010), http://www.gulfcoastclaimsfacility.com/pressB.php [hereinafter *GCCF Announces Next Phase of the Compensation Program*] (announcing program for free legal assistance would be made available soon and made available to any claimant seeking help).

200. *See* David Hammer, *Most BP Oil Spill Claimants Opt for One-Time 'Quick Payment,'* TIMES-PICAYUNE, Jan. 26, 2011, *available at* http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/01/most_bp_oil_spill_claimants_op.html (reporting that fewer than 3% of those filing claims had attorneys). *See also* Moira Herbst, *BP Claims Process Enters New, Uncertain*

In addition, several Gulf Coast plaintiffs' attorneys broke ranks with the MDL plaintiffs' attorneys and changed course, publicly urging Gulf Coast claimants to seek compensation through the GCCF.[201] These attorneys indicated a willingness to represent residents and businesses in seeking GCCF awards based on contingent fee arrangements for this representation.[202] This has pitted one segment of the plaintiffs' bar against the MDL attorneys.[203]

A major factor justifying fund approaches, including the WTC Fund, as a preferable means for resolving mass tort claims is the argument that a claimant's compensation is not diminished by a sizable attorney-fee award.[204] Developments in the GCCF have

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Phase, REUTERS, Feb. 10, 2011, *available at* http://www.reuters.com/article/2011/02/10/us-oilspill-feinberg- idUSTRE71933X20110210 (same); Tracy X. Miguel, *Naples Business Owner Says She'll Have to Live in Truck After BP Denies Her Claim*, NAPLES DAILY NEWS, Dec. 14, 2010, *available at* http://www.naplesnews.com/news/2010/dec/14/naples-business-live-truck-bp-denies-claim-candi/ (explaining the derivation of a business owner's emergency advance payment claim).

In late 2010, Feinberg announced that the GCCF would retain several private law firms to assist claimants, presumably on a fee-paid basis. However, the details of these arrangements with private firms to supply assistance of counsel to claimants have not been publicly disclosed, signifying yet another aspect of GCCF administration lacking. *See GCCF Announces Next Phase of the Compensation Program*, *supra* note 199 (detailing the GCCF's arrangement to retain private firms).

201. *See* Dionne Searcey, *Oil-Spill Lawyers Urge Clients to Settle*, WALL ST. J., Jan. 28, 2010, at A5, *available at* http://online.wsj.com/article/SB10001424052748703399204576108383134596432.html (reporting on a group of lawyers who redirected dozens of claimants to BP Fund) [hereinafter Searcey, *Oil-Spill Lawyers*].

202. *Id.*

203. Attorneys with Gulf Coast claimants have been fighting over attorney fees. *See* Gina Passarella, *Talk About a Mess: Lawyers Suing Each Other over BP Gulf Spill Fees*, N.Y. L.J., Aug. 15, 2011, *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202511177424&slreturn=1 (discussing a fee dispute involving a consortium of lawyers known as Gulf Action Spill Plaintiffs, or GASP).

204. Diller, *supra* note 9, at 764; Steenson & Sayler, *supra* note 8, at 537–38. *See also* Preamble, *September 11th Victim Compensation Fund of 2001* (Dec. 21, 2001) (indicating that contingency fee arrangements for attorneys representing claimants before the Fund, exceeding 5% of a claimant's recovery of the Fund, would not be in the best interests of claimants); September 11th Victim Compensation Fund, 28 C.F.R. § 104.81 (2011) ("Notwithstanding any contract,

undermined this rationale justifying the preference for a fund solution to mass disaster claims. Thus, in contrast to the WTC Fund, where attorneys worked *pro bono* and did not charge fees for assistance in making a claim, the Gulf attorneys undertaking representation for GCCF awards will charge a percentage of claimants' recovery from their GCCF award. Hence, at least one major justification for the superiority of fund resolution of claims is not present for the GCCF claimants who retain counsel.

When attorneys represent clients before a fund and take a fee, the advantages of a fund resolution are diminished. However, the more significant problem with the GCCF experience has been the pervasive lack of independent, neutral counsel to assist claimants in making an informed election of remedies. Against this backdrop, claimants have been confronted with a barrage of misleading and confusing information, accompanied with implicitly coercive pressure from the Fund's administrator to seek remediation from the Fund.

F. The BP Gulf Oil Litigation Options

As discussed above, the statutory authorization for the WTC Fund also enacted mandates for a single litigation track for victims who declined to seek a WTC Fund award.[205] These statutory provisions narrowly governed jurisdiction, venue, and applicable law.[206] Because of this statutory mandate, it would have been relatively easy to inform WTC claimants of the available litigation option, and to explain the consequences of pursuing that option.

In contrast, the GCCF came into existence without any such statutory mandates, and the litigation landscape is much more complicated than the single litigation track that developed after the September 11th events. In the GCCF context, there is no statute cabining parallel litigation in any fashion. Consequently, victims of the Gulf Coast spill were and are at liberty to pursue litigation individually or collectively in any forum of choice. This makes the need for neutral and impartial advice crucial to a claimant's election of remedies and waiver of the right to sue. In essence, by electing an

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the representative of an individual may not charge . . . more than 10 percent of an award paid under this title on such claim.").

205. *See supra* Part II.C.

206. *See supra* Part II.C.

award from the GCCF, claimants potentially relinquish much more than WTC victims, because of the broader litigation possibilities engendered by the oil spill disaster. Nonetheless, as was true for the WTC Fund, administrator Feinberg actively discouraged potential Gulf claimants from pursuing litigation.[207]

The alternative litigation options for Gulf Coast claimants who choose not to seek remediation through the GCCF are relatively immature, and there are multiple simultaneous litigation tracks underway. Thousands of lawsuits have been filed.[208] The Judicial Panel on Multidistrict Litigation approved a Gulf Oil Spill MDL,[209] and transferred and consolidated all oil-spill-related cases in federal district court in Louisiana.[210] In January 2011, presiding Judge Barbier selected the lead counsels' committee to represent and develop the litigation.[211]

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207. Schwartz, *More Delicate Diplomacy*, *supra* note 182 (noting that Feinberg was discouraging claimants from litigation because of uncertainty, delay, and attorneys' fees).

208. *See* Searcey, *supra* note 149 (noting the thousands of oil spill related lawsuits filed in the district court).

209. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, 808 F. Supp. 2d 943, 960 (E.D. La. 2011) (approving Master Complaint). *See also MDL-2179 Oil Spill by the Oil Rig "Deepwater Horizon,"* LAED.USCOURTS.GOV, http://www.laed.uscourts.gov/OilSpill/OilSpill.htm (reporting current development and updates occurring in the MDL) (last updated Mar. 21, 2012).

210. *See* Transfer Order, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" In the Gulf of Mexico, on Apr. 20, 2010, 731 F. Supp. 2d 1352 (J.P.M.L. 2010). BP's choice of forum was Houston. *See also* Margaret Cronin Fisk & Laurel Brubaker Calkins, *BP Wants All Gulf Oil-Spill Lawsuits Combined in Houston*, BLOOMBERG, May 10, 2010, *available at* www.bloomberg.com/news/2010-05-10/bp-wants-gulf-oil-spill-litigation-combined-in-federal-court-in-houston.html (noting BP's request to have the MDL cases consolidated in Houston, but that one lawyer representing over a hundred businesses asked for the cases to be consolidated in Judge Barbier's court in Louisiana); John Schwartz, *U.S. Judge in New Orleans Will Hear Gulf Spill Cases*, N.Y. TIMES, Aug. 10, 2010, at A11, *available at* http://www.nytimes.com/2010/08/11/us/11liability.html (discussing creation of MDL and transfer to New Orleans); Ashby Jones, *Big Gulf Spill Gets Sent to the Big Easy*, WALL ST. J. BLOG, Aug. 10, 2010, http://blogs.wsj.com/law/2010/08/10/big-gulf-spill-litigation-gets-sent-to-the-big-easy (noting creation of Oil Spill MDL and transfer to Federal Judge Carl Barbier in New Orleans; explaining that this was viewed as a victory for plaintiff attorneys).

211. Brian Baxter, *David Boies Wants Lead Role in BP Litigation*, AMERICANLAWYER.COM, Sept. 29, 2010, www.law.com/jsp/tal/PubArticle

The Louisiana MDL does not include securities class actions, which have been transferred to the federal district court in Houston, Texas, for adjudication.[212] In addition to these lawsuits, the Gulf State Attorneys General anticipate filing litigation asserting governmental claims for various damage to the Gulf States,[213] pursuant to an array of environmental statutes and common law theories.[214] Moreover, the federal government may pursue litigation for criminal violations and other fines arising from the *Deepwater Horizon* explosion and oil spill.[215]

TAL.jsp?id=1202483584171. *See also* Dionne Searcey, *Modesty Is Out as Lawyers Vie for Key Spots in BP Suit*, WALL ST. J., Sept. 28, 2010, *available at* http://online.wsj.com/article/SB10001424052748703694204575518232087667168.html (reporting that hundreds of attorneys were competing for selection for leadership posts in the MDL and its steering committees).

212. *In re* BP P.L.C. Sec. Litig., 734 F. Supp. 2d 1376, 1377–79 (J.P.M.L. 2010).

213. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2012, 808 F. Supp. 2d 943, 960 (E.D. La. 2011) (permitting lawsuits by states of Louisiana and Alabama to proceed on negligence and products liability claims, as well as for recovery of punitive damages against an array of defendants).

214. *See* Evan Perez & Dionne Searcey, *New Party to Suits in Gulf Spill: The U.S.*, WALL ST. J., Dec. 15, 2010, *available at* http://online.wsj.com/article/SB10001424052748704694004576019780202183482.html (commenting on suits by State Attorneys General). *See also* Dionne Searcey, *New Alabama AG Boots Oil-Spill Lawyers, Will Handle on His Own*, WALL ST. J., Jan. 27, 2010, *available at* http://blogs.wsj.com/law/2011/01/27/new-alabama-ag-boots-oil-spill-lawyers-will-handle-on-his-own/ (reporting that Alabama's new Attorney General, Luther Strange, fired trial attorneys and appointed himself lead counsel in the suit against BP).

215. *See* Jennifer A. Dlouhy, *BP Faces More Fines Over Spill*, HOUS. CHRON., Dec. 7, 2011, *available at* http://www.chron.com/business/articles/BP-faces-more-fines-over-spill-2374940.php (reporting that the federal government issued a second set of citations against BP for safety and security violations). *See also* Tom Fowler, *Criminal Charges Are Prepared in BP Spill*, WALL ST. J., Dec. 29, 2011, *available at* http://online.wsj.com/article/SB10001424052970203899504577126871591624572.html (examining the possible criminal implications for BP); Leslie Kaufman, *Task Force Says BP Oil Spill Fines Should Go to Gulf Coast Restoration*, N.Y. TIMES, Dec. 5, 2011, *available at* http://www.nytimes.com/2011/12/06/science/earth/panel-says-bp-oil-spill-fines-should-go-to-gulf-restoration (discussing possible civil penalties); Perez & Searcey, *supra* note 214 (reporting that Justice Department expected lawsuits under environmental protection statutes); John Schwartz, *U.S. Sues BP and Others for Damages in Gulf Spill*, N.Y. TIMES, Dec. 15, 2010 (late ed.) at 30, *available at*

The pending lawsuits relating to these events implicate complicated federalism issues, a significant array of federal and state statutory and common law claims,[216] multiple defendants,[217] and complicated choice-of-law problems.[218] Unlike the WTC experience, it is unlikely that one federal or state judge will oversee all BP Gulf Coast litigation, as Judge Hellerstein did in managing the WTC litigation.[219] Moreover, the relationship of Gulf Coast litigation to the parallel fund mechanism is currently unclear, although in overseeing the BP Gulf Oil Spill MDL, Judge Barbier has indicated a willingness to intervene in the Fund's operation.[220]

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http://www.nytimes.com/2010/12/16/us/16suit.html (reporting on a Department of Justice criminal investigation).

216. *See* Barry Meier, *Death and Disaster at Sea Lead to Calls to Update Maritime Laws*, N.Y. TIMES, July 6, 2010, at B1, *available at* http://www.nytimes.com/2010/07/06/business/06seas.html (commenting on plaintiffs' attorneys turning down compelling potential cases because of statutory limitations on recovery). *See also In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, MDL No. 2179, 2011 WL 5520295 (E.D. La. Nov. 14, 2011) (analyzing motion to dismiss common law claims and statutory state law claims); *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, 808 F. Supp. 2d 943 (E.D. La. 2011) (order relating to permissible jurisdiction and claims in the BP litigation).

217. *See supra* notes 179–181 and accompanying text (describing the numerous possible defendants).

218. *See supra* note 162 and accompanying text (describing the complexity of applicable law).

219. *See supra* note 17 and accompanying text (explaining Judge Hellerstein's involvement in the WTC litigation).

220. Judge Barbier has signaled his willingness to rein in Feinberg and his staff when appropriate, as manifested in Judge Barbier's February 2, 2011 order enjoining Feinberg and his law firm. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, MDL No. 2179, 2011 WL 323866 (E.D. La. Feb. 2, 2011). And, in a controversial Order issued on December 28, 2011, Judge Barbier ordered that 6% of fund awards be placed in escrow to pay attorney fees in the federal MDL litigation. The purpose of the escrow account is to establish a fund from which common benefit litigation fees and expenses may be paid to the Plaintiff Steering Committee and other lead and liaison plaintiff counsel if and when awarded by the court. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 6817982, at *6 (E.D. La. Dec. 28, 2011) (Order and Reasons of the Court, requiring withholding of 6% of any and all amounts determined to be paid to eligible GCCF claimants and to be deposited into a court-supervised Escrow Account). This order inspired heated controversy, and Judge Barbier has accepted further briefing on the issue. *See Editorial: Put Oil Spill Victims First*, THE TIMES-PICAYUNE, Jan. 5, 2012, at B6, *available at*

Finally, at this immature stage of the various litigation proceedings, it is already clear that a fissure has developed in the plaintiffs' bar,[221] with some attorneys seeking resolution of claims through the MDL auspices, others aligned to pursue securities violations through the class action mechanism, and another group seeking to represent clients in the GCCF in return for contingent fees.[222] Clearly, the MDL attorneys seeking to enjoin Feinberg in his GCCF efforts are not aligned with the plaintiffs' attorneys who are advocating claimant relief through this facility.

Ultimately, however, the Gulf oil spill events—and the consequent proliferation of litigation—suggest that victims of this environmental and regulatory disaster needed guidance in understanding the array of options for remediation. Given the squabbling among the practicing bar, some self-seeking attorneys, and the Fund administrator's partial advocacy in favor of the Fund, Gulf Coast victims were in great need of neutral, impartial counsel in order to make an informed decision.

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http://www.nola.com/opinions/index.ssf/2012/01/put_bp_oil_spill_victims_first.html (describing the frustration with Judge Barbier's order). *See also In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2012 WL 161194 (E.D. La. Jan. 18, 2012) (an Order amending the previous Dec. 28 and Jan. 7 order, thereby implying that Judge Barbier heard more briefing on the issue). *See also* Amanda Bronstad, *Taming the BP Beast: Judge Crack Whip to Keep Litigation Moving*, N.L.J., at 1 (Sept. 19, 2011) (discussing Judge Barbier's high level of involvement in the litigation process).

221. *See* John Schwartz, *Plaintiffs' Lawyers in a Bitter Dispute over Fees in Gulf Oil Spill Cases*, N.Y. TIMES, Dec. 4, 2011, at A30, *available at* http://www.nytimes.com/2011/12/04/us/plainitffs-lawyers-fighting-over-gulf-oil-spill-fees (reporting on disagreement among plaintiffs' lawyers).

222. *See* Brian Baxter, *Steering Committee Members Selected for Gulf Coast Oil Spill Suits*, AMLAW DAILY, Oct. 11, 2010, *available at* http://amlawdaily.typepad.com/amlawdaily/2010/10/gulfsuitssteering.html (reporting on the selection and contention among plaintiffs' lawyers to be on the litigation steering committee). *See also* Searcey, *Oil-Spill Lawyers*, *supra* note 201 (reporting on attorneys encouraging their clients to make claims for Fund money).

IV. CONCLUSION: THE NEED FOR INFORMED CONSENT TO ACCEPT A MASS DISASTER FUND AWARD AND WAIVE THE RIGHT TO SUE

While there may be some emerging debate whether the WTC Fund and the GCCF are similar or distinguishable—whether the WTC Fund is *sui generis* or the GCCF entirely different—this debate is beside the point. It simply does not matter that *this* fund differs from *that* fund in some particular way. What is important is that, on a continuum of dispute-resolution mechanisms, so-called "fund" approaches are generally alike.

Thus, fund approaches to the resolution of mass tort claims represent a no-fault privatized means of claim processing outside the adjudicatory system. It is a system of remediation accomplished through a private administrative bureaucracy. Perhaps the closest analog to the fund resolution of mass tort claims is insurance claim processing.[223]

Fund approaches to mass tort claim resolution embrace the concept that the government (as in the WTC events), a culpable defendant (in the case of the BP oil spill), or some combination of both, can create a pot of money to distribute to claimants, provided those claimants agree to forgo other options and elect the Fund as the sole source of compensation. Fund approaches to mass tort claim resolution promise a relatively speedy, inexpensive, and immediate award, counterbalanced by the forfeiture of other potential benefits. The very essence of fund approaches to the resolution of mass tort claims is the relinquishment of the right to sue.

There is nothing wrong with the private settlement of claims that require a concomitant relinquishment of the right to sue. Such settlements occur daily, and perhaps the most often repeated platitude is that the law favors settlement. Nonetheless, even in simple litigation (or other alternative dispute resolution settings), claimants typically have some considered advice, counsel, and hopefully accurate information with which to make an informed judgment about the wisdom of a settlement offer as compared to a litigation alternative.

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223. Ken Feinberg reported that many of the GCCF claims were being processed and adjusted by functionaries who were, or had been at some time, insurance claim adjusters. Interview with Ken Feinberg, administrator of the GCCF (Spring 2011).

It is another thing altogether when mass disaster victims, sometimes in stressful physical and psychological settings, must choose among remedies subject to implicit pressures to elect the fund and waive the right to sue, against a backdrop of confusing, misleading, or incomplete information. If we are moving into a twenty-first-century age of fund resolution of mass tort claims—and there is evidence of the growing appeal of these mechanisms[224]—then more attention needs to be focused on the issue of informed consent and the knowing and intelligent waiver of a right to sue.

In the haste to embrace fund approaches to the resolution of mass tort claims, its advocates variously suggest that claimants' election of fund awards are entirely voluntary and free from coercive influences.[225] The repeated mantra is: "Nobody is forcing anybody to go into the fund."[226] However, there is evidence from both the WTC and GCCF funds to the contrary.[227] Moreover, it is difficult to imagine why anyone would be opposed to requiring informed consent as a condition of a fund award when that award is itself conditioned on the relinquishment of the right to sue.

How might the need for informed consent to a fund award be accomplished? Experience suggests at least three models for consideration. First, of course, is the example provided by the practicing bar in the wake of the September 11th disaster. ATLA's exemplary lead in creating a cadre of volunteer attorneys to provide *pro bono* assistance to WTC victims who wished to make a claim through a fund represents an admirable development.[228]

However, in order to provide a balanced perspective on alternative options, such voluntary *pro bono* counsel needs to be impartial and not captured either by the fund or litigation

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224. In addition to the WTC and GCCF funds, *see Merck to Fund $4.85B Vioxx Settlement*, CBSNEWS.COM (Feb. 11, 2009), http://www.cbsnews.com/2100-500395_162-4269301.html (describing the settlement fund developed by Merck).

225. *See supra* note 14 and accompanying text (citing Feinberg as saying that no one is forcing claimants to take award from Fund).

226. *Id.*

227. *See supra* note 15 and accompanying text (describing impact of grief and psychological factors). *See also supra* note 17 and accompanying text (describing pressure placed on claimants by Feinberg and Judge Hellerstein).

228. *See supra* note 99 and accompanying text (discussing ATLA's call for a moratorium on all lawsuits). *See also supra* note 102 and accompanying text (citing to ATLA's sponsored efforts to organize voluntary participation of attorneys).

alternatives. The WTC volunteer attorneys provided assistance with making claims and filing paperwork; we cannot know the extent to which those volunteer attorneys engaged in meaningful conversations with claimants about the litigation alternative and assisted in weighing the comparative risks and benefits of declining a fund award.

A second model is provided by so-called disaster response teams, sponsored by state bar agencies throughout the country.[229] In many ways, the concept of state bar disaster response teams is somewhat analogous to the voluntary legal aid efforts created in response to the WTC disaster.[230] State bars created disaster response teams in the aftermath of several local disaster events, such as catastrophic airplane or bus crashes.[231]

Disaster response teams have been created to deal with two problems endemic in the immediate aftermath of such calamities, namely: (1) the improper attorney solicitation of clients, and (2) the presence of insurance adjusters pressuring vulnerable victims into quick but disadvantageous insurance settlements.[232] The purpose of bar-sponsored disaster response teams, then, is to arrive at the scene of a disaster, to police unethical attorney conduct, and to provide neutral and objective advice to disaster victims. This advice typically encourages victims to defer making any immediate decisions relating either to retention of counsel or to offers of immediate insurance settlements.

The fact that state bar sponsored disaster response teams easily could be adapted for the broader purpose of providing neutral

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229. *See, e.g.*, Michael E. Getnick, *Presidential Pledge*, 81 N.Y.S.B.J. 5 (2009) (commenting on activation of New York state's disaster response team). *See also* Judith L. Maute, *Reflections on "Public Service in a Time of Crisis,"* 32 FORDHAM URB. L.J. 291, 294 (2005) (commenting on state mass tort disaster response teams); Burnele V. Powell, *The Problem of the Parachuting Practitioner*, 1992 U. ILL. L. REV. 105, 108–10 (problems relating to attorney response to mass disasters and creation of disaster response teams); Marshall Wood, *Be an Uncommon Leader*, 66 TX. B.J. 729, 729 (2003) (noting Texas disaster response team); *Public Service in a Time of Crisis*, 31 FORDHAM URB. L.J. 831, 905 (2004) (describing New Jersey Mass Disaster Response Team).

230. *See, e.g.*, *Public Service in a Time of Crisis*, *supra* note 229, at 905 (describing the policies enacted by the Essex County Bar Association).

231. *See, e.g.*, Getnick, *supra* note 229, at 5 (detailing the three activations of the state bar Mass Disaster Response Team during 2009).

232. THERESE A. CANNON, ETHICS AND PROFESSIONAL RESPONSIBILITY FOR PARALEGALS 231 (2008).

advice to mass disaster victims suddenly offered the option of a quick and easy settlement through a fund mechanism. Such advice ought to be offered on a *pro bono* or low-fee basis, in order to dispassionately provide claimants with full, clear, and accurate information upon which to make a knowing and intelligent—and ultimately consensual—election of remedies. Attorneys involved in such efforts must themselves be free of conflicts of interest and not be captured by either alternative that might influence otherwise impartial advice.

Finally, acceptance of a fund award and a claimant's waiver of the right to sue ought to be subject to legal challenge based on a lack of informed consent and a knowing and intelligent waiver. Making informed consent a condition for such waivers to be legally enforceable might do much to encourage parties to fully educate victims of mass disasters of the relative merits and consequences of their options and choices.

Secret Class Action Settlements

Rhonda Wasserman*

I. INTRODUCTION 889
II. CASE STUDY: THE B'NAI B'RITH LITIGATION 890
III. SCOPE OF THE PRACTICE 899
A. *Secret Class Action Settlements in the News* 900
B. *Scope of Practice in One Federal Judicial District* 906
IV. SECRECY AND ACCESS IN CONTEXT 911
A. *Policies Favoring Public Access to Settlement Agreements* 911
B. *Policies Favoring Confidential Settlement Agreements* .. 922
V. SECRECY AND ACCESS TO CLASS ACTION SETTLEMENTS 927
A. *Statutory and Logistical Constraints* 927
B. *Policy-Based Constraints* 932
VI. CONCLUSION 941

I. INTRODUCTION

The journalist's email arrived on a Monday morning. "Can you settle a class-action lawsuit in secret?" he asked.[1] The parties to a putative federal class action had filed a joint motion the preceding Friday, seeking a confidentiality order "sealing all documents related to the settlement" of the litigation, including the stipulation of settlement, the notice of proposed settlement, the motion seeking approval of the settlement, any order entered by the court regarding the settlement, transcripts of the fairness hearing, and any objections filed by class members.[2] A proposed order, filed with the motion,

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1. E-mail from Brian Bowling, Reporter, PITT. TRIB.-REV., to author (Mar. 14, 2011, 9:45 a.m. EST) (on file with author).

2. Consented-To Motion to Maintain Settlement Documents Under Seal at 3, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 3,

further directed the state and federal officials to whom the settlement documents would be provided pursuant to the Class Action Fairness Act[3] to maintain their confidentiality.[4]

"Can you settle a class-action lawsuit in secret?"

The question threw me for a loop. Of course I was aware that parties to civil litigation settle cases every day of the week and routinely seek to shield from public scrutiny both the terms of the settlement and the inculpatory documents produced in discovery. But can you settle a *class action* lawsuit in secret?

This Article seeks to answer that question. It proceeds in four parts. To illustrate the practice of settling a federal class action under seal, Part I examines the class action lawsuit that prompted the journalist's email. While a case study can vividly present the issues raised by the practice, it cannot capture its scope or incidence. Part II, then, seeks to ascertain the scope of the practice of settling class actions under seal. Part III.A reveals several permutations of the practice gleaned from newspaper accounts describing class action settlements from around the country. Part III.B focuses on a single federal judicial district—the Western District of Pennsylvania—and seeks to ascertain the percentage of suits filed as class actions that were settled under seal. Having gained some understanding of the scope of the practice, the Article then seeks to assess it normatively. Part IV analyzes the policy debate surrounding secret settlements of civil suits in general, fleshing out the competing policy objectives served by public access to, and confidentiality of, settlement agreements, including those submitted to courts for their approval. Finally, Part V examines the statutory, logistical and policy-based constraints that call into serious question the legality, efficacy, and wisdom of secret class action settlements.

II. CASE STUDY: THE B'NAI B'RITH LITIGATION

On October 23, 2009, Dean and Melva Hirschfield and thirty-

2011), ECF No. 142 [hereinafter Consented-To Motion].

3. 28 U.S.C. § 1715 (2006).

4. Proposed Order at 2, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 3, 2011), ECF No. 142-1.

two other named plaintiffs filed a verified class action complaint in the Court of Common Pleas of Allegheny County, Pennsylvania, against B'nai B'rith International ("BBI"), a worldwide Jewish service organization, and ten individuals affiliated with BBI, among other defendants.[5] The plaintiffs sought recovery of deposits that they (or their decedents) had paid to gain entry into a continuing-care retirement community in Mount Lebanon, Pennsylvania, a suburb of Pittsburgh.[6]

According to the complaint, BBI had formed the Covenant of South Hills, Inc. ("Covenant") to develop the retirement community.[7] The plaintiffs or their decedents had paid deposits (each as much as several hundred thousand dollars) to Covenant to secure entry into the facility's independent living homes.[8] In each Residency Agreement, Covenant agreed to refund a large percentage of the deposit when the resident vacated the home and it was re-occupied.[9]

Plaintiffs alleged that BBI's name or logo appeared on the

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5. Class Action Complaint, Hirschfield v. B'nai B'rith Int'l, No. GD 09-19799 (Ct. Com. Pl. Allegheny Cnty. Oct. 23, 2009) [hereinafter Class Action Complaint]. Two other Class Action Complaints were filed in the same state court against the same defendants, alleging the same facts, pressing some or all of the same claims and purporting to represent the same class. *See* Class Action Complaint, Hartman v. Levin, No. GD 09-23090 (Ct. Com. Pl. Allegheny Cnty. Dec. 11, 2009) (raising some of the same claims); Class Action Complaint, PNC Bank v. B'nai B'rith Int'l, No. GD 10-004055 (Ct. Com. Pl. Allegheny Cnty. Apr. 21, 2010) (raising all of the same claims). Like *Hirschfield*, *Hartman* and *PNC Bank* were removed to federal court and eventually consolidated with *Hirschfield* for pretrial purposes. Order of Court, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2010), ECF No. 110. To simplify the narrative, this Article will focus primarily on the *Hirschfield* case and will ignore all defendants except BBI and the individual defendants.

6. Toby Tabachnick, *Former Covenant Residents File Second Lawsuit Against B'nai B'rith*, JEWISH CHRON. (2010), http://www.thejewishchronicle.net/view/full_story/4982346/article-Former-Covenant--residents-file-second-lawsuit-against-B%E2%80%99nai-B%E2%80%99rith (last visited Mar. 24, 2012).

7. Class Action Complaint, *supra* note 5, at 13–14, 19–20.

8. Motion to Abstain and/or Remand to State Court at 3, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Dec. 16, 2009), ECF No. 13; Plaintiffs' Brief in Support of Motion for Class Certification at 3, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 24, 2010), ECF No. 59 [hereinafter Plaintiffs' Brief in Support].

9. Class Action Complaint, *supra* note 5, at 6, 17.

marketing materials distributed to the public, on Covenant's signage and letterhead, and on the Residency Agreements signed by the plaintiffs.[10] Covenant's directors were BBI officers, directors, employees and outside counsel.[11] According to the complaint, plaintiffs were led to believe that BBI was "either the owner or principal of the Facility and would fully stand behind the obligations of Covenant."[12]

When Covenant later filed for protection under Chapter 11 of the Bankruptcy Code,[13] the plaintiffs' efforts to recoup their deposits from Covenant's assets in the bankruptcy proceeding failed.[14] Neither BBI nor the entity that acquired Covenant's assets, Concordia Lutheran Ministries, assumed Covenant's obligation to refund the resident deposits.[15] Class action litigation against BBI and several of its officers and directors ensued.

The thirty-four named plaintiffs who filed the class action complaint purported to represent a class

> consisting of all . . . Residents, former Residents and/or their successors-in-interest who are or were parties to a Residency Agreement and who have not received and will not receive all benefits due them under their Residency Agreements including, but not limited to, payment of the Deposit Refunds and other benefits.[16]

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10. *Id.* at 5, 15–16.

11. *Id.* at 5, 7, 15.

12. *Id.* at 17. *See also id.* at 7, 21 (explaining that plaintiffs tendered deposits "with the understanding and justifiable belief" that Covenant was "owned and sponsored by" BBI and that plaintiffs relied on "marketing materials circulated by" BBI as well as "other public representations and statements" concerning BBI's ownership, control, and sponsorship of Covenant).

13. Chapter 11 Voluntary Petition and Statement Regarding Corporate Resolution, *In re* The Covenant at South Hills, Inc., No. 09-20121-JKF (Bankr. W.D. Pa. Jan. 8, 2009), ECF No. 1.

14. *See* Order Requiring the Debtor to Determine Whether to Assume or Reject Residency Agreements at 1, *In re* The Covenant at South Hills, Inc., No. 09-20121-JKF (Bankr. W.D. Pa. Oct. 30, 2009), ECF No. 584 (rejecting the residency agreements).

15. Class Action Complaint, *supra* note 5, at 6.

16. *Id.* at 26–27. Plaintiffs' brief in support of its motion to certify the class estimated a class of approximately 150. Plaintiffs' Brief in Support, *supra* note 8, at 8.

The complaint alleged a host of claims, including breach of contract, fraud, negligent misrepresentation, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, civil conspiracy, negligent undertaking, breach of fiduciary duty, active malfeasance, unjust enrichment, bailment, and violation of the Pennsylvania Continuing-Care Provider Registration and Disclosure Act.[17]

The defendants promptly removed the action to the United States District Court for the Western District of Pennsylvania[18] and simultaneously moved to transfer the case to the United States Bankruptcy Court.[19] While plaintiffs' motion to abstain and/or remand to state court[20] was pending, they moved for class certification, claiming a class of approximately 150 members.[21] In their motion to certify, plaintiffs defined the proposed class as all persons and entities "[w]ho had unsatisfied rights to [a] refund of a portion of their Resident Deposits" as of the date that Covenant filed its bankruptcy petition.[22]

While these motions were still pending, the parties jointly filed a Stipulated Agreement and Protective Order on Confidentiality (the "Protective Order"), which permitted either the plaintiffs or defendants to designate as confidential any discovery material (broadly defined) "that the designating Party in good faith believes contains (i) confidential personal information; (ii) confidential

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17. Class Action Complaint, *supra* note 5, at 28, 30, 32, 35, 39, 42, 46–47, 49–50, 54, 56–57. Not all of the claims were brought against all of the defendants.

18. Notice of Removal, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Nov. 17, 2009), ECF No. 1-4 [hereinafter Notice of Removal]. *See also* Consent Motion to Amend/Correct Notice of Removal, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Jan. 4, 2010), ECF No. 18 (removing the case). The Notice of Removal invoked section 1452 of Title 28 of the United States Code, which authorizes removal of cases under title 11 of the Bankruptcy Code as well as "civil proceedings arising under title 11, or arising in or related to cases under title 11." Notice of Removal, at 2; 28 U.S.C. §§ 1334(b), 1452(a) (2006).

19. Motion to Transfer Case to Bankruptcy Court, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Nov. 17, 2009), ECF No. 2.

20. Motion to Abstain and/or Remand to State Court, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Dec. 16, 2009), ECF No. 13.

21. Motion for Class Certification at 2, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 24, 2010), ECF No. 58; Plaintiffs' Brief in Support, *supra* note 8, at 8.

22. Plaintiffs' Brief in Support, *supra* note 8, at 6.

business information; (iii) trade secrets; or (iv) sensitive proprietary, commercial, financial, or customer information . . . ."[23] The district judge signed the Protective Order several days later, on May 25, 2010.[24] The Protective Order limited the persons to whom confidential information could be disclosed and the uses to which it could be put.[25] It contemplated that third-party recipients of confidential information would sign a consent to be bound by the terms of the Protective Order.[26] The order further required that counsel for any party seeking to file confidential information with the court do so under seal.[27] With certain exceptions, the Protective Order required the parties to destroy or return all confidential information to the producing party at the conclusion of the litigation.[28]

In the fall of 2010, pursuant to the mandatory alternative dispute resolution program of the United States District Court for the Western District of Pennsylvania,[29] the parties and their insurers met with a mediator and ultimately "reached an agreement on the monetary terms of a settlement . . . ."[30] The Joint Status Report

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23. Stipulated Agreement and Protective Order on Confidentiality at 2, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. May 19, 2010), ECF No. 80.

24. Stipulated Agreement and Protective Order on Confidentiality (signed), Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. May 25, 2010), ECF No. 83 [hereinafter Protective Order].

25. *Id.* ¶¶ 4, 11. The Protective Order further permitted a party to designate discovery material containing "proprietary, marketing, sensitive personal, medical, financial or other strategic information that the Party . . . believes, in good faith, will be reasonably expected to cause harm to the designating Party by its mere disclosure to the non-designating Party . . . ." as "CONFIDENTIAL—ATTORNEYS' EYES ONLY," and limited its disclosure even more stringently. *Id.* ¶¶ 5, 6.

26. *Id.* ¶ 9; Consent to Stipulated Agreement and Protective Order on Confidentiality, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. May 25, 2010), ECF No. 83-1 (Exhibit A).

27. Protective Order, *supra* note 24, at ¶ 14. In light of the Protective Order, the parties filed, and the court granted, numerous motions to file under seal briefs referring to documents that had been designated as confidential. *See, e.g.*, Motion for Leave to File Under Seal, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. June 11, 2010), ECF No. 97; Order of Court, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. June 15, 2010), ECF No. 99.

28. Protective Order, *supra* note 24, ¶ 16.

29. W.D. PA. LOCAL CIV. R. OF CT. 16.2.

30. Joint Status Report at 1, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-

submitted to the court on December 1, 2010 stated that "[t]he Parties anticipate filing a joint motion for class certification and preliminary approval of the settlement in the near future . . . ."[31] At a status conference in late January 2011, the parties presented the court with "an update of the status of the settlement" and explained how they intended "to proceed with regard to class certification, notices, [and] waiver of rights to opt out and/or object."[32] The court approved the proposed procedures.[33]

In mid-March 2011, the defendants filed the motion that lies at the center of this Article—a Consented-To Motion to Maintain Settlement Documents Under Seal.[34] The motion sought a court order to seal

> all documents related to the settlement of the Litigation including, but not limited to, the Stipulation of Settlement and accompanying exhibits, the Joint Motion for Preliminary Approval of Settlement and accompanying Memorandum of Law in Support, all orders regarding the settlement entered by this Court, transcripts of hearings regarding the settlement, and any objections to the settlement filed by class members . . . .[35]

01535-DSC (W.D. Pa. Dec. 1, 2010), ECF No. 138 [hereinafter Joint Status Report].

31. *Id.* at 1–2.

32. Status Conference Before Judge David Stewart Cercone at 2, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Jan. 27, 2011), ECF No. 141 [hereinafter Status Conference]. The brief record of the conference does not explain what is meant by "waiver of rights to opt out."

33. *Id.*

34. Consented-To Motion, *supra* note 2.

35. *Id.* at 2. The proposed settlement encompassed the three class actions then pending in federal district court, see *supra* note 5, as well as a related case pending in the Court of Common Pleas of Allegheny County. *See* Consented-To Motion, *supra* note 2, at 1 (defining the "Litigation"). Defendants filed identical motions seeking orders sealing the settlement documents in the *Hartman* and *PNC Bank* class actions, and the plaintiffs consented to entry of the proposed orders. Consented-To Motion to Maintain Settlement Docs. Under Seal, Hartman v. Levin, No. 2:10-cv-00029-DSC (W.D. Pa. Mar. 11, 2011), ECF No. 107; Consented-To Motion to Maintain Settlement Docs. Under Seal, PNC Bank v. B'nai B'rith Int'l, No. 2:10-cv-00649-DSC (W.D. Pa. Mar. 11, 2011), ECF No. 39.

The motion stated that the plaintiffs consented to the entry of the proposed order.[36] The defendants' brief in support of the motion argued that the settlement terms were not "material" to any members of the general public other than the class members and that the defendants were not public officials or entities.[37] It assured the court that "all *named* plaintiffs in the Litigation will be provided every Settlement Document in connection with effectuating the settlement[,] and all other, *unnamed* class members will have access to all Settlement Documents through the Claims Administrators in charge of administering the settlement."[38] Thus, the brief suggested that general public interest in the case was low and that the proposed order would not deny access to anyone with a legitimate need for information regarding the settlement. On the other hand, the need for confidentiality was high, the brief posited, because

> disclosure of the Settlement Documents would cause embarrassment and serious injury to the Defendants, many of whom have devoted significant time and effort to charitable work and community projects for years. The settlement may damage the Defendants' reputations and result in a public misperception regarding their work and focus. In particular, any public misperception that detracts from several of the Defendants' important charitable work across the world would cause them, and those they serve, serious injury.[39]

Finally, the brief invoked "the strong public interest in promoting settlement, especially where, as in the present case, prospective confidentiality facilitated the settlement."[40]

Just four days after the motion was filed (and apparently without an evidentiary hearing or even an oral argument), the court signed the order, granting the parties "leave to submit all documents

36. Consented-To Motion, *supra* note 2, at 2.

37. Memorandum of Law in Support of Consented-To Motion to Maintain Settlement Documents Under Seal at 5, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 11, 2011), ECF No. 143 [hereinafter Memorandum in Support].

38. *Id.* at 5 (emphasis added).

39. *Id.* at 5–6.

40. *Id.* at 6.

that refer to the amount of the settlement . . . under seal" and directing the Clerk of Court "to file and maintain under seal all documents that refer to the amount of the settlement . . . ."[41] The order, which was unaccompanied by a judicial opinion, applied not only to the stipulation of settlement and all accompanying exhibits (including the order preliminarily approving the settlement, the notice of proposed settlement and fairness hearing, the summary notice, the proof of claim and release form, and the order and final judgment), but also to the joint motion for preliminary approval of the settlement and brief in support thereof, all orders regarding the settlement, all transcripts of hearings regarding the settlement, and any objections filed by class members.[42] Even the federal and state officials to whom notices of the proposed class action settlement had to be sent under the Class Action Fairness Act[43] were ordered to maintain them as confidential.[44]

A brief flurry of sealed filings followed, including, apparently, a Stipulation of Settlement[45] and a joint request "that the Court enter a preliminary order approving settlement, providing notice and certifying a class for settlement purposes."[46] An order was entered under seal on April 6, 2011, presumably granting preliminary approval of the settlement and certifying a class for settlement purposes.[47] The public record fails to disclose what materials, if any, were mailed to the absent class members and how

41. Order of Court at 1, Hirschfield v. B'nai B'rith Int'l at 1, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 17, 2011), ECF No. 144 [hereinafter Order of Court].

42. *Id.* at 1–2.

43. 28 U.S.C. § 1715(b) (2006).

44. Order of Court, *supra* note 41, at 2.

45. Sealed Document, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 29, 2011), ECF No. 147. A later-filed motion identified this sealed document as a Stipulation of Settlement. Motion for Miscellaneous Relief at 2, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 31, 2011), ECF No. 150 [hereinafter Motion to Withdraw] (re-docketed as Motion to Withdraw Motion to Certify Class).

46. *See id.* ¶ 4 (describing relief sought in a sealed filing). To avoid any risk of confusion regarding the definition of the class and the motion to certify before the court, the plaintiffs moved, unopposed, to withdraw their earlier motion for class certification, filed more than a year earlier, upon which the court had not yet ruled. *Id.* ¶ 5. The court granted the Motion to Withdraw the day after it was filed. Order of Court, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Apr. 4, 2011), ECF No. 151.

47. Sealed Order, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Apr. 6, 2011), ECF No. 152.

the Claims Administrator provided them with access to the documents if absent class members requested them. Two additional motions were filed under seal on July 27, 2011[48] accompanied by four separately-filed sealed documents.[49] The contents of these motions and documents cannot be discerned from the public record. An entry on the docket sheet on August 10, 2011 noted that a "Joint Motion for Final Approval of Settlement and Plaintiffs' Counsel's Application for Award of Attorney Fees were granted by the Court. Orders to follow."[50] Two orders, filed under seal, were issued the following day[51] and the status code, "Closed," was added to the docket sheet.[52]

Covenant's bankruptcy and the litigation against B'nai B'rith that followed had garnered significant media attention, not only in both of Pittsburgh's daily newspapers[53] and its local Jewish weekly,[54] but also in the national press.[55] The case had even been

48. Sealed Motion by All Plaintiffs, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 153; Sealed Motion by Dean and Melva Hirschfield, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 155.

49. Sealed Document by All Plaintiffs, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 154; Sealed Document by Dean Hirschfield, Melva Hirschfield, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 156; Sealed Document by Dean Hirschfield, Melva Hirschfield, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 157; Sealed Document by Dean Hirschfield, Melva Hirschfield, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 158.

50. Motion Hearing Before Judge David Stewart Cercone, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 10, 2011), ECF No. 159.

51. Sealed Order, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 11, 2011), ECF No. 160; Sealed Order, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 11, 2011), ECF No. 161.

52. Civil Docket, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 11, 2011).

53. *See* Chris Ramirez, *Protection for Seniors from Bad Real Estate Deals Urged*, PITT. TRIB.-REV. (Oct. 4, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/s_702569.html (focusing on seniors who had lost a combined $26 million when Covenant declared bankruptcy); Paula Reed Ward, *Sale of Bankrupt Mt. Lebanon Facility Delayed*, PITT. POST-GAZETTE, July 30, 2009, at S-4, *available at* http://www.post-gazette.com/pg/09211/987305-55.stm (reporting on delay of sale of Covenant because of financing difficulties).

54. *See* Toby Tabachnick, *Convenant* [sic] *Residents Could Recover Partial Deposits in Suit*, JEWISH CHRON. (Dec. 9, 2010), http://thejewishchronicle.net

the subject of testimony before the United States Senate Special Committee on Aging.[56] Notwithstanding the public interest in the case, the court-ordered secrecy surrounding the settlement denied the public and press any and all information regarding its ultimate resolution.

The B'nai B'rith litigation was the first secret class action settlement of which I was aware. In the next section, I seek to determine whether the case was singular or part of a broader, if hidden, practice.

III. SCOPE OF THE PRACTICE

By their very nature, settlements filed under seal are shielded from the public eye, and therefore it is difficult to discern the scope of the practice.[57] I took two steps to gain a preliminary understanding of the incidence of secret class action settlements. First, I searched online for newspaper articles regarding class action settlements filed under seal. Second, I undertook a modest empirical study, examining all of the class actions filed in the United States District Court for the Western District of Pennsylvania during a twenty-year period to determine the number and percentage of class action settlements that were filed under seal.[58] Neither step revealed

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/view/full_story/10593506/article-Convenant-residents-could-recover-partial-deposits-in-suit (detailing agreement with confidential specific terms, which would enable former residents to recover some funds) (last visited Mar. 24, 2012).

55. *See, e.g.*, Elizabeth Olson, *Concerns Rise About Continuing-Care Enclaves*, N.Y. TIMES, Sept. 16, 2010, at F5, *available at* 2010 WLNR 18348669 (highlighting the entrance fees paid by residents of the Covenant at South Hills and the financial risks assumed).

56. *Continuing Care Retirement Communities (CCRCs): Secure Retirement or Risky Investment?: Hearing Before the S. Spec. Comm. on Aging*, 111th Cong. 29 (2010) (statement of Charles Prine).

57. *See* David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1218 (noting that it is difficult to gauge the incidence of secret settlements because they "are by definition secret" and adding that "[e]mpirical data on the frequency of these practices is . . . unreliable"); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2650 (1995) (noting that "the extent of secret settlements . . . is purely conjectural (how could it be otherwise?)").

58. In both of these efforts, I relied heavily on work performed by my research assistant, Ian Everhart.

a single case in which a court had shielded from the public eye the settlement of a Rule 23 class action, but both identified a greater willingness on the part of courts to seal settlements in collective actions filed under the Fair Labor Standards Act.

A. Secret Class Action Settlements in the News

A WestlawNext search of the News database turned up a smattering of newspaper stories about secret settlements in cases filed as class actions. This undertaking was somewhat frustrating, however, as the underlying litigation papers for a number of the cases described in newspapers could not be located. Moreover, upon closer examination of the litigation papers that were available, some of the cases discussed in the news involved secret settlements of putative class actions in which no motion for class certification was ever made or in which a certification order was later withdrawn.

For example, in one putative class action filed on behalf of dog owners who purchased allegedly defective dog treats,[59] the parties reached a settlement before certification, but did not present it to the court for its approval. Instead, after agreeing to keep the terms of the settlement confidential,[60] the parties filed a Stipulation of Dismissal with Prejudice[61] and the court entered an Order of Dismissal.[62]

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59. The original class action complaint was filed in the United States District Court for the Southern District of New York, Class Action Complaint, Glass v. S&M NuTec, LLC, No. 7:06-CV-01534-WCC (S.D.N.Y. Feb. 24, 2006), ECF No. 1, but the case was later transferred to the Western District of Missouri. *See* Opinion & Order, Glass v. S&M NuTec, LLC, No. 7:06-CV-01534-WCC (S.D.N.Y. Oct. 11, 2006), ECF No. 19 (explaining that the action could have been filed in the Western District of Missouri). *See also* Opinion & Order, Glass v. S&M NuTec, LLC, No. 06-00853-CV-W-GAF (W.D. Mo. Oct. 16, 2006), ECF No. 20 (transferring case to the Western District of Missouri); Civil Docket for Case No. 4:06-CV-00853-GAF, Glass v. S&M NuTec, LLC, No. 06-cv-00853-GAF (W.D. Mo. 2006) (listing transfer order as first entry on docket sheet in transferee court).

60. *See S&M NuTec Settles Greenies Class Action*, KANSAS CITY BUS. J., Sept. 17, 2007, *available at* 2007 WLNR 18201820 (stating that the settlement terms were "private").

61. Stipulation of Dismissal with Prejudice, Glass v. S&M NuTec, LLC, No. 06-0853-CV-W-GAF (W.D. Mo. Sept. 14, 2007), ECF No. 147.

62. Order of Dismissal, Glass v. S&M NuTec, LLC, No. 06-0853-CV-W-GAF (W.D. Mo. Sept. 17, 2007), ECF No. 148.

In another putative class action, one filed on behalf of actors, writers and producers against all of the major movie studios, the court certified a class and approved a notice to be disseminated to the absentees,[63] but then, nearly two years later, vacated the certification order.[64] When the named plaintiffs and Warner Brothers later reached a confidential settlement,[65] the court entered a stipulation and order dismissing the complaint with prejudice.[66]

This avenue—voluntarily dismissing with no judicial review of the settlement—is an option only if the court has not yet certified a class or has vacated its certification order.[67] In such cases, the settlement binds only the named parties and not the absent class members, so these cases are not really class actions at all. They are nevertheless worth mentioning because they were filed as class actions and may have had some effects on the absentees, such as tolling the statute of limitations on their claims[68] and lulling them

63. Order Granting in Part and Denying in Part Motion for Class Certification, Garrison v. Warner Bros., Inc., No. 95-CV-08328-RMT-SH (C.D. Cal. Aug. 29, 1996), ECF No. 74; Stipulation and Order That the Notice of Pendency of Class Action Is Appropriate for Dissemination to the Members of the Class, Garrison v. Warner Bros., Inc., No. 95-CV-08328-RMT-SH (C.D. Cal. Sept. 19, 1997), ECF No. 101. While the docket sheet for *Garrison* is available on both Bloomberg Law and Public Access to Court Electronic Records (PACER), neither database provides access to the underlying documents (presumably because of the date of the litigation). The description of the case is gleaned solely from entries on the docket sheet and one news story. David Robb, *Family Settles Suit Filed over "JFK" Profits*, MILWAUKEE J. SENTINEL, Apr. 12, 1999, at B6, *available at* http://news.google.com/newspapers?nid=1683&dat=19990412&id=b6gaAAAAIBAJ&sjid=IToEAAAAIBAJ&pg=5420,5796956 (last visited Mar. 12, 2012).

64. Order [Vacating Prior Order Granting Class Certification], Garrison v. Warner Bros., Inc., No. 95-CV-08328-RMT-SH (C.D. Cal. May 26, 1998), ECF No. 152.

65. Robb, *supra* note 63, at B6 (stating that "[t]erms of the settlement are confidential").

66. Stipulation & Order, Garrison v. Warner Bros., Inc., No. 95-CV-08328-RMT-SH (C.D. Cal. Mar. 31, 1999), ECF No. 172.

67. According to the docket sheet in *Glass*, no motion to certify was ever filed, although a scheduling order that contemplated class certification was entered. *See* Scheduling Order at 1, Glass v. S&M NuTec, LLC, No. 06-CV-0853-W-GAF (W.D. Mo. Mar. 6, 2007), ECF No. 54 (stating that "the initial stage of this litigation shall focus exclusively on class certification discovery").

68. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974) ("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been

into believing that the named representatives and their attorney were looking out for the absentees' interests. In fact, until a 2003 amendment of Rule 23(e) clarified that judicial approval is required only with respect to certified class actions, some courts read the rule "to require court approval of settlements with putative class representatives that resolved only individual claims."[69]

A second group of newspaper stories involved confidential settlements in collective actions filed under the Fair Labor Standards Act ("FLSA" or the "Act").[70]

For example, in *Hammond v. Lowe's Home Centers, Inc.*, plaintiffs filed a putative class action on behalf of all employees of Lowe's Home Centers seeking unpaid overtime compensation and unpaid minimum wage compensation under the FLSA.[71] The court conditionally certified a class under section 216(b) of the FLSA,[72] which permits certain actions under the statute to be maintained "by any one or more of the employees for and in behalf of himself or themselves and other employees similarly situated."[73] Following mediation, the parties jointly moved to file a confidential settlement

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permitted to continue as a class action."). *See also* Rhonda Wasserman, *Tolling: The* American Pipe *Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 805 (2006) ("[T]he statute of limitations is tolled from the date of filing of the class action complaint until denial of the motion to certify.").

69. FED. R. CIV. P. 23(e)(1)(A), Committee Notes on Rules—2003 Amendment (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.41 (1995)). *See also* Crawford v. Hoffman-La Roche Ltd., 267 F.3d 760, 764–65 (8th Cir. 2001) (stating that judicial approval is required "even if a class has not yet been certified" because "[d]ismissal might prejudice potential members whose claims have expired under a statute of limitations . . . . [or] potential members who have been relying on the named plaintiff to protect their interests . . . .").

70. *See* 29 U.S.C. §§ 201, 216 (2006) (providing a private right of action to recover damages for violations of the Act's overtime provisions).

71. Plaintiffs' 216(b) Motion to Certify Representative Action and Approve Notice to Class Members, Hammond v. Lowe's Home Ctrs., Inc., No. 2:02-cv-02509-CM-GLR (D. Kan. Dec. 15, 2004), ECF No. 136. The court denied one motion and struck a second motion submitted by plaintiffs to certify a class under Rule 23 for purposes of related state contract claims. Memorandum and Order, Hammond v. Lowe's Home Ctrs., Inc., No. 2:02-CV-02509-CM-GLR (D. Kan. Sept. 1, 2005), ECF No. 187; Order, Hammond v. Lowe's Home Ctrs., Inc., No. 2:02-cv-02509-CM-GLR (D. Kan. Feb. 6, 2006), ECF No. 225.

72. Memorandum and Order at 8, Hammond v. Lowe's Home Ctrs., Inc., No. 2:02-cv-02509-CM-GLR (D. Kan. Sept. 1, 2005), ECF No. 187.

73. 29 U.S.C. § 216(b) (2006).

agreement under seal.[74] The court granted the motion the very day it was filed, permitting the parties to file the settlement agreement under seal and ordering that it "shall remain SEALED."[75] The parties did so on the same day[76] (it was a busy day in Kansas City!), and just one week later, the court approved the confidential settlement agreement.[77]

In another FLSA case, *Dernovish v. AT&T Operations, Inc.*, plaintiffs who provided telephone customer assistance sought compensation for the time they spent logging into telephone and computer systems before their paid shifts began.[78] The court conditionally certified a collective action (over defendant's opposition),[79] and a year later, following discovery, discovery-related litigation, and mediation, the plaintiffs filed an unopposed motion for approval of a settlement.[80] The Settlement Agreement itself was submitted to the court *in camera*.[81] The Court entered an order, scheduling a hearing and raising several concerns about the proposed settlement, including its confidentiality provisions:

> [T]he Court is troubled by the settlement agreement's confidentiality provisions. First, it calls for confidentiality regarding matters that are already in

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74. Parties' Joint Motion to File Confidential Settlement Agreement Under Seal, Hammond v. Lowe's Home Ctrs., Inc., No. 2:02-cv-02509-CM-GLR (D. Kan. Sept. 22, 2006), ECF No. 239; Memorandum in Support of Parties' Joint Motion to File Confidential Settlement Agreement Under Seal, Hammond v. Lowe's Home Ctrs., Inc., 2:02-cv-02509-CM-GLR (D. Kan. Sept. 22, 2006), ECF No. 240.

75. Order, Hammond v. Lowe's Home Ctrs., Inc., No. 2:02-cv-02509-CM-GLR (D. Kan. Sept. 22, 2006), ECF No. 241.

76. Parties' Joint Motion to File Confidential Settlement Agreement Under Seal, Hammond v. Lowe's Home Ctrs., Inc., No. 2:02-cv-02509-CM-GLR (D. Kan. Sept. 22, 2006), ECF No. 239.

77. Order Approving Settlement Agreement, Hammond v. Lowe's Home Ctrs., Inc., No. 2:02-cv-02509-CM-GLR (D. Kan. Sept. 29, 2006), ECF No. 245.

78. Dernovish v. AT&T Operations, Inc., 720 F. Supp. 2d 1085, 1087 (W.D. Mo. 2010).

79. Order and Opinion Granting Plaintiffs' Motion to Conditionally Certify Collective Action, Dernovish v. AT&T Operations, Inc., No. 4:09-cv-00015-ODS (W.D. Mo. Jan. 12, 2010), ECF No. 95.

80. Plaintiffs' Unopposed Motion for Approval of Collective Action Settlement and Attorney Fees with Memorandum in Support, Dernovish v. AT&T Operations, Inc., No. 4:09-cv-0015-ODS (W.D. Mo. Jan. 7, 2011), ECF No. 281.

81. *See id.* at 1 (stating that the agreement has been submitted in camera).

> the public record (e.g., "all allegations in the Lawsuit" and, apparently, the existence of the settlement). Second, it purports to impose liability on each class member should they disclose or discuss the settlement. Third, and most importantly, the Court is not convinced that a confidentiality provision in this case serves the public interest. The provision does not protect trade secrets, proprietary information, financial information, or other information that is normally entitled to secrecy. While Defendant understandably wants to avoid adverse publicity, the Court has not been persuaded that it–or the class–should be complicit in effectuating this desire.[82]

In light of this concern, the defendant filed a supplemental brief in support of the motion, stating that the parties proposed to limit the scope of the confidentiality provision "to maintain the confidentiality only of the financial terms of the agreement."[83] Following a hearing on the settlement, the defendant moved to seal a portion of the transcript, which revealed "the amount of attorney fees sought and the percentage of the settlement fund to be apportioned to attorney fees . . . ."[84] The court granted the motion to seal the portion of the transcript[85] and approved the settlement, including the limited confidentiality provision.[86] The court's order did not explain how or whether the parties had assuaged the judge's concern that the confidentiality provision did not serve the public interest.[87]

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82. Order Setting Hearing on Motion for Approval of Settlement at 2, Dernovish v. AT&T Operations, Inc., 4:09-cv-00015-ODS (W.D. Mo. Jan. 1, 2011), ECF No. 282. The court also expressed concern regarding the lack of information needed to assess the fairness of the settlement. *Id.* at 1.

83. AT&T's Unopposed Supplemental Brief in Support of Motion for Approval of Collective Action Settlement at 1, Dernovish v. AT&T Operations, Inc., 4:09-cv-0015-ODS (W.D. Mo. Jan. 26, 2011), ECF No. 283.

84. Defendant's Motion to Seal Portion of Jan. 27, 2011 Transcript of Hearing at 1, Dernovish v. AT&T Operations, Inc., 4:09-cv-00015-ODS (W.D. Mo. Jan. 27, 2011), ECF No. 286.

85. Order Granting Motion to Seal Portion of Transcript, Dernovish v. AT&T Operations, Inc., No. 4:09-cv-00015-ODS (W.D. Mo. Feb. 7, 2011), ECF No. 287.

86. Order Approving Collective Action Settlement, Dernovish v. AT&T Operations, Inc., No. 4:09-cv-0015-ODS (W.D. Mo. Feb. 7, 2011), ECF No. 288.

87. Scott Lauck, *Despite Misgivings, a Federal Judge Approved a Confidential Settlement in a Class Action Lawsuit Against AT&T*, MO. LAW.

In sum, my first effort to ascertain the scope of secret class action settlement, through the examination of news stories in Westlaw, yielded just two cases, which in and of itself is noteworthy. The study identified *no* class actions filed under Rule 23 that had been settled confidentially (or at least none that could be confirmed); the two class actions settled under seal that could be confirmed were both FLSA collective actions.

Two additional points should be emphasized. First, just as Rule 23 class actions may not be voluntarily dismissed or settled without judicial approval, claims under the FLSA may not be settled or compromised unless the Department of Labor supervises the settlement or a court approves a settlement in the context of an adversarial action filed under § 216(b).[88] That judicial approval of an FLSA settlement is required renders the sealing of the settlements in *Lowe's* and *Dernovish* noteworthy given the public interest in monitoring the judiciary's performance of this duty[89] and the obstacles the public faces if it lacks access to the agreement under review.

Second, since collective actions under § 216(b) of the FLSA bind only those employees who affirmatively opt in,[90] the "absent"

MEDIA, Mar. 27, 2011, *available at* 2011 WLNR 6419278.

88. *See, e.g.*, Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352–53, 1355 (11th Cir. 1982) (noting that the Department of Labor must supervise the settlement) (citing Schulte, Inc. v. Gangi, 328 U.S. 108 (1946) and Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945)); Stalnaker v. Novar Corp., 293 F. Supp. 2d 1260, 1262 (M.D. Ala. 2003) ("In reviewing a settlement of an FLSA private claim, a court must 'scrutiniz[e] the settlement of fairness,' and determine that the settlement is a 'fair and reasonable resolution of a bona fide dispute over FLSA provisions.'" (citing *Lynn's Food Stores*, 679 F.2d at 1353, 1355)); Boone v. City of Suffolk, 79 F. Supp. 2d 603, 605, 605 n.2 (E.D. Va. 1999) ("[E]mployees cannot waive their right to overtime wages unless such a settlement is overseen by the Department of Labor or approved for fairness and reasonableness by a district court." (citing *Lynn's Food Stores*, 679 F.2d at 1355)). *But see* Martinez v. Bohls Bearing Equip. Co., 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005) (holding that "parties may reach private compromises as to FLSA claims where there is a bona fide dispute as to the amount of hours worked or compensation due").

89. *See, e.g.*, *Boone*, 79 F. Supp. 2d at 609 ("[I]n an FLSA action, where federal law requires court approval for fairness before any settlement can be executed, the public has an interest in determining whether the Court is properly fulfilling its duties when it approves a back-wages settlement agreement."). *See also infra* Part IV.A (identifying the policies supporting public access to settlement agreements).

90. 29 U.S.C. § 216(b) (2006). *See also* Hoffman-La Roche, Inc. v. Sperling,

employees in a collective action are not quite as removed from the proceedings and the lawyer representing the class as absent class members in a Rule 23 class action. Therefore, the policies implicated in the FLSA secret settlements may not be identical to those in Rule 23 class actions, a matter that we will take up in Part IV. First, however, let us consider a somewhat more scientific effort to gauge the incidence of secret class action settlements.

B. Scope of Practice in One Federal Judicial District

In undertaking a modest empirical study of the incidence of secret class action settlements, I solicited the assistance of the Clerk of Court of the United States District Court for the Western District of Pennsylvania, Robert V. Barth, Jr. Searching the court's records electronically, Mr. Barth identified ninety-four cases filed between June 1991 and June 2011 in which a motion to certify a class was granted.[91] Running a different query, he identified 168 additional cases filed during the same period, which were designated as class actions on the civil cover sheet but in which a motion for class certification was denied (152 of the 168) or in which no motion to certify a class was ever filed or decided (16 of the 168).[92] Thus, a total of 262 cases were filed as class actions in the district between June 1991 and June 2011.

Interestingly, the case that first provoked my attention,

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493 U.S. 165, 168–69 (1989) (discussing the process whereby employees affirmatively consent in writing to become parties to an ADEA or FLSA collective action). For a critical assessment of the FLSA's opt-in requirement, *see* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1321 (2008).

91. E-mail from Robert V. Barth, Jr., Clerk of the Court, U.S. District Court for the Western District of Pennsylvania, to author (June 22, 2011) (on file with author and THE REVIEW OF LITIGATION) (containing a report of cases for which a motion for class certification was granted). This list of cases included both Rule 23 class actions and FLSA collective actions.

92. *See id.* (containing a report of cases for which motion for class certification was denied, or in which no motion was presented). Section VII of the Civil Cover Sheet requires an attorney filing an action in federal court to indicate "if this is a **class action** under F.R.C.P. 23." JUDICIAL CONFERENCE OF THE U.S., JS 44 CIVIL COVER SHEET, *available at* http://www.uscourts.gov/uscourts/FormsAndFees/Forms/JS044.pdf (emphasis in original).

Hirschfield v. B'nai B'rith International, was included on the second list—those in which motions to certify were denied or never filed or decided. While I believe the court granted a motion to certify a settlement class (at least preliminarily) in April 2011,[93] the order was filed under seal, so I cannot confirm my belief. If such an order was granted in April, it may not have been "counted" as a grant of a motion to certify either because it was filed under seal or because it was only a preliminary grant. The order that finally approved the settlement and presumably finally certified the settlement class was entered and filed under seal on August 11, 2011, after the June 2011 cut-off date for this study.[94]

In all events, my research assistant and I focused on the ninety-four cases flagged as certified class actions and sought to determine how many, if any, had been settled under seal. First, we sought to confirm, through analysis of docket sheets and public filings,[95] that motions to certify a class had in fact been granted in all ninety-four cases. In eleven of the ninety-four cases, we were unable to find a motion to certify a class or an order granting such a motion on the docket sheet and therefore omitted these eleven cases from our analysis. One additional case was omitted due to the lack of online access to its documents.[96]

Of the eighty-two remaining cases in which a class certification order had been entered, fifteen were still pending as of September 1, 2011, and these cases were also excluded from our analysis (because a settlement might be filed under seal in the future). Of the remaining sixty-seven closed cases in which a class had been certified, three, or 4.5%, contained orders granting leave to file a class-wide settlement agreement under seal.[97] All three of

93. Sealed Order, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Apr. 6, 2011), ECF No. 152.

94. Sealed Order, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 11, 2011), ECF No. 160; Sealed Order, Hirschfield v. B'nai B'rith Int'l, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 11, 2011), ECF No. 161. *See also supra* notes 45–51 and accompanying text (discussing the order approving the settlement).

95. We searched the Bloomberg Law docket database and occasionally conducted follow-up searches on PACER.

96. Zuleg v. Ratner, No. 92-cv-01165 (W.D. Pa. May 1, 1992).

97. Order to Seal, Nawojski v. First Advantage Litig. Consulting, No. 2:09-cv-00544-DSC (W.D. Pa. Apr. 7, 2010), ECF No. 22; Order to Seal, Abercrombie v. Pressley Ridge, No. 2:09-cv-00468-AJS (W.D. Pa. July 19, 2010), ECF No. 92.

these cases involved FLSA collective actions with opt-in classes.[98] These figures are summarized below in Table 1.

Table 1.

	Class actions in which a motion to certify was granted
	94
Docket sheet did not reveal order to certify	11
On-line access unavailable	1
Remaining cases	82
Still pending as of 9/1/11	15
Total closed cases in which a motion to certify was granted	67
Class actions filed under seal	3
Percentage filed under seal	4.5%

Three points deserve special mention. First, this study reinforces the principal finding of the Westlaw study: courts are disinclined to seal settlements in Rule 23 class actions, while they occasionally do so in collective actions filed under the FLSA. Unlike employees in FLSA cases, who are bound only if they affirmatively opt in, Rule 23 absent class members are bound by the class action judgment unless they opt out and have little, if any,

See also Status Conference Before: Magistrate Judge Robert C. Mitchell, Bishop v. AT&T Corp., No. 2:08-cv-00468-RCM (W.D. Pa. Oct. 25, 2010), ECF No. 243 (documenting, in a minute entry, court's grant at status conference of joint oral motion to file joint stipulation of settlement under seal).

98. Complaint, Nawojski v. First Advantage Litig. Consulting, No. 2:09-cv-00544-DSC (W.D. Pa. May 5, 2009), ECF No. 1; Complaint, Abercrombie v. Pressley Ridge, No. 2:09-cv-00468-AJS (W.D. Pa. Jan. 22, 2009), ECF No. 1; Complaint, Bishop v. AT&T Corp., No. 2:08-cv-00468-RCM (W.D. Pa. Apr. 9, 2008), ECF No. 1.

contact with the attorney charged with representing their interests.[99] As a result, courts in Rule 23 class actions have a unique obligation to protect the interests of absent class members, which may explain judicial reticence to seal class action settlements. This point will be more fully developed in Part IV.

Second, a national study by the Federal Judicial Center ("FJC") of settlement agreements filed under seal for the two-year period 2001–02 puts these local statistics into perspective. The FJC study revealed that only 0.44% of the 288,846 civil cases examined (*not* exclusively class actions) involved settlements filed under seal[100] and an even smaller percentage, 0.26%, of cases examined by the FJC from the Western District of Pennsylvania involved settlements filed under seal during the 2001–02 period.[101] These tiny percentages suggest that among parties that settle their claims, the vast majority decline to file their agreements in court or seek judicial approval. Thus, the 0.44% percentage tells us nothing about the percentage of all civil cases that settled secretly; it tells us only that a tiny percentage involved settlements *filed under seal.*

In Rule 23 class actions and FLSA collective actions, parties do not have the freedom to settle their cases without judicial approval.[102] Since settlements in FLSA collective actions and Rule 23 class actions must be judicially approved, they are frequently filed.[103] Accordingly, class actions and collective actions that are settled confidentially will often (if not invariably) involve a settlement that is *filed* under seal. Thus, it is not surprising that of all settlements filed under seal, a sizeable fraction involve cases in

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99. *See* John Bronsteen, *Class Action Settlements: An Opt-in Proposal*, 2005 U. ILL. L. REV. 903, 908–09 (2005) (noting potential pitfalls of the opt-out nature of Rule 23).

100. ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1, 3, A-2 (2004) (stating that "a sealed settlement agreement is filed in less than one-half of one percent of civil cases," identifying a rate of 0.44% for all civil cases, and examining cases that were terminated in 2001 and 2002).

101. *Id.* at 4, Figure 1.

102. *See* FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the courts' approval"). *See also* Taylor v. Progress Energy, Inc., 493 F.3d 454, 460 (4th Cir. 2007) ("[T]here is a judicial prohibition against the unsupervised waiver or settlement of claims" under the FLSA) (citing P.A. Schultz, Inc. v. Gangi, 328 U.S. 108, 114–16 (1946)).

103. REAGAN ET AL., *supra* note 100, at 3, 5.

which the parties were required to seek judicial approval. According to the FJC study, "almost one-quarter (22%) [of the actions in which settlement agreements were filed under seal] were actions typically requiring court approval of settlement agreements," including cases involving minors and others requiring special protection (13%), FLSA actions (7%) and class actions (6%).[104] Nor is it surprising that the sealed settlement rate in my local study of *class actions* (4.5%) is ten times higher than the general sealed settlement rate for civil cases (0.44%)[105] and seventeen times higher than the general sealed settlement rate for civil cases in the Western District of Pennsylvania for the 2001–02 period (0.26%).[106]

Finally, it is worth noting that the 4.5% sealed settlement rate in my local class action study is markedly higher than the sealed settlement rate for FLSA actions in the FJC study (2.6%).[107] This difference *is* surprising since the FJC study distinguished between Rule 23 class actions, on the one hand, and FLSA cases, on the other, whereas in our study, the list of certified class actions from which we worked contained both Rule 23 and FLSA class actions.[108] Since courts appear more reticent to seal settlements in Rule 23 class actions, we would have expected our (combined Rule 23 and FLSA) sealed settlement rate to have been *lower* than the FLSA sealed settlement rate found in the FJC study.

In conclusion, while secret class action settlements are not unheard of—the FJC study found that 6% of settlements filed under seal involved class actions[109]—both my Westlaw study and the modest empirical study of class actions filed in the Western District of Pennsylvania suggest that the practice is quite uncommon. Before turning to the legal, logistical, and policy-based constraints that help explain judicial reluctance to seal class action settlements, let us examine the swirl of competing policies surrounding the broader debate over sealed settlements in general.

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104. *Id.* at 5. The percentages add up to more than 22% because some cases fell into more than one category. *Id.* at 5 n.8.

105. *Id.* at 3.

106. *Id.* at 4, Figure 1.

107. *Id.* at 3.

108. *See supra* notes 88–90 and accompanying text (examining cases that involved both Rule 23 and FLSA class actions).

109. REAGAN ET AL., *supra* note 100, at 5.

IV. SECRECY AND ACCESS IN CONTEXT

In this broader debate, courts have been called upon to issue confidentiality orders to shield settlements from public scrutiny, on the one hand, and to grant public access to settlements previously filed under seal, on the other, while lawmakers and rules committees have debated and occasionally enacted restrictions on judicial authority to seal settlements.[110] We will outline the contours of this debate and the clash of competing policies at issue.

A. Policies Favoring Public Access to Settlement Agreements

Let us begin by identifying those policies that support public access to settlement agreements that are filed and presented to courts for judicial approval. Parties may seek judicial approval of a negotiated settlement because they anticipate a need for judicial enforcement[111] or because the law requires it.[112] Once presented to a

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110. *See* S. 623, 112th Cong. § 2 (2011) (mentioning that the proposed Sunshine in Litigation Act of 2011 would limit judicial authority to approve settlements that would shield from public scrutiny information "relevant to the protection of public health or safety"). *See also* D.S.C. LOCAL CIV. R. 5.03(E) (providing that "[n]o settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule"); TEX. R. CIV. P. 76a (presuming that court records, including settlement agreements, are "open to the general public" and stating that such records may be sealed only upon a showing "a specific, serious and substantial interest" that "clearly outweighs" (1) the "presumption of openness" and (2) "any probable adverse effect that sealing will have upon the general public health or safety"); REAGAN ET AL., *supra* note 100, at 2–3, App. B (describing local rules of federal district courts that address sealed documents). In September 2011, the Judicial Conference of the United States issued a policy limiting the circumstances in which entire civil case files may be sealed. JUDICIAL CONFERENCE OF THE UNITED STATES, JUDICIAL CONFERENCE POLICY ON SEALED CASES, *available at* http://www.uscourts.gov/uscourts/News/2011/docs/JudicialConferencePolicyOnSealedCivilCases2011.pdf. For a study of this practice, *see* FED. JUD. CENTER, SEALED CASES IN FEDERAL COURTS (Oct. 23, 2009).

111. *See, e.g.*, Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344 (3d Cir. 1986) (stating that parties filed their settlement agreement in anticipation that they would "disagree on the terms and would want recourse to the court"). *See also* REAGAN ET AL., *supra* note 100, at 5; Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 388–89, 394 (1999) (stating that "litigants who rely exclusively on contractual confidentiality provisions

court for its approval, a settlement agreement becomes part of the judicial record[113] and the court's ruling on the settlement "directly affect[s] an adjudication."[114] The court's approval or rejection of the settlement determines the outcome of the case and the parties' substantive rights.[115]

In these cases, public access to the settlement agreement and public monitoring of the judicial proceedings held to review it serve a variety of related policy objectives. First, public access helps ensure that the documents and testimony submitted to the court and upon which it relies are truthful and accurate.[116] As the Third Circuit

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potentially limit their enforcement options" and that "litigants presumably do not file their agreement unless they want the court to take some action concerning it"); Anne-Thérèse Béchamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 119 (1990) (stating that parties frequently opt to file agreements "in order to obtain a consent decree that will enable them to enforce the agreement by use of the court's contempt power without filing an entirely new lawsuit").

112. *See* FED. R. CIV. P. 23(e) (stating that a certified class action may be settled, voluntarily dismissed, or compromised only with the court's approval). *See also* D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 113 n.8 (1946) (concluding that the FLSA bars private settlements of wage claims, but appearing to sanction stipulated judgments because of "the requirement of pleading the issues and submitting the judgment to judicial scrutiny"); REAGAN ET AL., *supra* note 100, at 5 (noting that almost one quarter of cases with sealed settlement agreements were in actions in which judicial approval of a settlement was required).

113. *See* Jessup v. Luther, 277 F.3d 926, 929 (7th Cir. 2002) (stating that the agreement was submitted to and approved by the judge and a copy was deposited in the files of the court and then ordered sealed); *Rittenhouse*, 800 F.2d at 343–44 (stating that a "motion or a settlement agreement filed with the court is a public component of a civil trial"); Stalnaker v. Norvar Corp., 293 F. Supp. 2d 1260, 1263 (M.D. Ala. 2003) (stating that when a settlement is approved by a court, the settlement becomes part of the judicial record). Doré provides a more thorough discussion of the documents that qualify as judicial records. Doré, *supra* note 111, at 374–78.

114. United States v. Amodeo (*Amodeo II*), 71 F.3d 1044, 1049 (2d Cir. 1995); *Stalnaker*, 293 F. Supp. 2d at 1264 (citing *Amodeo II*).

115. *See Amodeo II*, 71 F.3d at 1049 (noting that "the strong weight to be accorded the public right of access to judicial documents was largely derived from the role those documents played in determining litigants' substantive rights-conduct at the heart of Article III-and from the need for public monitoring of that conduct").

116. *See In re* Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001) (noting that the right of access strengthens confidence in the courts); Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. 1988) (noting that public access "enhanc[es] testimonial trustworthiness and the quality of justice dispensed by the court")

put it, "the bright light cast upon the judicial process by public observation diminishes possibilities for . . . perjury and fraud."[117] Public access to judicial proceedings may even "induce unknown witnesses to come forward with relevant testimony."[118]

Second, public access to settlement agreements and the judicial proceedings held in connection with their approval or enforcement helps monitor judicial performance.[119] "Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior."[120]

In other words, if the public is afforded access to settlement agreements and the judicial proceedings held to review them, the public can provide feedback to judges on their performance. To the extent judges seek to avoid negative feedback, monitoring promotes careful and scrupulous judicial work.[121] These monitoring functions

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(citation omitted). *See also* Judith Resnik, *Courts: In and out of Sight, Site and Cite*, 53 VILL. L. REV. 771, 784 (2008) (discussing Jeremy Bentham's belief that "public adjudication produced more accurate decisions").

117. *Littlejohn*, 851 F.2d at 678 (not a settlement case).

118. Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979). *Accord* Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1178 (6th Cir. 1983) (asserting that open trials promote "true and accurate fact finding" and "when information is disseminated to the public through the media, previously unidentified witnesses may come forward with evidence").

119. *See, e.g.*, Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002) (noting that "the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret"); *Amodeo II*, 71 F.3d at 1048 (noting a presumption of access to hold judges accountable and to instill public confidence in the administration of justice); Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 345 (3d Cir. 1986) (stating that public access to a settlement agreement filed in court, and motions and orders related thereto, promotes "informed discussion of governmental affairs" and helps assure "'that the courts are fairly run and judges are honest'") (citations omitted).

120. *Amodeo II*, 71 F.3d at 1048.

121. *See* Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 161 (3d Cir. 1993) (stating that access assures that judges perform their duties in an honest and informed matter); *Littlejohn*, 851 F.2d at 682 ("[P]ublic access serves to promote trustworthiness of the judicial process."); *Rittenhouse*, 800 F.2d at 345 (stating that public access to settlements "serves as a check on the integrity of the judicial process"); Mokhiber v. Davis, 537 A.2d 1100, 1110 (D.C. 1988) (stating that "public knowledge of the courts is essential to democratic government because it is essential to rational criticism and reform of the justice system") (citations omitted). *See also* REAGAN ET AL., *supra* note 100, at 1 (discussing accountability); Resnik, *supra* note 116, at 784 (describing Bentham's views on the benefits of public processes).

are especially important for federal judges, who may serve for life unless impeached, and those state judges who are not checked by the political process, because there are few formal mechanisms to hold them accountable.

Third, public access to settlement agreements and the judicial approval process promotes public confidence in the integrity of the judicial system and the conscientiousness of its judges.[122] Public confidence is gained only if the public has an opportunity to observe courts in action and, to the extent courts are reviewing settlement agreements, if the public has access to the settlements under review.[123] As the Seventh Circuit Court of Appeals put it, judges claim legitimacy "by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat . . . ."[124]

Fourth, in cases involving issues of general interest to the public, such as discrimination, voting rights, and antitrust, access to settlement agreements and the judicial approval process

> serve[s] an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to [wrongful] conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help.' . . . The crucial prophylactic aspects of the administration of justice cannot

122. *See* Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839 (1978) ("The operations of the courts and the judicial conduct of judges are matters of utmost public concern."); Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) (stating that public access serves the "citizen's desire to keep a watchful eye on the workings of public agencies"); *In re* Cendant Corp., 260 F.3d 183, 192 (3rd Cir. 2001) (stating that "'[t]he public's exercise of its common law access right in civil cases promotes public confidence in the judicial system'") (citation omitted); *Amodeo II*, 71 F.3d at 1048 (concluding that monitoring of the judicial approval process provides the public with "confidence in the conscientiousness, reasonableness . . . [and] honesty of judicial proceedings").

123. *See Rittenhouse*, 800 F.2d at 345 (stating that public access to settlements filed with the court "promotes . . . the 'public perception of fairness which can be achieved only by permitting full public view of the proceedings'") (citations omitted).

124. Union Oil Co. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000).

> function in the dark. . . .[125]

While this "community therapeutic value"[126] may be greatest in criminal cases that provoke shock and anger, "community catharsis . . . is also necessary in civil cases [that raise] issues crucial to the public," such as discrimination, voting rights, antitrust, government regulation, and bankruptcy, among others.[127]

In those cases in which judicial approval of settlements is required, such as FLSA collective actions,[128] these policies in favor of public scrutiny are particularly salient because "the public has an interest in determining whether the Court is properly fulfilling its duties . . . ."[129] Moreover, the substantive policy objectives underlying the law—ensuring that workers are paid fair wages and protected from pressure to work excessive hours, in FLSA cases—are served by public scrutiny of the settlement.

Even in cases where judicial approval is not required and the court disclaims jurisdiction to enforce the settlement, if the judge in fact approves the parties' settlement before dismissing the case, "the fact and consequences of his participation are public acts[,]" and "[t]he public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to."[130]

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125. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (plurality op.) (addressing a right of public access to criminal trials).

126. *Id.* at 570.

127. Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983). *Accord* Gannett Co. v. DePasquale, 443 U.S. 368, 386 n.15 (1979) (stating that in "some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal trials").

128. *See supra* notes 88–90 (examining FLSA actions).

129. Boone v. City of Suffolk, 79 F. Supp. 2d 603, 609 (E.D. Va. 1999). *Accord* Baker v. Dolgencorp, Inc., No. 2:10cv199, 2011 WL 166257, at *2 (E.D. Va. Jan. 19, 2011) (noting that "the public has an interest in determining whether the Court is properly fulfilling its duties when it approves an FLSA settlement agreement"); Stalnaker v. Novar Corp., 293 F. Supp. 2d 1260, 1264 (M.D. Ala. 2003) (noting that "the sealing from public scrutiny of FLSA agreements between employees and employers would thwart the public's independent interest in assuring that employees' wages are fair and thus do not endanger 'the national health and well-being'") (quoting Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945)).

130. Jessup v. Luther, 277 F.3d 926, 929 (7th Cir. 2002). *Accord* LEAP Sys., Inc. v. MoneyTrax, Inc., 638 F.3d 216, 221 (3d Cir. 2011) (noting that the

Where the court dismisses the plaintiff's complaint without scrutinizing the parties' settlement agreement,[131] public access to the agreement may promote public health and safety if the case involves a defective product, a negligent physician, an abusive priest, or another matter affecting public health or safety.[132] When a lawsuit alleging a defective product or other hazard is filed and settlement of the claim is publicly disclosed, individuals learn of the danger and can protect themselves by avoiding it. Government agencies charged with public safety may glean from the case enough data to justify a full-blown investigation.[133] On the other hand, if cases identifying these hazards are settled confidentially, the public may not learn about the dangers until other individuals suffer harm that could have been avoided had the case been publicized (or at least had the settlement been accessible).

For example, it has been reported that people were injured or killed *after* certain products (including the drugs Zomax and Halcion, the Dalkon Shield IUD, certain heart valves, General Motors pick-up trucks, and Bridgestone/Firestone tires) were identified as defective, but because claims involving the products were settled confidentially, unknowing consumers continued to use

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public has an interest in knowing the settlement terms that a judge would approve).

131. In such cases, the settlement agreement is not a "judicial record" but rather a private contract. *Jessup*, 277 F.3d at 928. *See also* B.H. v. McDonald, 49 F.3d 294, 300 (7th Cir. 1995) (differentiating private settlements from consent decrees, which are "entered as judgments and . . . backed by the court's powers of enforcement").

132. *See, e.g.*, *LEAP Sys., Inc.*, 638 F.3d at 222 (balancing public interest in health and safety against the need for confidentiality and favoring the former). *See also* REAGAN ET AL., *supra* note 100, at 7–8 (concluding that approximately two-fifths of the cases in which settlement agreements were filed under seal involved matters that "might be of special public interest," including the environment, product liability, professional malpractice, a public party defendant, a very serious injury, or sexual abuse); Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point?*, 53 VILL. L. REV. 811, 814–15 (2008) (making the case for public access); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 948 (2006) (making the argument that secret settlements may endanger public safety and using examples of secret settlements involving defective breast implants); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2695 (1995) (suggesting mass tort settlements inherently implicate public interests).

133. Dana & Koniak, *supra* note 57, at 1232.

them.[134] Today, as the nation debates the public health risks posed by hydraulic fracturing (or "fracking") of shale to release natural gas, executives from the oil and gas industry maintain that "there is not one, not one reported case of a freshwater aquifer having ever been contaminated from hydraulic fracturing. Not one."[135] Yet the Environmental Protection Agency has documented a contaminated water well and suggests there may be others that "[r]esearchers . . . were unable to investigate . . . because their details were sealed from the public when energy companies settled lawsuits with landowners."[136] Even beyond the public health and safety context, public access to settlements may deter other undesirable behaviors, such as employment discrimination, by denying defendants the option of shielding their discriminatory conduct from public scrutiny.[137]

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134. *See id.* at 1229–30 (arguing that Firestone would have discontinued production of defective tires had prior settlements not been secret); Luban, *supra* note 57, at 2650–51 n.124 (listing products whose defects were hidden by protective orders); Richard A. Zitrin, *The Case Against Secret Settlements (or, What You Don't Know* Can *Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 119–21 (1999) (identifying products alleged to have been defective that were the subject of secret settlements); Davan Maharaj, *Tire Recall Fuels Drive to Bar Secret Settlements*, L.A. TIMES, Sept. 10, 2000, at A1, *available at* 2000 WLNR 8376803 (examining effects of secret settlements on product safety). *But see* Arthur R. Miller, *Confidentiality, Protective Orders and Public Access to the Courts*, 105 HARV. L. REV. 428, 480–82 (1991) (questioning the accuracy of anecdotal reports).

135. Ian Urbina, *A Tainted Water Well, and Concern There May Be More*, N.Y. TIMES, Aug. 4, 2011, at A13, *available at* 2011 WLNR 15390732 (quoting Rex W. Tillerson, chief executive officer of ExxonMobil).

136. *Id. See also* SEC v. Citigroup Global Mkts., Inc., No. 11 Civ. 7387(JSR), 2011 WL 5903733, at *4, *6 (S.D.N.Y. Nov. 28, 2011) (declining to approve a settlement that would have "deprived [the public] of ever knowing the truth in a matter of obvious public importance" because the alleged wrongdoer neither admitted nor denied the government's allegations; "in any case like this that touches on the transparency of financial markets . . . , there is an overriding public interest in knowing the truth"); Kirk Johnson, *E.P.A. Links Tainted Water in Wyoming to Hydraulic Fracturing for Natural Gas*, N.Y. TIMES, Dec. 9, 2011, at A23, *available at* 2011 WLNR 25454422 (discussing the issue of contaminated water wells and the effect of the private nature of researchers' efforts).

137. *See* THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES 43 (Mar. 2007) (noting that "disputes . . . brought by individual consumers or employees to vindicate statutory rights . . . may not be appropriate for private dispute resolution given the public interest in their

The public may also have an interest in scrutinizing a settlement (even one not approved by a court) that resolves a claim against a governmental official.[138] Just as the public has an interest in monitoring judges as they perform their official duties, the public has an interest in monitoring other governmental officials.[139] A classic example is the public's interest in the Watergate tapes, which cast light on "an immensely important historical occurrence."[140] The settlement of a claim against a governmental official may cast light on her performance and may reveal new obligations undertaken by

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resolution"); Kotkin, *supra* note 132, at 930, 952–53 (maintaining that the "whole thrust of equal employment legislation was that, by facilitating employee suits, discrimination would be brought to public attention and that the litigation process would serve to deter other employers from similar conduct").

138. *See* LEAP Sys., Inc. v. MoneyTrax, Inc., 638 F.3d 216, 222 (3d Cir. 2011) (noting that courts are more likely to require public disclosure when a case involves a public official); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994) (same); Mokhiber v. Davis, 537 A.2d 1100, 1117 (D.C. 1988) (noting similar transparency concerns about issues of historical importance). *See also* THE SEDONA CONFERENCE, *supra* note 137, at 49 (stating that "when a public entity enters into a settlement, no expectation of confidentiality should exist"); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 41 (1983) (conceding that public access to discovery materials "may be justified . . . when there is a strong public interest in the alleged governmental misconduct that is the subject of the suit"); *id.* at 50–53 (discussing the "rare cases in which alleged governmental misconduct justifies access").

139. *See* FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987) (finding that in cases in which the government is a party, "the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch"); THE SEDONA CONFERENCE, *supra* note 137, at 49 (arguing for the public's right to know about executive branch activities); Resnik, *supra* note 116, at 804 (noting the public interest in observing the enormity of the power of the bureaucratic state); Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 GA. L. REV. 121, 127 (1992) (maintaining that arguments favoring public access to protective orders are "considerably stronger" when the government is a party); Susan M. Angele, Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1656, 1665 (1980) (noting that the Freedom of Information Act evinces a policy in favor of public access to governmental material). *But see* Marcus, *supra* note 138, at 51 (arguing that "[e]ven when governmental activity is involved . . . general public access to confidential materials will only rarely be appropriate").

140. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 602 (1978). In *Nixon*, the Court held that "the common-law right of access to judicial records does not authorize release of the tapes" because Congress had enacted a statute to govern access to presidential recordings. *Id.* at 608.

the official, which the public may have an interest in monitoring.[141] Thus, the public's interest in scrutinizing governmental conduct, also protected by state right-to-know laws and the Federal Freedom of Information Act,[142] strongly counsels in favor of public access to settlements resolving claims against governmental officials.[143]

If the general public has an interest in scrutinizing settlements of claims affecting health, safety, and government competency, a subset of the public—litigants, their attorneys, and judges—has an interest in settlements of claims that are substantively related to matters they are pressing or charged with deciding. Just as litigants bargain in the shadow of the law,[144] today—when a large fraction of civil cases settle out of court—litigants bargain in the shadow of settlements. Given the paucity of jury verdicts, litigants and their attorneys need access to benchmark settlement figures against which to compare their claims.[145] Thus,

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141. *See Pansy*, 23 F.3d at 786, 788 ("The public's interest is particularly legitimate and important where, as in this case, at least one of the parties to the action is a public entity or official."); *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 (discussing the public's interest in monitoring the executive branch). *See also* Miller, *supra* note 134, at 485 (conceding that "public access may be important when one of the settling litigants is a governmental agency, public entity, or official"); Toran, *supra* note 139, at 122 (identifying "the public's undeniable interest in monitoring the health and safety activities of a government agency") (footnote omitted).

142. Federal Freedom of Information Act, 5 U.S.C. § 552 (2006). All fifty states have some form of freedom-of-information law. *See Pansy*, 23 F.3d at 791 n.29 (citing Toran, *supra* note 139, at 129 n.38); *State Public Record Laws*, FOIADVOCATES, http://www.foiadvocates.com/records.html (last visited Aug. 12, 2011) (linking to the freedom-of-information laws of each state).

143. *See Pansy*, 23 F.3d at 791–92 (discussing the implications of FOIA); Toran, *supra* note 139, at 177–78, 181–82 (discussing the same).

144. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

145. *See* Doré, *supra* note 111, at 398 (noting that settlement terms "might strategically assist other present or future litigants in assessing the settlement value of their cases"); Kotkin, *supra* note 132, at 969–70 (discussing how "invisible settlements" hamper lawyers and judges in subsequent cases); Menkel-Meadow, *supra* note 132, at 2680–81 (noting that attorneys rely on reports of settlement values to guide their demands and settlements); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 898–900 (2007) (explaining how public access to settlement data may accelerate the settlement of other filed cases). *Cf.* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991) (noting that "in a world where all cases settle, it may not

access to settlement agreements enables litigants in other cases to accurately value their claims. Not only does access to settlement data help litigants with related claims, but it also helps courts determine the adequacy and fairness of proposed settlements. The Manual for Complex Litigation, for example, encourages courts reviewing class action settlements to "[i]dentify . . . the historic values of cases involving the same or similar claims and defenses."[146] If settlements are routinely filed under seal, courts will lack the comparative data needed to gauge the fairness of settlements submitted for their approval.[147]

Finally, in addition to policies that counsel in favor of access to settlement agreements themselves, there are strong policies that counsel in favor of access to the underlying discovery materials, at least when litigants with related claims exist. Often, an important term in a confidential settlement agreement is the commitment to return to the producing party any materials disclosed in discovery.[148] But litigants and lawyers pursuing related claims could reduce their litigation costs if they had access to the discovery materials uncovered in the settled case, and the judicial system would operate more efficiently.[149] Likewise, regulatory agencies, charged with

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even be possible to base settlements on the merits because lawyers may not be able to make reliable estimates of expected trial outcomes . . . . In short, there is nothing to cast a shadow in which the parties can bargain").

146. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.924 (2004).

147. *See* Alexander, *supra* note 145, at 566 ("[J]udges . . . [will] have little relevant experience to draw on . . . ."); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1385 (1994) (agreeing with Alexander's assessment).

148. *See* Luban, *supra* note 57, at 2649 (stating that the defendant "offers the original plaintiff a generous settlement in return for a promise of secrecy and the return of the discovery materials").

149. *See* FRANCIS H. HARE, JR., ET AL., CONFIDENTIALITY ORDERS 24–26, 60–64 (1988) (arguing that plaintiffs are uniquely harmed by protective orders because they must unnecessarily duplicate the discovery efforts of one another); Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure; Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109, 115–16 (1989) (stating that failing to allow the sharing of information among plaintiffs' attorneys maximizes inefficiency). Even Professor Marcus, a strong advocate of umbrella protective orders to secure confidentiality of discovery materials, concedes that public access "may be justified when litigants seek to obtain evidence relevant to other litigation." Marcus, *supra* note 138, at 41. In his view, "the most important justification for granting nonparties access to discovery information is their need to use the information in other litigation." *Id. See also*

protecting the public, should have access to information uncovered in litigation if it would enable them to work more effectively.[150] Professor Luban calls this the "other-litigants argument": "Discovery material is a public good, which is 'purchased' by one litigant and should be made available for other litigants to avoid unnecessary multiplication of expense."[151]

In sum, public access to settlement agreements submitted to courts for their approval and to the judicial approval process itself permits the public to monitor judicial performance as well as the accuracy of materials and testimony upon which the courts base their decisions. Public access also promotes public confidence in the integrity of the judicial system and provides an outlet for public concern and emotion. Access to unfiled agreements may protect public health and safety. Moreover, litigants may have unique interests in gaining access to settlement agreements and the discovery underlying them if their claims are related to the settled claims.

While there is a presumptive right of public access to settlement agreements that are filed in court and to other judicial records, the right is not absolute.[152] A number of competing policies support confidentiality orders to shield certain settlement agreements and judicial records from public view. It is to these competing

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Ex parte Uppercu, 239 U.S. 435, 440 (1915) (stating that "[s]o long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it . . . however proper and effective the sealing may have been as against the public at large"). Professor Miller argues that parties will be more likely to contest discovery in the underlying litigation if they know that "compliance . . . could lead to uncontrolled dissemination of private or commercially valuable information . . . ." Miller, *supra* note 134, at 483.

150. *See* Morrison, *supra* note 149, at 123 (arguing that regulatory agencies should have freer access to litigation materials). *Cf.* Miller, *supra* note 134, at 494 (cautioning against the release of "any confidential information unrelated to the potential harm").

151. Luban, *supra* note 57, at 2653. *Accord* Morrison, *supra* note 149, at 122–23 (advocating disclosure of discovery materials to other plaintiffs' attorneys).

152. *See, e.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) (addressing access to audiotapes admitted into evidence at a trial and stating that the "right to inspect and copy judicial records is not absolute"); LEAP Sys., Inc. v. MoneyTrax, Inc., 638 F.3d 216, 221 (3d Cir. 2011) (addressing access to the transcript of a hearing memorializing a settlement agreement); *In re* Cendant Corp., 260 F.3d 183, 194 (3d Cir. 2001) (addressing access to bids to serve as lead counsel).

policies that we now turn.

B. *Policies Favoring Confidential Settlement Agreements*

Several policies that counsel in favor of confidentiality have greater relevance to discovery materials than to settlement agreements. For example, few deny the importance of shielding trade secrets from the public.[153] In what may be the classic trade secret case, a federal district court noted that the formula for Coca-Cola "is one of the best-kept trade secrets in the world,"[154] and concluded that "any disclosure of [the formulae for Coke products] would be harmful to the company."[155]

Just as few contest a need to protect true trade secrets, few contest the need to protect the identity of informants who have provided information to law enforcement officers with an expectation (and perhaps an assurance) that their names would be shielded from the public.[156] "If such informants in the present or

153. *See* Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002) (identifying "a compelling interest in secrecy . . . in the case of trade secrets"); Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 166 (3d Cir. 1993) (noting that documents that hold trade secrets may remain sealed); Doré, *supra* note 111, at 308 (same); Marcus, *supra* note 138, at 9 (discussing the merits of withholding trade secrets); Miller, *supra* note 134, at 429, 433–34 (same). Rule 26(c) authorizes issuance of a protective order not only for true trade secrets, but also to protect "other confidential research, development, or commercial information . . . ." FED. R. CIV. P. 26(c)(1)(G). *See also* 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2043, at 302 (4th ed. 2010) (discussing FED. R. CIV. P. 26(c)(1)(G)). But confidential business information that is not a true trade secret is not entitled to the same level of protection as true trade secrets. Littlejohn v. BIC Corp., 851 F.2d 673, 685 (3d Cir. 1988).

154. Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 107 F.R.D. 288, 289 (D. Del. 1985).

155. *Id.* at 294. In a suit between the company and its bottlers over the pricing of Diet Coke syrup, the court nevertheless required disclosure of several formulae to plaintiffs' trial counsel, subject to the terms of a protective order to be negotiated by the parties to prevent public disclosure of the secret information. *Id.* at 300. This decision is consistent with the advisory committee note to Rule 26(c), which states that "[t]he courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure." FED. R. CIV. P. 26(c), Notes of Advisory Committee on Rules—1970 Amendment.

156. *See Jessup*, 277 F.3d 926, 928 (7th Cir. 2002) (noting that a record can be sealed in the interest of protecting the identities of informants); United States v.

future cases anticipate that their cooperation will likely become a matter of public knowledge, valuable cooperation might cease."[157] And courts have recognized that military secrets and other classified material affecting national security may be filed under seal or otherwise shielded from public scrutiny.[158] But since trade secrets, informants' identities, military secrets, and other classified information are rarely disclosed in settlement agreements, these policies rarely, if ever, justify sealing settlement agreements.

Scholars, courts, and litigants have invoked a variety of other policies to justify shielding settlement agreements from public view. For example, some have cited a strong public interest in encouraging settlements because they save the parties time and money, conserve scarce judicial resources, and permit the parties to resolve their disputes creatively in a manner that serves their idiosyncratic interests.[159]

Amodeo (*Amodeo II*), 71 F.3d 1044, 1050 (2d Cir. 1995) (discussing the merits of withholding court documents if there is a risk of injury to a party); United States v. Amodeo (*Amodeo I*), 44 F.3d 141, 147 (2d Cir. 1995) (noting that, among other reasons, courts seal trial documents in the interests of furthering law enforcement); *In re* Knight Publ'g Co., 743 F.2d 231, 236 (4th Cir 1984) (same); Miller, *supra* note 134, at 429 (discussing the merits of sealing trial documents). The Freedom of Information Act also exempts from its disclosure requirements "records or information compiled for law enforcement purposes" if its production "could reasonably be expected to disclose the identity of a confidential source . . . ." 5 U.S.C. § 552(b)(7)(D) (2006).

157. *Amodeo II*, 71 F.3d at 1052.

158. *See, e.g.*, United States v. Reynolds, 345 U.S. 1, 10–12 (1953) (examining state secrets in a time of "vigorous preparation for national defense"); *In re* United States, 872 F.2d 472, 474, 476 (D.C. Cir. 1989) (discussing the state secrets privilege shielding classified material); United States v. Progressive, Inc., 467 F. Supp. 990, 999–1000 (W.D. Wis. 1979) (withholding documents concerning thermonuclear technology), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). *But see* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (holding that the government's interest in national security did not justify an injunction barring the press from publishing the then-classified Pentagon Papers). The Freedom of Information Act also exempts from its disclosure requirements "matters that are . . . [properly classified as] secret in the interest of national defense or foreign policy . . . ." 5 U.S.C. § 552(b)(1) (2006).

159. *See* Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344–46 (3d Cir. 1986) (stating that there is a strong public interest in encouraging settlement of private litigation); Béchamps, *supra* note 111, at 128 (noting that settlement saves parties the time, expense, and publicity of an open trial); Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 835 (1990) (noting that

According to Professor Marcus, "[a] party may desire a settlement in part to avoid a trial at which confidential information will be disclosed. Such a party is likely to condition his willingness to settle upon the entry of a court order prohibiting the disclosure of the terms of the settlement or of information obtained through discovery . . . . Such settlements may substantially reduce the burden on the courts."[160] This interest may be particularly powerful in massive multi-party cases in which a trial could last months and cost millions of dollars if a settlement cannot be reached.[161]

Similarly, some argue that it is necessary to shield settlement terms in order to reduce the likelihood of copycat claims. "Defendants in particular are reluctant to disclose the terms of settlement lest those terms encourage others to sue."[162] If the settlement terms are attractive enough, even those without meritorious claims may bring nuisance suits to extract a

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"facilitation of settlements is increasingly being recognized as a 'legitimate and desirable goal for courts to pursue'"); Doré, *supra* note 111, at 293, 384 (noting that "settlement produces significant institutional benefits in addition to benefiting the immediate parties"); Menkel-Meadow, *supra* note 132, at 2669–78 (justifying settlement over adjudication); Miller, *supra* note 134, at 486 (noting that settlement reduces need for further governmental involvement, reduces cost of dispute resolution, and frees judicial resources). Some scholars decry (or at least critically examine) the rise of settlements and the concomitant loss of the "public goods" that adjudication produces, such as precedents. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that the settlement process should "be treated . . . as a highly problematic technique for streamlining dockets"); Galanter & Cahill, *supra* note 147, at 1384–86 (noting the dissolution of legal standards resulting from settlements); Luban, *supra* note 57, at 2622–26 (noting that settlements fail to produce rules and precedents).

160. Marcus, *supra* note 138, at 28. *See also* THE SEDONA CONFERENCE, *supra* note 137, at 42 (stating that "[c]onfidentiality of settlement terms is generally believed to encourage such settlements"); Miller, *supra* note 134, at 432, 486 (noting that settlements conserve scarce judicial resources); Moss, *supra* note 145, at 874, 878 (explaining the traditional model, in which defendants settle "to avoid costly public disclosures of negative information").

161. *See, e.g.*, *In re* Franklin Nat'l Bank Secs. Litig., 92 F.R.D. 468, 469–70 (E.D.N.Y. 1981) (noting that lawyers had collected millions of documents, more than a hundred thousand pages of depositions, and more than ten million dollars in legal fees), *aff'd sub nom.*, FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982).

162. Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002). *Accord* Baker v. Dolgencorp., Inc., No. 2:Wcv199, 2011 WL 166257, at *2 (E.D. Va. Jan. 19, 2011) (noting that "confidential settlements provide parties with incentives to reach amicable resolutions, especially where one party fears that publicity of a settlement could potentially encourage additional litigation").

settlement.[163]

In addition to concern for copycat claims, litigants have expressed the fear that public access to the terms of settlements will improperly influence litigants' expectations in related cases. As a settling defendant argued in a brief urging the court to approve a confidential settlement agreement,

> The public disclosure could prejudice the parties in related litigation if they desire to enter into settlement negotiations in the future by creating an artificial expectation of the value of that case (which could impose an artificial ceiling or floor on the negotiations—ultimately harming one party or the other). In addition, although the parties here agree that the settlement agreement does not constitute any admission of wrongdoing or liability by the Defendant, there is a significant risk that counsel, parties, or jurors in similar litigation would treat the information contained in this settlement agreement as an indication [that the defendant had violated the law].[164]

Professor Miller not only expresses concern for defendants, who wish to "to avoid encouraging nuisance claims," but also for the plaintiff, who might face "harassment . . . by unscrupulous free riders,"[165] such as long-lost relatives seeking a piece of the recovery. He also expresses concern that public disclosure of a small settlement with one defendant might undercut the plaintiff's ability to pursue her claims against other defendants.[166]

Another policy often invoked to shield settlements and other

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163. *See* Miller, *supra* note 134, at 485 (noting that parties "often have a compelling interest in keeping the settlement amount confidential to avoid encouraging nuisance claims"). Professor Moss counters that access to settlement data may actually *decrease* the filing of frivolous or "low-odds" claims. *See* Moss, *supra* note 145, at 902–03 (arguing that banning confidentiality may reduce trivial filings by exposing modest settlement values of similar prior cases).

164. AT&T's Unopposed Supplemental Brief in Support of Motion for Approval of Collective Action Settlement at 3, Dernovish v. AT&T Operations, Inc., No. 4:09-cv-00015-ODS (W.D. Mo. Jan. 26, 2011), ECF No. 283.

165. Miller, *supra* note 134, at 485.

166. *Id.*

material from the public eye is privacy,[167] especially where the "subject matter is traditionally considered private rather than public," such as "family affairs, illnesses[, and] embarrassing conduct with no public ramifications . . . ."[168] Since discovery processes require the production of intensely personal information, such as medical records, financial records, and facts about one's personal life,[169] courts need discretion to shield such disclosures from public view. These privacy concerns are exacerbated in the information age, when anyone with a personal computer or smart phone and a credit card can access litigation papers filed virtually anywhere in the country. While organizations, such as labor unions and publicly-held corporations, have "diminished" expectations of privacy,[170] some scholars argue that their interests in their reputation deserve protection since "the disclosure of unsubstantiated information could unjustifiably damage the reputation, profitability, and conceivably

167. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34–36, 35 n.21 (1984) (discussing the importance of protective orders in discovery); United States v. Amodeo (*Amodeo II*), 71 F.3d 1044, 1050–51 (2d Cir. 1995) (weighing privacy concerns against the presumption of access); United States v. Amodeo (*Amodeo I*), 44 F.3d 141, 147 (2d Cir. 1995) (weighing privacy concerns); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir. 1994) (examining whether good cause exists for a protective order); 8A WRIGHT ET AL., *supra* note 153, § 2042, at 229–30 ("Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)."); Menkel-Meadow, *supra* note 132, at 2683–84 (arguing that confidentiality can protect privacy rights); Miller, *supra* note 134, at 447, 464–67, 474–77 (1991) (discussing privacy concerns in litigation, confidentiality, and protective orders); Resnik, *supra* note 116, at 808 (noting that the cost of public adjudication is exposure to the public, which participants in a dispute may find disquieting).

168. *Amodeo II*, 71 F.3d at 1051. *Accord* Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002); Marcus, *supra* note 138, at 62–63. The Freedom of Information Act exempts from its disclosure requirements "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (2006).

169. Miller, *supra* note 134, at 466–67.

170. *Amodeo II*, 71 F.3d at 1052. *See also* Cippollone v. Liggett Grp., Inc., 785 F.2d 1108, 1121 (3d Cir. 1986) (stating that it may be difficult for businesses to demonstrate embarrassment—a nonmonetizable harm—because their "primary measure of well-being is presumably monetizable"); Angele, *supra* note 139, at 1663 ("Only private individuals are protected: a corporation has no legal right to privacy."); Doré, *supra* note 111, at 330 (noting that "courts generally frown upon claims of commercial embarrassment or damaged corporate reputation").

the viability of a product or even the enterprise itself."[171]

In conclusion, confidential settlements in the non-class action context serve a variety of policies, including a need to facilitate settlements; reduce the risks of copycat claims, unreasonable expectations, and harassment; and protect personal privacy.

V. SECRECY AND ACCESS TO CLASS ACTION SETTLEMENTS

Against this backdrop of the competing policies served by public access to, and confidentiality of, settlement agreements, let us now turn to the unique considerations that affect class action settlements. Statutory, logistical and policy-based constraints all call into serious question the legality, efficacy, and wisdom of secret class action settlements.

A. Statutory and Logistical Constraints

Rule 23 of the Federal Rules of Civil Procedure limits the parties' freedom to settle a certified class action confidentially. The Rule provides that a certified class action "may be settled, voluntarily dismissed, or compromised only with the court's approval"[172] and requires the court to "direct notice in a reasonable manner to all class members who would be bound by the proposal."[173] Moreover, if class members are to be bound by the settlement, "the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."[174]

These requirements of judicial scrutiny after notice and a

171. Miller, *supra* note 134, at 470.

172. FED. R. CIV. P. 23(e). The unique issues that arise when the named representative seeks to dismiss a putative class action that has *not* been certified and to settle her individual claims are beyond the scope of this Article. *See* 5 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 11:13, at 20–21 (4th ed. 2002) ("Under certain circumstances, settlement with a class plaintiff before class certification may be available, with approval of the court."); MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 21.312, 21.61 (2004) (noting that when a proposed class has not been certified, special circumstances might lead a court to impose terms to prevent abuse). For ease of reference, "statutory" is used in lieu of "Rules-based" constraints.

173. FED. R. CIV. P. 23(e)(1).

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

hearing seriously constrain the parties' ability to shield a class action settlement from public view.[175] By its terms, the Rule requires that absent class members be notified of the settlement. In those class actions in which the names and addresses of the class members are unknown,[176] notice by publication in print media or via television, radio or the Internet may be ordered.[177] In such cases, it will be impossible to shield the settlement's general terms from the public.[178]

Even in cases where the class members' names and addresses are known and notice of the settlement can be mailed to them, the class itself may include hundreds of thousands[179] or even millions of members.[180] Once that many people learn the terms of the

175. *Accord* NAT'L ASSOC. OF CONSUMER ADVOCATES, NACA CLASS ACTION GUIDELINES 47 (2006), *available at* http://www.naca.net/sites/default/files/pdfs/RevisedGuidelines.pdf (stating that "[c]lass action documents must remain open and available to the public in virtually all circumstances"); Marcus, *supra* note 138, at 49 n.206 (stating that "[i]n view of the extent of disclosure and judicial evaluation of the merits, it is questionable whether class actions can often be settled on a confidential basis"); Menkel-Meadow, *supra* note 132, at 2695 (noting that "courts must engage in some scrutiny of the adequacy of counsel and the reasonableness of [a class action] settlement").

176. For example, in a class action filed on behalf of millions of purchasers of Milli Vanilli records, tapes and CDs, the names and addresses of the absent class members were presumably unknown. Freedman v. Arista Records, Inc., 137 F.R.D. 225, 226–27 (E.D. Pa. 1991). *See also* Reuters, *Small Victory for Milli Vanilli Fans*, N.Y. TIMES, Aug. 31, 1991 (late ed.), at 16, *available at* 1991 WLNR 3030334 (discussing the Milli Vanilli case).

177. *See* 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 1797.6, at 201–02 (3d ed. 2005) (describing the ways in which notice may be ordered); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.312 (2004) (same).

178. *See* 5 CONTE & NEWBERG, *supra* note 172, § 11:53, at 164 (stating that the notice under Rule 23(e) "must inform class members . . . of the settlement's general terms").

179. *See, e.g.*, Brown v. Cameron-Brown Co., 92 F.R.D. 32, 37 (E.D. Va. 1981) (finding that the numerosity requirement was satisfied where "plaintiffs assert the class to number 'at least several thousand' and the defendants refer to a potential class of 200,000"); Fischer v. Weaver, 55 F.R.D. 454, 458 (N.D. Ill. 1972) (considering a class with 833,055 members).

180. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2547 (2011) (reviewing a class action with 1.5 million members); *Freedman*, 137 F.R.D. at 228 (stating that "[i]t is safe to assume that 7,000,000 people cannot be joined practically to one litigation"); Kendler v. Federated Dep't Stores, Inc., 88 F.R.D. 688, 691 (S.D.N.Y. 1981) (considering a class estimated to include 1.9 million members).

settlement, it will be extremely difficult, if not impossible, to keep its terms secret. After all, in deciding whether to accept the terms of the settlement, to object, or to opt out (assuming that remains an option), the class members may need to discuss the terms of the settlement with their partners, parents, and children; their attorneys and accountants; and other trusted advisors. It is difficult to imagine that even a court committed to ensuring the confidentiality of a class action settlement would deny class members that opportunity.

But once the absent class members, their family members, and other advisors learn the terms of the settlement, both legal and logistical constraints limit the efficacy of a confidentiality requirement, even one imposed by court order. If any of the absent class members or non-party family members or other advisors were to disclose the terms of the settlement, it would be difficult, if not impossible, for the court to identify which individual(s) had breached confidentiality. Even if the court, somehow, could identify the person(s) who had revealed the terms of the settlement, it would lack authority to sanction a non-party. Unlike absent class members, who are deemed, however improbably, to have consented to the court's jurisdiction by declining to opt out,[181] non-parties are neither served with process nor afforded an opportunity to opt out from which their consent might be inferred.

Rule 65(d), which has been read to govern not only injunctions but all "equitable decrees compelling obedience under the threat of contempt,"[182] provides that such decrees bind only parties and their "officers, agents, servants, employees, and attorneys," and "other persons who are in active concert or participation" with them if they "receive actual notice of [the decree]

181. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that absent class members who lack minimum contacts with the forum state nevertheless may be bound by the court's judgment because they consent to jurisdiction by declining to opt out. 472 U.S. 797, 812–14 (1985). For critiques of this consent rationale, see Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561–62 (2004); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1170 n.95, 1185–86 (1998); Rhonda Wasserman, *The Curious Complications with Back-end Opt-out Rights*, 49 WM. & MARY L. REV. 373, 407–12 (2007).

182. 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 2955, at 309 (2d ed. 1995) (citing, *inter alia*, Int'l Longshoremen's Ass'n, Local 1291 v. Phil. Marine Trade Ass'n, 389 U.S. 64, 75 (1967)).

by personal service or otherwise . . . ."[183] The non-parties with whom absent class members might consult likely would not receive notice of a court order requiring confidentiality and might well be beyond the court's jurisdiction. If the class has not yet been certified, even the putative absent class members themselves might be beyond the court's authority.[184] Thus, it is highly unlikely that the court would have authority to punish a breach of confidentiality even if it could identify the individual(s) who released the terms of the settlement.

In addition to requiring notice to absent class members of the proposed settlement, Rule 23(e) requires the court to conduct a "hearing" before approving a class action settlement.[185] While Rule 23 does not, by its terms, require that the hearing be open to the public, and while Rule 77(b) permits proceedings other than trials on the merits to be "conducted by a judge in chambers,"[186] there is a large body of precedent that strongly supports a right of public access to fairness hearings. For more than thirty years, the Supreme Court has recognized a First Amendment right of public access to criminal trials[187] and pretrial proceedings in criminal cases.[188] While the Court has not had occasion to consider whether there is a First Amendment right to attend civil trials,[189] all of the federal Courts of

183. FED. R. CIV. P. 65(d)(2).

184. *See* Smith v. Bayer Corp., 131 S. Ct. 2368, 2379–80 (2011) (rejecting the "surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*" and stating that "[n]either a proposed class action nor a rejected class action may bind nonparties") (quoting Devlin v. Scardelletti, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting)).

185. FED. R. CIV. P. 23(e)(2). Before 2003, federal courts had discretion whether to conduct an evidentiary hearing before approving a class action settlement. 7B WRIGHT ET AL., *supra* note 177, § 1797.5, at 178–80. In 2003, the Rule was amended and "settlement hearings now are mandatory." *Id.* at 180 & 51 (2010 Supp.).

186. FED. R. CIV. P. 77(b).

187. *See* Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 604–06 (1982) (discussing why a right of access to criminal trials is protected by the First Amendment); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality op.) ("[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment . . . .").

188. *See* Press-Enterprise Co. v. Super. Ct., 478 U.S. 1, 10 (1986) (holding that the First Amendment "right of access applies to preliminary hearings"). *See also* Press-Enterprise Co. v. Super. Ct., 464 U.S. 501, 508–10 (1984) (finding a "presumption of openness" to the jury selection process in criminal cases).

189. *See* Whistleblower 14106-10W v. Comm'r, 137 T.C. No. 15, 2011 WL

Appeals that have considered the issue have held such a right exists.[190]

As the Sixth Circuit stated in *Brown & Williamson Tobacco Corp. v. FTC*, "[t]hroughout our history, the open courtroom has been a fundamental feature of the American judicial system."[191] And as the Seventh Circuit declared in *Union Oil Co. of California v. Leavell*, "[w]hat happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after *public arguments* based on public records."[192] If, as these cases suggest, the First Amendment guarantees the public a right to attend a class action fairness hearing, it will be impossible to keep the terms of the settlement secret.

Even if the First Amendment does not secure a right of public access to civil trials, Rule 43(a) of the Federal Rules of Civil Procedure requires that "[a]t trial, witnesses' testimony must be taken in open court" unless otherwise provided by law or in

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6110061, at *4 n.8 (2011) (stating that the Supreme Court "has not expressly ruled on whether there is a First Amendment right of access to civil proceedings and documents"). *Cf. Richmond Newspapers*, 448 U.S. at 580 n.17 (plurality op.) (stating that "[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open").

190. *See, e.g.*, *Whistleblower 14106-10W*, 2011 WL 6110061, at *4 n.8 (noting that the "Courts of Appeals that have addressed the issue agree that there is such a constitutional right"); Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 120, 124 (2d Cir. 2006) (noting that the public has a right to attend trials); Detroit Free Press v. Ashcroft, 303 F.3d 681, 700 (6th Cir. 2002) (concluding that "Deportation hearings, and similar proceedings, have traditionally been open to the public"); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061 (3d Cir.1984) ("We hold that the First Amendment does secure a right of access to civil proceedings."); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) (agreeing that "the policy reasons for granting public access to criminal proceedings apply to civil cases as well"); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983) (deciding that "civil trials which pertain to the release or incarceration of prisoners and the conditions of their confinement are presumptively open to the press and public"). *See also* Rushford v. New Yorker Magazine, 846 F.2d 249, 253 (4th Cir. 1988) (holding that "the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case"). *Cf.* N.J. Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 204–05 (3d Cir. 2002) (concluding that there is no First Amendment right to attend administrative deportation proceedings).

191. 710 F.2d 1165, 1177 (6th Cir. 1983).

192. 220 F.3d 562, 568 (7th Cir. 2000) (emphasis added).

compelling circumstances.[193] If the fairness hearing is characterized as a trial, the Rules, too, require that it be open to the public.

Finally, the Class Action Fairness Act ("CAFA") requires defendants participating in proposed class action settlements to serve upon state and federal governmental officials the class action complaint, the proposed settlement, any side deals, and related documents.[194] The purpose of this provision is to ensure that responsible governmental officials are "in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies."[195] In fact, these government officials sometimes appear in court at the fairness hearing and voice their objections to proposed class action settlements.[196] It would be difficult, if not impossible, for these governmental officials to perform their duties under the statute if they were ordered to maintain the materials received "as confidential in order to maintain the confidentiality of the settlement . . . ."[197]

Read together, Rule 23, CAFA, and the resulting logistical constraints render it impossible for the parties, the court, and other governmental officials to keep the terms of a class action settlement confidential. These constraints serve a variety of policies supporting public access to class action settlements to which we now turn.

B. Policy-Based Constraints

As the Third Circuit stated in a case involving public access to bids submitted by attorneys seeking to serve as class counsel, the "right of public access is particularly compelling"[198] in the class

193. FED. R. CIV. P. 43(a).

194. 28 U.S.C. § 1715(b) (2006).

195. S. REP. NO. 109-14, at 27 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 32.

196. *See* Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data*, SSRN 7, July 2008, *available at* http://ssrn.com/abstract=1206315 (providing an example of government officials' objections to proposed settlements).

197. Order of Court, *supra* note 41, at 3. *See also supra* notes 34–44 and accompanying text (discussing the court order entered in the B'nai B'rith litigation).

198. *In re* Cendant Corp., 260 F.3d 183, 193 (3d Cir. 2001). *See also id.* at 194 (stating that the "test for overriding the right of access [in a class action] should be applied . . . with particular strictness").

action context. Even Professor Miller concedes that "public access may be important . . . when the settlement is a court-approved class settlement . . . ."[199] Numerous differences between standard civil suits and class actions help explain why public access is particularly important in this context.

In standard civil litigation, the client retains an attorney to represent her, while reserving "ultimate authority" over the important decisions to be made in the suit,[200] including whether or not to settle and on what terms.[201] While the client's ability to monitor her attorney's performance is limited, the rules of professional ethics enhance that ability by requiring the attorney to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required . . . ; reasonably consult with the client about the means by which the client's objectives are to be accomplished; [and] . . . keep the client reasonably informed about the status of the matter . . . ."[202] These rules assume that a client who is informed of the progress of her suit and who retains decision-making authority will be a more effective monitor.[203]

Unlike this standard litigation model, the attorney representing a class is often the driving force behind the lawsuit, has more at stake financially than any individual class member, and rarely communicates with absent class members, who are dispersed and disorganized and lack incentive to monitor the conduct of their ostensible agent.[204] Even the named representative may have little

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199. Miller, *supra* note 134, at 485–86.

200. MODEL RULES OF PROF'L CONDUCT R. 1.2(a), 1.2 cmt. (2006) (stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued").

201. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. (2006) (requiring "a lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . [to] promptly inform the client of its substance").

202. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(1)–(3) (2006).

203. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 14–15 (1991).

204. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 884–85 (1987) (explaining that "the members of a plaintiff class usually have very little capacity to monitor their agents"); Macey & Miller, *supra* note 203, at 3, 7–8, 19–20; William B. Rubenstein, *The Fairness Hearing: Adversarial and*

influence over the lawyer representing the class.[205] In this context, the risks of collusion between the defendant and class counsel and of a deal that would maximize class counsel's fee while minimizing recovery for the class are of real concern.[206]

To reduce these risks, Federal Rule 23 bars class action settlements without judicial approval and permits the court to approve a class action settlement only if it finds "that it is fair, reasonable, and adequate."[207] While judicial scrutiny of settlements is particularly important in the class action context, it is not a panacea both because the reviewing court lacks the information it needs to assess the settlement's fairness and because the court has its own incentive to favor class action settlements.[208] If a court approves a class action settlement (whether fair or not), it is freed of the burden of overseeing a large and potentially time-consuming

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Regulatory Approaches, 53 UCLA L. REV. 1435, 1441–43 (2006).

205. *See* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 297 n.22 (2010) (analyzing the powerlessness of named representatives); Macey & Miller, *supra* note 203, at 5, 20 (arguing that class members have no incentive to take on a "litigation monitor" role because they would incur individual costs, with only a pro rata share of the benefits); Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633, 634 n.2 (2003) (same).

206. *See* John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 626, 647–48 (1986/1987) (describing "structural collusion"); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 470–73 (2000) [hereinafter Wasserman, *Dueling Class Actions*] ("The attorney's interest in securing the highest fee and the class members' interest in attaining the greatest recovery often diverge."). The additional risks posed by side deals, pursuant to which inventories of claims would be settled at a premium outside of the class action in order to reduce the presence of objectors, have been reduced by the enactment of Rule 23(e)(3), which requires the "parties seeking approval" to "file a statement identifying any agreement made in connection with the proposal." FED. R. CIV. P. 23(e)(3). *See* Dana & Koniak, *supra* note 57, at 1233–40 (describing the unique risks of collusion posed by such side deals and exacerbated by secrecy).

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

208. *See* Dana & Koniak, *supra* note 57, at 1234–35 (arguing that parties have incentives to conceal information regarding the unfairness of a settlement to the court, and that the court has an interest in approving the settlement to clear its docket); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1105–15 (1996) (same); Rubenstein, *supra* note 204, at 1445 (same); Wasserman, *Dueling Class Actions*, *supra* note 206, at 479–83 (discussing the "informational disadvantage" of courts in fairness hearings).

case.[209] It may also gain prestige as the court that oversaw the settlement of a complex class action.[210] Thus, courts may be too quick to approve settlements regardless of their adequacy.

Proposals advocating the appointment of a guardian *ad litem* to represent the interests of the class during the settlement process or a "devil's advocate" to raise objections to any proposed class action settlement[211] have not gained traction with the Advisory Committee on Civil Rules.[212] In the absence of a guardian or class advocate, the public's role in scrutinizing class action settlements and the judicial approval process itself assumes particular importance.

As suggested in Part III.A above, public access to settlements submitted for judicial approval helps police the accuracy of materials submitted to the court in connection with the settlement and ensure that courts perform their reviews with diligence and care. Given the court's unique role in protecting the interests of the class and given the risk that the court's self-interest may skew the process in favor of approval, these monitoring functions are particularly important in the class action context. A court order shielding a class action

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209. *See* Koniak & Cohen, *supra* note 208, at 1122–23, 1127 (discussing judicial self-interest); Luban, *supra* note 57, at 2660 (suggesting that settlement was reached in part as a result of the court's "overwhelming interest in damming the flood of asbestos cases"); Macey & Miller, *supra* note 203, at 45–46 ("If the judge approves the settlement, the result will be to remove a potentially complex and time-consuming case from the judge's calendar."); Rubenstein, *supra* note 204, at 1445 ("Settlement removes the matter from the judge's docket, not an unimportant factor in a time of onerous caseloads."); Wasserman, *Dueling Class Actions*, *supra* note 206, at 476 ("[T]he court may . . . have an interest in approving a settlement to clear its docket.").

210. *See* Koniak & Cohen, *supra* note 208, at 1123 (arguing that "[j]udicial self interest may lead judges to seek power, prestige, and autonomy," which is gained by overseeing high-profile cases); Wasserman, *Dueling Class Actions*, *supra* note 206, at 476, n.73 (citing Koniak & Cohen in arguing that judges occasionally act in their own self-interest).

211. *See* Macy & Miller, *supra* note 203, at 47–48 (discussing various proposals for appointing a guardian ad litem to reform the current class action system); Rubenstein, *supra* note 204, at 1453–56, 1475–77 (advocating the appointment of "an attorney to argue against the settlement"); Wasserman, *Dueling Class Actions*, *supra* note 206, at 529 (endorsing a proposal advanced by Professor John Leubsdorf that defendant and class counsel should be required to post bond for the appointment of a court-appointed advocate who would scrutinize the fairness of the proposed settlement).

212. *See* Koniak & Cohen, *supra* note 208, at 1109 n.190 (describing judges' and lawyers' "chilly reception" of Professor Leubsdorf's proposal).

settlement from public view would obviously compromise the public's ability to serve in this role.

Like absent class members, the public at large may lack the incentives and the data needed to scrutinize the adequacy of the settlement.[213] But public interest groups may appear and voice their objections to a class action settlement (assuming it is accessible to them).[214] Moreover, the government officials that receive notice of proposed class action settlements under CAFA sometimes appear in court and voice their objections [215]—that is, as long as no court bars them from voicing their objections in open court. And one should not underestimate the efficacy of press coverage, which a right of public access enables, both in monitoring the judicial approval process and in notifying the public of health and safety threats that are the subject of litigation.[216] After all, while Joe Q. Public may lack the incentive and resources to assess the fairness of a particular settlement, investigative journalists are paid to research, expose wrongdoing and write about it. For example, while the media coverage of the fen-phen litigation may not have affected the ultimate recovery by class members, it certainly shed considerable light on the behavior of class counsel, the doctors they relied upon for medical expertise, and the judicial review process.[217] The fallout of that press scrutiny is arguably still being felt, as one state bar association recently recommended the disbarment of both a

213. Even class member objectors are frequently denied the opportunity to take the discovery needed to assess the adequacy of the settlement. *See, e.g.*, Koniak & Cohen, *supra* note 208, at 1109–10 (noting that "discovery accorded objectors in the settlement process is limited"); Wasserman, *Dueling Class Actions*, *supra* note 206, at 477–78 (same). It is highly unlikely that members of the public at large would have access to the data needed to assess the settlement's fairness.

214. Pace & Rubenstein, *supra* note 196, at 7; Rubenstein, *supra* note 204, at 1450–51.

215. Pace & Rubenstein, *supra* note 196, at 7. *But see* Rubenstein, *supra* note 204, at 1448 (noting that CAFA does not require the government officials to comment on the adequacy of the proposed settlement or to do anything else).

216. *See* Menkel-Meadow, *supra* note 132, at 2686–87 (noting that "[p]ress coverage and open court hearings . . . facilitate . . . public discourse").

217. *See* Alison Frankel, *Third Circuit (Again) Upholds $567 Million Fee Award in Fen-Phen Class Action*, AM. LAWYER, June 8, 2010 (describing the fen-phen litigation); Alison Frankel, *$982 an Hour for Fen-Phen Plaintiffs' Lawyers*, AM. LAWYER, Apr. 10, 2008 (same); Alison Frankel, *Still Ticking: Mistaken Assumptions, Greedy Lawyers, and Suggestions of Fraud Have Made Fen-Phen a Disaster of a Mass Tort*, AM. LAWYER, Mar. 1 2005 (same).

prominent class action attorney who represented claimants in fen-phen litigation filed in state court and the judge who approved the settlement of that case.[218]

Public (and media) access to class action settlements not only permits testing of the accuracy of the data upon which settlements are predicated and monitoring of judicial performance, but it also provides an outlet for the release of public sentiment on matters of public importance and reduces the risk of "vengeful 'self-help.'"[219] Since class actions, by definition, affect large groups of people and often involve matters of great public importance, such as discrimination or environmental contamination, this policy in favor of public access appears particularly strong in the class action context. Likewise, public access to class action settlements permits notice to the public of health and safety risks posed by the product or behavior that underlies the litigation. If a confidentiality order barred class members from discussing not only the settlement but also the problem that gave rise to the litigation, it could inhibit reporting to governmental agencies such as the Consumer Product Safety Commission and the National Highway Safety Traffic Administration, which would greatly compromise their effectiveness.

Finally, while class actions are intended to resolve the claims of large groups of similarly-situated class members in a single proceeding, they often fail to include all those affected by the defendant's conduct or product. For example, given the choice-of-law problems that can arise in nationwide class actions,[220] lawyers often structure class actions to include only class members from a single state.[221] Class members injured by the same product but

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218. *See* Peter Smith, *Lawyer Faces New Troubles*, THE COURIER-J. (Louisville, Ky.), Nov. 13, 2011, at B1, *available at* 2011 WLNR 23518428; Andrew Wolfson, *Fen-Phen Judge Under Fire Again; Ky. Bar Association Wants Bamberger Disbarred over Diet-Drug Case*, THE COURIER-J. (Louisville, Ky.), June 17, 2011, at A1, *available at* 2011 WLNR 12192510.

219. *See supra* note 125 and accompanying text (citing and discussing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (plurality op.)).

220. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985) (applying constitutional limitations on choice of law in a nationwide class action suit).

221. *See, e.g.*, Altria Grp., Inc. v. Good, 555 U.S. 70, 73 (2008) (challenging cigarette advertising in the context of a statewide class action and considering whether a state unfair trade practices statute was preempted by federal law). *Cf.* Dana & Koniak, *supra* note 57, at 1233–34 (explaining that class actions are sometimes structured so as to exclude plaintiffs whose claims are settled outside

living in different states, who may be participating in other statewide class actions or pressing individuals suits, would benefit from access to the benchmark settlement figures produced in the first class action to settle.[222]

In sum, many of the policies identified in Part III.A counsel in favor of public access to class action settlement agreements with particular force. While they also counsel strongly in favor of public access to settlement agreements in FLSA collective actions, there are differences between the two types of group litigation that may explain why courts appear more willing to seal settlements in the FLSA context. First, class members in FLSA cases can be bound only if they affirmatively opt in.[223] Thus, they are aware of the litigation, are sometimes required to participate in discovery,[224] and presumably have at least some contact with the attorney representing the class.[225] The need for public scrutiny of the approval process in such cases may be less obvious. Second, since class members in FLSA cases are all employees of the same employer and often work together in the same plant, they may be less dispersed and disorganized than class members in the typical Rule 23(b)(3) class action and therefore better able to monitor the attorney representing them.[226] Although there are good reasons to doubt this conclusion,[227] it, too, may explain what appears to be a greater

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the class action in an effort to "buy off" potential objectors).

222. *See supra* note 145 and accompanying text (discussing benefits of such access).

223. 29 U.S.C. § 216(b) (2006). *See also supra* note 90 and accompanying text (discussing § 216(b) opt-in requirement).

224. *See, e.g.*, Ingersoll v. Royal & Sunalliance USA, Inc., No. C05-1774-MAT, 2006 WL 2091097, at *1–3 (W.D. Wash. July 25, 2006) (allowing defendants to conduct depositions of all opt-in plaintiffs); Coldiron v. Pizza Hut, Inc., No. CV03–05865TJHMCX, 2004 WL 2601180, at *2 (C.D. Cal. Oct. 25, 2004) (allowing the same).

225. *See* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. (forthcoming 2012) (manuscript at 4–6, 14, 30–32, 42–43) (positing that the agency problems and asymmetric information problems that plague Rule 23 class actions are far less pronounced in FLSA collective actions).

226. *Cf. id.* at 26 (noting that in FLSA cases, the claims of the employees against the same employer are "presumptively similar").

227. *See* Becker & Strauss, *supra* note 90, at 1325–29 (suggesting that low-wage workers often decline to opt into FLSA collective actions because they do not receive the notice; do not understand it; or lack the knowledge, experience or fortitude to sue their employer).

willingness on the part of courts to seal settlements in FLSA collective actions.

Whether or not the FLSA cases should be treated differently, it is clear that regarding Rule 23 class actions, numerous policies strongly counsel in favor of public access to both filed settlement agreements and the judicial approval process. And the policies often cited in support of confidentiality are unlikely to overcome the presumptive right of access to class action settlement agreements submitted for judicial review.

First, class action settlement agreements rarely, if ever, contain trade secrets, identify confidential informants or disclose military secrets. Settlement amounts themselves are obviously not trade secrets.[228] If ever there is a case in which a trade secret, informant's name, or military secret is disclosed in a class action settlement agreement, the secret itself can be shielded from the public without shielding the entire settlement agreement.[229]

Second, while settlements may conserve both private and public resources and enable the parties to resolve their disputes in ways that best serve their idiosyncratic interests, one should question the frequent claim that parties will decline to settle unless they are assured confidentiality.[230] After all, whether or not a confidentiality order issues, the parties will save time and money and reduce risk if they settle.[231] And if they are genuinely worried about publicity, the alternative of a public trial likely will bring even more unwanted publicity.[232] Data from the United States District Court for the

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228. Dana & Koniak, *supra* note 57, at 1226.

229. *See* Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 567 (7th Cir. 2000) ("Litigation about trade secrets regularly is conducted in public; the district court seals only the *secrets* (and writes an opinion omitting secret details); no one would dream of saying that every dispute about trade secrets must be litigated in private.").

230. *See, e.g.*, Zitrin, *supra* note 134, at 118 (stating that "there are no empirical studies or even 'anecdotal' evidence indicating that it is actually harder to attain a settlement when secrecy is not permitted"). In fact, Professor Moss's economic analysis suggests that a ban on confidential settlements likely would "*accelerate* settlement." Moss, *supra* note 145, at 887 (emphasis added). *See also id.* at 892, 910 (offering further economic analysis of a potential ban on confidential settlements).

231. *See, e.g.*, Béchamps, *supra* note 111, at 130 (arguing that "[g]iving preference to the public interest in access should not seriously hinder efforts to settle").

232. *See* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994)

District of South Carolina, which enacted a local rule barring sealed settlements in 2002,[233] reveals a *decline* in the number of trials following enactment of the rule, suggesting that parties prefer public settlements to public trials.[234] Thus, the claim that parties will decline to enter into class action settlements unless they are assured confidentiality seems overstated.

Third, while defendants may fear that a public settlement will give rise to copycat claims,[235] this fear is not likely to justify an order sealing a class action settlement. If a public settlement apprises others who have been injured by the defendant's product or wronged by its conduct of their potential right to recover, the defendant's interest in evading or reducing its liability to those with meritorious claims hardly justifies confidentiality.[236] While the defendant has a legitimate interest in avoiding trumped-up charges, that interest may not be best served by sealing the class action settlement. As Professors Dana and Koniak argue, "[t]he most effective way for a defendant to combat truly frivolous suits, arguably, would be to prevail (or pay only a nominal settlement) and publicize, rather than hide, the outcome."[237] While this advice will not help a defendant who settles bona fide claims in the class action and fears frivolous copycat claims if the settlement is publicized, that risk seems no greater than the risk of copycat claims following a trial of the class claims, something that surely would occur in public. It is unclear why the concern for copycat claims would justify an order sealing a class action settlement any more than an order closing the courthouse door. And while it is true that settlement values in a class action may influence the expectations of litigants in related cases, one must question whether that concern is sufficient to overcome a

("[I]f the case goes to trial, even more is likely to be disclosed than if the public had access to pretrial matters."); Zitrin, *supra* note 134, at 118 ("[P]arties who don't want their conduct exposed still have substantial incentive to settle before the heightened scrutiny of a trial.").

233. D.S.C. LOCAL CIV. R. 5.03(E) ("No settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule.").

234. Anderson, *supra* note 132, at 817 n.34.

235. District Judge Anderson of the United States District Court for the District of South Carolina finds this argument persuasive. *Id.* at 818.

236. Moss, *supra* note 145, at 902 (discussing the possibility that "some of the 'copycats' are deserving plaintiffs who simply had not known enough to sue") (footnote omitted).

237. Dana & Koniak, *supra* note 57, at 1225.

presumptive right of access to a settlement agreement filed with a court for its approval.

Finally, while personal privacy interests may justify confidentiality orders in certain cases, the corporations, labor unions and other institutions that are the typical class action defendants have diminished expectations of privacy.[238] Like the "repeat players" in Professor Marc Galanter's classic article, "Why the 'Haves' Come Out Ahead," they may have legitimate interests in "maintaining credibility . . . as combatant[s]" and in their "bargaining reputation[s]."[239] But in class actions, where the law requires judicial scrutiny of the fairness and adequacy of settlements, it is difficult to conclude that corporations' interests in their reputations as tough bargainers can outweigh the presumptive right of the public to monitor the courts.

VI. CONCLUSION

It may be that the class action that first attracted my attention, *Hirschfield v. B'nai B'rith International*—in which the court agreed to seal not only the settlement agreement itself, but also the transcript of the fairness hearing and the objections filed by absent class members—is a very rare breed. Certainly my modest efforts to learn the scope of the practice—through a Westlaw search and an examination of the class actions filed in a single federal judicial district—suggest as much, although a more comprehensive study by the FJC found that 6% of all settlements filed under seal involve class actions.[240]

Even if secret class action settlements are rare, it is nevertheless a useful exercise to understand the constraints on the practice. A combination of statutory, logistical and policy-based considerations all constrain the discretion of federal district courts to

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238. *See supra* note 170 and accompanying text (citing several examples of the diminished privacy expectations of institutional defendants); Zitrin, *supra* note 134, at 119 ("[P]ersonifying corporations by ascribing to them intensely personal feelings—including annoyance and embarrassment—stretches credulity.").

239. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 99 (1974). *See also* Moss, *supra* note 145, at 878 (admitting that repeat class action defendants may be concerned about developing a "reputation for settling").

240. *See supra* note 104 (citing to the FJC study).

seal class action settlements. Both Rule 23, which requires notice to class members of proposed settlements and judicial review at fairness hearings, and CAFA, which requires notice to governmental officials of proposed class action settlements so they can "react" if the settlements are unfair, seriously limit the court's authority to shield class action settlement agreements from public scrutiny. Even if a court were to order absent class members to keep the terms of a proposed class action settlement confidential, it would be a logistical nightmare to police such an order.

Moreover, the inability of absent class members to monitor the behavior of their agent (the class counsel) highlights the need for judicial scrutiny of class action settlements. And the court's potential bias in favor of approval highlights a need for public scrutiny of the court itself. Such scrutiny would be impossible if the public were denied access to the very settlement agreement that was the subject of judicial review. Thus, secret class action settlements should be very rare indeed given that public access to class action settlement agreements is a critical prerequisite to public monitoring of the judicial approval process.

Separation of Powers and Second Opinions: Protecting the Government's Role in Developing the Law by Limiting Nationwide Class Actions Against the Federal Government

Michelle R. Slack*

I. INTRODUCTION 944
II. *GORBACH V. RENO*: AN ILLUSTRATIVE CASE 946
III. THE SUPREME COURT CASES 955
  A. Califano v. Yamasaki*: The Power to Certify on a Nationwide Scope* 955
  B. United States v. Mendoza*: The Federal Government as Litigant, and its Greater Role in Developing the Law* 956
  C. Reexamining Califano *and* Mendoza*—The Detrimental Effect of the Nationwide Class Action on Development of the Law* 960
IV. THE TENSION BETWEEN UNIFORMITY/EFFICIENCY AND THE DEVELOPMENT OF THE LAW THROUGH DEBATE AMONG THE LOWER COURTS 964
V. THE GOVERNMENT, AS A LITIGANT, IS DIFFERENT THAN PRIVATE PARTIES 971
  A. The Nature of the Issues and the Constitutional Design. 971
  B. The Geographical Breadth and Frequency of Government Litigation 978
  C. The Policy and Political Role of the United States Solicitor General 982
VI. A PROPOSAL FOR A REBUTTABLE PRESUMPTION AGAINST CERTIFYING NATIONWIDE CLASS ACTIONS AGAINST THE FEDERAL GOVERNMENT 987

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VII. CONCLUSION 995

I. INTRODUCTION

The nationwide class action vehicle provides an efficient means of achieving nationwide uniformity. Thus, at first glance, its use against the federal government on issues relating to federal law seems particularly appropriate. Yet, it comes with a price: an arguably unconstitutional roadblock on the federal government's role in development of the law, as well as an impediment to development through debate among the lower federal courts. This detrimental effect of a nationwide class was recognized by the Supreme Court in *Califano v. Yamasaki*.[1]

Perhaps more relevant to the issues raised in this Article is *United States v. Mendoza*.[2] In *Mendoza*, the Supreme Court recognized that federal government litigation plays a critical role in developing the law, making the United States different than private parties.[3] Although *Mendoza* dealt with non-mutual offensive collateral estoppel,[4] its reasoning is applicable to nationwide class certification in many meaningful ways. As explained in this Article, because the federal government, as a litigant, is different than a private party, the price of developing the law is too high in relation to the uniformity and efficiency it provides.[5] Accordingly, this Article proposes a narrowly focused and rebuttable presumption against certifying nationwide class actions against the federal government.[6] This proposal protects the coequal branches' roles in developing the law, allows legal issues to "percolate"[7] among the

1. Califano v. Yamasaki, 442 U.S. 682, 702 (1979). *See infra* Part III.A. (discussing *Califano*, 442 U.S. 682).

2. United States v. Mendoza, 464 U.S. 154 (1984). *See infra* Part III.B. (discussing *Mendoza*, 464 U.S. 154).

3. *Mendoza*, 464 U.S. at 159–63.

4. *Id.* at 157–63.

5. *See infra* Parts IV & V.

6. *See infra* Part VI.

7. *See* Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 554–55 (2010) (acknowledging the "percolation" theory, which posits that conflicting interpretations of federal rules of decision in lower courts will help inform a higher court's judgment when the issue reaches that court).

lower federal courts, and still assures some level of efficiency and uniformity within the federal judiciary's statutory and constitutional design.[8] By protecting the ability to obtain a second opinion, the proposal reinforces important separation of powers principles and encourages the development of law that is of public importance.[9]

Part II examines an actual nationwide class action against the federal government to illustrate some of the critical concerns raised by such class certifications. As addressed in this Part, as well as throughout the Article, the *Gorbach v. Reno*[10] litigation provides an excellent illustration of these concerns because it raised an important issue of first impression with substantial policy and political ramifications, demonstrated the certifying court's disregard for other pending parallel litigation, and provided evidence of counterintuitive inefficiencies and forum-shopping.

Part III explores the two critical decisions of the United States Supreme Court: *Califano v. Yamasaki* and *United States v. Mendoza*. First, it explains these two critical decisions, focusing on the reasoning relevant to the question of how nationwide class actions against the federal government impact the development of the law. Then, it addresses some of the difficulties of applying the *Mendoza* reasoning to that same question, reconciling the differences between the two cases.

Part IV addresses the tension that exists in deciding when to certify a nationwide class action—a tension quite similar to that confronted by application of nonmutual collateral estoppel. First, it examines the benefits of uniformity and efficiency provided by a nationwide class action. Then, it explores the impact such class actions have on development of the law, as well as how the statutory and constitutional design of the federal judiciary contemplates and encourages development of the law through debate.

Part V demonstrates the ways in which the federal government is meaningfully different from private parties, thereby providing justification for resolving the tension in favor of protecting the government's role in developing the law. It discusses how

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8. *See infra* Part VI.

9. *See infra* Part VI (noting the manner in which parallel structure protects basic separation of powers interests).

10. 181 F.R.D. 642 (W.D. Wash. 1998), *aff'd on rehearing en banc*, 219 F.3d 1087 (9th Cir. 2000).

litigation against the federal government is distinguishable from that against private parties in the following ways: (A) the nature of the issues raised and the constitutional design; (B) the geographical breadth and frequency of government litigation; and (C) the policy and political role of the United States Solicitor General.

Part VI proposes a narrowly-focused and rebuttable presumption against nationwide class certification in actions against the federal government. First, it explains how this proposal is true to both Federal Rule of Civil Procedure 23 and the Court's holding in *Califano v. Yamasaki*, and appropriate under the doctrine of constitutional avoidance. Next, it provides limits on the proposed presumption to assure its use is consistent with the rationale behind it. Thereafter, it proposes criteria for rebutting the presumption—again based upon the policy of legal development upon which it relies. Finally, it explains how uniformity and efficiency can still be achieved with the proposed presumption.

II. *GORBACH V. RENO*: AN ILLUSTRATIVE CASE

To help illustrate the issues raised by certifying nationwide class actions against the federal government, this Article will use an actual case example. The litigation in *Gorbach v. Reno*[11] provides an excellent illustrative example of nationwide class litigation against the federal government.[12] The *Gorbach* case challenged the statutory authority for the government to administratively revoke illegally and fraudulently obtained naturalization.[13]

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11. *Id.*

12. While working for the United States Department of Justice, Civil Division, the author served as lead counsel for the government in the *Gorbach* litigation. However, the author does not speak for the Department of Justice in this Article and has not revealed any non-public information about the litigation. Instead, this Article is a product of the author's own experience, research, and opinions and draws especially on a perspective gained by time and distance from the Department and the issue. In addition, the author relies upon her personal knowledge for some assertions made in this Article about the *Gorbach* litigation and general experiences from working within the Department of Justice.

13. *Gorbach*, 181 F.R.D. at 644.

In 1990, Congress transferred the power to naturalize United States citizens from the courts to the Attorney General.[14] Yet, the number of naturalization applications continued to increase, including dramatic increases and resulting backlogs in the mid-1990s.[15] In an effort to reduce the backlog of naturalization applications and maximize naturalization decisions, on August 31, 1995, the Immigration and Naturalization Service (INS) instituted an initiative called Citizenship USA (CUSA).[16] CUSA was successful in reducing the backlog and naturalizing more than a million new citizens in a year.[17] Unfortunately, a number of existing procedural problems in the naturalization process were exacerbated by this expedited review process.[18] In particular, a number of issues developed regarding the FBI fingerprint and background checks.[19] These problems included the discovery of 124,111 "unclassified" fingerprints, meaning the fingerprint cards were not "suitable for comparison," and 61,366 instances in which there was no record of any fingerprint check ever being done.[20] Thus, of the 1,049,867 citizens naturalized during CUSA between 1995 and 1996, approximately 18% received insufficient background checks.[21] In addition, thousands of "rap" sheets were discovered or received *after* the applicants' naturalization became final.[22] As a result, it was later

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14. Immigration Act of 1990, Pub. L. No. 101-649, tit. IV, § 401(a), 104 Stat. 4978, 5038 (1990).

15. DEP'T OF JUSTICE, AN INVESTIGATION OF THE IMMIGRATION AND NATURALIZATION SERVICE'S CITIZENSHIP USA INITIATIVE: EXECUTIVE SUMMARY 1 (2000), http://www.justice.gov/oig/special/0007/execsum.pdf [hereinafter CUSA EXECUTIVE SUMMARY].

16. *Id.*

17. *Id.* at 3. *See also Justice Department Inspector General's Investigation of Citizenship USA: Hearing before the Subcomm. on Immigration and Claims of the H. Comm. of the Judiciary*, 106th Cong. 1048 (2000), *available at* http://commdocs.house.gov/committees/judiciary/hju67344.000/hju67344_0.htm (statement of Rep. Lamar Smith, Chairman, S. Comm. on Immigration and Claims) [hereinafter CUSA Hearing] (noting that the backlog of applications for citizenship reached 1.1 million cases).

18. CUSA EXECUTIVE SUMMARY, *supra* note 15, at 5–6.

19. *Id.* at 25–32.

20. *Id.* at 3.

21. *See id.* at 3–4 (revealing results of KPMG Peat Marwick audit). A later INS audit revealed slightly higher numbers. *Id.* at 3 n.1.

22. *Id.* at 2, 33–35. *See also* CUSA Hearing, *supra* note 17, at 11 (statement of Hon. Lamar S. Smith) ("Applicants who were ineligible because of criminal

discovered that a substantial number of newly naturalized citizens had criminal histories that might have impacted, and even precluded, their naturalization. Notably, the time frame of the CUSA initiative corresponded with the 1996 federal elections, and some officials suspected that CUSA was a method to naturalize new citizens who would vote for Democratic Party candidates.[23] An investigation was launched by the Office of Inspector General (OIG),[24] and an audit of the CUSA naturalization files was conducted.[25] The investigation turned out to be the largest such investigation ever conducted by the OIG.[26] Despite some evidence of political pressure, the OIG "did not find that CUSA was developed, implemented, or otherwise directed to further inappropriate political ends."[27]

Regardless of the political turmoil associated with the potentially invalid grants of naturalization, the INS still faced the possibility that a substantial number of grants were obtained illegally or fraudulently. As a result, the INS decided to implement a newly promulgated regulation that provided an administrative procedure for revoking naturalization procured illegally or through material misrepresentation.[28] The regulation relied upon section 340(h) of the Immigration and Nationality Act, which in 1990, along with the authority to naturalize, also transferred from the courts to the Attorney General the "[p]ower to correct, reopen, alter, modify, or vacate" an order of naturalization.[29]

After months of screening naturalization files and developing processes to administer and implement the administrative revocation system, the INS began to initiate proceedings under the new

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records, or because they fraudulently obtained green cards, were granted citizenship because the INS was moving too fast to check their records.").

23. CUSA EXECUTIVE SUMMARY, *supra* note 15, at 2.

24. *Id.* at 4.

25. The audit of the CUSA files was conducted by KPMG Peat Marwick. *Id.* at 3.

26. *Id.* at 4. The investigation included review of more than 80,000 pages of documents and 1,829 interviews. *Id.*

27. *Id.* at 5.

28. *See* 8 C.F.R. § 340.1 (2011), *removed and reserved by* 76 Fed. Reg. 53,804 (Aug. 29, 2011) (outlining procedures for reopening naturalization applications).

29. 8 U.S.C. § 1451(h) (2006).

regulation.[30] With very few exceptions, the screening of files and initiation of proceedings were done centrally by INS Headquarters, in Washington, D.C., and was supervised by the INS General Counsel's Office.[31] Soon after beginning this process and before few, if any, proceedings had concluded, the *Gorbach v. Reno* case was filed in the Western District of Washington.[32] The case was assigned to United States District Court Judge Barbara Rothstein.[33]

The *Gorbach* plaintiffs challenged the statutory authority for the regulation under which the INS brought administrative, as opposed to judicial, revocation proceedings, and sought nationwide class certification and injunctive relief.[34] The lead plaintiff, Irina Gorbach, received her citizenship in Utah.[35] Lead counsel, Jonathan Franklin, from Hogan & Hartson, worked out of the firm's Washington, D.C. offices.[36] The primary counsel for the INS, through the United States Department of Justice, Civil Division, Office of Immigration Litigation, worked out of offices in

30. *See* Gorbach v. Reno, 181 F.R.D. 642, 645 (W.D. Wash. Aug. 7, 1998) (stating that the regulation was promulgated in 1996 and that the INS had instituted proceedings under the regulation by the time of trial).

31. *See supra* note 12 (relying on the author's personal knowledge of the facts involved in the *Gorbach* litigation).

32. Gorbach v. Reno, 181 F.R.D. 642, 647 (W.D. Wash. 1998), *aff'd on rehearing en banc*, 219 F.3d 1087 (9th Cir. 2000) (acknowledging that none of the plaintiffs' administrative proceedings had concluded or resulted in their loss of citizenship).

33. Notably, Judge Rothstein also presided over another large-scale class action immigration case challenging the INS's processes for adjudicating legalization applications—a case that was litigated for more than a decade on the issues of class certification and preliminary injunctive relief. Immigrant Assistance Project of L.A. Cnty. Fed'n of Labor v. INS, 709 F. Supp. 998 (W.D. Wash. 1989). The case was filed in 1988, and the Ninth Circuit was still sorting through the certification and preliminary injunction issues in 2002. Immigrant Assistance Project of L.A. Cnty. Fed'n of Labor v. INS, 306 F.3d 842 (9th Cir. 2002).

34. *Gorbach*, 181 F.R.D. at 647.

35. *See supra* note 12 (relying on author's personal knowledge of the *Gorbach* litigation).

36. *See Gorbach*, 181 F.R.D. at 644 (listing, among others, Jonathan S. Franklin, Hogan & Hartson, Washington, D.C., as counsel for plaintiffs). *See also supra* note 12 (noting that some assertions are based upon the author's personal knowledge of the *Gorbach* litigation).

Washington, D.C. as well.[37] In fact, the government counsel's offices were located across the street from Hogan & Hartson's Washington, D.C. offices.[38]

The *Gorbach* case, however, was not the only case brought challenging the authority and specifics of the administrative revocation regulations. In addition, a similar suit was filed by an individual plaintiff in the Western District of New York.[39] Relying on *Califano v. Yamasaki*,[40] the government argued in the *Gorbach* litigation that any ruling on nationwide certification should avoid interfering with this pending parallel suit.[41]

Shortly after the filing of motions and memoranda in support and in opposition to class certification and a preliminary injunction, as well as a government motion to dismiss,[42] the district court made its ruling. Without the benefit of either discovery or a court hearing, the district court granted nationwide class certification and a nationwide preliminary injunction, as well as denied the

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37. *See supra* note 12 (relying on author's personal knowledge).

38. During the course of the *Gorbach* litigation, the United States Department of Justice Office of Immigration Litigation was located in the National Place Building, 1331 Pennsylvania Avenue, Washington, D.C., 2004. *See also supra* note 12 (relying on author's personal knowledge). This address is located along 13th Street, between F and E Streets, in downtown Washington, D.C. http://www.quadrangledevcorp.com/1331_Pennsylvania_Avenue_NW.cfm (last visited Mar. 28, 2012). Hogan & Hartson's, now Hogan Lovells, Washington D.C. law office was and still is located at 555 13th Street NW #800E Washington, DC 20004. *Hogan Lovells Washington D.C. Office*, HOGAN LOVELLS, http://www.hoganlovells.com/washington-dc/ (last visited Mar. 25, 2012). This address is located along the other side of 13th Street, NW, and also between F and E Streets in downtown Washington, D.C. Accordingly, these offices are directly across the street from one another, along 13th Street, NW, in Washington, D.C.

39. *See Gorbach*, 181 F.R.D. at 644 (acknowledging that "at least one other lawsuit challenging the regulations at issue . . . has been filed in another circuit"). *See also supra* note 12 (detailing the author's personal knowledge of the *Gorbach* case).

40. Califano v. Yamasaki, 442 U.S. 682, 702 (1979). *See infra* Part III.A (discussing the *Califano* case).

41. *See supra* note 12 (detailing the author's personal knowledge acquired in her capacity as lead counsel for the U.S. government in the *Gorbach* litigation). *See generally* Response by Defendants to Motion to Certify Class Action, Gorbach v. Reno, No. C98-278R (W.D. Wash. Apr. 3, 1998), ECF No. 46.

42. *See Gorbach*, 181 F.R.D. at 644 (detailing the motions filed by both parties).

government's motion to dismiss.[43] Although acknowledging that nationwide certification "may have a detrimental effect by foreclosing adjudication by a number of different courts . . . and of increasing, in certain cases, the pressure on [the Supreme Court's] docket,"[44] the district court granted class certification on a nationwide basis.[45] In the district court's opinion, the legal issue did not relate to the facts of individual class members' cases.[46] Moreover, the district court opined that "anything less than a nationwide class would result in an anomalous situation allowing the INS to pursue denaturalization proceedings against some citizens, but not others, depending on which district they reside in."[47]

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43. *Id.* at 644–45. Notably, the district court even rejected the government's motion to dismiss the claims of Irina Gorbach and Adolpho Erazo as moot, even though the administrative proceedings against these named plaintiffs had been terminated. According to the district court, "[a] class representative may continue to represent a class even if his or her own claims have become moot." *Id.* at 648 (citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44 (1991)). Yet, this exception to the doctrine of mootness only applies to named plaintiffs' claims that become moot after class certification has been granted or denied—not to claims that become moot prior to a decision on class certification. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980) (recognizing an exception to mootness that arises while the denial of class certification is on appeal for the limited purpose of litigating class certification); Sosna v. Iowa, 419 U.S. 393, 399 (1975) (recognizing an exception to mootness that arises after a class has been properly certified); Rocky v. King, 900 F.2d 864, 867 (5th Cir. 1990) (relying on *Sosna* and *Geraghty* to dismiss, as moot, a named plaintiff's claim that became moot before class certification was decided either way). Thus, the district court's contention that "[d]ismissing Gorbach and Erazo without first ruling on the motion for class certification would be premature" and its decision to decline "to reach the issue at [that] time," has the correct rule flipped around. *Gorbach*, 181 F.R.D. at 648. Moreover, named plaintiff Ruben Lara, who also had his administrative proceedings terminated, moved for voluntary dismissal in response to receiving a notice for his deposition during the limited discovery phase of the litigation that followed the certification and preliminary injunction decision, suggesting that he no longer felt sufficiently invested in the class's litigation to warrant appearing for a deposition. Motion for Voluntary Dismissal, Gorbach v. Reno, No. C98-278R (W.D. Wash. Dec. 28, 1998), ECF No. 115; Order Granting Plaintiff Lara's Motion for Voluntary Dismissal, Gorbach v. Reno, No. C98-278R (W.D. Wash. Jan. 26, 1999), ECF No. 129.

44. *Gorbach*, 181 F.R.D. at 644 (quoting *Califano*, 442 U.S. at 702).

45. *Id.*

46. *Id.*

47. *Id.*

Furthermore, the district court agreed to the nationwide scope despite its awareness of another pending case in another district raising the same legal issues[48] and despite the command of *Califano* that the certifying court should avoid interfering with ongoing parallel litigation.[49] Finally, finding against the government on the legal issue of statutory authority, the district court granted the preliminary injunction.[50]

Pursuant to 28 U.S.C. §1292(a)(1), the government filed an expedited appeal with the United States Court of Appeals for the Ninth Circuit, challenging the preliminary injunction,[51] though not the class certification decision.[52] At the time, Rule 23 did not include a method for seeking an immediate appeal from a grant or denial of class certification as now exists under Rule 23(f).[53] The original three-judge panel, in a split decision, ruled in favor of the government, reversing the district court's grant of a preliminary injunction.[54] Because the regulation had statutory authority, the majority opinion held that the district court's decision was based on

48. *Id.* ("The court is mindful that at least one other lawsuit challenging the regulations at issue here has been filed in another circuit.").

49. *Califano*, 442 U.S. at 702 (stating that a proper exercise of discretion "should take care to ensure . . . that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts").

50. *Gorbach*, 181 F.R.D. at 650.

51. Gorbach v. Reno, 179 F.3d 1111, 1114 (9th Cir. 1999), *aff'd in part, rev'd in part en banc*, 219 F.3d 1087 (9th Cir. 2000) (affirming that the citizens had standing but holding that the Attorney General lacked statutory authority).

52. *Id.* at 1117 (recognizing that the class certification decision was not a part of the appeal from the grant of the preliminary injunction).

53. Even before Federal Rule of Civil Procedure 23(f), though, some courts recognized the power of interlocutory review of class certification as part of injunctive relief review under 28 U.S.C. § 1292(a)(1). *See* Paige v. California, 102 F.3d 1035, 1039 (9th Cir. 1996) (recognizing that "certification of the class is . . . inextricably intertwined with the issuance of the interim injunction because effective review of the injunction requires review of the class certification"). *See also* Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 209 (3d Cir. 1990) (acknowledging that the preliminary injunction could not be upheld without reviewing and upholding the certification, but that it may be struck down without doing so); ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION, CASES AND MATERIALS 817–18 (2d ed. 2006) (discussing the decisions on this issue).

54. *Gorbach*, 179 F.3d at 1114.

an error of law.[55] Thus, the preliminary injunction issued by the district court, which relied upon this error of law, was an abuse of discretion. By contrast, the dissenting opinion agreed with the district court that the administrative process lacked statutory authority.[56]

Thereafter, plaintiffs petitioned and received rehearing en banc.[57] Yet, because the Ninth Circuit's en banc procedure simply selects eleven active judges, rather than the true full court,[58] the en banc panel does not always include the judges presiding over the original panel decision. As a result of this unique aspect of Ninth Circuit en banc review, neither of the judges in the original panel majority was included on the en banc panel; but the en banc panel did include the dissenting judge, Judge Kleinfeld.[59] In contrast to the original panel decision, the en banc panel adopted the position of the original dissenting judge—with Judge Kleinfeld then writing for the majority—affirming the preliminary injunction and holding the administrative process without statutory authority.[60]

The Solicitor General did not file a petition for a writ of certiorari, rendering the en banc panel decision final. In light of the nationwide class certification and injunction, this decision was frozen as the final statement on the issue. This left the federal government with only one method for correcting the large-scale problems of CUSA—individual judicial denaturalization proceedings.[61] Yet, when plaintiffs sought attorneys' fees under the

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55. *Id.*

56. *Id.* at 1126 (Kleinfeld, J., dissenting).

57. Gorbach v. Reno, 192 F.3d 1329 (9th Cir. 1999).

58. 9th Cir. R. 35-3.

59. Judge Rymer, who wrote the majority opinion in the original panel decision, was not selected for the en banc panel. *Gorbach*, 179 F.3d at 1124 (majority opinion). Judge Alarcon, who joined Judge Rymer's opinion in the original panel decision, was a senior judge and, therefore, not even eligible for the en banc panel. *See* 9th Cir. R. 35-3 ("The en banc court . . . shall . . . be drawn by lot from the active judges of the Court.").

60. Gorbach v. Reno, 219 F.3d 1087, 1089 (9th Cir. 2000) (en banc).

61. 8 U.S.C. § 1451(a) (2006). In light of the preliminary injunction, the government identified the most egregious cases of illegal grants in order to begin judicial denaturalization proceedings during the pendency of the appeal before the Ninth Circuit. The government had already identified 369 cases for judicial denaturalization, along with another 5,954 to be considered thereafter. *See*

Equal Access to Justice Act, the district court denied fees completely, finding the government's position "substantially justified."[62]

The *Gorbach* litigation provides an excellent illustration to set the stage for the issues discussed in this Article. Naturalization is a power unique to the federal government and perhaps the most significant benefit this country can bestow on a person. Considering the CUSA background, the litigation involved substantial political ramifications. In light of the substantial resources already devoted to the administrative revocation process, the issue of statutory authority impacted agency policymaking—particularly in the area of administrative efficiency.[63] The recourse to judicial denaturalization proceedings required additional litigation resources, including resources from both the Executive and Judicial Branches. The existence of parallel litigation at the time of certification, as well as the district court's ultimate decision that the government's position was substantially justified, demonstrate that *Gorbach* raised an issue with great potential for differences of opinion among the circuits—and thus, the great potential benefit of development of the law through debate. Yet, the nationwide class certification prevented any further development of this important issue of first impression, affecting thousands of newly naturalized citizens and the integrity of the naturalization process.

Gorbach, 179 F.3d at 1127–28 (Kleinfeld, J., dissenting) (citing to a recent Department of Justice press release contained within the appendices).

62. *See* Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (2006) (permitting a "prevailing party" to recover fees and costs associated with adversarial litigation with the United States unless the position of the government was "substantially justified").

63. *See Gorbach*, 179 F.3d at 1124. Among the 1998 congressional appropriations to the INS, Congress specially designated $3,391,000 to deal with the revocation of illegally and fraudulently procured grants of naturalization. H.R. REP. NO. 105–405, at 106 (1997) (Conf. Rep.). These specially designated funds included funds to create 27 new positions at the INS for such purposes. H.R. REP. NO. 105–207, at 31 (1997).

III. THE SUPREME COURT CASES

A. Califano v. Yamasaki*: The Power to Certify on a Nationwide Scope*

The United States Supreme Court confronted the issue of sustaining class actions with a nationwide scope in *Califano v. Yamasaki*.[64] In *Califano*, the Court reviewed a district court's certification of a nationwide class action—a nationwide class action *against the federal government*, in fact. Petitioner challenged the power of the district court to certify such a class.[65] Among petitioner's contentions, as the Court viewed them, was that a nationwide class is "unwise" because it "forecloses reasoned consideration of the same issues by other federal courts and artificially increases the pressure on the docket of [the] Court by endowing with national importance issues that, if adjudicated in a narrower context, might not require [the Court's] immediate attention."[66]

To the extent that petitioner directly challenged the jurisdictional reach of Federal Rule of Civil Procedure 23, the Court rejected petitioner's arguments.[67] After all, "[n]othing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule."[68] Significantly, though, the Court did "concede the force" of petitioner's arguments regarding the negative impact nationwide class actions have on development of the law, as well as their potential to increase the pressure on the Court's docket.[69] As a result, the Court cautioned against the nationwide

64. Califano v. Yamasaki, 442 U.S. 682 (1979).

65. *Id.* at 701–03.

66. *Id.* at 701–02.

67. *Id.* at 702.

68. *Id.* Yet, as Rule 82 makes clear, the Federal Rules of Civil Procedure do not provide jurisdiction to courts. *See* FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts."). And, the Court's reliance on Rule 23 is further suspect because to the extent that the nationwide scope is inconsistent with the structural protections inherent in the United States Constitution, the Constitution, not Rule 23, provides the proper source for resolving this issue. *See infra* Part V (discussing the application of the doctrine of constitutional avoidance to a serious constitutional issue raised by preventing a coequal branch's role in developing the law).

69. *Califano*, 442 U.S. at 702.

scope because "[i]t *often* will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts."[70] Despite this concern, the Court declined to adopt a rule against such a class in all situations.[71] Instead, the Court found the district court's certification decision to be within that court's discretion, and therefore, the Court upheld the nationwide class certified in that case.[72]

B. United States v. Mendoza: *The Federal Government as Litigant, and its Greater Role in Developing the Law*

Perhaps the most significant Supreme Court case to examine the role of litigation against the federal government in developing the law, though, is not one that deals with class actions—nationwide or otherwise—against the federal government. Rather the case that best exemplifies the Court's position on the role that government litigation plays in developing the law, *United States v. Mendoza*, deals with the issue of nonmutual offensive collateral estoppel against the federal government.[73] In refusing to extend the application of nonmutual collateral estoppel to suits against the United States, the Court reasoned that the government is different than private parties in ways that significantly impact development of the law.[74]

Under the doctrine of collateral estoppel, an issue that is once litigated by the parties and conclusively decided by a court cannot be relitigated in other cases by a party to the original suit.[75] Efficiency is the primary rationale behind the general doctrine—with its many requirements designed to assure fairness.[76] In the decade prior to *Mendoza*, though, the Court broadened the doctrine by permitting its

70. *Id.* (emphasis added).
71. *Id.* at 702–03.
72. *Id.* at 703.
73. United States v. Mendoza, 464 U.S. 154, 158 (1984).
74. *Id.* at 159–63.
75. *Id.* at 158 (citing Montana v. United States, 440 U.S. 147, 153 (1979)).
76. *See id.* (identifying the functions of collateral estoppel as relieving parties of the cost of multiple lawsuits, conserving judicial resources, and preventing inconsistent decisions).

application without the common law requirement of mutuality.[77] As a result, a litigant who was not a party to the prior suit and, therefore, not bound by it, may be permitted to use it against a litigant who was a party. This broadening of collateral estoppel was justified by the greater efficiencies flowing from application of the doctrine by litigants beyond those who were parties or privies to the prior litigation.[78] Moreover, the Court reasoned that this extension was also fair to the party who lost on the issue in the prior suit because "no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation."[79]

Despite the efficiency and fairness of limiting a party to only one opportunity to litigate an issue by permitting nonmutual collateral estoppel, the Court still refused to extend its application to suits against the federal government.[80] The Court justified this refusal by pointing out that the federal government is different than private litigants—particularly in ways that impact the development of the law.[81] The frequency,[82] geographical breadth,[83] and

77. *See Mendoza*, 464 U.S. at 159 n.4 (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979)) ("Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party."). *See Parklane Hosiery*, 439 U.S. at 327–30 (conditionally permitting the use of nonmutual "offensive" collateral estoppel); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971) (abandoning the requirement of mutuality for "defensive" use of collateral estoppel).

78. Notably, though, the doctrine of collateral estoppel still can only be applied against a party, or its privies, to the prior litigation.

79. Standefer v. United States, 447 U.S. 10, 24 (1980) (referring to *Blonder-Tongue*, 402 U.S. 313 (1971), and *Parklane Hosiery*, 439 U.S. 322 (1979)).

80. *Mendoza*, 464 U.S. at 163.

81. Most courts recognize *Mendoza* as an absolute bar to nonmutual offensive collateral estoppel against the federal government. *See, e.g.*, National Medical Enters. v. Sullivan, 916 F.2d 542, 545 (9th Cir. 1990) ("[N]onmutual collateral estoppel cannot be asserted against the government."); United States v. Alexander, 743 F.2d 472, 476 (7th Cir. 1984) ("The Court [in *Mendoza*] held that there was no nonmutual offensive collateral estoppel against the Government."). Yet, not all courts or commentators agree that *Mendoza* creates an absolute rule against

substantial importance of the issues[84] raised in government litigation place the federal government as a party in a significantly different position than private litigants. Furthermore, the Court acknowledged the political and policy role,[85] as well as the decision-making

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nonmutual offensive collateral estoppel against the government. *See* Benjamin v. Coughlin, 905 F.2d 571, 576 (2d Cir. 1990) (distinguishing the interests outlined in *Mendoza* from the ones outlined in the case at hand); Colo. Springs Prod. Credit Ass'n v. Farm Credit Admin., 666 F. Supp. 1475, 1475 (D. Colo. 1987) (positing that the rule set forth in *Mendoza* is not absolute). *See also* Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847, 859 (1986) (pointing out the possible dangers of interpreting *Mendoza* as a "blanket rule"); Bradley Bishop Jones, Note, *Precluding Government Relitigation of Statutory Interpretations:* Clark-Cowlitz Joint Operations Agency v. Fed. Regulatory Comm'n, 10 U. PUGET SOUND L. REV. 301, 318 (1987) (noting that *Mendoza* did not answer whether or not nonmutual collateral estoppel could be applied against the government); Michael Nathan Mills, Comment, *Inequality Creates Exceptions: Limiting* United States v. Mendoza *to Its Policy Rationale*, 30 U.C. DAVIS L. REV. 889, 890 (1997) (indicating that some courts have read *Mendoza* much more narrowly than an absolute rule). *Cf.* Thomas v. Heckler, 598 F. Supp. 492, 496 n.1 (M.D. Ala. 1984) (distinguishing nonmutual offensive collateral estoppel from the application of binding law of the circuit). As explained in Part VI, though, the proposed rule against nationwide class actions accounts for some of the exceptions to and criticisms of the *Mendoza* rule. *See infra* notes 238–239 and accompanying text (discussing grounds for rebutting the presumption against nationwide class actions involving the federal government).

82. *Mendoza*, 464 U.S. at 159–60 (discussing the frequency of litigation in which the United States or one of its agencies is a party). *See also infra* Part V.B (analyzing this important difference between the United States and private litigants).

83. *Id.* at 159 (acknowledging the difference between the geographical breadth of litigation against the United States and litigation against private parties). *See also infra* Part V.B (analyzing the impact of geographical breadth on litigation against the United States).

84. *Id.* at 160 (discussing the greater public importance of the issues raised in government litigation than those in private litigation). *See also infra* Part V.A (examining the impact of this difference between government and private litigation on the development of the law).

85. *Mendoza*, 464 U.S. at 161 (discussing the important policy role played by the Solicitor General and the need for independence between different administrations of the executive branch). *See also infra* Part V.C (examining the impact of the role of the Solicitor General and its independence between administrations).

processes,[86] of the Solicitor General that justifiably demand greater flexibility among different administrations and multiple court opinions,[87] which the use of nonmutual collateral estoppel would prevent. Accordingly, the Court concludes that the United States, as a litigant, is different from private litigants "so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government."[88] In the Court's view, this "conclusion will better allow thorough development of legal doctrine by allowing litigation in multiple forums."[89]

The Court declined to apply this distinction between the federal government and private litigants to all uses of collateral estoppel though.[90] Instead, where mutuality is present, the doctrine of collateral estoppel remains generally applicable. According to the Court, "[t]he concerns underlying our disapproval of collateral estoppel against the government are for the most part inapplicable where mutuality is present . . . ."[91] Although the government would be bound in future litigation with the same parties, it would be "free to litigate" the issue against different parties.[92] Moreover, in the interest of fairness to the previously prevailing party, the continued application of mutual collateral estoppel protects the prevailing party from the time and expense associated with relitigating issues it already won in prior litigation.[93]

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86. *Mendoza*, 464 U.S. at 160–61 (acknowledging the differences between the Solicitor General's policy for determining when to appeal an adverse decision and the decision to appeal by private parties). *See also* Part V.C (examining the Solicitor General's role in determining which cases to appeal and when to seek certiorari).

87. As the Court observes, "if nonmutual estoppel were routinely applied against the government, this Court would have to revise its practice of waiting for a conflict to develop before granting the government's petitions for certiorari." *Mendoza*, 464 U.S. at 160 (citing SUP. CT. R. 17.1).

88. *Id.* at 163.

89. *Id.*

90. *Id.* at 163–64.

91. *Id.* at 163–64.

92. *Id.* at 164.

93. *Id.*

C. *Reexamining* Califano *and* Mendoza—*The Detrimental Effect of the Nationwide Class Action on Development of the Law*

Many similarities exist between the benefits and disadvantages of nationwide certification and nonmutual collateral estoppel. Like nonmutual collateral estoppel, nationwide certification maximizes the efficiencies inherent in aggregate litigation by reducing to one action the resolution of common issues.[94] Yet, the same fairness is still achieved by limiting a litigant to "one full and fair hearing" on the common issues. On the negative side, legal decisions made in a nationwide class action, like those precluded by nonmutual collateral estoppel, will often have the effect of "freezing the first final decision rendered on a particular issue."[95] As is more fully explained in Parts III & IV, this interest is essentially the same one the Court considered significant in *Mendoza*.[96] Thus, because the federal government is different than private parties in ways that impact the development of the law, the *Mendoza* rationale should resolve the tension between efficiency and development through debate in favor of the latter.

Although the rationale of *Mendoza* applies with near equal force to the decision to certify a nationwide class against the federal government, its literal holding does not. As an initial matter, *Mendoza* is easily distinguishable because it deals not with class certification, let alone nationwide certification, but with nonmutual offensive collateral estoppel against the government. Yet, as explained earlier, *Mendoza*'s reasoning is based on the difference between the United States, as a litigant, and private litigants.[97] As discussed more fully in Part IV, these differences remain the same, resulting in a similar detrimental effect on development of the law when applied to nationwide certification. *Califano*, a case dealing

94. *See infra* Part IV (discussing the efficiency associated with nationwide class actions).

95. *Mendoza*, 464 U.S. at 160. *See also* Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (acknowledging the effect of nationwide class resolution on development of the law).

96. *See supra* Part III.B (examining *Mendoza* and the factors the Court considered when reaching its decision).

97. *See supra* Part III.B (analyzing the Court's discussion of the government's status contrasted with that of a private litigant).

with certification of a nationwide class action against the federal government,[98] would seem more directly on point than *Mendoza*. And, because the Court approved the certification decision in *Califano*,[99] its holding arguably applies—not *Mendoza*'s. Yet, unlike in *Mendoza*, the Court in *Califano* never addressed the "government is different" argument. Instead, *Califano* focused on the geographical scope of the certifying court's power under Rule 23[100]—not on the political, policy, and constitutional ramifications of the government as a litigant. In fact, to the extent that the *Califano* Court considers the development of the law issue, it warns against nationwide certification, finding that it will "often" be better to allow different courts to consider a significant legal issue.[101] Because *Mendoza* cites to *Califano* in support of its development of the law principle,[102] the Court suggests that the two decisions both support this primary rationale. At the very least, the applicability of "the government is different" rationale to nationwide class certification is an open issue.[103]

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98. *See Califano*, 442 U.S. at 687 (noting that the plaintiffs, in their action against the federal government, sought class certification); *supra* Part III.A (detailing the facts of the *Califano* case).

99. 442 U.S. at 706; *supra* Part III.A.

100. *See Califano*, 442 U.S. at 702 (discussing the court's powers under Rule 23 and noting that the Rule does nothing to "limit the geographical scope of a class action"); *supra* Part III.A (discussing the Court's focus in *Califano*).

101. *Califano*, 442 U.S. at 702. *See* Torres v. Shalala, 48 F.3d 887, 891 n.7 (5th Cir. 1995) (noting that the *Califano* court "advised federal courts to exercise caution before certifying a national class").

102. United States v. Mendoza, 464 U.S. 154, 160 (1984) (citing to *Califano*, 442 U.S. at 702).

103. A similar, though distinguishable, issue is presented when a lower court issues a nationwide, administrative injunction against a federal agency in non-class litigation. Daniel J. Walker, Note, *Administrative Injunctions: Accessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1134–39 (2005) (criticizing the use of administrative injunctions, in part, because they undermine the role that government litigation plays in development of the law by foreclosing further lower court consideration of the governing legal issue). *See also* L.A. Haven Hospice v. Sebelius, 638 F.3d 644, 665 (9th Cir. 2011) (vacating a nationwide injunction). Of course, the administrative injunctions issue is distinguishable because there is a lack of mutuality and the benefit of the injunction will be enjoyed by parties not before the court without the reciprocal risk of being bound by an adverse ruling. Opponents of administrative injunctions easily accept this distinction. Walker, *supra* note 103, at 1136. Yet, this

Furthermore, if one focuses on the narrow holding of *Mendoza* rather than its reasoning, the unavailability of nonmutual collateral estoppel against the federal government seems to support certification of such class actions. Essentially, because mutuality is necessary to receive the benefit of the estoppel doctrine, nationwide class certification becomes necessary for achieving complete preclusion in a single suit.[104] Accordingly, a litigant who wants to foreclose the government from litigating an issue in the future can undermine *Mendoza*'s concerns by simply obtaining mutuality through nationwide class certification. Granted, *Mendoza*'s holding of non-applicability of collateral estoppel against the federal government is limited to non-mutuality, leaving mutual collateral estoppel intact.[105] Yet, it is doubtful that the Court intended its concerns to be circumvented in this fashion.[106] Instead, the Court's reasoning suggests that it did not have nationwide class action mutuality in mind when it limited its holding in *Mendoza* to nonmutual collateral estoppel. No reference is made to class action litigation in *Mendoza*—let alone nationwide class actions. Quite the contrary, the Court explained itself by claiming that its limitation still "avoids the problem of freezing the development of the law because the government is still free to litigate that issue in the future with some other party."[107] This statement reinforces the premise that nationwide preclusion through use of a nationwide class action was not considered in the context of *Mendoza*. Moreover, the Court's assertion that permitting mutual collateral estoppel will "spare[] a

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distinction bears little significance with regard to the detrimental effect on the development of the law. *Cf.* Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n, 263 F.3d 379, 394 (4th Cir. 2001) (recognizing that "[w]e would in effect be imposing our view of the law on all the other circuits").

104. *Cf.* Lopez v. Heckler, 572 F. Supp. 26 (C.D. Cal. 1983) (involving a circuit-wide class action designed to achieve a similar purpose).

105. *See Mendoza*, 464 U.S. at 163–64 ("The concerns underlying our disapproval of collateral estoppel against the government are for the most part inapplicable where mutuality is present . . . .").

106. In fact, the Court clearly states that its "*concerns* underlying [its] disapproval of collateral estoppel against the government are for the most part inapplicable where mutuality is present . . . ." *Id.* (emphasis added). *Cf.* Kanter v. CIR, 590 F.3d 410, 419-20 (7th Cir. 2009) (expanding the scope of Mendoza to defensive issue preclusion because of the equal applicability of the "policy reasons for treating the government differently").

107. *Id.* at 164.

party that has already prevailed once from having to relitigate,"[108] has less force when the "prevailing party" is merely an absent class member in a nationwide class.[109] After all, the absent class member is not the party who actually devoted time, energy, and other resources in order to prevail in the original suit. Accordingly, the application of the *Mendoza* rationale to a nationwide class certification decision is not foreclosed by the literal limits of the case itself to non-mutuality.

Finally, the Supreme Court's decision in *Califano* stresses the deferential role of an appellate court reviewing an otherwise legally proper class certification.[110] At that point in the litigation, the nationwide class has already been certified. Thus, the procedural posture of the *Califano* case leaves open the possibility of applying the *Mendoza* principle at the certification stage.[111] Nothing in *Califano* is inconsistent with the certifying court declining to certify a class action against the federal government on a nationwide scope to assure greater development of the legal issues involved. Quite the contrary—the *Califano* Court's use of the "often preferable" language, suggests that it supports the use of *Mendoza*-like principles before certifying a class action on a nationwide basis.[112]

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108. *Id.*

109. *Cf.* Antonio Gidi, *Issue Preclusive Effect of Class Certification Orders*, 63 HASTINGS L.J. 1023, 1068 (2012) (recognizing how the unique nature of class action litigation justifies modifications of principles of issue preclusion).

110. *See* Califano v. Yamasaki, 442 U.S. 682, 703 (1979) ("The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court.").

111. *Cf.* Gidi, *supra* note 109 at 1064 (proposing a rebuttable presumption against relitigation of class certification applied as a matter of trial court discretion at the certification stage).

112. *See* Torres v. Shalala, 48 F.3d 887, 891 n.7 (5th Cir. 1995) (noting that the *Califano* court "advised federal courts to exercise caution before certifying a national class"). *See also* Geraghty v. U.S. Parole Comm'n, 719 F.2d 1199, 1205 (3d Cir. 1983) (upholding district court's refusal to certify a nationwide class and limiting the class to the Middle District of Pennsylvania, reasoning that a nationwide class "might interfere with the litigation of similar issues in other judicial districts").

IV. THE TENSION BETWEEN UNIFORMITY/EFFICIENCY AND THE DEVELOPMENT OF THE LAW THROUGH DEBATE AMONG THE LOWER COURTS

The clearest benefits to a nationwide class action are the increased uniformity and efficiency it brings. Unlike individual or smaller-scale aggregate litigation, which leaves open the possibility of inter-circuit splits, the nationwide class action provides uniformity without the need for Supreme Court review. The nationwide class action also provides increased efficiency by avoiding multiple suits involving the same legal issues.

Referred to by Judge Henry J. Friendly as "the most basic principle of jurisprudence,"[113] uniformity has apparent virtues, including providing equal treatment, greater transparency, and some measure of fairness. A substantial body of scholarship exists regarding uniformity of law—particularly uniformity of federal law.[114] As one scholar observes, "uniformity in the interpretation and application of federal law throughout the United States" is a

113. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982). *See also* Colo. Springs Prod. Credit Ass'n v. Farm Credit Admin., 666 F. Supp. 1475, 1477 (D. Colo. 1987) (noting Lord Mansfield's recognition of the obligation of the courts to "act alike in all cases of like nature" (quoting R. v. Wilkes, 98 Eng. Rep. 327, 335 (1770))).

114. *See generally* Dragich, *supra* note 7 (examining the issue of uniformity of federal law); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (examining the value placed on uniform interpretation of federal law); Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984) (detailing conflicts between the federal judiciary on interpretation of federal law); Caleb Nelson, Review, *Statutory Interpretation and Decision Theory: Judging Under Uncertainty: An Institutional Theory of Legal Interpretation, Adrian Vermeule*, 74 U. CHI. L. REV. 329 (2007) (suggesting that judges limit their role in interpreting federal statutes); Note, *Securing Uniformity in National Law: A Proposal for the Courts of Appeals*, 87 Yale L.J. 1219 (1978) (discussing the lack of uniformity in national law and suggesting ways to increase it); Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 831 (1993) (advocating for increased en banc review to increase uniformity of statutory interpretation); Joseph F. Weis, Jr., *The Case for Appellate Court Revision*, 93 MICH. L. REV. 1266, 1269 (1995). *Cf.* Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1626 (2007) (discussing the negative consequences of a nationally-unified body of patent law).

"necessary corollary of supremacy" of federal law.[115] Yet, as a result of circuit independence and the limits of the Supreme Court's docket, the federal judiciary fails to provide this uniformity.[116] Substantial numbers of circuit splits exist and remain unresolved for long periods of time.[117] The federal judiciary's lack of uniformity carries over to the Executive Branch through the use of inter-circuit nonacquiescence by federal administrative agencies.[118] Yet, as

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115. Dragich, *supra* note 7, at 536. *See also* Evan Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38 (1994) ("Both the Constitution's Framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process."). *But see* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 272 (5th ed. 2007) (referring to this justification for federal question jurisdiction as "problematic").

116. *See generally* Dragich, *supra* note 7 (discussing the serious lack of uniformity in the federal judiciary); *see also* Martha Dragich, *Back to the Drawing Board: Re-examining Accepted Premises of Regional Circuit Structure*, 12 J. APP. PRAC. & PROCESS 201 (2011) (examining how the regional structure of the United States circuit courts limits uniformity).

117. *See* David F. Pike, *High Court Debut at 29*, L.A. DAILY J., Feb. 23, 2000, at 1 (estimating two to three thousand circuit splits, most of which have never reached the Supreme Court); Dragich, *supra* note 7, at 538 n.13 (providing statistics and citations regarding circuit splits). *See also* Mary Garvey Alegero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 606 (2003) (examining unresolved circuit splits). In particular, Arthur D. Hellman's scholarship examines the extent and impact of intercircuit conflicts. *See generally* Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995) (continuing Mr. Hellman's study of inter-circuit conflicts); Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247 (1998) (conducting studies concerning inconsistency of circuit courts of appeals in interpreting federal law); Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81 (2001) (noting that conflicts between circuits are so numerous that the Supreme Court does not adjudicate a large number of conflicts).

118. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (discussing inter-circuit nonacquiescence); Carolyn A. Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399 (1989) (discussing inter-circuit nonacquiescence); Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471 (1986) (discussing inter-circuit nonacquiescence). *Cf.* Aaron-Andrew P. Bruhl, *Hierarchy*

evidence that the desire for uniformity is manifest, even critics of administrative inter-circuit nonacquiescence accept its interim use in order to preserve uniform application of federal administrative law while a legal issue is being litigated.[119]

To the extent that a particular case meets the requirements of Federal Rule of Civil Procedure 23, the nationwide class action achieves uniformity without the need to navigate through potential circuit splits and await Supreme Court resolution. In fact, the district court's rationale for certifying the nationwide class in *Gorbach* implicates this power to achieve nationwide uniformity without the risk or uncertainty connected with smaller-scale litigation. As the district court explains, "anything less that [sic] a nationwide class would result in an anomalous situation allowing the INS to pursue denaturalization proceedings against some citizens, but not others, depending on which district they reside in."[120] This reasoning implicates the fairness[121] component of uniformity and displays hostility toward the permissibility of circuit conflicts.

The desire for uniformity seems particularly appropriate when applied to the federal government. Because it administers and enforces a single body of law, most citizens would expect the federal government to interpret and apply a law in a uniform fashion. In fact, the expectation of uniformity even appears in the Constitution's commands to the Legislative Branch within Article I, including uniform taxation,[122] as well as a "uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."[123] Moreover, maintaining multiple interpretations

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and Heterogeneity: How to Read a Statute in a Lower Court, 97 CORNELL L. REV. 433, 482-83 (2012) (arguing for strong deference to agency interpretations to provide greater uniformity).

119. Estreicher & Revesz, *supra* note 118, at 743.

120. Gorbach v. Reno, 181 F.R.D. 642, 644 (W.D. Wash. 1978).

121. Courts also rely upon the unfairness associated with the disproportionate power between individuals and the federal government as a justification for certifying nationwide class actions. *See* Lynch v. Rank, 604 F. Supp. 30, 38–39 (N.D. Cal. 1984), *aff'd*, 747 F.2d 528 (9th Cir. 1984), *amended on reh'g on other grounds*, 763 F.2d 1098 (9th Cir. 1985) (noting that it would not be "equitable to pit plaintiffs against . . . the federal government in a state-by-state battle").

122. U.S. CONST. art. I, § 8, cl. 1.

123. U.S. CONST. art. I, § 8, cl. 4.

and federal programs could waste government resources and result in avoidable complexities.[124]

Moreover, the nationwide class carries the potential to combine uniformity with the goal of efficiency. After all, a fundamental goal of the Federal Rules of Civil Procedure is efficiency.[125] Like most aggregate litigation, the class action achieves increased efficiencies.[126] To apply these efficiencies on a nationwide scope, therefore, further increases these efficiencies, as well as supplies a simple route to uniformity. As one court acknowledged, "[t]o shop in a number of courts of appeals in hopes of securing favorable decisions is not only wasteful of overtaxed appellate resources but dissipates agency energies as well."[127] In particular, without substantial factual differences between individual cases, limiting the scope of a class action arguably increases this inefficiency. For example, in *Perez-Funez v. INS*, the district court certified a nationwide class in an action against the INS challenging its procedure for dealing with unaccompanied minors' request for voluntary departure. The court reasoned that "there is little need to allow adjudication by different courts in different factual contexts, because the factual context will never change, regardless of the forum in which it is being litigated . . . ."[128]

Yet, applying some of the lessons of the *Gorbach* litigation, immediate efficiency can come at the price of overall efficiency. Although the nationwide class action provided an efficient means of deciding the fundamental question of statutory authority for administrative revocation, it required a complete shutdown of an

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124. Estreicher & Revesz, *supra* note 118, at 748 (recognizing that "[d]ifferential administration can impose significant costs on an agency"). *See also* Hi-Craft Clothing v. NLRB, 660 F.2d 910, 912 n.1 (3d Cir. 1981) (suggesting acquiescence to the first ruling of a circuit court to avoid wasting agency resources).

125. FED. R. CIV. P. 1; *See, e.g.,* United Mine Workers of America v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 1138 (1966) (recognizing that "[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of an action consistent with fairness to the parties . . . ").

126. Walters v. Reno, 145 F.3d 1032, 1045 (9th Cir. 1998) (recognizing that one of the purposes of the class action device is the efficiency it brings).

127. Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 912 n.1 (3d Cir. 1981) (recommending the agency acquiesce to the first circuit court to decide a particular issue to avoid wasting government resources).

128. Perez-Funez v. INS, 611 F. Supp. 990, 1001 (C.D. Ca. 1984).

administrative program to which Congress had designated substantial resources[129] and the pursuit of individual district court denaturalization cases, increasing the overall burden on both the agency and the judiciary. To the extent that the decision was correct, this was an inevitable cost. But, considering the likelihood that further development may have resulted in a different conclusion, this increased demand on litigation and judicial resources was an avoidable cost.

Weighed against the costs to uniformity and efficiency, a limit on the geographical scope of class actions enhances the ability of the lower federal courts to develop the law through debate among them. By allowing a legal issue to "percolate" through the lower federal courts before it reaches the Supreme Court, "the Court's judgment can be informed by and reflect lessons gleaned from independent legal analyses performed by the lower courts."[130] The Court recognizes the virtue of allowing legal issues to be debated among the lower federal courts prior to resolution by the Supreme Court in both *Mendoza* and *Califano*, among other cases.[131] Even Justice John Paul Stevens, who expresses a preference for uniformity of federal law,[132] has recognized that "[t]he doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result."[133] This "dialogue" among the lower courts and ultimately with the Supreme Court allows the law to develop through debate.[134] As Samuel

129. *See supra* note 63 (citing congressional funding specifically targeting the administrative revocation process).

130. Caminker, *supra* note 115, at 54. *See also* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System,* 61 AM. U. L. REV. 457, 482-83 (2012) (emphasizing the benefits of "percolation" on development of constitutional law); Dragich, *supra* note 7, at 554–55 (acknowledging the "percolation" theory).

131. United States v. Mendoza, 464 U.S. 154 (1984); Califano v. Yamasaki, 442 U.S. 682 (1979).

132. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 389–90 (2000) (Stevens, J.) (calling attention to "the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way").

133. John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982).

134. *See* Estreicher & Revesz, *supra* note 118, at 737 ("[D]octrinal and experiential dialogue on the part of the circuits aids the Supreme Court in deciding cases on the merits.").

Estreicher and Richard L. Revesz recognize, "[d]ifficult issues are likely to have been decided incorrectly in the first instance and are also likely to result in intercircuit conflicts."[135] By looking for circuit conflicts as a critical factor before granting certiorari, the Supreme Court ratifies the value of development in the law through debate.

Looking at the *Gorbach* litigation, as previously suggested, further litigation likely would have yielded some differences of opinion and further development of the law before the Solicitor General faced the decision whether to pursue Supreme Court review. After all, a similar case already had been filed in another district court even before the certifying court decided to certify the nationwide class.[136] Moreover, in denying plaintiffs' request for attorneys' fees, the district court concluded that the government's position was "substantially justified."[137] Considering that the "substantial justification" defense does not simply mean the government's position was not frivolous, but rather means that reasonable minds could differ,[138] the Court's conclusion further demonstrates the potential for a reasonable difference of opinion among the circuits on this important issue and the opportunity for further development of the law.

The regional and pyramid structure of the federal judiciary also shows that the freedom for the lower courts to disagree was not a legislative accident.[139] In particular, Richard L. Marcus contends that circuit independence was the "inevitable" result of the structure of the Judiciary Act of 1891,[140] also known as the Evarts Act.[141]

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135. *Id.*

136. *See supra* note 39 (discussing the *Gorbach* litigation and noting that another similar case was pending in the Western District of New York).

137. Order Denying Plaintiffs' Motion for Attorneys' Fees at 1, Gorbach v. Ashcroft, No. C98-278R (W.D. Wash. Sept. 5, 2001), ECF No. 171.

138. *Accord* Pierce v. Underwood, 487 U.S. 552, 564 (1988) (noting that "substantially justified" means justified in substance or to a degree that could satisfy a reasonable person).

139. *See* Dragich, *supra* note 7, at 538 ("The regional structure of the courts of appeals . . . values intra-circuit consistency over uniformity.").

140. The Judiciary Act of 1891, ch. 517, 26 Stat. 826 (1891) (creating the intermediate appellate court system in the federal judiciary).

141. Marcus, *supra* note 114, at 686. *See also* Dragich, *supra* note 7, at 543 (citing to Marcus, *supra* note 114).

This system of multiple lower federal courts of general jurisdiction by which district courts are governed by what appellate circuits do suggests as much.[142] Moreover, the discretion of the Supreme Court to deny its review reinforces congressional awareness that circuit splits will not only exist, but will go unresolved until the issue is sufficiently mature to warrant Supreme Court review. Although these characteristics may simply be "concessions to practicality,"[143] they represent "departures from the goal of uniformity"[144] and efficiency that Congress apparently accepts.

By contrast, the Federal Circuit's reign over issues of patent law stands in sharp contrast to the general circuit courts of appeals in this regard. Because the Federal Circuit has exclusive jurisdiction over patent law issues, its holdings provide uniformity. Notably, some scholars actually criticize the uniformity in patent law because it comes without the benefit of the dialogue enjoyed by the other circuits.[145] Yet, this distinction between the uniformity of the Federal Circuit's pronouncements of patent law and the pronouncements of general circuit courts of appeals demonstrates that if Congress wants to minimize disagreement among the circuits, it is free to do so by limiting appellate review of particular issues to particular appellate courts.[146]

Furthermore, the Constitution's creation of only one Supreme Court, leaving the creation of the lower federal courts to Congress,[147] demonstrates that this freedom was not a constitutional accident either. In fact, the clarity of the "one" Supreme Court limit and the reference to the congressionally created lower federal courts as

142. *See* Estreicher & Revesz, *supra* note 118, at 726 (explaining that a combination of factors intentionally leads to "the law remain[ing] in a state of flux even well after a particular court of appeals has announced its rule on a subject").

143. Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 84 (1990).

144. *Id.*

145. Nard & Duffy, *supra* note 114, at 1502, 1645–46, 1660–61.

146. *See* Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary,"* 78 TEX. L. REV. 1513, 1516 (2000) (stating that "certainly Congress may move some attributes of judicial power . . . from one federal court to another" (emphasis omitted)).

147. U.S. CONST. art. III, § 1, cl. 1. *See also* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 221 n.60 (1985) (describing the "suprem[acy]" of the high court, even if Congress created additional courts).

"inferior" weighs heavily against empowering nationwide effect to such inferior court rulings. The combination of the Constitution and the legislative structure of the federal judiciary demonstrates that it is "the ultimate function of the Supreme Court . . . to maintain the supremacy and uniformity of the Constitution and laws of the United States."[148] Despite the inefficiencies of this system, it is the design under the Constitution and federal law. By implication, therefore, this constitutional and legislative design ratifies the value of developing the law through debate in the lower courts.

V. THE GOVERNMENT, AS A LITIGANT, IS DIFFERENT THAN PRIVATE PARTIES

"[T]he Government is not in a position identical to that of a private litigant."[149]

The United States, as a litigant, is in a different position than a private litigant in ways that are significant in resolving the tensions created by nationwide certification of actions against the federal government. Due to the importance of the issues it litigates, the geographical breadth and frequency of such litigation, as well as the policy role of the Solicitor General, the government plays a more significant role than private parties in the development of the law. Moreover, the Constitution's structure is designed to protect that role. Accordingly, similar to the Court's resolution on the issue of nonmutual collateral estoppel, a rule that disfavors and limits the scope of class action certification against the federal government is justified by these critical and unique differences.

A. The Nature of the Issues and the Constitutional Design

Perhaps the most significant differences between government and private litigation are the nature of the issues raised in government litigation and the way in which the Constitution's

148. Dragich, *supra* note 7, at 541.
149. INS v. Hibi, 414 U.S. 5, 8 (1973).

structure is designed to protect the Executive Branch's role in developing the law. As the Court recognizes in *Mendoza*, government litigation often involves questions of greater public importance than private litigation.[150] In particular, many of the protections in the United States Constitution are aimed at protecting citizens against government action and thus limit the power of the government. As a result, "many constitutional questions can arise only in the context of litigation to which the Government is a party."[151] For example, the constitutionality of the corporate political finance restrictions at issue in *Citizens United v. Federal Election Commission*[152] was unlikely to arise outside of litigation involving the federal government. Likewise, the habeas corpus rights of the detainees at Guantanamo and the constitutionality of the military commissions[153] could only arise in litigation against the federal government. Even on issues raised by private litigants against state governmental action, the United States tends to intervene or bring parallel litigation. As an example, although private litigants have challenged state efforts to control immigration, it is the litigation brought by the United States that captured the most attention and obtained the most success.[154] Ultimately, it was the action brought by the United States against Arizona S.B. 1070 that the Supreme Court chose for purposes of deciding many of the pre-emption issues raised by such state efforts to control immigration.[155] In addition, significant issues of statutory

150. United States v. Mendoza, 464 U.S. 154, 160 (1984).

151. *Id.*

152. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

153. *See* Boumediene v. Bush, 553 U.S. 723, 732 (2008) (addressing a petition for habeas corpus by a Guantanamo detainee); Hamdan v. Rumsfeld, 548 U.S. 557, 558 (2006) (same); Rasul v. Bush, 542 U.S. 466, 473 (2004) (addressing an action brought by Guantanamo detainees contesting the conditions of confinement).

154. For example, challenges to the Alabama law generated both private litigation and litigation initiated by the United States. Yet, the Eleventh Circuit chose to decide most of the issues in the context of the case brought by the United States and dismissed, as moot, most of the arguments raised by the companion case brought by the private litigants. *Compare* United States v. Alabama, 2012 WL 3553503 (11th Cir. Aug. 20, 2012), *with* Hispanic Interest Coalition of Alabama v. Governor of Alabama, 2012 WL 3553613 (11th Cir. Aug. 20, 2012).

155. Arizona v. United States, 132 S. Ct. 2492 (2012) (holding several provisions of Arizona law pre-empted by federal immigration law).

interpretation frequently arise in the context of litigation against federal administrative agencies. As a result of the Administrative Procedure Act (APA)[156] and the application of administrative deference under *Chevron, U.S.A., Inc., v. Natural Resource Defense Council, Inc.*,[157] federal administrative agencies play a large role in interpreting the statutes they are charged with enforcing.[158] Accordingly, such interpretations necessitate litigation against these administrative agencies. Most of the issues raised in federal government litigation will impact more than just the parties to the litigation—regardless of whether they are brought in the context of class action or not. Because of the greater public importance of issues raised in federal government litigation, there is also a greater need to get a "second opinion" and to develop the law.

Again, the *Gorbach* litigation provides an excellent example of the significant, cutting-edge issues of public importance raised in government litigation. The litigation dealt with an important benefit granted by the federal government and the INS's effort to rectify significant illegal grants of citizenship—an effort to which Congress had devoted substantial resources.[159] It was no less than a showdown between the citizenship status of thousands of newly-naturalized citizens, the integrity of the naturalization process, and the Clinton Administration. Likewise, it was an issue of first impression in light of previous statutory amendments to the immigration laws.[160] Moreover, it raised substantial questions about the applicability of *Chevron* deference to questions of statutory authority and the impact of a recent Supreme Court case on the deference issue.[161] Yet, nationwide class certification prevented

156. 5 U.S.C. §§ 551–559 (2006).

157. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

158. *See id.* at 843–44 (1984) (noting that federal agencies have the expertise and knowledge necessary to interpret federal statutes and regulations).

159. *See supra* Part II (discussing the *Gorbach* litigation).

160. *Id.*

161. Only two days before the *Gorbach* oral arguments before the Ninth Circuit en banc panel, the Court decided *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), which involved the FDA's statutory power to regulate tobacco and the applicability of *Chevron* deference on that issue. The *Brown & Williamson* case played a critical role in the en banc panel's decision in *Gorbach*. It not only is cited by the majority opinion, *Gorbach*, 219 F.3d at 1093, but is also

further development of these important legal issues within other circuits.

Furthermore, the United States Constitution's system of checks and balances between the three coequal branches of the federal government further embodies the role of the Executive Branch in developing the law. As previously discussed, certification of a nationwide class action essentially places a single district court on par with the United States Supreme Court. Yet, the Constitution only allows for one Supreme Court within the federal judiciary.[162] In fact, the Constitution merely provides Congress with the authority to create the lower federal courts[163] and provides no direct authority to the lower federal courts. Although this dilemma would seem to exist in all nationwide class actions, including those involving only private parties, the Executive Branch is on a different footing than private parties. The President's coequal in the judiciary is the United States Supreme Court. Thus, permitting a lower federal court's decision to have nationwide reach raises constitutional separation of powers issues that are unique when applied to the federal government as a litigant.

The structure of the United States Constitution provides the basis for a variety of legal doctrines and decisions.[164] For example, some of the arguments justifying the right to habeas corpus for the

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the crucial component of Judge Thomas's concurring opinion, which is joined by four other judges on the panel. *Gorbach*, 219 F.3d at 1099–1102 (Thomas, J., concurring). As Judge Thomas opines, "[t]he guidance of *Brown & Williamson* is especially important in this appeal, because understanding the history of denaturalization procedure is vital to placing the present statute in appropriate context." *Id.* at 1099. Despite the critical role it played in the Ninth Circuit's en banc decision, the government had no meaningful opportunity to develop the issues raised by *Brown & Williamson* prior to deciding whether the *Gorbach* case warranted further review. *See id.* at 1103 (ending the inquiry before the court without going any further into *Brown & Williamson*'s analysis). In fact, the majority opinion criticizes the government for not developing the *Chevron* issue more fully in light of the importance of *Brown & Williamson* to its decision. *See id.* at 1093 (noting that the Attorney General failed to develop the argument beyond a "cursory reference").

162. U.S. CONST. art. III, § 1, cl. 1.

163. *Id.*

164. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 958–59 (1983) (holding that, under the Constitution, legislative acts require passage by a majority of both houses of Congress and presentment to the President).

Guantanamo detainees were based upon the structure and design of the Constitution.[165] A significant aspect of the Court's decision in *Boumediene* relied upon the premise that the Suspension Clause[166] was designed to protect the Judicial Branch's common law habeas corpus power against Executive Branch encroachment in the absence of suspension by the Legislative Branch.[167] As the *Boumediene* Court states, "[t]he Clause protects the rights of the detained by a means consistent with the essential design of the Constitution."[168]

Essentially, like the Suspension Clause arguments, separation-of-powers doctrines rely upon an inter-branch "dialogue" in which two or more of the federal coequal branches serve a role in developing the law.[169] Other examples include *Chevron* deference and the constitutional avoidance doctrine. In *Chevron*, the Court held that reasonable federal agency interpretations of ambiguous statutes are entitled to deference by the judiciary.[170] The Court reasoned that Congress intentionally leaves interpretive gaps in federal statutes to allow the agencies charged with their enforcement, as experts in the area of law, to interpret.[171] Thus, as generalists, the federal judiciary should defer to agencies' expertise and their reasonable interpretations.[172] In this fashion, the *Chevron* deference doctrine illustrates an inter-branch dialogue:[173] Congress

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165. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 743–46 (2008) (basing its decision on the Constitution's separation-of-powers structure and the design of the Suspension Clause).

166. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

167. *Boumediene*, 553 U.S. at 725.

168. *Id.* at 745.

169. Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantanamo?*, 85 N.Y.U. L. REV. 535, 573 (2010) (discussing the "dialogue" of constitutional avoidance used in the course of the Guantanamo detainee litigation).

170. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

171. *See id.* ("'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" (alteration in original) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))).

172. *Id.* at 844.

173. *See* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1730 (2011) (examining the rules

communicates with the Executive by implicitly leaving a gap for the Executive Branch agency; the Executive Branch agency responds by using its expertise to fill that gap; and the Judicial Branch communicates back to both the Legislative and Executive Branches by assuring that Congress left a gap and that the Executive Branch agency reasonably filled it.

Like the *Chevron* deference doctrine, the constitutional avoidance doctrine relies, in part, on the desire to foster an inter-branch dialogue.[174] The constitutional avoidance doctrine states that courts should avoid deciding constitutional issues when reasonably possible.[175] Perhaps the doctrine's most recognized application is the rule of statutory construction—where a court interprets statutes to avoid serious constitutional issues.[176] Yet, scholars have connected other legal principles with the avoidance doctrine, including abstention,[177] standing,[178] and stare decisis.[179] The various avoidance principles embody our structural system of separation of powers and recognize this structure's intentional dialogue by design. As Lisa Kloppenberg, a leading scholar on the constitutional

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for conversation and relationships between courts and federal agencies); Glen Staszewski, *Constitutional Dialogue in a Republic of Statutes*, 2010 MICH. ST. L. REV. 837, 861–62 (discussing the ways in which statutory agencies have "played the leading role in developing important constitutional dialogue").

174. *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1604–16 (2001) (stating that the use of the constitutional avoidance doctrine leads to a "constitutional colloquy" among the branches); Michelle R. Slack, *Avoiding Campaign Finance Reform: Examining the Doctrine of Constitutional Avoidance in Campaign Finance Reform Law in Light of* Citizens United v. Federal Election Commission, 16 NEXUS 153, 157 (2010–2011) (describing the constitutional avoidance doctrine as a mechanism to show greater respect for the branches of government).

175. Clark v. Martinez, 543 U.S. 371, 381 (2005).

176. *Id.*

177. LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW 5–9 (2001).

178. *See id.* at 39–66 (drawing a connection between standing and the avoidance doctrine).

179. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 938–40 (2010) (Stevens, J., dissenting) (characterizing stare decisis, along with other techniques, as mechanisms of constitutional avoidance). *See also* Slack, *supra* note 174, at 154–55, 169 (explaining how stare decisis, as approached by Justice Stevens's dissent, operates as a form of constitutional avoidance).

avoidance doctrine, observes, "[o]ur divided system of democratic governance affords an opportunity for dialogue . . . . Constitutional law should be formulated in an ongoing, long-term dialogue in which judges, legislators, and other constitutional actors participate actively in shaping our understanding of the Constitution's protections and limitations."[180]

Again, the litigation by the Guantanamo detainees provides an excellent example of how avoidance fosters this dialogue and how inter-branch dialogue is inherent in the constitutional design. As explained in *Boumediene*,[181] the Court was asked to consider the detainees' habeas corpus rights and the constitutionality of the military commission systems in *Rasul v. Bush*[182] and *Hamdan v. Rumsfeld*.[183] Yet in both instances, the Court avoided the constitutional ruling and decided the cases on other bases.[184] By doing so, the Court engaged in a dialogue with its coequal branches that honed the constitutional issue prior to its review in *Boumediene*.[185] This application of avoidance demonstrates that even the Supreme Court, as a coequal to the Executive and Legislative branches, attempts a dialogue and hesitates before completely precluding further litigation on an important issue of law.

By design, the Constitution fosters an inter-branch dialogue as a byproduct of separation of powers. These careful crafted structural protections assure a role for all three branches in the

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180. Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 CASE W. RES. L. REV. 1031, 1031 (2006).

181. *See* Boumediene v. Bush, 553 U.S. 723, 743–46 (2008) (detailing the difficulties in deciding this line of habeas cases and the courts' inconsistency in defining detainees' rights).

182. *See generally* Rasul v. Bush, 542 U.S. 466, 471 (2004) (taking up petitioners' challenge to the legality of their detention at the military base).

183. *See generally* Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006) (addressing Hamdan's petition for writ of habeas corpus and objection to the stated authority of the military commission).

184. *See Rasul*, 542 U.S. at 483–84 (holding that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges); *Hamdan*, 548 U.S. at 575–76 (holding that "ordinary principles of statutory construction suffice to rebut the government's theory").

185. *See Boumediene*, 553 U.S. at 743–46 (describing the holdings of *Rasul* and *Hamdan*, in addition to how the lower courts' discussions of these cases led up to the Court's current analysis). *See also* Mulligan, *supra* note 169, at 573 (discussing the dialogue exchanged during the Guantanamo detainee litigation).

development of the law. Thus, constitutional structure places the federal government, as a litigant, in a meaningfully different position than private litigants. Having different lower court opinions on the constitutionality or legality of an Executive Branch interpretation or agency program allows for a dialogue that aids in the inter-branch development of the law.[186] Yet, legal decisions made in the context of a nationwide class action, like nonmutual collateral estoppel, effectively shut down this dialogue and leave the government with only one lower court's position on an issue. Any mere procedural rule or process that significantly undermines this intentional constitutional design would raise a serious constitutional dilemma that is best avoided, if reasonably possible.

B. The Geographical Breadth and Frequency of Government Litigation

The geographical breadth of litigation against the federal government also justifies treating the question of nationwide certification differently in such cases than those involving private parties. By necessity, the federal government operates on a nationwide basis—largely in a uniform fashion. Accordingly, many legal issues can be raised against the government in virtually any federal district court. As a result, unlike private parties, the federal government cannot really control the venue in which any particular legal issue gets raised, thereby making the federal government far more vulnerable to forum shopping,[187] as well as to nationwide class actions. The *Gorbach* litigation provides an excellent example of the anomalies this position presents. Although lead counsel for the plaintiffs and the government were both located in Washington, D.C.—in offices across the street from one another—the case was filed across the country in the Western District of Washington. Change of venue under 28 U.S.C. §§ 1404 and 1406 is highly

186. *See* Estreicher & Revesz, *supra* note 118, at 743 (supporting inter-circuit nonacquiescence because it fosters dialogue that helps to develop the law). The structural criticism of nationwide certification carries its greatest force when applied to agencies that are clearly within the Executive Branch and where its top officials serve "at the pleasure of the President." *Id.* at 723 n.230.

187. *See* Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1161 (2006) (examining forum shopping among federal courts).

unlikely because the federal government is subject to nationwide venue. Moreover, because the majority of legal interpretations and governmental programs operate on a uniform, nationwide basis, the federal government is more easily subjected to nationwide class actions than a private party. Yet, this analysis ignores the reality that the federal government is largely expected to operate in a uniform fashion nationwide,[188] while private parties are not. As explained in Part IV, instances of non-uniform application or interpretations of law are met with considerable criticism.[189] Nevertheless, the government's operation in this expected fashion should not force it to sacrifice its role in developing the law and engaging in a dialogue with more than one lower federal court over issues of law important to the public.

The frequency of litigation brought against the United States and its agencies makes the federal government, as a litigant, different than private litigants in a manner than impacts the role that government litigation plays in developing the law. As the Court in *Mendoza* recognized, "[i]t is not open to serious dispute that the government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity."[190] The statistics cited in *Mendoza* make this point quite clearly. In 1982, the United States was a party to 75,000-plus district court filings out of a total of more than 206,000 filings, and in 30% of all civil appellate cases.[191] More recent statistics also prove this point. According to records of the Federal Judicial Center, from 2000 to 2011, the United States was a party to more than 586,000 of three million-plus cases—more than 18% of all cases.[192] During this time period, the high point occurred in the year 2000, with nearly 71,000, out of a

188. *See* Estreicher & Revesz, *supra* note 118, at 724 (recognizing that administrative agencies "are responsible for a nationally uniform administration of the statutes entrusted to them").

189. *See generally* Maranville, *supra* note 118, at 740 (criticizing the use of nonacquiescence as undermining the uniformity of federal law). *Cf.* Dragich, *supra* note 7, at 536–39 (criticizing the doctrine of circuit independence because it minimizes uniformity of federal law at the circuit level).

190. United States v. Mendoza, 464 U.S. 154, 159 (1984).

191. *Id.* at 159–60 (citing ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 79, 82, 98 (1982)).

192. E-mail from Emery Lee, Fed. Judicial Ctr., to author (Jan. 11, 2012, 8:54 AM EST) (on file with author).

total of about 254,000, cases filed with the United States as a party—representing nearly 28% of all cases filed in 2000.[193] Significantly, the vast majority of these cases are actions brought *against* the United States—with nearly 75% (more than 436,000) of the cases involving the United States as the defendant.[194]

These statistics suggest that numbers alone give the United States a more significant role in the development of the law, as well as a greater investment in its accuracy, than any private party.[195] The

193. *Id.* The prominence of federal government litigation is found in all the other years during the 2000–2011 time period, though at slightly lower proportions than in 2000. In file year 2001, the United States was a party to nearly 60,000 of the nearly 265,000 cases filed—approximately 22.6%. In file year 2002, the United States was a party to nearly 53,000 of the more than 253,000 cases filed—approximately 20.7%. In file year 2003, the United States was a party to more than 47,000 of the more than 256,000 cases filed—approximately 18.6%. In file year 2004, the United States was a party to more than 50,000 of the more than 275,000 cases filed—approximately 18.2%. In file year 2005, the United States was a party to more than 49,000 of the nearly 244,000 cases filed—approximately 20%. In file year 2006, the United States was a party to nearly 45,000 of the more than 277,000 cases filed—approximately 16%. In file year 2007, the United States was a party to more than 45,000 of the more than 246,000 cases filed—approximately 18.4%. In file year 2008, the United States was a party to more than 43,000 of the nearly 269,000 cases filed—approximately 16%. In file year 2009, the United States was a party to more than 43,000 of the more than 279,000 cases filed—approximately 15.5%. In file year 2010, the United States was a party to more than 44,000 of the more than 292,000 cases filed—approximately 15%. Finally, in file year 2011, the United States was a party to more than 25,000 of the more than 215,000 cases filed—approximately 16.3%. Accordingly, federal government litigation consistently represents a significant percentage of the total litigation in the United States courts. *Id.*

194. *Id.*

195. The frequency of government litigation impacts the manner in which some judges approach their judicial role. The author is reminded of comments made by the Honorable Alex J. Kozinski, currently Chief Judge of the United States Court of Appeals for the Ninth Circuit, to a group of attorneys at the United States Department of Justice during an appellate advocacy course in 1996. Judge Kozinski pointed out that the federal government is the most frequent "customer" of the federal judiciary and its repeat status as a litigant before the courts increases the likelihood that that the government will be before the courts with similar arguments and in possibly similar cases. He explained further that this often means the same attorneys for the Department of Justice will appear before the courts. Because many of the cases granted oral argument in the Ninth Circuit include difficult and novel issues of law—close questions—Judge Kozinski indicated that he becomes concerned if he thinks the government attorney fails to

frequency of litigation against the government played a vital role in the *Mendoza* decision.[196] After all, the probabilities alone would undermine development of the law if nonmutual collateral estoppel were to apply to the federal government.[197] Similarly, the volume of federal government litigation makes the United States more likely to be involved in class action litigation than its private litigant counterpart. Combined with the nationwide geographical breadth of federal government litigation, the United States is more likely to be sued on a nationwide basis than is a private litigant.

Granted, these statistics might suggest that an increase in nationwide actions could help to reduce the volume of federal litigation to some extent. Yet, the same could be said for applying nonmutual collateral estoppel against the federal government. As the Court recognized in *Mendoza*, the detrimental impact of such litigation reduction is too high a price to pay for the efficiencies gained.[198] Moreover, the sustained nature of the federal government's high volume of litigation demonstrates the competence

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appreciate the importance or difficulty presented. In such situations, Judge Kozinski indicated that he is more likely to rule against the government and designate the opinion for publication in order to "bop" the government. According to him, "that's what F.2d is for—it's for bopping." Essentially, this anecdote suggests that the dialogue between the courts and the government, as a party, that is inherent in the constitutional structure, is further heightened by the frequency of federal government litigation before the federal judiciary. Hon. Alex J. Kozinski, Remarks in Appellate Advocacy Course, U.S. Dept. of Justice, Office of Legal Educ. (Spring 1996).

196. *Mendoza*, 464 U.S. at 159–60 ("[Because] the Government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues[, a] rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.").

197. *See* Walker, *supra* note 103, at 1135 n.134 (suggesting that inherent in the *Mendoza* decision is a probabilistic disadvantage to the United States by permitting the abandonment of the mutuality requirement of collateral estoppel in federal government litigation). *See generally* Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612 (1978) (demonstrating how probability theory supports the continuation of the mutuality requirement of estoppel).

198. *See Mendoza*, 464 U.S. at 163 ("[W]hat might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the Government.").

of its advocates and qualities of its processes, undermining the necessity of sacrificing legal development to gain greater efficiency.

C. *The Policy and Political Role of the United States Solicitor General*

In a related fashion, the policy and political role played by the Solicitor General in the development of the law makes the federal government meaningfully different than private litigants. In addition to other duties, the Solicitor General determines when to appeal an adverse judgment against the United States.[199] As the *Mendoza* Court recognized, unlike decisions of private litigants, this decision involves more than considering the likelihood of success on appeal. Instead, "the Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal."[200] Even when intending to seek further review of a particular legal issue, the Solicitor General will consider which case is the appropriate vehicle for a particular issue, considering factors like the maturity of the issue, the context of the case, priority of the issue against thousands of other federal cases, and many other highly policy-oriented and political considerations.[201] Rarely will the Solicitor General "go to the mat" on the first case to raise any particular legal issue.[202]

More significant than the initial decision to appeal from an adverse district court decision to the court of appeals is the Solicitor

199. 28 C.F.R. § 0.20(b) (2011). *See also Mendoza*, 464 U.S. at 160 (discussing the role of the Solicitor General in developing the law).

200. *Mendoza*, 464 U.S. at 161.

201. *See* REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW, 111–12 (1992) (identifying criteria used by various Solicitor Generals); Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1328–30 (2010) (discussing some of the factors considered by the Solicitor General and explaining political and policy considerations); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 318 (1994) (indicating the importance of policy considerations in the Solicitor General's decision to seek further review). *See also supra* note 12 (relying on author's personal knowledge and experiences).

202. *See* Cordray & Cordray, *supra* note 201, at 1329 n.31 and accompanying text (indicating that the most significant factor considered is the existence of a circuit split on a legal issue).

General's decision to petition for a writ of certiorari for review by the United States Supreme Court. In comparison to the overall petitions filed with the Supreme Court in federal government civil litigation, a Solicitor General's petition is an extreme rarity.[203] For example, in the Supreme Court term ending September 30, 2010, 783 petitions were filed in civil cases with the United States as a party and another 165 were filed from administrative appeals.[204] Yet, less than thirty of these more than 900 petitions were filed by the Solicitor General on behalf of the United States and its agencies.[205] Among numerous other factors, the Solicitor General considers whether there is a circuit split on the legal issue involved before using one of these "chits" on a case, viewing the existence of a circuit conflict as a near prerequisite to certiorari for the Court.[206] Thus, like the application of nonmutual collateral estoppel, certification of a nationwide class action requires the Solicitor General and the Court to abandon important discretionary factors in

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203. *See id.* at 1328 n.27 and accompanying text (demonstrating that only a small percentage of petitions are filed by the Solicitor General).

204. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR Table B-2, "Petitions for Review on Writ of Certiorari to the Supreme Court Commenced, Terminated, and Pending During the 12-Month Period Ending September 30, 2010," http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/B02Sep10.pdf (last visited August 9, 2012). *See also* Cordray & Cordray, *supra* note 201, at 1349–52 (demonstrating a decrease from approximately thirty Solicitor General petitions per term to approximately fifteen per term).

205. The number of petitions filed by the government is based upon information available at www.justice.gov/osg, which contains "all briefs" filed by the United States Solicitor General's office, including petitions. From a review of each petition filed in late 2010 and early 2011, it is clear that a substantial number of the petitions raise the same or similar issues and are likely "hold" petitions or will be consolidated if granted. *See* Richard L. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1496 n.45 (2008) (recognizing that statistics on petitions filed by the Solicitor General are misleading because they include a substantial number of hold petitions).

206. SUP. CT. R. 10(a) (providing that the existence of a circuit conflict is a basis for granting certiorari). *See* United States v. Mendoza, 464 U.S. 154, 160 (1984) (acknowledging that it is the practice of the Court to "wait[] for a conflict to develop before granting the government's petitions for certiorari"). *See also* Cordray & Cordray, *supra* note 201, at 1329 n.31 and accompanying text (contending that the primary factor is the existence of a circuit split).

their decisions to seek or grant certiorari.[207] No longer can the Solicitor General, or the Court, wait for a circuit conflict to develop. No longer can the Solicitor General factor in the importance of this particular issue into the federal government's overall nationwide litigation. No longer can the Solicitor General wait for further factual development surrounding a given legal issue and administrative program. Instead, the Solicitor General gets one chance—in a case most often brought against the United States in a venue not of the government's choosing—to seek Supreme Court review. Essentially, an adverse decision in a nationwide class action amounts to a "speak now or forever hold your peace" scenario. As the *Mendoza* Court observed with regard to nonmutual estoppel, such a rule actually "might disserve the economy interests in whose name . . . [it] is advanced by requiring the government to abandon virtually any exercise of discretion in seeking to review judgments unfavorable to it."[208]

Allowing nationwide certification of actions against the federal government effectively creates the same dilemma for the Solicitor General and the Court as allowing nonmutual collateral estoppel. Granted, nationwide certification would present this dilemma on a smaller scale because neither the Solicitor General nor the Court would need to face this problem in every single case that results in an adverse decision to the United States. Yet, considering the extreme rarity of petitions filed by the Solicitor General in comparison to overall petitions, this pressure remains rather significant. In fact, the *Gorbach v. Reno* litigation provides an excellent illustration of the disruptive effect of even a single nationwide class adverse decision on the Solicitor General's discretionary processes.[209] The Ninth Circuit's en banc decision came at the same time as significant other immigration law issues were making their way through the courts and into the national media. The Elian Gonzalez case,[210] to which the federal government

207. *Cf. Mendoza*, 464 U.S. at 160–61.

208. *Id.* at 163.

209. *See* Gorbach v. Reno, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc) (illustrating that the case of just one class action called into question the power of the Solicitor General to carry out the duties and prerogatives of the Executive Branch).

210. *See* Dalrymple v. Reno, 164 F. Supp. 2d 1364, 1366 (S.D. Fla. 2001), *rev'd*, 334 F.3d 991 (11th Cir. 2003) (describing the circumstances in which INS

devoted substantial time and resources,[211] was litigated at the same time.[212] Likewise, the Department of Justice was in the process of litigating numerous novel issues stemming from the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[213] including cases for which the Solicitor General petitioned for certiorari.[214] Accordingly, even with its nationwide preclusive effect, it was not an automatic candidate for a certiorari petition because it had to be balanced against other priorities within the area of immigration law.

By placing the Solicitor General in an all-or-nothing position, nationwide certification against the federal government also conflicts with constitutional structural protections. The decision to forego an appeal by the Solicitor General of one administration also prevents future administrations from litigating that issue against the same party or its privies. Yet, in the same way as allowing nonmutual collateral estoppel against the federal government would, a decision to forego an appeal of a nationwide class adverse decision will bind future administrations from litigating the entire legal issue. As the *Mendoza* Court observed, such preclusion undermines the independence of future administrations of the Executive Branch.

Yet, the Constitution's design places limits on the continuing power of any particular administration of the Executive Branch. A couple of rather obvious examples of the intent to limit a perpetual executive power are four-year terms[215] and the Twenty-Second

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agents retrieved six-year-old Elian Gonzalez from his great uncle's home in Florida).

211. *See Elian Saga Costs: $2,193,000*, ORLANDO SENTINEL, Nov. 26, 2000, (Orange Extra) at K6 (indicating that the federal government spent more than two million dollars on the case).

212. *See Dalrymple*, 164 F. Supp. 2d at 1366 (stating that INS agents extracted Elian from his relative's home on April 22, 2000).

213. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009.

214. *See* Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999) (denying writ of certiorari); Petition for Writ of Certiorari, INS v. Enrico St. Cyr., 533 U.S. 289 (2001) (No. 00-767), 2000 WL 33979638, at *1 (petitioning, as the Solicitor General, for a writ of certiorari); Petition for Writ of Certiorari, *Goncalves*, 144 F.3d 110 (No. 98-835), *available at* www.justice.gov/osg/briefs/1998/2pet/7pet/98-0835.pet.rep.pdf.

215. U.S. CONST. art. 2, § 1.

Amendment.[216] On its face, the four-year limit to an Executive Branch term of office demonstrates the intent to temporally limit the scope of a particular administration's executive power. Similarly, the Twenty-Second Amendment's limit of two terms for any particular administration reinforces the intent to avoid any particular administration possessing perpetual executive power.[217] By contrast, the Constitution provides lifetime appointment to Art. III judges[218] and contains no limit on the number of terms served by members of Congress.[219]

The Solicitor General's decision to seek further review carries with it important policy-oriented assessments and political ramifications. As the *Mendoza* Court observed:

> It would be idle to pretend that the conduct of government litigation in all its myriad features, from the decision to file a complaint in the United States District Court to the decision to petition for certiorari to review a judgment of the Court of Appeals, is a wholly mechanical procedure which involves no policy choices whatever.[220]

The example cited by the Court in *Mendoza* vividly establishes the potential impact of a rule that binds future administrations from revisiting an entire legal issue. In 1977, the Commissioner of the INS recommended that the Solicitor General withdraw its appeal in *68 Filipinos*, commenting that such action "'would be in keeping with the policy of the [new] Administration,' described as 'a course of compassion and amnesty.'"[221] In order to protect the independence of future administrations of the Executive Branch and their ability to reevaluate their policies and priorities, "courts should be careful when they seek to apply expanding rules . . . to

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216. U.S. CONST. amend. XXII, § 1.

217. *Id.*

218. U.S. CONST. art. 3, § 1.

219. Although some states do have term limits that apply to members of Congress, the United States Constitution does not provide any such limits.

220. United States v. Mendoza, 464 U.S. 154, 161 (1984).

221. *Id.* (Brief for United States, U.S. v. Mendoza, 464 U.S. 154 (1984) (No. 82-849), 1983 U.S. S. Ct. Briefs LEXIS 164, at 21).

government litigation."[222] Similarly, an administration following the Clinton Administration might have prioritized the integrity of the naturalization process over the jurisdictional restrictions of IIRIRA or the media attention associated with the unique factual circumstances of the Elian Gonzalez case. Moreover, future administrations might not face as large a set of novel immigration law issues after many of the issues stemming from IIRIRA have been resolved. Yet, because *Gorbach v. Reno* was certified as a nationwide class action, the adverse ruling precludes even future administrations from litigating the issues it raised.

VI. A PROPOSAL FOR A REBUTTABLE PRESUMPTION AGAINST CERTIFYING NATIONWIDE CLASS ACTIONS AGAINST THE FEDERAL GOVERNMENT

As explained in Parts IV and V, the federal government's position as a litigant is different enough than that of a private litigant to justify a rule favoring development of the law over the possible benefits of nationwide class actions against the federal government. A presumption against nationwide class actions against the federal government would encourage development of the law and assure a continued dialogue between the coequal branches of the federal government—particularly between the Executive Branch and the Judicial Branch, as well as within the Judicial Branch—by allowing different lower courts to consider these issues of significant public importance prior to raising such issues in the United States Supreme Court.

The absence of a geographical scope limitation in Rule 23 does not prevent the use of such a sound and reasonable rule. As the Court observed in *Califano*, Federal Rule of Civil Procedure 23 contains no geographical limits.[223] Instead, its prerequisites and other requirements focus on the due process rights of absent class members[224] and the appropriateness of representative litigation.[225]

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222. *Id.*

223. *See* Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (stating that a class action under Rule 23 has no jurisdictional limits based on geography).

224. *See* Hansberry v. Lee, 311 U.S. 32, 41–43 (1940) (raising many of the concerns about fairness and adequacy of representation addressed by the standards

The role of the government, as a litigant, in developing the law does not appear to be a factor within the mix between fairness and efficiency. Thus, the absence of an affirmative provision on nationwide scope against the federal government—especially considering the serious constitutional issues raised by foreclosing an active dialogue[226]—should leave it open for such a presumption.

Moreover, as a reminder, the *Califano* Court did opine that it will "often will be preferable" not to certify nationwide classes, as they tend to diminish the development of the law.[227] As previously explained, as well, *Califano* did not focus any attention on the unique position of the federal government in developing the law, as the Court did in *Mendoza*.[228] In the end, *Califano* relied heavily on the Court's deferential appellate role to review an already certified nationwide class action.[229] Nothing in *Califano* prevents application of a presumption against nationwide class certification *before* the class is certified. If anything, the "often . . . preferable" language[230] supports the reasonableness of a certifying court favoring development of the law over mere Rule 23 requirements.

Furthermore, the absence of express limits within the Federal Rules of Civil Procedure has not prevented judicially created rules from developing. For example, some courts recognize an exception to permissive party joinder under Rule 20[231] for joining insurance companies because such joinder may result in undermining the

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in FED. R. CIV. P. 23); JOHN T. CROSS ET AL., CIVIL PROCEDURE: CASES, PROBLEMS, AND EXERCISES 522 (3d ed. 2011) (recognizing that Rule 23 "was completely revamped in 1966, in part to answer many of the concerns raised by *Hansberry*").

225. *See* FED. R. CIV. P. 23(b)(3) (providing for a "superiority" requirement).

226. *See supra* Part V.A. (discussing how the constitutional design protects the Executive Branch's role in development of the law).

227. *Califano*, 442 U.S. at 702.

228. *See supra* Part III.C (explaining the reasoning behind the desire not to certify classes on a nationwide basis).

229. *See Califano*, 442 U.S. at 703 (maintaining an appellate role by reviewing the District Court under an abuse-of-discretion standard).

230. *See id.* at 702 ("It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts.").

231. FED. R. CIV. P. 20.

evidentiary rule excluding evidence of insurance coverage.[232] Judicially created rules in the face of silence in the written rule are not limited to the Federal Rules of Civil Procedure, but can also be found in statutory procedural parameters. After all, the well-recognized rule of complete diversity is a judicially created rule[233]—found nowhere within the diversity statute and not compelled by the constitutional grant of diversity jurisdiction.[234]

Application of the constitutional avoidance doctrine, too, supports a presumption against nationwide class actions against the federal government. As previously mentioned, the doctrine of constitutional avoidance counsels courts to avoid constitutional issues when reasonably possible. One of those techniques, the avoidance canon, operates when interpretation of a statute or rule would raise a serious constitutional issue. In such a situation, the constitutionally questionable interpretation is avoided in favor of a reasonable alternative. Applying that canon and principle to the issue of nationwide class actions against the federal government, a presumption against such nationwide scope reasonably avoids the serious constitutional issues raised by foreclosing the inter-branch dialogue provided by allowing different lower courts to consider an issue before raising it to the Supreme Court for nationwide resolution.

Yet, this proposed rule is not without limits. Initially, this proposed presumption should be limited to the federal government and its agencies, and should not apply to state governments.[235] For

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232. CROSS ET AL., *supra* note 224, at 46 (asserting that "[e]ven when multiple claims meet the standards of Rule 20, other factors may cause a court to deny joinder" (citing Cincinnati Ins. Co. v. Reybitz, 421 S.E.2d 767 (Ga. App. 1992) (refusing to allow joinder of an insurance company in order to avoid effectively undermining the evidentiary rule against admitting evidence of insurance coverage))).

233. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806).

234. CROSS ET AL., *supra* note 224, at 244 (noting that although "*Strawbridge* has often been criticized ... it has never been overturned," and recognizing that the Constitution only requires "minimal diversity").

235. Both literally and theoretically, the *Mendoza* decision dealt with federal government litigation and the ways in which the federal government is different than private litigants. *See* United States v. Mendoza, 464 U.S. 154, 159–63 (1984) (explaining the challenges in treating the government as a private litigant). The Second Circuit's decision to invoke nonmutual collateral estoppel against a state government in *Benjamin v. Coughlin* has little impact on *Mendoza*. *See* Benjamin

obvious reasons, state government litigation simply is not subject to the same geographical breadth as the litigation against the United States government. Because each of the fifty states is within only one federal circuit and most within only one federal district, the likelihood that any legal issue raised in state government litigation would generate a circuit split or justify a nationwide class action is so minute as to render the proposed presumption unnecessary to protect the development of the law. Furthermore, despite the principles of federalism embodied by the Constitution, state governments are not coequal branches of the federal government. Thus, the structural design justifications for this proposed presumption do not apply.

Most significantly, this presumption should be limited to cases implicating the federal government's role in developing the law—where the federal government is acting in its role as law enforcer or interpreter. It should not apply when the government acts in a role that is similar to that of private parties, including as a mere employer,[236] tortfeasor,[237] or property owner. Although the federal government, even in these roles, is subject to more frequent and geographically broad litigation than private parties, the other justifications for treating the government differently are sufficiently diminished or absent. Notably, the constitutional structural reasons

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v. Coughlin, 905 F.2d 571, 576 (2d Cir. 1990); Mills, *supra* note 81, at 899 (pointing out that the *Benjamin* court does not distinguish *Mendoza* on the state versus federal government basis). This distinction is all the more appropriate when applied to the nationwide class certification issue. Accordingly, this limitation on the proposed rule is not undermined by the Second Circuit's holding in *Benjamin*. *See infra* note 238 and accompanying text (discussing the maturity of the legal issue as an appropriate basis for rebutting the proposed presumption).

236. *See, e.g.*, Bangert v. Hodel, 705 F. Supp. 643, 644–45 (D.D.C. 1989) (involving Interior Department's random drug testing program's application to non-sensitive employees). Yet, some actions brought by employees against the federal government may raise uniquely governmental issues—particularly actions brought by employees in high-level and national security positions. *See, e.g.*, Doe v. Rumsfeld, 341 F. Supp. 2d 1, 3 (D.D.C. 2004) (involving suit by employees to enjoin required immunization of military personnel and challenging FDA regulation authorizing use of anthrax vaccine).

237. *See, e.g.*, Markham v. White, 171 F.R.D. 217, 218–19 (N.D. Ill. 1997) (involving a sexual harassment suit brought by a class of plaintiffs against instructors at the Drug Enforcement Administration).

and the direct connection to legal development is lacking when the government acts in such ordinary capacities.

In addition, this proposed presumption should be rebuttable in instances in which a nationwide class action is unlikely to have a detrimental effect on development of the law. For example, once several lower courts have weighed in on an issue in individual or small class action litigation—particularly if they have all ruled against the government—the need for further dialogue is diminished.[238] The presumption might also be rebutted when the legal issue is so insignificant that it is unlikely to be litigated on anything less than a nationwide scope or so unlikely to lead to any difference of opinion between the circuits.[239] Allowing the

238. By permitting the presumption to be rebutted on this basis, this proposal is consistent with at least one court's view of the *Mendoza* rule. In *Benjamin v. Coughlin*, the United States Court of Appeals for the Second Circuit considered a civil rights action brought by inmates of the Rastafarian faith against state prison officials. *Benjamin*, 905 F.2d at 573–74. Distinguishing *Mendoza*, the Second Circuit invoked nonmutual offensive collateral estoppel against the state government officials on the issue of the prison's haircut regulations. *Id.* at 576. Unlike the situation in *Mendoza*, the directive at issue in *Benjamin* had already been challenged and "percolated" through the New York state court system, leading to two adverse decisions by the state's highest court. *Id.* at 576 (providing that relitigation of the "reasonableness" of the haircut directive was foreclosed by the litigation within the New York state courts in People v. Lewis, 496 N.Y.S.2d 258 (N.Y. App. Div. 1985), *aff'd*, 502 N.E.2d 988 (N.Y. 1986) and Overton v. Dep't of Corr. Servs., 499 N.Y.S.2d 860 (N.Y. Sup. Ct. 1986), *aff'd*, 520 N.Y.S.2d 32 (N.Y. App. Div. 1987), *appeal dismissed*, 526 N.E.2d 42 (N.Y. 1988)). Accordingly, the policy rationale of *Mendoza*—development of the law—did not apply to the issue presented in *Benjamin*. *Benjamin*, 905 F.2d at 576. The proposed rule against nationwide class actions to assure development of the law will not apply to a case like *Benjamin* for two reasons: (1) it will not apply to class actions against state governments; and (2) it will not apply where the legal issue raised has already been fully developed in multiple cases—especially where all or most decisions were in agreement. Thus, the logic of *Benjamin* does not diminish the proposal, but actually supports its limitations. *Cf. supra* note 81 (discussing exceptions to the Mendoza rule recognized by some courts and commentators).

239. Although this exception does consider the substantiality of the legal issue involved, this proposal does not accept the constitutional versus administrative law distinction used by *Colo. Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 666 F. Supp. 1475 (D. Colo. 1987) for invoking nonmutual offensive collateral estoppel. Rather, the substantive rebuttal should focus on the likelihood that the issue will result in a difference of opinion.

certifying court to consider rebuttal criteria does not carry the dangers that caused the *Mendoza* Court to reject the standards used by the lower court in that case.[240] Unlike the use of nonmutual offensive collateral estoppel, which will likely not be known until the opportunity for the Solicitor General to consider further appeal

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In *Colorado Springs Production Credit Association*, unlike in *Benjamin*, 905 F.2d at 576, the issue had not been litigated in multiple cases and completely through the appellate process before the court applied the estoppel doctrine. Instead, the legality of the particular regulations had only been decided in a single district court decision, in a different district, and without appeal. *See Colo. Springs*, 666 F. Supp. at 1476. In distinguishing *Mendoza* and permitting nonmutual collateral estoppel against the government, the court focused on the final words of the Court's summary of its holding in *Mendoza*—"'nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues *such as those involved in this case*.'" *Id.* at 1477 (quoting *Mendoza*, 464 U.S. at 574) (emphasis added). Accordingly, the court limited *Mendoza* to situations involving factual differences and implicating constitutional law. Because the District of Colorado viewed the issue as "a discrete question of administrative law, with no fact variation," it refused to apply *Mendoza* and applied nonmutual offensive collateral estoppel instead. *Id.* at 1479.

Yet, while giving credence to the "such as those involved in this case" language in *Mendoza*, the District of Colorado failed to recognize the *Mendoza* Court's express rejection of subjective, after-the-fact justifications for invoking estoppel against the government. *See Mendoza*, 464 U.S. at 162 (rejecting the court of appeals "crucial need" standard as subjective and untimely). As the Court explained, after-the-fact justifications prevent the Solicitor General from fully assessing the consequences of declining appeal on the issue. *See id.* ("By the time a court makes its subjective determination that an issue cannot be relitigated, the Government's appeal of the prior ruling of course would be untimely."). Although constitutional law may rate higher in importance than a limited issue of administrative law, the government's role in defining administrative law is greater than its power to influence constitutional law, suggesting the development of the law policy would be stronger not weaker. *See supra* Part V.A. (discussing the role *Chevron* deference plays in government interpretation and development of the law). Moreover, the requirements that the exact same legal issue be raised in both cases and that the cases not involve significant factual differences are fundamental to the doctrine of collateral estoppel anyway. As a result, it renders the distinction between the government as a litigant and a private party a nullity.

240. United States v. Mendoza, 464 U.S. 154, 162 (1984) (rejecting the court of appeals' "crucial need" standard because it was subjective and untimely). *See also supra* note 81 and accompanying text (discussing the use of after-the-fact criteria to determine the applicability of nonmutual collateral estoppel).

from the original ruling has already passed,[241] the Solicitor General will be fully aware that the presumption was rebutted and the nationwide class certified in time to recognize its impact on the decision to appeal.

The proposed presumption would leave in place numerous other vehicles for achieving uniformity and efficiency outside the nationwide class action. First, class actions with a narrower scope—perhaps district or circuit class actions—would remain an option for achieving greater efficiency and impact than individual actions, but would still allow for development of law among the various circuits.[242] Additionally, government acquiescence may result in early litigation on an issue because a well-reasoned judicial opinion, especially from an appellate court, might persuade the government to change its position on the legal issue. As the Third Circuit advised: "We suggest that in most situations, a far better approach for an administrative agency would be to accept the first ruling of a court of appeals on a particular point . . . ."[243] In fact, especially to preserve a nationally uniform position in the face of contrary circuit authority, the government might find it best to simply acquiesce.[244] Thus, the Executive Branch, through the Solicitor General or its administrative agencies, may decide to accept and apply the first ruling of a lower court on a particular issue. Similarly, the rule should permit the federal government to concede to the nationwide scope of a class action that otherwise meets Rule 23's requirements. For reasons similar to acquiescence, the government may determine in a particular case that the best use of its role in developing the law, along with the expectation of uniformity and efficiency policies, is to allow one lower court to decide the issue. Yet, in both instances, this proposed presumption better protects the Executive Branch's role in this process.

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241. *Mendoza*, 464 U.S. at 162 ("By the time a court makes its subjective determination that an issue cannot be relitigated, the government's appeal of the prior ruling of course would be untimely.").

242. *See* Shvartsman v. Apfel, 138 F.3d 1196, 1201 (7th Cir. 1998) (limiting certification to the circuit to avoid undermining development of the law).

243. Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 912 n.1 (3d Cir. 1981).

244. *But see* Estreicher & Revesz, *supra* note 118, at 743 (supporting, on a temporary basis, even intracircuit nonacquiescence to preserve a nationally uniform approach).

Moreover, the persuasive authority of the first decision remains a powerful force for other courts to follow suit. For example, on the issue of federal court power to consider motions to reopen in immigration cases, several of the circuits to consider the issue followed the lead provided by the first court to decide the issue.[245] In fact, to reinforce the power of a lower court to persuade not only other courts, but the federal government as well, the government changed positions on the issue and agreed that jurisdiction remained to decide such motions. It was not until the Seventh Circuit, sua sponte, declined jurisdiction, that any court held otherwise,[246] and the Supreme Court reversed the Seventh Circuit, agreeing with the other circuits and the government on the issue.[247]

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245. Kucana v. Holder, 130 S. Ct. 827, 839 (2010) (citing to Infanzon v. Ashcroft, 386 F.3d 1359 (10th Cir. 2004) and Medina-Morales v. Ashcroft, 371 F.3d 520 (9th Cir. 2004), as well as indicating that prior to the case at hand, "no court had reached a contrary result").

246. *See* Kucana v. Mukasey, 533 F.3d 534, 539 (7th Cir. 2008) (dismissing the case for lack of jurisdiction).

247. *Kucana*, 130 S. Ct. at 839–40. Also, by way of anecdotal evidence, the author is reminded of the oral argument in *Pak v. Reno*—a case dealing with federal court jurisdiction to review immigration cases brought by a petitioner deportable for conviction of certain criminal offenses. Oral Argument, Pak v. Reno, 196 F.3d 666 (No. 98-3852) (6th Cir. 1999). During oral argument before the United States Court of Appeals for the Sixth Circuit, the Honorable Nathanial Jones asked government counsel to list which circuits had ruled in favor of the government's interpretation of the statute and which had ruled against it. Once it was apparent that the majority of courts aligned against the government, Judge Jones pointed out that the government was asking the court to "buck the tide." *See Pak*, 196 F.3d at 672 ("Although we have not yet addressed this issue, the majority of circuits that have done so have rejected the government's argument."). And, although Judge Jones acknowledged that he was no stranger to bucking the tide, the ultimate decision in the case followed the lead of the majority of circuits finding that the government's interpretation violated the Suspension Clause. *See id.* at 672 (following the majority of circuits in rejecting the government's argument). Here, too, the Supreme Court ultimately supported the majority of circuits as well. *See* INS v. Enrico St. Cyr., 533 U.S. 289, 314 (2001) (following the majority of lower federal courts in ruling against the federal government and finding habeas corpus jurisdiction proper). For more information on how courts handle the government's request to reopen in immigration cases, see Michelle R. Slack, *No One Agrees . . . But Me? An Alternative Approach to Interpreting the Limits on Judicial Review of Procedural Motions and Requests for Discretionary Immigration Relief After Kucana v. Holder*, 26 GEO. IMMIGR. L.J. (forthcoming Fall 2011).

Finally, the United States Supreme Court remains available to provide nationwide resolution of federal law issues and to establish uniformity to the extent necessary. Despite its limits and inefficiencies, the "one Supreme court" design is the Constitution's design.[248] It is also the system most conducive to balancing the tension between nationwide uniformity and development of the law through lower court debate.

VII. CONCLUSION

The federal government, as a litigant, is different from private parties. Most importantly, these differences increase the impact that government litigation has on development of the law. This concern for protecting the government's role in development of the law justified the Supreme Court's refusal to apply nonmutual offensive collateral estoppel against the federal government in *United States v. Mendoza*. It also formed the basis for the Court's cautionary warning against nationwide class actions in *Califano v. Yamasaki*. It is now time to take the next step and protect the fundamental and constitutional role that government litigation plays in legal development by creating a narrowly focused and rebuttable presumption against nationwide class actions against the federal government. As explained throughout this Article, this proposal strikes the best balance between uniformity and efficiency on one hand, and development of the law through debate on the other. By providing the federal government with the opportunity to seek a "second opinion," the proposal protects separation-of-powers principles and assures greater development of the law.

248. U.S. CONST. art. III, § 1. *See also* Dragich, *supra* note 7, at 538 (observing that the regional structure of the courts of appeals "values intracircuit consistency over uniformity").

Beyond Transfer: Coordination of Complex Litigation in State and Federal Courts in the Twenty-First Century

Catherine R. Borden & Emery G. Lee III*

I. INTRODUCTION 997
II. PREVIOUS GUIDANCE ON STATE–FEDERAL COORDINATION IN MULTI-JURISDICTIONAL LITIGATION 1000
A. *Commentary: Schwarzer (1992)* 1000
B. *FJC Publications* 1003
C. *Renewed Interest in the Topic* 1007
III. SURVEY FINDINGS 1010
A. *Awareness of Parallel Proceedings* 1010
B. *Communication* 1014
1. Findings 1014
2. Ex Parte Communication 1016
C. *Coordination* 1020
D. *Problems and Issues* 1023
IV. CONCLUSION 1029
V. APPENDIX 1030

I. INTRODUCTION

In June 2011, the U.S. Supreme Court decided *Smith v. Bayer Corp.*,[1] the facts of which are particularly relevant for our purposes—even if the actual holding of the case is not. *Smith* involved two parallel court proceedings—one in a federal multidistrict litigation (MDL) transferee court and one in a West Virginia state court.[2] The federal transferee judge, having denied class certification in the federal proceeding, enjoined the state court from considering a pending motion for class certification.[3] The Eighth Circuit affirmed.[4] The Supreme Court reversed, unanimously

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1. 131 S. Ct. 2368 (2011).
2. *Id.* at 2373.
3. *Id.* at 2374.
4. *Id.*

holding that the federal transferee judge had exceeded his authority and violated the Anti-Injunction Act.[5]

The federal courts themselves, through the instrumentality of the Judicial Panel on Multidistrict Litigation (JPML) and under the federal multidistrict litigation transfer statute, 28 U.S.C. § 1407, have the means to transfer similar federal cases to a single transferee court for consolidated pretrial proceedings.[6] In *Smith*, for example, all federal cases against Bayer alleging harms through use of the drug Baycol were transferred to a single judge for pretrial proceedings.[7] But many such cases—those in the state courts—remain *beyond transfer*; the JPML cannot transfer cases that are in state courts (and not removed) to make them part of the federal MDL proceeding.[8]

The problems that § 1407 transfers are designed to address—duplicative discovery and motions activity, inconsistent rulings, and the like—arise in most, if not all, multi-jurisdictional litigation. But given the inherent limits of § 1407, as well as the limited jurisdiction of the federal courts,[9] state and federal courts must look *beyond transfer* to address these problems. Communication and, when appropriate, coordination between the state and federal courts are the only plausible solutions. As *Smith* made absolutely clear, federal judges' power to enjoin parallel state proceedings is very limited.[10]

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5. *Id.* at 2382.

6. 28 U.S.C. § 1407 (2010).

7. *Smith*, 131 S. Ct. at 2373 (describing the "preexisting order of the Judicial Panel on Multi–District Litigation, which had consolidated all federal suits involving Baycol (numbering in the tens of thousands) before a single District Court Judge").

8. *See* JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE 41 (2002) ("At present, the transfer power is available only at the federal level, not at the state . . . level.").

9. *See id.* at 43 ("[T]he primary structural impediments derive from the fact that federal courts are courts of 'limited jurisdiction'; in other words, unless a particular case is one of the types of cases that a federal court has the power to adjudicate, the case must be heard in state court."). *See also* Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169, 196 (1990) (noting that even though "[l]ogic compels the concept of consolidating complex cases in single federal or state forums," existing jurisdictional and substantive laws prevent such consolidations).

10. *See Smith*, 131 S. Ct. at 2375 (stating that the Court has taken special care to strictly and narrowly interpret the provision of the Anti-Injunction Act that authorizes an injunction to prevent parallel state litigation).

Part II of this Article provides some background information on the history of state–federal coordination in multi-jurisdictional litigation. This is hardly a new topic. Indeed, in an article published in 2000, Professor McGovern cites former Chief Justice Burger and former Chief Justice Rehnquist, among others, as advocates of state–federal cooperation and coordination.[11] Moreover, the Federal Judicial Center (FJC) has been providing federal judges with guidance on this topic since at least the 1980s. Part II ends with a brief account of the renewed interest in this topic from both the state and federal judiciaries. Perhaps it makes sense, in this period of budget cuts, especially in the state courts,[12] to refocus attention on the potential efficiencies of greater coordination in multi-jurisdictional litigation.

Part III details the findings of a survey, conducted by the FJC, of the experiences of federal transferee judges in coordinating with their state counterparts.[13] Of the federal judges responding to

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11. *See* Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1871–72 (2000) [hereinafter McGovern, *Toward a Cooperative Strategy*] ("Chief Justice Burger, Chief Justice Rehnquist, Federal Judicial Center Directors Schwarzer and Zobel . . . and others have promoted cooperation among judges in order to assist in the fair, timely, and efficient resolution of litigation. These thoughtful proposals have generally focused on communication and coordination.").

12. *See* Barbara Madsen, *Budget Cuts to State Courts Threaten Justice, Public Safety*, NEWS TRIBUNE, Nov. 9, 2011, *available at* 2011 WLNR 23124652 ("At what point is the due process of law compromised for Washington residents, and at what point do growing delays deny justice?"); Lucy Morgan, *'Taj mahal' Judge Quits*, ST. PETERSBURG TIMES, Nov. 17, 2011, at 1A (describing "a legislative session that could see even more budget cuts aimed at the state's struggling judicial system"); Ted Siefer, *Some Blame Delay in New Hampshire Court Cases on State Budget Cuts*, N.H. UNION LEADER, Jan. 1, 2012, *available at* 2012 WLNR 97963 ("After two years of staff cuts, judge vacancies, and reduced operating hours, [some] say cases are plagued by interminable delays, compromising the speedy administration of justice."). Madsen is the Chief Justice of the Washington Supreme Court. The American Bar Association Task Force on the Preservation of the Justice System has been shining a spotlight on the budgetary woes of the state judiciaries. *See* Betsy M. Adeboyejo & Alexandra Buller, *Cuts to State Courts Are Focus of Symposium*, ABA NEWS SERV., Sept. 23, 2011, *available at* http://www.abanow.org/2011/09/cuts-to-state-court-focus-of-symposium (describing ABA documentation of state judiciary budget cuts, effects on budget cuts, and a September 2011 symposium on cuts in state court funding).

13. EMERY G. LEE III, FEDERAL JUDICIAL CENTER, SURVEY OF FEDERAL TRANSFEREE JUDGES IN MDL PROCEEDINGS REGARDING COORDINATION WITH

the survey, 44% reported that they were aware of parallel state proceedings at some point in their experience as a transferee judge.[14] Of those judges who were aware of the parallel state proceedings, the survey found that 60% communicated either directly or indirectly with state counterparts.[15] After discussing a possible explanation for that (seemingly low) figure, the Article turns to types of coordination. Not surprisingly, scheduling of discovery and motions activity was the most commonly reported type of coordination.[16] Finally, the Article examines federal transferee judges' assessments of potential issues that may arise in coordinating multi-jurisdictional litigation. Somewhat surprisingly, we find that, on average, federal transferee judges do not view potential issues as very severe.[17]

II. THE HISTORY OF STATE–FEDERAL COORDINATION IN MULTI-JURISDICTIONAL LITIGATION

A. Commentary: Schwarzer (1992)

Arguably, the major secondary source in this field is the 1992 *Virginia Law Review* article written by Judge William W. Schwarzer (FJC Director at the time), Nancy E. Weiss, and Alan Hirsch (FJC attorney and writer at the time)—"Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts."[18] The article "tells the stories of how several state and federal judges forged into uncharted territory to coordinate complex litigation pending in their courts."[19] Judge Schwarzer and his co-authors

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PARALLEL STATE PROCEEDINGS: REPORT TO THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION AND THE JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION 2 (Dec. 2011), http://www.fjc.gov/public/pdf.nsf/lookup/leemdlfedst.pdf/$file/leemdlfedst.pdf. The survey results underlying this report are on file with the authors and will hereinafter be cited as "FJC Transferee Judge Survey Results."

14. *Id.* at 1.

15. *Id.*

16. *Id.*

17. *Id.* at 2.

18. William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

19. *Id.* at 1689–90.

sought to shine light on "the extensive coordination between state and federal courts that can be achieved without new legislation or rules, and without subordinating one system to the other."[20] In other words, what were state and federal judges actually doing—without an expansion of federal jurisdiction, without use of injunctions ("subordinating")—to prevent, or at least minimize, "duplication and a consequent drain on judicial and private resources"?[21] The article provides somewhat detailed case studies of a series of multi-jurisdictional litigation.[22] It describes the concerns motivating judges to coordinate across jurisdictional lines in this way:

> A number of factors motivated the judges in these cases to coordinate their proceedings. Some sought to prevent the "great duplication of effort and money" that would result "if both court systems were going to conduct discovery and hold hearings and . . . settlement negotiations." Other judges worried that if the cases proceeded separately, scheduling conflicts or other tensions between the court systems would impede their progress. Still others were motivated by a desire for consistency in the state and federal treatment of the cases in order to ensure comparable outcomes for similarly situated parties. Finally, a few judges believed that coordination would help them take charge of their

20. *Id.* at 1690.

21. *Id.* at 1690. *See also id.* at 1699 ("[E]ven within the existing system, the judiciary, together with counsel, can take effective action to reduce costs, delays, and inefficiencies.").

22. The case studies are the Florida Everglades Air Crash cases, the Beverly Hills Supper Club Fire cases, the Chicago Air Crash cases, the Hyatt Skywalk cases, the Ohio Asbestos litigation, the MGM Grand Hotel Fire cases, the Technical Equities Fraud cases, the L'Ambiance Plaza Collapse cases, the Brooklyn Navy Yard Asbestos litigation, the Exxon-Valdez Oil Spill cases, and the Sioux City Air Crash cases. *Id.* at 1700–07. Interestingly, not all of these case studies involved multidistrict consolidations under § 1407. The asbestos litigation occurred, for example, prior to the consolidation of MDL 875 in 1991. *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 417 (J.P.M.L. 1991) (finding, only after rejecting five previous requests for consolidation of asbestos cases in multi-district litigation, that the centralization of asbestos actions would "best . . . promote the just and efficient conduct of litigation").

> cases. Mass litigation can present an awesome managerial task, and when judges work together they can jointly develop strategies to manage the litigation and can reinforce each other's strategies.[23]

The article then presents detailed summaries of how the state and federal judges in these multi-jurisdictional litigations coordinated discovery,[24] settlement,[25] joint pretrial hearings,[26] and, potentially, joint trials.[27]

The Schwarzer article also provides some practical advice for judges in multi-jurisdictional litigation. With respect to timing of contact, for example, it advises early contact: "As a general rule, contact at the earliest possible time is desirable," especially considering that "the most extensive cooperation has been achieved primarily during discovery and other early stages of litigation."[28] It also advises that federal judges should usually, but not always, establish contact—perhaps because state judges would be "intimidated by their federal counterparts"[29]—"through a simple telephone call."[30] After the initial discussion, "focus[ing] on general perspectives of the litigation, case management strategies, and areas appropriate for state–federal cooperation," the article advises "monthly or bi-monthly contact."[31]

In addition to the potential benefits of state–federal coordination, the Schwarzer article also describes some potential drawbacks, focusing on "the fact that intersystem coordination invites tampering with the traditional jurisdictional boundaries of the state and federal court systems."[32] Specifically, the article points to the potential costs to plaintiffs especially, in terms of forum choice:

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23. Schwarzer et al., *supra* note 18, at 1706–07 (internal citations omitted).
24. *Id.* at 1707–14.
25. *Id.* at 1714–21.
26. *Id.* at 1721–26.
27. *Id.* at 1727–32. It is noteworthy that none of the judges interviewed by Schwarzer and his co-authors conducted a joint trial, although several considered doing so. *Id.* at 1727.
28. *Id.* at 1734.
29. *Id.* We would note that we have rarely encountered state judges who are so easily intimidated.
30. *Id.*
31. *Id.* at 1735.
32. *Id.* at 1743.

> Perhaps the greatest concern is that intersystem coordination can diminish the litigants' benefits of their choice of forum. They might have had good reason for selecting one court system over the other, and when judges work together and influence one another, or mold their rules to conform to those of another system, or decide matters jointly, litigants may lose the advantages of their chosen forum.[33]

As the article makes clear, the plaintiffs in cases remaining in state court retain their choice of forum, but this benefit is endangered when "state and federal courts join forces in deciding issues of substantive law."[34] The article then goes on to discuss the question of when federal judges should defer to state judges on questions of state law, and vice versa.[35] It concludes: "We do not purport to resolve the issues raised. Rather, we emphasize that state and federal courts coordinating their cases must be aware of and sensitive to these issues."[36] Even if state and federal judges with related cases choose not to actively coordinate, awareness of the issues raised by Schwarzer and his co-authors is preferable to the alternative.

B. FJC Publications

The FJC has been providing guidance on coordination between state and federal courts for many years. The *Manual for Complex Litigation (Second)*, published in 1985, included a chapter on "Related State and Federal Cases."[37] It is interesting to see how

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33. *Id.* at 1744 (citations omitted). *Cf.* TIDMARSH & TRANGSRUD, *supra* note 8, at 43 ("As long as we operate within a litigation model that allows plaintiffs the autonomy to locate the case in the forum they find most desirable, related cases are likely to end up being dispersed between the state and federal court systems.").

34. Schwarzer et al., *supra* note 18, at 1745.

35. *Id.* at 1725, 1745-49.

36. *Id.* at 1749.

37. MANUAL FOR COMPLEX LITIGATION (SECOND) § 31.3 (1985). There really is not a MANUAL FOR COMPLEX LITIGATION (FIRST), although in 1969 the Federal Judicial Center published the MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION. *See* McGovern, *Toward a Cooperative Strategy*, *supra* note 11, at 1875 n.40 (referring to the MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION as the MANUAL FOR COMPLEX LITIGATION (FIRST)). Interestingly, the MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION does *not* appear to

that guidance has changed over time to urge a more active role. More than a quarter of a century ago, the FJC was advising federal judges that they should communicate "informally" with their state counterparts:

> The attorneys should be urged by the courts to confer and develop ways to avoid conflicts and duplication. However, it is often valuable, particularly at the outset of the litigation, for the judges themselves to communicate informally and determine how best to coordinate their activities and facilitate an efficient resolution of the entire litigation.[38]

The *Manual for Complex Litigation (Third)*, published in 1995, provides more substantial guidance, especially on the issue of the federal judge's role in establishing communication:

> Coordination becomes much more difficult and complex when cases are dispersed across a number of states, even where the federal cases are all centered in a single MDL transferee court. Clearly, the federal MDL judge cannot impose coordinated management on widely dispersed state courts; it is difficult even to obtain and communicate information about such widespread litigation. The greatest need, therefore, is for an information network that could form the basis for voluntary coordinated action by state court judges to the extent feasible under and consistent with their rules and

include advice on coordinating between state and federal courts, although it does include sections on related cases pending in one division of a single district, MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION § 5.1 (1969); related cases pending in more than one division in a single district, *id.* at § 5.2; related cases pending in two or more districts in the same circuit, *id.* at § 5.3; and related cases pending in two or more circuits, *id.* at § 5.4. The focus of what some have called the *Manual for Complex Litigation, First*, was chiefly "the experience of judges who managed the electrical equipment antitrust litigation in the 1960s." William W. Schwarzer, *Preface* to MANUAL FOR COMPLEX LITIGATION (THIRD), at xiii (1995).

38. MANUAL FOR COMPLEX LITIGATION (SECOND) § 31.31 (1985).

> procedures. The federal judge can serve as a catalyst for the development of an information network from which eventually some degree of state-federal coordination may emerge.[39]

In ten years' time, the federal judge's role has shifted from pursuing informal communication, preferably at the outset of litigation, to acting as the catalyst for the formation of a multi-state information network as a basis for voluntary inter-jurisdictional coordination.

The *Manual for Complex Litigation (Fourth)*, published in 2004,[40] urges federal judges to take an even more active role. In a section labeled "Threshold Steps," the manual advises: "The court should direct counsel to identify the names of all similar cases in other courts, their stage of pretrial preparation, and the assigned judges. Such a direction should be part of the initial case-management order in any case with related litigation pending in other courts . . . ."[41] By 2004, the FJC's guidance was to think about coordination—or, at minimum, identify parallel litigation—as an essential part of case management of complex litigation. After detailing the potential use of an information network or judicial advisory committee, the manual makes clear that it is the federal judge's responsibility to act:

> Federal judges should communicate personally with state court judges who have a significant number of cases in order to discuss mutual concerns and suggestions, such as designating a liaison attorney and judge to communicate with federal counterparts. These communications provide an opportunity to

39. MANUAL FOR COMPLEX LITIGATION (THIRD) § 31.31 (1995).

40. In addition to the multiple editions of the MANUAL FOR COMPLEX LITIGATION, in 1997 the FJC published, jointly with the National Center for State Courts and the State Justice Institute, a MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS, which included a section titled, "Special Issues Relating to Complex and Multijurisdictional Litigation." JAMES G. APPLE ET AL., MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS 15–34 (1997), *available at* http://ftp.resource.org/courts.gov/fjc/stfedman.pdf.

41. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.312 (2004).

> exchange pretrial orders and proposed schedules that help avoid potential conflicts.[42]

Not to put too fine a point on it, but the *Manual for Complex Litigation*'s extensive discussion of coordination in multi-jurisdictional litigation is a great resource for federal *and* state judges in multi-jurisdictional litigation.

In a 2009 pamphlet that the FJC published jointly with the JPML, *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges*, step seven is "Coordinate with Parallel State Court Cases."[43] This rather brief publication is modeled on the FJC's "pocket guides."[44] Here is what it has to say about inter-jurisdictional communication:

> Sometimes there are pending state court cases related to your MDL. Take it upon yourself to reach out to your state court colleagues from the outset. Try to forge constructive working relationships with them. One way of doing this is to establish an MDL-specific website so that your orders and rulings are readily available. You can also begin by assessing what issues presented in the related state and federal court cases might be suited for coordinated efforts.[45]

Most recently, in 2011, the FJC and JPML jointly published *Managing Multidistrict Litigation in Products Liability Cases*,[46]

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42. *Id.*

43. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES 7 (2009) [hereinafter TEN STEPS TO BETTER CASE MANAGEMENT] (internal citations omitted), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/mdljudge.pdf/$file/mdljudge.pdf.

44. *Id.*

45. *Id.*

46. BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FED. JUDICIAL CTR. & JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES (2011), *available at* http://www.jpml.uscourts.gov/managing_MDL_PL_Pocket_Guide.pdf.

which includes a relatively lengthy section on inter-jurisdictional communication (it is one of the longest sections in the publication).[47]

C. Renewed Interest in the Topic

As outlined in the previous sections, the need for coordination between federal and state judges in multi-jurisdictional litigation has long been recognized. The issue is now receiving increased attention, because in January 2011 the Conference of Chief Justices (CCJ) adopted the resolution, "Directing the National Center for State Courts to Promote Communication and Best Practices for the Management of Like-Kind Litigation That Spans Multiple State Jurisdictions and Federal Districts."[48] In full, that resolution stated:

> WHEREAS, the globalization of communications, business, and commerce has resulted in a significant amount of complex, repetitive litigation in multiple jurisdictions, both state and federal; and
>
> WHEREAS, multi-jurisdiction litigation, such as mass torts, can challenge the resources and ingenuity of both federal and state judiciaries because there are often different categories of potential claimants, overlapping jurisdiction of state and federal courts, daunting amounts of information and documents, and differing laws on subjects such as discovery and the qualification of experts; and
>
> WHEREAS, the judicial management of the In re: Phenylpropanolamine (PPA) Products Liability Litigation [MDL-1407 (W.D. Wa.)], an example of effective and efficient coordination between state and federal courts, included the establishment of joint

47. *See id.* at 33 (including a discussion over inter-jurisdictional communication).

48. CONFERENCE OF CHIEF JUSTICES, *Resolution 2*, *in* POLICY STATEMENTS & RESOLUTIONS, *available at* http://ccj.ncsc.dni.us/MultiJurisResolutions/resol2District.html.

> committees to encourage parties to reach consensus on trial management issues, master written discovery lists, document depositories, cross notices, joint hearings, and Daubert hearings in which interested state judges were invited to participate;
>
> NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices directs the National Center for State Courts to take all available and reasonable steps to promote communication between state and federal courts for the purpose of establishing best practices for the management of like-kind litigation that spans multiple state jurisdictions and federal districts.[49]

Lacking any information suggesting there were increasing tensions between state and federal judiciaries, we are led to believe that the motivation came from the idea that improved communication between the state and federal courts was a worthwhile issue for the National Center for State Courts to take up.

Following discussions between the chair of the CCJ at that time, Chief Justice Wallace Jefferson of Texas, and United States District Judge Royal Furgeson, a member of the JPML, the federal judiciary became involved.[50] The issue of communication between state and federal courts was referred to the Judicial Conference Committee on Federal-State Jurisdiction (Committee).[51] The FJC

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49. *Id.*

50. Telephone conference with United States Senior District Judge Royal Furgeson, Northern District of Texas (Feb. 8, 2012).

51. JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION, REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 24 (Sept. 2011) (hereinafter REPORT TO JUDICIAL CONFERENCE). The Committee is not new to this issue. For example, in an interview with the *Maine Bar Journal* in 2004, the chair of the JPML at that time, Judge William Terrell Hodges, answered a question about parallel state proceedings by pointing to the Committee's work: "That is a challenging issue that has received a lot of study by the Rules Committees of the Judicial Conference and the Committee on State and Federal Jurisdiction [sic], which is populated by some state judges and five chief justices of the states." Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 ME. B.J. 16, 20 (2004).

was asked to survey federal MDL transferee judges about their experiences coordinating with state counterparts.[52] The National Center for State Courts set about conducting a parallel—although much more difficult—survey of state judges with experience in multi-jurisdictional litigation.[53]

After consulting with the JPML, the Committee, and judges with experience in such matters, the FJC distributed the survey (found in the Appendix) electronically "to every transferee judge with an open MDL in the spring of 2011 or who had closed an MDL proceeding in the prior two years."[54] A sizeable number of federal transferee judges had more than one MDL proceeding that matched these criteria.[55] The decision was made to send these judges just one survey covering two or more proceedings—or, in other words, the data was collected at the judge-level, not the proceeding-level.[56] In all, the survey was sent to 287 federal judges, garnering 204 replies (for a response rate of 71%).[57] The survey's findings are detailed in Part III.

The purpose of the FJC and National Center for State Courts surveys was to provide a jumping-off point for the discussion of "a small group of federal and state judges" that would "help develop a 'best practices' protocol [to] assist judges" presiding in multi-jurisdictional litigations.[58] It is anticipated, as of this writing, that the FJC and National Center for State Courts will publish either complementary "pocket guides" for their respective audiences or a joint publication. How this publication will differ from previous FJC

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52. REPORT TO JUDICIAL CONFERENCE, *supra* note 51, at 24.

53. *Id.* With respect to the greater difficulty involved in this undertaking, there is simply no state-court equivalent of the JPML. There may be single-state equivalents in, say, California or Texas. *See* Amanda Bronstad, *The States Are Getting in on the MDL Action*, NAT'L L.J., Sept. 19, 2011, at 12 (describing the Multidistrict Litigation Panel in Texas and the Judicial Council in California, both of which coordinate and oversee MDLs in their respective states). But no one has a list of all the state judges potentially having experience in multi-jurisdictional litigation. Therefore, it is very difficult to target a state-judge survey in the way that we were able to with the assistance of the JPML.

54. LEE, *supra* note 13, at 1.

55. *Id.*

56. *Id.*

57. *Id.*

58. REPORT TO JUDICIAL CONFERENCE, *supra* note 51, at 25.

efforts is, at present, not clear, as the meeting of state and federal judges has yet to take place as of this writing.

The next part of the Article details the findings of the FJC survey of transferee judges and, when appropriate, some of the findings of the National Center for State Courts survey of state judges.

III. SURVEY FINDINGS

A. Awareness of Parallel Proceedings

The threshold issue, before any communication or coordination can take place, is whether the federal MDL transferee judge is aware of parallel state proceedings. Given the public nature of courts and the likely overlap in state and federal counsel, presumably transferee judges eventually become aware of parallel state proceedings, if any. Indeed, the location of parallel state cases is one of the factors that the JPML itself uses in deciding where to consolidate a proceeding.[59] In many cases, then, the transferee judge will know from the date of transfer that there are parallel state proceedings.

Forty-four percent of the surveyed transferee judges reported that, at some point in presiding over a proceeding, they became aware of parallel state proceedings.[60] The percentage of judges reporting awareness of state proceedings varied widely among different types of proceedings,[61] in a pattern generally explainable by whether the underlying substantive law is predominantly state or federal. Types of litigation where federal jurisdiction is based largely in diversity, for example, are more likely to have related cases without any basis for federal jurisdiction. Conforming to this

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59. *See* DAVID F. HERR, MULTIDISTRICT LITIGATION 152–53 (1986) ("The Panel has considered the potential for coordination of pretrial proceedings, particularly discovery, between the transferred federal court actions and related state court actions. If the potential exists for coordinating these actions, the federal district in which the state court actions are pending will be favored.").

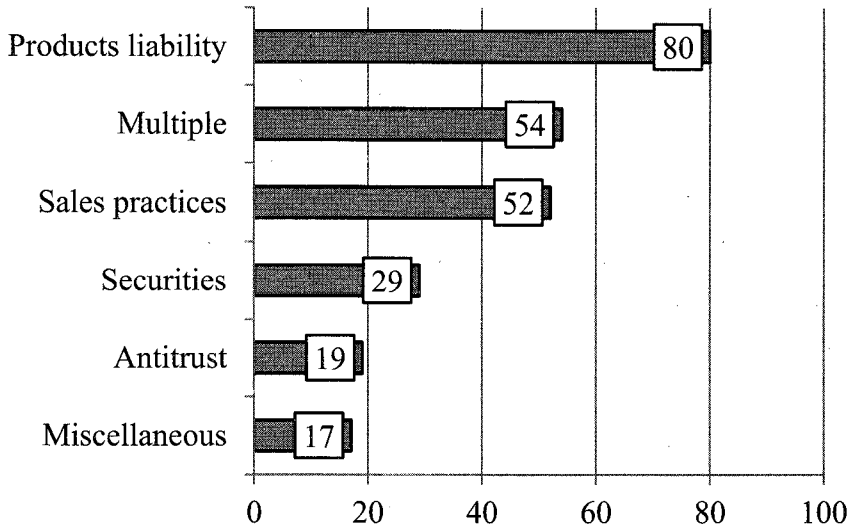
60. LEE, *supra* note 13, at 1.

61. *Id.* at 1–2. In the discussion that follows, we employ the JPML's classification of proceedings, except when a repeat transferee judge heard more than one type of proceeding.

pattern, none of the transferee judges in intellectual property (patent) proceedings reported becoming aware of related state proceedings,[62] which makes sense as patent litigation is based in federal law.[63] In contrast, judges in products liability proceedings were very likely (80%) to report awareness of related state proceedings.[64] Products liability claims, of course, tend to be based in state law[65] and thus are in federal court only through diversity of citizenship jurisdiction. Transferee judges in sales practice proceedings were almost always evenly split,[66] likely reflecting the prevalence of state consumer protection laws. Securities (29%) and antitrust (19%) MDLs, two areas dominated by federal law,[67] were fairly unlikely to have related state cases. Transferee judges with multiple types of proceedings were slightly more likely than average (54%) to report state proceedings (as expected, because they would answer yes even if only one of their MDLs had related state cases).[68]

62. FJC Transferee Judge Survey Results, *supra* note 13.
63. U.S. CONST. art. I, § 8, cl. 8; 35 U.S.C. § 2 (2010).
64. *See infra* Figure 1.
65. ROTHSTEIN & BORDEN, *supra* note 46, at 1.
66. *See infra* Figure 1.
67. THOMAS LEE HAZEN, FEDERAL SECURITIES LAW 24 (3d ed. 2011).
68. *See infra* Figure 1.

Figure 1: Percentage of transferee judges reporting that they became aware of parallel state proceedings at some point, by type of proceeding



Another interesting, and rather surprising, factor correlated with awareness was when the proceeding was initiated. To make a rough comparison, we divided our sample in half according to MDL number, which corresponds to the order of filing. Transferee judges presiding over earlier-filed proceedings were more likely to report awareness of related state litigation (55%) than transferee judges presiding over later-filed proceedings (32%).[69] Why would judges presiding in later MDLs be less likely to be aware of related state litigation? Congress has increased removability to federal court, at least with respect to putative class actions,[70] which may lessen the

69. FJC Transferee Judge Survey Results, *supra* note 13. We did not exclude the many judges who presided over multiple proceedings, which may have weakened the effect. Nevertheless, a chi-squared test was significant ($p < .01$). *See* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 284 (3d ed. 2011) ("The chi-squared statistic measures the distance between the data and expected values computed from a statistical model. If the chi-squared statistic is too large to explain by chance, the data contradict the model.").

70. *See* 28 U.S.C. § 1332(a)(2) (2010) ("The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum

likelihood that newer cases will remain in state court. Consider *Smith v. Bayer Corp.*[71] Today, the West Virginia state case would likely be removable under the Class Action Fairness Act of 2005 (CAFA)[72] and thus would be consolidated into the MDL proceeding. CAFA, however, only applies to cases raising class allegations.[73] Individual actions alleging only state-law claims and not meeting the amount-in-controversy requirement would still not be removable.[74] Moreover, state-law class actions brought in the defendant's state of citizenship on behalf of a statewide class would not be removable, regardless of the amount in controversy.[75]

Even if CAFA means that there are fewer class actions in the state courts, post-2005, there will clearly still be cases in the state courts. The incentives for plaintiffs and plaintiffs' attorneys to avoid consolidation in a federal MDL proceeding have not changed

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or value of $5,000,000 . . . and any member of a class of plaintiffs is a citizen of a State different from any defendant."). *See also* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1733–35 (2008) (describing Class Action Fairness Act's (CAFA) expansion of federal jurisdiction); *id.* at 1751 ("[T]he number of diversity class actions filed in or removed to the federal courts increased in the post-CAFA period.").

71. 131 S. Ct. 2368 (2011).

72. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1–2074 (2005)). The recitation of facts in Justice Kagan's opinion for the Court in *Smith* states that the West Virginia state-court plaintiff "had sued several West Virginia defendants in addition to Bayer, and so the suit lacked complete diversity." *Smith*, 131 S. Ct. 2368, 2373 (2011). The attached footnote states that "[t]he Class Action Fairness Act of 2005, which postdates and therefore does not govern this lawsuit, now enables a defendant to remove to federal court certain class actions involving nondiverse parties." *Id.* at 2373 n.1. Later, the opinion states that "CAFA may be cold comfort to Bayer with respect to suits like this one beginning before its enactment." *Id.* at 2382.

73. Blockbuster, Inc. v. Galeno, 472 F.3d 53, 56 (2d Cir. 2006).

74. Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 751 (11th Cir. 2010).

75. *See* 28 U.S.C. § 1332(d)(4)(B) (2010) (providing that a federal district court shall decline to exercise jurisdiction where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."). *Cf.* Hertz Corp. v. Friend, 130 S. Ct. 1181, 1195 (2010) (holding that a complaint alleging violations of California wage and hour laws brought against a corporation with its "principal place of business" in New Jersey was removable to federal court under CAFA).

substantially, post-2005. Here is how Paul Rheingold, a leading attorney in the "phen-fen" litigation, described those incentives:

> There were several reasons why many lawyers shunned the federal system: some feared that they would lose control of their clients; others objected to the inherent delays involved in MDL preparation work. Many attorneys sought to prevent their cases from being subsumed into a class action. Most importantly, a share of the fee (known colloquially as a "tax") would have to be paid for the work of the plaintiffs' steering committee.[76]

It is possible that, in some newer proceedings, state litigation has not yet begun or the federal judges have not yet learned of them. Yet because cases typically move from state court to federal court rather than vice versa, this is unlikely to account for much of the time-of-filing effect on federal judges' awareness of related state proceedings.

B. Communication

1. Findings

Fifty-three respondents, or 60% of the eighty-nine transferee judges who were aware of related state proceedings, communicated with state counterparts.[77] Of the fifty-three respondents who communicated, fifty (94%) said they communicated directly and twenty (38%) communicated indirectly (through attorneys, for example).[78] These responses were not mutually exclusive in the transferee judge survey.[79]

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76. Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910, 914–15 (2001) (internal citations omitted).

77. LEE, *supra* note 13, at 1.

78. *Id.*

79. *Id.*

When broken down by type of proceeding, the numbers are too small to draw any firm conclusions.[80] It is noteworthy that transferee judges with products liability proceedings were significantly different from average ($p < .05$).[81] Nearly 80% of such judges communicated with their state counterparts; the twenty-two communicating transferee judges in products liability proceedings account for more than 40% of the communicating transferee judges.[82] The benefits of communication in these proceedings may seem clearer than in litigation that is less grounded in state law. It should also be noted that some of the transferee judges with multiple types of proceedings did have a products liability proceeding (along with other types).[83] So, some of the communication in the multiple proceedings category was certainly in the products liability area.

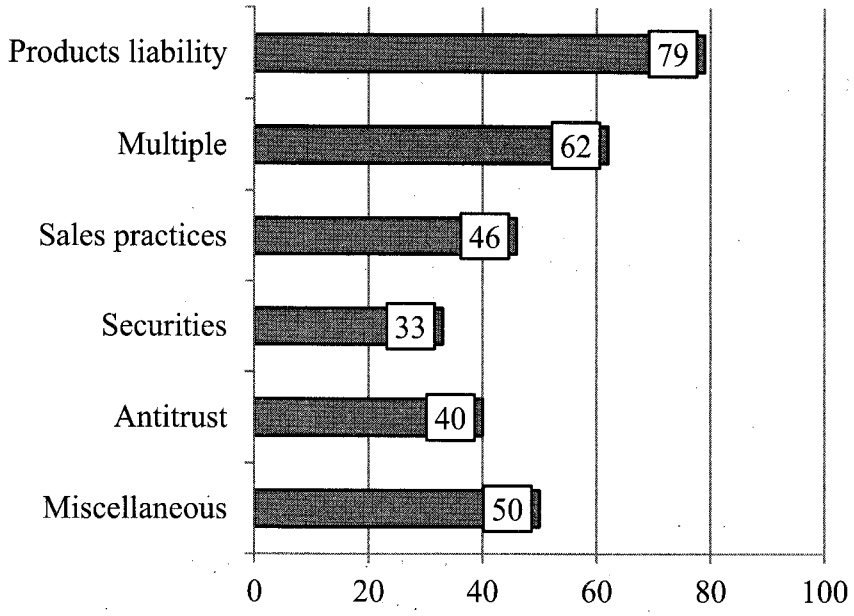
80. Only five judges with an antitrust proceeding, six with a securities proceeding, and four with a miscellaneous proceeding reported being aware of parallel state proceedings.

81. *See infra* Figure 2.

82. *See infra* Figure 2.

83. FJC Transferee Judge Survey Results, *supra* note 13.

Figure 2: Percentage of transferee judges aware of parallel state proceedings who communicated with state counterparts, by type of proceeding



In the survey of state judges conducted by the National Center for State Courts, forty of the seventy-seven (52%) responding judges stated that they communicated with other state or federal judges handling related litigation.[84] Of the forty communicators, thirty said they communicated directly and ten said they communicated indirectly.[85] It appears that the answers were mutually exclusive in the state survey.

2. Ex Parte Communication

One of the more interesting points emerging out of this part of the research was that several federal judges, including members of the Committee, expressed reservations about the propriety of

84. NAT'L CTR. FOR STATE COURTS, MDL Survey (state) (Sept. 2, 2011) (on file with the authors) [hereinafter NCSC Survey Results].

85. *Id.*

contacting their state counterparts about pending matters.[86] This may help to explain why 40% of transferee judges did not take steps to communicate with state counterparts,[87] despite the FJC's admonition to "[t]ake it upon yourself to reach out to your state court colleagues from the outset."[88]

The Canons governing federal judicial conduct are not terribly instructive on this point.[89] The most relevant provision is probably Canon 3(A)(4). That provision, regarding ex parte communications, reads:

> (4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, *a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers.* If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:
>
> (a) *initiate, permit, or consider ex parte communications as authorized by law*;
>
> (b) when circumstances require it, permit ex parte communication for *scheduling*, *administrative*, or emergency purposes, but only if the ex parte communication does not address *substantive* matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

86. FJC Transferee Judge Survey Results, *supra* note 13.

87. *Id.*

88. TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 43, at 7.

89. U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES (2009), *available at* http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx (last visited Feb. 28, 2011).

> (c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or
>
> (d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.[90]

The limitation on ex parte and other case-related communications would seem to apply to communications between state and federal judges on parallel cases. Subsection (a) probably does not apply, as there is, to the authors' knowledge, no law that authorizes such communications. Subsection (b) may apply, however, to the extent that inter-jurisdictional communications are limited to scheduling and administration and not substantive matters. Then there is this explanation in the commentary (the most relevant part):

> The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.[91]

The question, in a nutshell, is whether inter-jurisdictional communication fits within that commentary: "A judge may consult with other judges."[92] Clearly, transferee judge communication with state counterparts would have to be limited to scheduling and administration of the parallel proceedings. Discussion of the merits or other substantive matters would be off-limits. However, there is

90. *Id.* at Canon 3(A)(4) (emphasis added).
91. *Id.* at Canon 3A(4) cmt.
92. *Id.*

at least one secondary source that would limit all judge-to-judge communication to "judges for the same jurisdiction."[93] Under that interpretation, inter-jurisdictional coordination by judges is not authorized by the judge-to-judge consultation exception.

That leaves the scheduling and administration exception. It is worth pondering whether inter-jurisdictional communications can be limited to scheduling and administrative matters—or, perhaps more precisely, whether administrative and substantive matters are so distinct. Professor McGovern has phrased this concern in the following way:

> Cooperation in the strategy of judicial management is the most difficult type of cooperation to evaluate from a normative perspective. Generally, administrative cooperation is viewed favorably from ethical [and other] perspectives. The issue is the definition of "administrative." In most cases, the administrative role of the judge is well defined and predictable. In mass torts, however, . . . the role of the judge has been expanding—from umpire to manager to player.[94]

Clearly, there is a line that federal and state judges must respect, not only in terms of inter-jurisdictional communications. In a subsequent article, Professor McGovern made the point in a slightly different way, cautioning against allowing administrative coordination to morph into centralized decision making on the merits:

> The judicial rules of ethics, the adversarial process, and the customs of litigation all allow judges to communicate and coordinate amongst themselves but

93. Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1378 n.135 (2000). *See also* Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 856–58 (1989) (pointing out that there is a formal procedure for a federal judge seeking advice about state law matters, explaining that ex parte communication should be limited to members of the same geographical courts, and describing the logic behind such limitations).

94. Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1869 (1997).

> do not contemplate collective decisions by independently elected or selected trial level judges. Appellate judges collaborate in this manner, but trial judges do not view their role as seeking out other trial judges for ex ante consensus building.[95]

Note that the same issue arose in the 1992 Schwarzer article—the danger of "collective decisions" (McGovern's term) or, in the terms of Schwarzer, the prospect of "state and federal courts join[ing] forces in deciding issues of substantive law."[96]

The Judicial Conference Committee on Codes of Conduct may address this issue. One final point is that we do find that some transferee judges communicate *only* indirectly with state counterparts. This may reflect a discomfort with direct communication stemming from a concern about ex parte communications.

C. Coordination

Fifty-three respondents, or 60% of the eighty-nine MDL judges reporting awareness of state proceedings, communicated with state judges.[97] These fifty-three were asked if they had attempted coordination with state judges in any of sixteen different areas, and forty-seven (89%) reported at least one attempted coordinated activity.[98]

The frequency of each type of coordination was as follows, in order of frequency:

- Scheduling of dispositive motions—22 judges (42%)
- Establishing a common document depository for discovery—22 (42%)
- Scheduling of trial dates—21 (40%)

95. McGovern, *Toward a Cooperative Strategy*, *supra* note 11, at 1874.
96. Schwarzer et al., *supra* note 18, at 1745.
97. LEE, *supra* note 13, at 1.
98. FJC Transferee Judge Survey Results, *supra* note 13.

- Scheduling of *Daubert*[99] or *Frye*[100] hearings—16 (30%)
- Scheduling of fact witness depositions—15 (28%)
- Using a website to communicate the courts' significant orders—15 (28%)
- Scheduling other pretrial hearings—14 (26%)
- Scheduling of expert witness depositions—12 (23%)
- Appointing the same lead or liaison counsel in state and federal court—11 (21%)
- Appointing the same special master or court-appointed expert in both courts—11 (21%)
- Holding a joint mediation–settlement conference—10 (19%)
- Appointing the same mediator—8 (15%)
- Holding joint pretrial hearings, either in person or using technology—7 (13%)
- Scheduling of class-certification motions—6 (11%)
- Creating a procedure for addressing emergency or time-limited issues—4 (8%)
- Holding a joint trial—1 (2%)[101]

It is unsurprising that scheduling tasks tended to be the most frequently reported type of coordination activity.[102] Scheduling is among the easier tasks to coordinate and, because choosing specific dates is entrusted to the judge's discretion, conflicting state and federal rules generally should not pose a problem. Establishing a shared document depository was also very common, likely for similar reasons. These types of activities steer clearest of the collective decision-making concerns discussed above.

At the other extreme, holding a joint trial was the least-reported coordinated activity. Logistically, holding a joint trial is the

99. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

100. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

101. LEE, *supra* note 13, at 1–2.

102. *Cf.* Schwarzer et al., *supra* note 18, at 1734 ("[T]he most extensive cooperation has been achieved primarily during discovery and other early stages of litigation.").

most difficult task and can have the most complications in terms of state and federal rules of evidence and procedure. Whether to have one or two juries, how to shield one jury from evidence admissible in one jurisdiction but not the other, and how two judges can rule on objections during trial are just some of the potential complications.[103]

In the survey of state judges conducted by the National Center for State Courts, the most commonly reported coordinated activities were scheduling of pretrial hearings and expert witness depositions.[104] The frequency of each type of coordination was as follows, in order of frequency:

- Scheduling other pretrial hearings—15
- Scheduling of expert witness depositions—15
- Establishing a single document depository for discovery—14
- Scheduling of dispositive motions—13
- Using a website to communicate the courts' significant orders—13
- Scheduling of *Daubert*[105] or *Frye*[106] hearings—12
- Scheduling of fact witness depositions—12
- Appointing the same lead or liaison counsel in state and federal court—12
- Scheduling of trial dates—11
- Appointing the same mediator—9
- Holding joint pretrial hearings, either in person or using technology—9
- Holding a joint mediation–settlement conference—7
- Creating a procedure for addressing emergency or time-limited issues—5
- Scheduling of class certification motions—4
- Appointing the same special master or court-appointed expert in both courts—4
- Holding a joint trial—2[107]

103. *Id.* at 1727–32.
104. NCSC Survey Results, *supra* note 84.
105. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
106. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Although the exact order differs, results were similar to the federal survey in that scheduling items and establishing a shared document depository were the most common and holding a joint trial the least. Among the tasks listed in the surveys, appointing the same lead or liaison counsel was relatively more common among state judges responding to the survey,[108] while appointing the same special master or expert was more commonly reported by federal judges.[109]

In the federal survey, we calculated the number of coordinated activities each communicating judge reported and were surprised at how extensive the coordination was. One judge reported fourteen, nearly all of the activities covered by the survey, and another reported twelve.[110] Nineteen percent of judges reported just one activity, and 13% reported two.[111] The median and mode for the number of reported coordinated activities was three (21% of judges).[112] The mean was 3.7, reflecting a long tail of 36% reporting between four and fourteen coordinated activities.[113]

D. Problems and Issues

The federal survey asked transferee judges who had become aware of parallel state proceedings to rate the seriousness of a series of potential problems that might arise in multi-jurisdictional litigation.[114] The ratings were on a five-point scale, from "Not at all a problem" to "A serious problem."[115] The potential problems that respondents rated were:

- Attempts by parties to use state proceedings to their strategic advantage in the federal MDL proceedings.[116]

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107. NCSC Survey Results, *supra* note 84.
108. *Id.*
109. FJC Transferee Judge Survey Results, *supra* note 13.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. LEE, *supra* note 13, at 2.
115. *Id.*
116. *See* Barbara J. Rothstein et al., *A Model Mass Tort: The* PPA *Experience*, 54 DRAKE L. REV. 621, 623–24 (2004). Judge Rothstein, former

- Duplicative discovery due to multiple proceedings.
- Conflicts between counsel in state and federal courts over schedule or pace of proceedings.
- Jurisdictional conflicts between state and federal courts.
- Delay in resolution of the state and federal litigation due to multiple proceedings.
- Establishing a means to compensate attorneys representing plaintiffs in parallel state proceedings from a common fund in the federal MDL.
- State cases had a procedural "head start" on MDL proceeding.
- Reluctance of state judges to coordinate with MDL proceeding.[117]

Among the fifty-three transferee judges who reported communicating with state counterparts, the most serious problem, on average, was attempts by parties to use state proceedings to their strategic advantage in the federal MDL proceedings, which received an average of 2.8 out of 5.[118] This was followed by conflicts between counsel in state and federal courts over schedule or pace of proceedings, at 2.2; jurisdictional conflicts between state and federal courts, at 2.1; duplicative discovery due to multiple proceedings, at

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director of the FJC, and her co-authors describe this phenomenon in the following way:

> The scrambling for strategic advantage in federal multidistrict litigations often spills into the state courts as plaintiffs' counsel attempt to litigate in jurisdictions with favorable discovery rules, early trial dates, and juries that are receptive to such claims, the expectation being that sizeable early verdicts in friendly jurisdictions will sharply increase settlement values for similar actions. Defense counsel counter by attempting to limit state venue, delaying state proceedings in cases they view as unfavorable, and removing cases to federal court.

Id.

117. LEE, *supra* note 13, at 2.

118. *Id.* at 1–2.

2.1; delay in resolution of the state and federal litigation due to multiple proceedings, at 2.0; state cases had a procedural "head start" on MDL proceeding, at 1.8; and establishing a means to compensate attorneys representing plaintiffs in parallel state proceedings from a common fund in the federal MDL, at 1.8.[119] Somewhat surprisingly, the potential problem receiving the lowest average rating was the reluctance of state judges to coordinate with an MDL proceeding, which was rated at 1.6 among transferee judges who communicated with state counterparts.[120]

The survey was constructed so that transferee judges who reported that they were aware of parallel state proceedings but did not communicate, either directly or indirectly, with state counterparts were also asked to rate these potential problems.[121] There were thirty-six such judges in the survey.[122] Interestingly, these judges tended to rate the problems about the same as the communicating transferee judges.[123] The one glaring exception was that non-communicating judges rated "Attempts by parties to use state proceedings to their strategic advantage in the federal MDL proceedings" much less seriously than communicating judges, at only 1.9 out of 5.[124] That difference of means (2.8 versus 1.9) is statistically significant at the 0.05 level.

What to make of that finding? It is plausible that judges are more likely to communicate when attempts to use the parallel proceedings for a strategic advantage become clear to them. But it is equally plausible that attempts to use parallel proceedings for a strategic advantage are clearer when one is in contact with the judges in those proceedings. The answer probably includes some of both explanations. Another, probably less likely, explanation is that the communication actually causes problems. It is possible that judges' efforts to respect each others' work gives an opening to crafty attorneys to manipulate the proceedings. Since judges are not known for being wallflowers, however, this explanation is unlikely to

119. *Id.* at 2.
120. *Id.*
121. *Id.*
122. FJC Transferee Judge Survey Results, *supra* note 13.
123. *Id.*
124. *Id.*

account for much of the difference between communicating and non-communicating judges.

We also created an additive index of the overall seriousness of the eight potential problems. Possible scores on the additive index range from eight to forty.[125] Given the relatively low ratings of the problems presented above, it should come as little surprise that eight, the low end of the possible scores, was the modal response for communicating transferee judges, with eight respondents, or 15.1%.[126] The highest observed score was thirty-one (an average response on the problems of 3.9), followed by twenty-six (3.3).[127] The mean score for these fifty-three judges was 16 (also the median).[128]

For the judges who were aware of parallel state proceedings but did not communicate with state counterparts, the mode was also 8 but the mean score was 14 (with a median of 12).[129] That difference of means is not statistically significant ($p = 0.147$) and is largely accounted for by the "strategic advantage" question.

In general, federal transferee judges who were aware of parallel state proceedings did not rate potential problems very seriously. It would be interesting to compare these results with a large sample of state judges with experience in multi-jurisdictional litigation to see if their experiences are similar. The National Center for State Courts, as discussed above, has conducted a survey of state judges, but its sample includes only thirty-two judges with experience in state cases in which there was a parallel federal MDL proceeding.[130] Ignoring for the moment that important caveat in the

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125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. NCSC Survey Results, *supra* note 84. One might think that our samples are not that different in size. The point, however, is the size of the underlying population. Our sample included all federal transferee judges in current or recent MDL proceedings (minus non-response), a relatively small figure (287). The actual size of the population, in our case, was knowable, based on the JPML's records. There is no comparable state institution. The National Center for State Court survey's population size (i.e., the number of state judges potentially with experience coordinating with federal proceedings) is an unknown, but we think it is beyond cavil to say that the figure is much higher than 287. We cannot

preceding footnote, however, Figure 3, *infra*, displays the mean responses of federal and state judges on the issues questions in a dot plot. As can be seen in the figure, the National Center for State Courts survey did not include two of the issues questions.[131] It also substituted "Difficulty in arriving at amicable judicial leadership,"[132] for the "reluctance of state judges to coordinate" question.

In the figure, we have summarized these two questions as "Judicial Relationship" (see the bottom row of Figure 3). Interestingly, the federal and state judges surveyed do not appear to differ greatly in their views. The state judges surveyed rated the parties' strategic use of parallel proceedings as less problematic than the federal judges and rated duplicative discovery and delay in resolution as more problematic. But on three other questions, it is remarkable how similar the ratings are. The state judges surveyed did not view judicial relationships as more (or less, really) problematic than the federal judges, and in terms of compensating state counsel and jurisdictional conflicts, the dots overlap.

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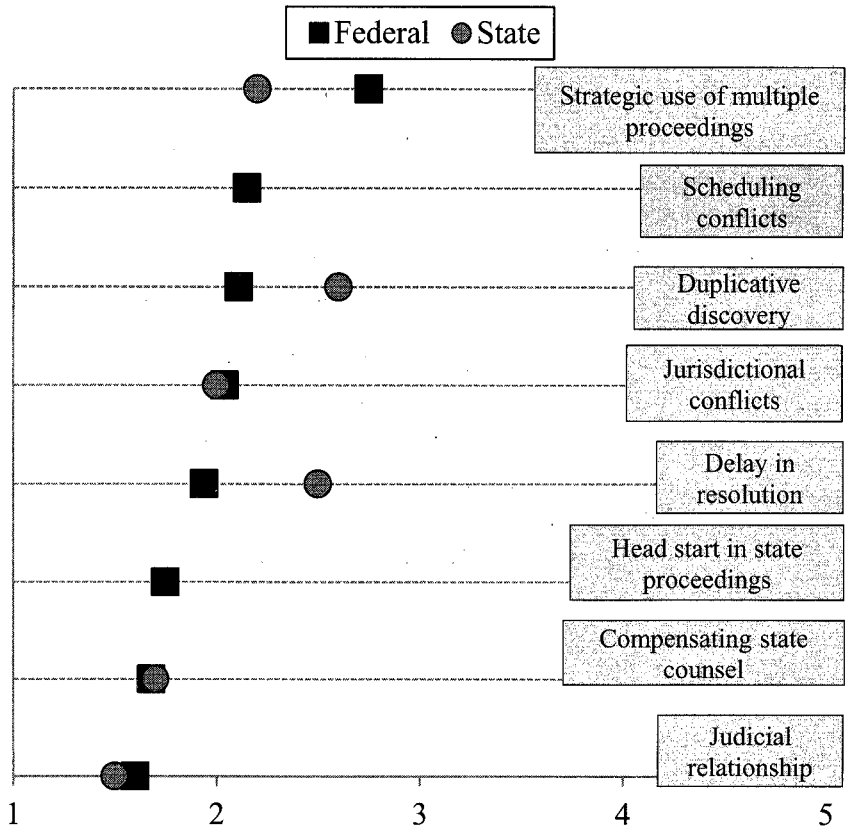
rely on the views of just thirty-two state judges as representative of state judges' views in general.

131. *Id.*

132. *Id.*

Figure 3: Judges' rankings of potential issues in multi-jurisdictional litigation



Of course, with so little data, it would be irresponsible to suggest that the state judges surveyed adequately represent the views of the entire state judiciary. It is possible that, in more than a few instances, state judges resent the "interference" of the federal proceeding. One might reasonably speculate that the West Virginia jurist in *Smith v. Bayer Corp.* felt that way.[133] But the empirical evidence collected thus far does not show that this is widespread.

133. Smith v. Bayer Corp., 131 S. Ct. 2368 (2011).

IV. CONCLUSION

Coordination between state and federal judges with parallel cases is hardly a new topic. Indeed, given the thoroughness of the treatment the subject has received in the *Manual for Complex Litigation, Fourth*, and other recent FJC publications, one might reasonably ask what new statements can be made on the subject. The renewed interest in the subject in the past year does not seem to have been motivated by a sense that there was a problem. In business-speak, problems are often referred to, euphemistically, as "opportunities." In the case of coordinating between state and federal judges, perhaps this is actually true for once—the topic presents less a problem than an opportunity to improve the administration of complex litigation in the state and federal courts. Indeed, there is no better time than the present—a time of shrinking judicial resources at the federal and, more significantly, the state levels—to refocus attention on "economy, efficiency, and consistency"[134] in multi-jurisdictional litigation.

134. Schwarzer et al., *supra* note 18, at 1732.

V. APPENDIX

Questionnaire for MDL Transferee Judges

Panel records indicate that you are an MDL transferee judge in one or more open MDL proceeding and/or an MDL transferee judge in one or more recently closed MDL proceeding. The FJC is seeking information from MDL transferee judges to assist in the development of practical resources such as a best practices guide for federal and state judges in complex litigation. Your insights into this process will prove invaluable to this process.

This survey should take approximately 20 minutes to complete.

1) In your experiences as an MDL transferee judge, at any point have you become aware of state cases raising similar claims against at least one defendant that were not removed to federal court and transferred as part of an MDL ("parallel state proceedings")?

- ☐ Yes
- ☐ No

2) Did you communicate either directly or indirectly with any judges presiding in the parallel state proceedings?

- ☐ Yes
- ☐ No

3) How did you communicate with judges presiding in the parallel state proceedings? If you have presided over multiple MDLs with parallel state proceedings, please check all that apply.

- ☐ I communicated personally with state judges, by telephone, email, mail, and/or in person.
- ☐ I communicated indirectly with state judges, through lawyers or law clerks.

4) Do you have any suggestions for successfully establishing communication with judges in state parallel proceedings?

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5) After communicating with state judges, did you attempt to coordinate MDL pretrial proceedings with parallel state proceedings in any of the following ways? Please check all that apply.

- ☐ Appointing the same lead or liaison counsel in state and federal cases
- ☐ Scheduling of dispositive motions
- ☐ Scheduling of motions for class certification
- ☐ Establishing a single document depository for discovery (this may include an online depository)
- ☐ Using a website to communicate the courts' significant orders
- ☐ Scheduling of expert witness depositions (expert discovery)
- ☐ Scheduling of *Daubert* or *Frye* hearings
- ☐ Scheduling of fact witness depositions (non-expert discovery)
- ☐ Appointing the same special master or court-appointed expert in state and federal courts
- ☐ Appointing the same mediator in state and federal courts
- ☐ Holding a joint mediation/settlement conference
- ☐ Scheduling pretrial hearings
- ☐ Holding joint pretrial hearings, either in person or using technology
- ☐ Creating a procedure for addressing emergency or time-limited issues
- ☐ Scheduling of trial dates
- ☐ Holding a joint trial

6) Do you have any suggestions for effectively coordinating an MDL proceeding with parallel state proceedings?

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7) On a scale of 1 to 5, with 1 being "Not at all a problem" and 5 being "A very serious problem", please rate the following potential problems in your experiences as an MDL transferee judge.

	1- Not at all a problem	2	3	4	5 - A very serious problem
Attempts by parties to use state proceedings to their strategic advantage in the federal MDL proceedings	☐	☐	☐	☐	☐
Establishing a means to compensate attorneys representing plaintiffs in parallel state proceedings from a common fund in the federal MDL	☐	☐	☐	☐	☐
Duplicative discovery due to multiple proceedings	☐	☐	☐	☐	☐
Jurisdictional conflicts between state and federal courts	☐	☐	☐	☐	☐
Delay in resolution of the state and federal litigation due to multiple proceedings	☐	☐	☐	☐	☐
Reluctance of state judges to coordinate with MDL proceeding	☐	☐	☐	☐	☐
State cases had a procedural "head start" on MDL proceeding	☐	☐	☐	☐	☐
Conflicts between counsel in state and federal courts over schedule or pace of proceedings	☐	☐	☐	☐	☐

8) Do you have any suggestions for addressing potential problems in MDL proceedings involving parallel state proceedings?

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9) In light of my experiences as an MDL transferee judge, I believe that other judges (both state and federal) who are called upon to manage complex multi-jurisdiction cases would be well served by the following practical resources: (please check all that apply)

- ☐ A listserv that enables active, ongoing communication between judges who are experienced and those who are not experienced in managing these types of cases
- ☐ A multi-jurisdiction litigation workshop bringing together judges and trial attorneys experienced in these types of cases
- ☐ A handbook of model orders from completed multi-jurisdiction cases
- ☐ A compendium of model rules, statutes, and case opinions that direct the management of various aspects of multi-jurisdiction litigation
- ☐ Other (please specify)

If you selected other, please specify

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10) Do you have any additional thoughts on managing MDL proceedings involving parallel state proceedings?

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Thank you for completing this survey. Your input will prove invaluable in creating practical resources for transferee judges.