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AGGREGATE LITIGATION AND THE DEATH OF DEMOCRATIC DISPUTE RESOLUTION

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ABSTRACT—Professor Redish has anchored the modern class action in American political and constitutional theory, raising serious questions about the legitimacy of this procedural device for resolving aggregate claims. Professor Redish's major insight is his argument that the courts and litigants have transformed the modern class action from a mere procedural device into a means for controlling and altering substantive law in ways that he considers to be highly undemocratic.

Others, however, have suggested that the class action is dead. The Article surveys accounts of the death of class actions and explains the continued endurance of class litigation, which, it turns out, is hard to kill off. The Article then documents the changing landscape of aggregate dispute resolution, documenting a significant paradigm shift in the twenty-first century towards increased use of private claims resolution mechanisms. The Article focuses on settlement classes, multidistrict litigation procedure, contractual nonclass settlements, the quasi-class action, and fund approaches to mass claim resolution.

Finally, the Article critically evaluates this paradigm shift and concludes that Redish's critique of class action litigation has even greater relevance in the new world of nonclass, aggregate claims resolution: that Professor Redish's critique applies with even greater force in the nonclass universe. With the paradigm shift towards nonclass aggregate claims resolution, the arc of history may be bending towards greater injustice—a shift that is more significant because it is largely unbounded by rules and unmoored from judicial oversight.

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Class actions are dead.

—Kenneth R. Feinberg[†]

INTRODUCTION

No one has written as passionately and well about the democratic theory of class action litigation than Professor Martin H. Redish.[1] Indeed, no one else has written about it at all.[2] Through a series of landmark

[†] Kenneth R. Feinberg, Unconventional Responses to Unique Catastrophes: Tailoring the Law to Meet the Challenges, Address Before the Faculty of the University of Texas School of Law (Oct. 3, 2011).

[1] *See, e.g.*, MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009).

[2] *See id.* (back cover) ("Although much has been written about class actions, this book is original and enormously important. No one else has analyzed the class action from the perspective of political and democratic theory. All who write about class actions, whatever their perspective, will need to consider and address this provocative work. It is a superb contribution to the literature." (quoting Erwin Chemerinsky)); *id.* (back cover) ("Widely regarded as one of the most important federal courts scholars of the past quarter century, Redish is also a leading figure in constitutional law. In this convincing,

articles,[3] Professor Redish has anchored the modern class action in American political and constitutional theory and, at the same time, raised serious questions about the legitimacy of this procedural device.

Professor Redish's major insight into class action litigation is his argument that the courts and litigants have transformed the modern class action from a mere procedural device into a means for controlling and altering substantive law in ways that he considers to be highly undemocratic.[4] In particular, Redish has identified and challenged the drift of the modern class action into what he has labeled the "bounty hunter" remedial model,[5] characterizing such litigation as "faux" class actions.[6]

In addition to taking aim at the problem of faux class actions, Redish rightly has focused much of his critique on the modern settlement class action, a mechanism greatly expanded in the late 1990s that generated enormous controversy in the courts and academic arena.[7] Redish has argued that settlement classes, "where all sides are in total agreement from

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dramatic work, he has fused his fields of expertise in a unique effort to address the class action in terms of democratic theory. He makes a startlingly strong case that class practice undermines significant notions of democratic accountability and raises serious questions about underlying democratic values." (quoting Richard D. Freer)).

[3] *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71; Martin H. Redish, *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 DEF. COUNS. J. 18 (1996); Martin H. Redish, *The Need for Jurisdictional and Structural Class Action Reform*, 32 ENVTL. L. REP. 10,984 (2002); Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753 (2007); Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573 (2007).

[4] If true, of course, this violates the stricture of the Rules Enabling Act, which prohibits rules of procedure that amend, abridge, or modify substantive rights. 28 U.S.C. § 2072(b) (2006).

[5] *See* REDISH, *supra* note 1, at 14 ("Instead of compensating victims as dictated by controlling substantive law, the class proceeding effectively imposes an entirely different—and often far more politically controversial—remedial structure, what can best be labeled a 'bounty hunter' remedial model. Here private class action plaintiffs' attorneys—individuals who themselves are not victims seeking to be made whole—sue as a type of legal vigilante to enforce substantive behavioral proscriptions against wrongdoers. In such situations the class exists, as a practical matter, solely for the purposes of display. . . . The so-called class itself is all but comatose.").

[6] *Id.* at 14–15 ("Under the guise of a procedural rule, these 'faux' class actions have the inescapable, albeit indirect, impact of transforming substantive law containing a private compensatory remedy into a law that contains a bounty hunter enforcement mechanism. This is a potentially controversial result politically that has presumably never even been considered, much less formally adopted, by the lawmaking organ that promulgated the applicable substantive law in the first place.").

[7] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 865 (1999) (reversing approval of asbestos settlement class); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 629 (1997) (approving decertification of a similar asbestos settlement class); *see also* Symposium, *Mass Tortes: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995) (presenting submissions discussing the tensions between individual autonomy and collective justice, especially regarding settlement class actions).

the very initiation of the proceeding," raise serious questions about the constitutionality of the entire process.[8]

Specifically, Professor Redish contends that settlement classes violate the Article III requirement that federal courts adjudicate only "real cases and controversies," and that ginned-up disputes that are resolved through settlement classes violate Article III of the Constitution.[9] In addition, Redish has persuasively argued that settlement classes are the poster child for procedural mechanisms that transgress the Rules Enabling Act,[10] and therefore that settlement classes under Rule 23 are an unconstitutional exercise of judicial authority.[11]

As a consequence of his critique of the class action mechanism, Professor Redish suggests that "major constitutionally dictated changes" to Rule 23 and prevailing judicial applications of Rule 23 doctrine are necessary.[12] In this view, federal courts should hold that settlement classes contravene the Article III case or controversy requirement because current doctrine sanctions the judicial resolution of faux disputes, without any real case or controversy. In addition, courts should find that all mandatory classes, with the possible exception of Rule 23(b)(1)(A) classes,[13] violate the Due Process Clause because they do not permit voluntary exclusion from the binding nature of the class judgment.[14]

Finally, Professor Redish suggests that the existing Rule 23(b)(3) opt-out procedure also violates the Due Process Clause by departing from key notions of democratic theory.[15] Among his recommendations for possible

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[8] REDISH, *supra* note 1, at 19 ("But when federal courts, bound by the Constitution to operate only through the adjudication of active, adversary cases or controversies, issue binding legal decrees in proceedings where all sides are in total agreement from the very initiation of the proceeding, serious questions may be raised about the constitutionality of the entire process. The settlement class action undermines both the formalistic dictates of Article III and the important constitutional values underlying the requirement of adversary adjudication.").

[9] *See, e.g.*, *id.* at 176–83.

[10] 28 U.S.C. § 2072(b) (2006) (indicating that rules of procedure may not enlarge, abridge, or modify substantive rights of litigants).

[11] *See, e.g.*, REDISH, *supra* note 1, at 72–85.

[12] *See id.* at 231.

[13] Rule 23(b)(1)(A) describes the "prejudice to defendants" class. FED. R. CIV. P. 23(b)(1)(A). This mechanism is largely used to certify classes where in the absence of a class action, prejudice would likely result to the defendant who might be subjected to multiple, conflicting individual judgments and who would not, as a consequence, know how to obey the law. The theory is that by joining all plaintiffs against the defendant, a unitary judgment will result. Prevailing doctrine suggests that Rule 23(b)(1)(A) class actions are not suitable for the recovery of monetary damages but are suitable for injunctive and similar relief.

[14] *See* REDISH, *supra* note 1, at 231.

[15] *Cf. id.* at 131–33 (describing the very limited circumstances in which an opt-out, as opposed to an opt-in, procedure is acceptable). As he develops this consent thesis throughout the book, Professor Redish argues that the only democratic theory by which class members can reasonably manifest consent to be bound by a class judgment is by an affirmative act to opt into the class and not through the negative mechanism of opting out and thereby withdrawing consent. *Id.* at 169–73. As current class

revision of the class action rule, Redish proposes that—especially in light of the faux class action problem—federal judges be required to consider, as part of the class certification process, whether success in the class proceeding is likely to result in real (i.e., money), as opposed to sham (like gift cards for the defendants' business), relief to the class.[16] He also has advocated that the current Rule 23(b)(3) opt-out regime be replaced with an opt-in procedure over time to ensure informed consent to aggregate settlements.

Professor Redish's thoroughgoing critique of Rule 23 considerably elevated the debate surrounding aggregate litigation because it was grounded in the context of democratic theory and encouraged rule revisers and commentators alike to question core values of aggregate dispute resolution. Until Redish focused the debate on fundamental principles, virtually all class action commentary centered on increasingly narrow doctrinal disputes. Redish rightly rechanneled the aggregate litigation debate into elemental issues of justice, fairness, and constitutional due process.

These insights are collected and expanded in Professor Redish's major contribution to the aggregate litigation debate, his 2009 book *Wholesale Justice*, which reflects more than fifteen years of scholarly research and deliberation on the problem of class litigation. His seminal work in this field paralleled the efforts of the Advisory Committee on Civil Rules to amend Rule 23 in the 1990s and illuminated many of the public and academic debates surrounding those considerable efforts. However, almost in tandem with the development of Redish's critique, Special Master Kenneth Feinberg, also originally of considerable class action pedigree,[17] simultaneously began announcing the death of class action litigation. By 2011, after his administration of the World Trade Center (WTC) Victim Compensation Fund and the BP Gulf Coast Claims Facility (GCCF), Feinberg definitively declared that class actions were dead.[18]

Feinberg has famously served as the special master overseeing the resolution of several aggregate relief funds including *Agent Orange*, the WTC Victim Compensation Fund, and most recently, the BP Gulf Coast

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action doctrine maintains, if a class member does nothing, the class member's lack of action constitutes consent to be bound by the class judgment. Professor Redish contends that in all but the narrowest circumstances, this negative opt-out procedure by which one withdraws consent is not a valid consent and hence an undemocratic imposition upon absent class members. *Id.* at 172–73.

[16] *Id.* at 231.

[17] *See* Terry Carter, *The Master of Disasters: Is it Just Him, or Is Kenneth Feinberg Changing the Course of Mass Tort Resolution?*, A.B.A. J., Jan. 2011, at 33, 34–38 (describing Feinberg's role in the *Agent Orange* and *Dalkon Shield* class settlements, among other matters); Keith Roberts, *An Interview with Kenneth Feinberg*, JUDGES' J., Spring 2011, at 4, 4 (describing Feinberg's participation in crafting the Agent Orange settlement).

[18] *See* Feinberg, *supra* note †.

Claims Facility.[19] As a supporter of fund approaches to resolving mass claims, Feinberg surveyed the same aggregate litigation landscape as Professor Redish—over the same four decades—and declared that the class action mechanism for resolving such disputes is moribund.[20] Thus, for Feinberg, mass tort claimants now live in a world that will be governed by fund mechanisms or other nonclass mechanisms.

Feinberg's declarations raise provocative questions. First, is the class action actually dead, and if so, what are the signs of its demise? Second, if the class action is dead, then what killed it? Third, if the class action is indeed dead, then what means of aggregate dispute resolution have taken its place? And fourth—and most importantly for Professor Redish's work—if the class action is dead, then what is the continued relevance of Redish's carefully crafted critique of class action litigation?

This Article addresses these four questions. In the first half, this Article shows that Ken Feinberg is fundamentally wrong; the class action is not dead. Various Cassandras over the past four decades have frequently, inaccurately, and repetitively reported the class action's death. Similar to the reports of Mark Twain's demise, accounts of the class action's death are highly exaggerated. This Article suggests that, far from being dead, class action litigation robustly continues in federal and state courts. It surveys the various accounts of the class action's death and explains the continued endurance of class litigation in spite of historical setbacks. Class action litigation, it turns out, is hard to kill off. In this dynamic class action arena, then, Redish's critiques have continued relevance and vitality.

The second half of this Article, however, documents the changing landscape of aggregate dispute resolution, arguing that the twenty-first century has experienced a significant paradigm shift in aggregate dispute resolution away from the class action mechanism and towards increased use of private claims resolution mechanisms. This portion of the Article focuses on the doctrinal evolution of settlement classes, multidistrict litigation procedure, contractual nonclass settlements, the quasi-class action, and fund approaches to mass claim resolution.

Finally, the Article critically evaluates the paradigm shift to these various private aggregate dispute resolution mechanisms and concludes that Professor Redish's critique of class action litigation has even greater relevance in the new world of nonclass, contractual aggregate claim resolution and fund approaches to disposing of massive liabilities. With the paradigm shift towards innovative nonclass aggregate claims resolution, the arc of history may indeed be bending towards greater injustice—a phenomenon that should raise concerns, if not alarms. Therefore, the same

[19] *See* 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, 820–21 (2011); *see also* Carter, *supra* note 17, at 38.

[20] *See* Feinberg, *supra* note †.

issues that undergirded Redish's disquiet over Rule 23 class litigation—and especially class settlements—are even more significant for aggregate claim resolution that is largely unbounded by rules and unmoored from judicial oversight.

I. THE LIFE AND TIMES OF THE CLASS ACTION: THE DEATH OF CLASS ACTIONS (I)

A. The Life Cycle of the Class Action (Death #1)

It is entirely fair to suggest that the original class action rule—that promulgated with the original Federal Rules in 1938—did die once, killed off by its very rulemakers in the early 1960s. The first death of the class action rule may perhaps most accurately be apprehended as a true demise. By the early 1960s, jurists, litigators, and the rulemakers recognized that the original rule had long outgrown its initial conception and become a dysfunctional mechanism for resolving aggregate disputes.[21] As is well documented, the original Rule 23 class categories of "pure," "hybrid," and "spurious" class actions confounded useful or consistent application of the rule.[22] Problems of class categorization, though, were among many other problems endemic to the original rule.[23]

Because of this doctrinal confusion, litigants largely eschewed the class action, and class litigation played no prominent (or even subsidiary) role during the first twenty-five years of practice under the Federal Rules. In addition, the original rule famously contained no provision for a class seeking damages,[24] and federal law itself embraced few sweeping legislative mandates that would have provided the substantive basis for pursuing group remedies through a class action. In short, there was little felt need for group remedies. Aggregate litigation, as we know it today, did not exist.

By the early 1960s, the reformers then populating the Advisory Committee on Civil Rules committed the first homicidal attack on the class

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[21] See 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1752–1753, at 18–54 (3d ed. 2005), for a good history of the original Rule 23 and the doctrinal interpretation problems inspired by that version of the rule. This narrative history also describes the growing recognition of the need for a rule revision by the early 1960s and describes how the 1966 revisions replaced the former class action rule with what was essentially a new rule. *See id.* § 1753, at 42–46.

[22] *See id.* § 1753, at 43.

[23] *See id.* § 1753, at 43–44.

[24] Rule 23(b)(3) was added in 1966, and according to the Advisory Committee's note, it allows class actions for damages when certain conditions are met. In contrast, Rules 23(b)(1) and 23(b)(2) were meant to address primarily nonmonetary claims for relief. FED. R. CIV. P. 23(b)(1)–(3) & advisory committee's note to 1966 amendment.

action rule,[25] completely rewriting it.[26] In addition, the enactment of sweeping substantive federal legislation during this same period that created new rights and remedies[27] provided the rulemakers with further impetus for reforming the class action to provide a procedural mechanism for enforcing the newly created rights. The rulemakers' somewhat revolutionary concept was their perceived ability to harness procedural means to enforce newly created substantive rights.

B. Class Actions Revivified, 1966

1966 marked the first back-from-the-dead moment for class action litigation. The rewritten rule now contained supposedly clear and "functional" class categories, replacing the old, difficult-to-apply class concepts.[28] The 1966 rule famously created, for the first time, the Rule 23(b)(3) damage class action.[29] In addition, the new Rule 23(b)(2) provided classes a means for pursuing injunctive and declaratory relief, which played an important role in enforcing the sweeping federal legislation enacted during the Johnson and Nixon presidencies.

The promulgation of the 1966 class action rule ushered in a golden age of class action litigation.[30] Hence, from 1966 and throughout the ensuing decade, attorneys realized that they could employ the new class action rule, especially the Rule 23(b)(2) injunctive relief provision, to enforce an array of group rights. During this period, the era of institutional reform litigation or "public law" litigation was created, transforming the litigation landscape

[25] The 1966 revision of Rule 23 was actually part of a larger "package" of rule reforms that addressed and revised almost all of the so-called joinder rules, including Rules 13, 14, 18, 19, 20, 22, and 24.

[26] As can best be determined, and through some oral history of rulemaking, Rule 23 is the only original rule of the 1938 Federal Rules of Civil Procedure to be rewritten in its entirety rather than simply amended from its original version.

[27] Much of this legislation between 1964 and the late 1960s was part of President Lyndon Baines Johnson's Great Society program, including the enactment of various Civil Rights Acts, the Voting Rights Act, housing legislation, Title VII employment discrimination legislation, and more. This change in the domestic legislative landscape, and its effect on federal rulemaking and judicial decisionmaking, was documented in the famous article by Professor Abram Chayes. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[28] *See* 7A WRIGHT ET AL., *supra* note 21, § 1752, at 21–42 (describing the previous classifications—true, hybrid, and spurious class actions—and the difficulties courts had in applying them).

[29] As will be explained below, the Rule 23(b)(3) damage class action did not attain real prominence until the 1980s and 1990s during the era of class action mass tort litigation. For the first decade after promulgation of the 1966 rule, injunctive and declaratory relief class actions reigned supreme. *See* discussion *infra* Part I.D.

[30] *See, e.g.*, PETER H. SCHUCK, AGENT ORANGE ON TRIAL 26, 33–34 (1986) (describing the golden era of class action litigation in the 1960s and 1970s after promulgation of the 1966 class action rule by the Advisory Committee on Civil Rules and Congress).

forever.[31] Between 1966 and the mid-1970s, federal courts were transformed by the influx of massive class action cases seeking remediation for alleged violations of various constitutional, federal, and state laws.[32]

C. The Death of the Class Action, 1970s (Death #2)

Professor Arthur Miller has accurately observed that federal rulemaking, as well as the response to federal rulemaking, is a pendulum-like phenomenon.[33] Thus, after the Advisory Committee promulgates a rule amendment, courts and litigants predictably experience an upswing in enthusiasm over (and use of) the new rule, followed inevitably by a reaction to correct for that initial, over-enthusiastic endorsement of the rule revision. Eventually, Miller has noted, sanity prevails and federal procedure swings back to equilibrium.[34]

Consistent with Professor Miller's pendulum account, the 1960s burst of passion for the new 1966 rule inevitably resulted in a class action backlash. Some commentators suggested this backlash reflected resistance to and bias against plaintiffs' civil rights actions.[35] By the early 1970s, enthusiasm for the class action mechanism had waned, and in some quarters, at least, was greeted with growing hostility.

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[31] *See* Chayes, *supra* note 27, at 1281–84. In this famous article, Professor Chayes documented the shift in the litigation landscape from what he deemed the "traditional" civil case to the modern institutional public law reform litigation. According to Chayes's description, the previous traditional civil case was characterized by: (1) a lawsuit that was bipolar, (2) litigation that was retrospective, (3) litigation where the right and remedy were interdependent, (4) a lawsuit that was a self-contained episode, and (5) a party-initiated and party-controlled process. *Id.* at 1282–83. The new public law model of litigation was characterized by: (1) a process that was "sprawling and amorphous," (2) litigation that was subject to change over the course of proceedings, (3) a process that was "suffused and intermixed with negotiating and mediating," (4) a judge who was "the dominant figure in organizing and guiding the case," and (5) ongoing judicial involvement in remedies. *Id.* at 1284. The Chayes article, published ten years after the promulgation of the 1966 class action rule, was retrospectively commenting on the new era of litigation that the 1966 class action rule enabled and in effect helped to create.

[32] *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 670–76 (1979) (noting an influx of class actions in the decade after the 1966 amendments to Rule 23); *see also Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1325 n.30 (1976) (noting that the largest group of class actions on federal dockets were civil rights cases, comprising approximately 50% of cases for the years 1973–1976).

[33] I have heard Professor Miller provide this description at several procedure conferences.

[34] This certainly was true of the Advisory Committee's amendment of Rule 11 and the sanctioning provision in 1983, whose enthusiastic judicial implementation in the 1980s subsequently led to a major counter revolt and revision of that rule one decade later in 1993, thereby restoring sanity to federal sanctioning for pleading offenses. *Cf.* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment ("This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. . . . The revision . . . places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court.").

[35] The theory that repeated historical backlash against class litigation is a reflection of antiliberal bias has been a consistent theme of class action advocates since at least 1966.

Two landmark Supreme Court decisions between 1973 and 1974 highlighted the developing doctrinal reaction, and both decisions had an impact on the viability of certain types of class actions. Thus, in *Eisen v. Carlisle & Jacquelin*,[36] the Court determined that class plaintiffs must pay the costs of sending notice to absent class members,[37] and in *Zahn v. International Paper Co.*, the Court ruled that in diversity-based class actions, each class member must individually satisfy the amount-in-controversy requirement.[38]

Eisen and *Zahn* combined to hobble enthusiasm for class litigation. Given the extremely high cost of notice, some plaintiffs' attorneys avoided pursuing the Rule 23(b)(3) classes that require it.[39] *Zahn*, which effectively instituted a famous "no aggregation" rule, impaired the ability of plaintiffs to pursue large class actions where individual class members failed to have substantial damages.[40] By the late 1970s, several commentators, noting the effects of *Eisen* and *Zahn*, lamented the slow death of the class action.[41]

The combined *Eisen* and *Zahn* decisions—affecting diversity and Rule 23(b)(3) class actions—signaled a slackening of the class litigation juggernaut as litigants and attorneys regrouped to evaluate how to proceed. By the end of the 1970s, and somewhat as a consequence of *Eisen* and *Zahn*, formerly robust class litigation gradually slipped into partial eclipse.

The Cassandras were again pronouncing the death of class actions.

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[36] 417 U.S. 156 (1974).

[37] *See id.* at 178–79.

[38] 414 U.S. 291, 292 (1973). The *Zahn* decision created the interesting anomaly that in diversity cases, courts need only look to the citizenship of the class representatives and the defendants to establish diversity of citizenship but must look to each individual class member's damages to establish the requisite amount in controversy. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365–66 (1921).

[39] Hysteria over the *Eisen* decision may have been overstated, however, because the impact of the so-called *Eisen* notice rule on class litigation was limited to Rule 23(b)(3) damage class actions. *See Eisen*, 417 U.S. at 173. Injunctive civil rights actions pursued under Rule 23(b)(2), which do not require notice to class members, remained unaffected. *See* FED. R. CIV. P. 23(c).

[40] It would take nearly thirty-five years for one Supreme Court decision, and the congressional enactment of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), to effectively overrule the Court's nonaggregation decision in *Zahn*. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 566–67 (2005) (overruling *Zahn* in diversity class actions). The Act added 28 U.S.C. § 1332(d)(2) (2006), which provides an amount-in-controversy requirement for diversity class actions of $5 million dollars, and § 1332(d)(6), which expressly authorizes individual damages to be aggregated to achieve the requisite amount in controversy, effectively abrogating *Zahn*'s nonaggregation rule.

[41] *See* Paul A. Freund, *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 47 (1974) (noting that *Eisen* and *Zahn* severely limited availability and effectiveness of federal class actions); Miller, *supra* note 32, at 679 (noting that class actions have bleaker prospects since *Eisen* and *Zahn*); Glenn A. Danas, Comment, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 EMORY L.J. 1305, 1312 (2000) (arguing that the Court acted in accord with the "reactive tide" by handing down restrictive decisions in *Eisen* and *Zahn*).

D. Class Actions Reinvigorated—Mass Tort Litigation, 1980s

As it turns out, the class action's second death was not long-lived. In the late 1970s, when the *Eisen* and *Zahn* decisions were hindering plaintiffs in civil rights litigation, the era of mass tort litigation dawned. It would dominate the litigation landscape for more than two decades.

The emergence of the mass tort phenomenon in the late 1970s and early 1980s has been well documented in the general and scholarly literature; the three seminal mass torts that engaged the attention of the bench and bar centered on asbestos, *Agent Orange*, and the *Dalkon Shield* litigations.[42] Significantly, both the *Agent Orange* and *Dalkon Shield* litigations were resolved through class action settlements;[43] in the ensuing decades, plaintiffs' attorneys would repeatedly attempt to certify asbestos class actions, with mixed success.[44]

Mass tort litigation presented a relatively new type of aggregate litigation: individual tort damage claims pursued by thousands or tens of thousands of claimants allegedly injured by exposure to a toxic substance, consumption of a pharmaceutical, or use of an allegedly defective medical device. Until the late 1970s, tort claims had been pursued on an individual, case-by-case basis. But with massive exposure to toxic chemicals such as Agent Orange, the pervasive incidence of asbestos-related illness, and the large numbers of women (and men) suffering adverse effects of pharmaceuticals or medical devices, plaintiffs' attorneys turned to procedural means for aggregating the claims.

The dominant legal debate of the 1980s and 1990s focused on the use of the class action to resolve mass tort litigation.[45] Virtually every institutional reform organization—including the American Bar Association, the American Law Institute, the Rand Institute for Civil Justice, the Federal Judicial Center, the Advisory Committee on Civil Rules, and the Commissioners on Uniform State Laws—studied the problems of mass tort

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[42] *See* LINDA S. MULLENIX, MASS TORT LITIGATION 2–20 (2d ed. 2008) (presenting an overview of and related commentary on the three seminal mass tort litigations).

[43] *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 174 (2d Cir. 1987) (approving class certification and fairness of subsequent settlement); *In re* A.H. Robins Co., 880 F.2d 709, 752 (4th Cir. 1989) (approving class certification and settlement). A.H. Robins Co., the manufacturer of the Dalkon Shield and sole defendant in that litigation, subsequently went into bankruptcy, forcing resolution of the Dalkon Shield claims through bankruptcy. *See, e.g.*, Comm. of Dalkon Shield Claimants v. A.H. Robins Co., 828 F.2d 239 (4th Cir. 1987).

[44] *See, e.g.*, *In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (reversing class certification of a Rule 23(b)(3) asbestos class action); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 475 (5th Cir. 1986) (upholding class certification of a Rule 23(b)(3) opt-out asbestos class limited to claimants in the Eastern District of Texas).

[45] *See* MULLENIX, *supra* note 42, at 132–44 (documenting various cases and materials involved in the 1970s through the late 1980s and judicial decisions relating to whether mass torts could be certified in class action litigation pursuant to Rule 23).

litigation and issued proposals for reform.[46] Federal and state courts contributed greatly to the debate, often rendering conflicting decisions concerning the ability of mass tort litigants to certify class actions under all different categories of the rule, state and federal.[47] As courts and commentators documented, the major obstacle to judicial certification of mass tort cases was the 1966 Advisory Committee note to Rule 23(b)(3), which suggested that the class action rule was not suitable for use in tort litigation.[48] Nonetheless, the sheer volume of mass tort cases inundating the federal and state courts, the duplicate and expensive nature of this litigation, and the added costs of time and delay, created a crisis mentality in the judiciary, which resulted in efforts to revitalize the class action.[49]

Initially, the federal judiciary resisted use of the class action rule to aggregate mass tort cases, but by the early 1980s—and especially following Judge Jack Weinstein's approval of the *Agent Orange* settlement class in 1984[50]—courts began reappraising their resistance to mass tort class actions and began certifying mass tort classes. By the mid-1980s and into the early 1990s, bolstered by landmark asbestos class action decisions from the Second, Third, Fifth, and Ninth Circuits,[51] federal courts that had once eschewed mass tort class actions instead embraced them as efficient and economical. Collectively, these decisions—coupled with dozens more from lower federal courts—substantially resuscitated class litigation and ushered in an adventuresome era of judicial innovation and experimentation. This

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[46] *See* LINDA S. MULLENIX, MASS TORT LITIGATION viii–xii (1st ed. 1996) (listing efforts by various institutional law reform bodies studying the problem of mass tort litigation).

[47] With varying success, plaintiffs sought class certification of mass tort actions under Rules 23(b)(1)(A), (b)(1)(B), (b)(2), and (b)(3). In addition, numerous plaintiffs sought to circumvent the more stringent requirements of Rule 23(b)(3) by seeking class certification of "limited issues" classes under Rule 23(c)(4)(A). For a survey history of these various attempted uses of the class action rule during the 1980s and 1990s, see MULLENIX, *supra* note 42, at 150–77.

[48] *See* FED. R. CIV. P. 23(b)(3) advisory committee's note ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.").

[49] *See, e.g.*, *Jenkins*, 782 F.2d at 473 (noting the mass tort litigation crisis and famously concluding that "[n]ecessity moves us to change and invent").

[50] *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 174 (2d Cir. 1987) (approving Judge Weinstein's class certification of the *Agent Orange* class and settlement fund).

[51] *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767, 787 (9th Cir. 1996) (upholding a mass tort settlement of claims arising from the Marcos regime in the Philippines and using statistical sampling to calculate damages); Watson v. Shell Oil Co., 979 F.2d 1014, 1020–23 (5th Cir. 1992) (upholding the certification of a class of claimants injured by an oil refinery explosion); *In re Agent Orange*, 818 F.2d at 174; *In re* Sch. Asbestos Litig., 789 F.2d 996, 1011 (3d Cir. 1986) (upholding certification of a nationwide class of school districts seeking compensation for asbestos remediation in school buildings); *Jenkins*, 782 F.2d at 469, 475 (upholding class certification of asbestos personal injury claimants); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 666–67 (E.D. Tex. 1990) (approving certification of class of asbestos personal injury claimants and approving the statistical sampling method of calculating damages), *vacated in part*, 151 F.3d 297 (5th Cir. 1998).

included such novel devices as applying statistical extrapolation from individual cases to estimate class-wide damages.[52]

It also should be noted that with the rise of enthusiasm for class litigation in the mid-1980s and early 1990s, plaintiffs' attorneys also breathed new life into consumer class actions and securities fraud class actions, both pursued as Rule 23(b)(3) damage classes. Thus, in this era, class litigation pivoted away from plaintiffs' civil rights actions and institutional reform litigation and toward mass tort, small claims, and securities class actions. This was class litigation's second "golden age," characterized by a different substantive provenance than the first golden age of the 1960s.

E. Are Class Actions Dead? (Deaths #3, 4, 5, and 6)

By the mid-1990s, however, inevitable class action resentment struck the corporate, political, judicial, and legislative arenas, launching a new decade of class action retrenchment.[53] The cry of "*Basta*!" resounded from aggressive class action critics, including the usual suspects: namely, the defendants.[54] Thus, from the mid-1990s and for the ensuing decade, several judicial decisions and legislative initiatives effectively braked class litigation, causing class action Cassandras to again sound the cry that class litigation was dead.[55]

1. The Laws of Procedural Physics: The 1990s Judicial Rule 23 Retrenchment (Death #3).—As indicated above, by the laws of procedural physics, for every action, inevitably there is an equal and opposite reaction, and after a decade of expansive, creative, innovative, and adventuresome use of the class action rule, federal judicial reaction set in with a vengeance in the mid-1990s.[56] In particular, several influential

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[52] *See, e.g.*, *Hilao*, 103 F.3d at 787.

[53] Not coincidentally, this class action reaction occurred during the presidencies of Ronald Reagan and George H.W. Bush, at a time of substantial Republican legislative majorities who promulgated the Contract with America, which advocated for civil justice and tort reform, including limits on or elimination of class action litigation (among other reforms). *See* CONTRACT WITH AMERICA (Ed Gillespie & Bob Schellhas eds., 1994).

[54] Again, not surprisingly, the critics of expansive and innovative use of the class action rule (especially when applied to resolve mass tort and small claims damage class actions) included corporate defendants, the Chamber of Commerce of the United States, like-minded lobbying groups, and most Republicans.

[55] *See, e.g.*, *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

[56] The revolt of the federal courts against mass tort class certifications in the mid-1990s was presaged by the Fifth Circuit's repudiation of the original trial plan in *Cimino v. Raymark Industries, Inc.*, 739 F. Supp. 328, in an appeal styled *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990). Notwithstanding the court's repudiation of the class action trial plan, Judge Parker nonetheless after remand went forward with a combined Rule 42 and class action procedure. *See Cimino*, 751 F. Supp. at 766–67. The ensuing trial and jury verdicts in that case were successfully appealed and repudiated by the Fifth Circuit in *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297.

appellate courts issued landmark decisions in 1995 and 1996 that heralded the third death of the class action rule. The 1995–1996 appellate judicial rebellion is well-known to all class action practitioners and was heralded by Judge Richard Posner's famous decision in *In re Rhone-Poulenc Rorer Inc.*,[57] which reversed the certification under Rule 23(b)(3) of a nationwide class of hemophiliac purchasers of tainted blood products. Among other reasons, Judge Posner opined that this mass tort could not satisfy the class action requirements for predominance of common questions,[58] involved intractable choice of law issues, violated the *Erie* doctrine,[59] and potentially violated the plaintiffs' Seventh Amendment right to a trial by jury.[60] In addition, Judge Posner objected to certification of a premature mass tort, which he believed unfairly tilted the litigation playing field against the corporate defendants.[61] Judge Posner's *Rhone-Poulenc* decision was of particular importance because it provided a roadmap for future defense challenges to mass tort as well as other class litigation.

In a domino-like reaction, several other appellate courts struck down various mass tort class certifications in 1996. These included the Fifth Circuit's resounding repudiation of the largest class action to date, a fifty million-person nationwide class of nicotine addicts in *Castano v. American Tobacco Co.*,[62] in which the Fifth Circuit largely relied on *Rhone-Poulenc*.[63] In turn, the Sixth Circuit overturned certification of a class of penile implant claimants,[64] and the Third Circuit reversed settlements of a GMC pick-up truck class[65] as well as the first global asbestos deal.[66] These decisions also collectively lectured federal judges to apply a "rigorous analysis"[67] to the class certification inquiry, further tightening the belt on the era of relatively free-wheeling, drive-by class certifications prevalent in the 1980s.

Moreover, by the end of the decade, the Supreme Court issued the ultimate death blow to the 1980s laissez-faire class litigation in its twin

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[57] 51 F.3d at 1304.

[58] Here, the district judge had clearly agreed, as the suit was not certified as a Rule 23(b)(3) class; "[i]nstead the judge certified the suit 'as a class action with respect to particular issues' only." *Id.* at 1297 (quoting FED. R. CIV. P. 23(c)(4)(A)).

[59] *See id.* at 1300–02.

[60] *Id.* at 1302–04.

[61] *See id.* at 1299–1300.

[62] 84 F.3d 734 (5th Cir. 1996).

[63] *See, e.g.*, *id.* at 751.

[64] *In re* Am. Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

[65] *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995).

[66] Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996).

[67] *See, e.g.*, *Castano*, 84 F.3d at 740 ("A district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class.").

decisions *Amchem Products, Inc. v. Windsor*[68] and *Ortiz v. Fibreboard Corp.*[69] In rejecting nationwide asbestos class settlements under both Rule 23(b)(3) and Rule 23(b)(1)(B), the Court effectively required heightened judicial scrutiny for settlement classes, redefined adequacy and due process requirements, and frustrated the ability of litigants to certify "limited fund" class actions.[70] The Court's *Amchem* decision became the benchmark for all subsequent class certification decisions, and for all practical purposes, *Ortiz* interred the limited fund class action.[71]

More grimly, as a policy matter—and no doubt with a skeptical eye to many of the innovative lower court decisions issued in the previous decade—the Court warned the lower federal courts against any further adventuresome uses of the class action rule. To emphatically make its point, the Court suggested that any further class action adventures conceivably (and unconstitutionally) might violate the Rules Enabling Act.[72]

Thus, the 1999 *Ortiz* decision effectively terminated the great decade of entertaining and riveting class action adventures. By the end of the 1990s, commentators once again declared that class actions were dead.

2. The Private Securities Litigation Reform Act of 1995 (Death #4).—In the midst of the judicial class action revolt of the mid-1990s, class action opponents actively pursued a multifront campaign against class litigation. This attack included federal legislative initiatives to fill gaps where judicial decisions alone would not suffice to hobble class litigation. These legislative initiatives took two forms: restricting securities class actions and levitating irksome state class actions out of "hellhole state courts"[73] into presumably more defendant-favoring federal courts (where

[68] 521 U.S. 591 (1997).

[69] 527 U.S. 815 (1999).

[70] The "limited fund" class action is one where many people have a claim against a single fund that is too small to cover all the claims. The class action, in a manner somewhat similar to a constructive trust, brings all the claims together to ensure that no single claimant exhausts the fund. *See id.* at 834.

[71] As of this writing, in the twelve years since the Court announced its decision in *Ortiz*, there have been relatively few certifications of Rule 23(b)(1)(B) limited fund class actions, largely due to the three factors Justice Souter indicated had to be satisfied for courts to approve such class actions. *See id.* at 838–41 (describing the three factors: (1) total liquidated claims definitely exceed the fund available to satisfy them, (2) the entire fund is to be distributed to satisfy the claims, and (3) pro rata distribution to claimants on a common theory of recovery).

[72] *See, e.g.*, *id.* at 845–46 (warning of potential Rules Enabling Act violations and counseling against any further adventuresome uses of the class action rule).

[73] I am not making this up. This colorful term was widely used (and is still used) by class action defense counsel to describe a list of local plaintiff-favoring state court forums characterized by so-called drive-by certification procedures and accommodating settlement judges. *See, e.g.*, AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2011–2012 (2011), *available at* http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf; *see also* Joseph M. Nixon, *The Purpose, History and Five Year Effect of Recent Lawsuit Reform in Texas*, ADVOCATE, Fall 2008, at 9, 10–14 (describing the basis for certain counties in Texas becoming known as judicial hellholes). *But cf.* PUB.

proposed class actions ostensibly would be killed off by more restrictive class certification standards). The sponsors of these legislative efforts were successful, adding fuel to class action funeral pyres #4 and #5.

Through the early 1990s, securities class action litigation proliferated, spearheaded by a highly dedicated and experienced plaintiffs' bar. Moreover, the standards for certifying securities classes were famously lax, requiring merely the existence of a single class representative owning a single share of a company's stock.[74] These lax standards led attorneys to troll business pages and stock tickers for drops in securities prices and eventually led to unethical solicitation of willing plaintiffs to represent derivative class actions.[75] Consequently, the ease of pursuing securities derivative class litigation contributed to the bane of "strike suits,"[76] in which corporate defendants willingly settled claims rather than incur the cost and burden of defending them.

By the early 1990s, corporate resistance to securities strike suits led to congressional enactment in 1995 of the Private Securities Litigation Reform Act (PSLRA),[77] which Congress amended in 1998.[78] The general thrust of the PSLRA and its amendments was to make it more difficult to pursue securities class litigation.[79] The PSLRA embodies heightened substantive amendments to the securities laws combined with procedural reforms.[80] Among many changes, the Act created a presumption that a class be represented by the largest institutional investor rather than a shareholder

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CITIZEN, CLASS ACTION "JUDICIAL HELLHOLES": EMPIRICAL EVIDENCE IS LACKING 2–4 (2005), *available at* http://www.citizen.org/documents/OutlierReport.pdf (critiquing the claims of existence of counties particularly unfriendly to defendants or corporations); Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates, and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097 (2008) (arguing that the hellhole label is often used disingenuously by corporate interests in an attempt at political capture).

[74] Shareholder derivative litigation also supplied class action jurisprudence with the famous Mrs. Dora Surowitz, of know-nothing fame, who was deemed to be an adequate class representative even though she knew nothing about her claims, her case, or the English language. *See* Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 364–67 (1966).

[75] At least some renowned securities class action lawyers went to jail for these practices.

[76] *See Surowitz*, 363 U.S. at 371.

[77] Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.). *See generally* Joel Seligman, *The Private Securities Reform Act of 1995*, 38 ARIZ. L. REV. 717 (1996) (describing the history and enactment of the PSLRA).

[78] Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

[79] The Act included a "safe harbor" provision, as well, which insulated securities defendants from liability based on ultimately unrealized projections of future business success. *See* Seligman, *supra* note 77, at 722–24.

[80] *See* ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 868–72 (3d ed. 2012) (describing the PSLRA, with accompanying illustrative cases and materials).

owning a single share of stock.[81] The PSLRA also includes "heightened" pleading requirements.

Parallel to the judicial reaction against mass tort class actions (and mixing metaphors), the PSLRA represented another nail in the class action coffin at the end of the 1990s. Congressional amendment of the PSLRA in 1998 was bracketed by the Supreme Court's 1997 decision in *Amchem* and its 1999 decision in *Ortiz*. The anticipated effect of this class action trifecta, presumably, was to cripple and dispatch mass tort, consumer, and securities class actions.

3. The Class Action Fairness Act of 2005 (Death #5).—The PSLRA was not the only legislative assault on class action litigation in the late 1990s. One of the ironic unintended consequences of the appellate revolt of 1995–1996 was to induce the plaintiffs' bar to recalibrate its litigation strategy. Hence, in reaction to the Fifth Circuit's *Castano* decision,[82] a member of the plaintiffs' *Castano* consortium famously said (somewhat to this effect): "Fine. If the federal courts don't like our class actions, then we will file separate cases in every state court."[83]

Thus, after suffering a number of significant jurisprudential setbacks in class certification efforts in 1995–1996, the plaintiffs' bar largely abandoned federal forums for state ones,[84] focusing especially on a well-known list of sympathetic local courts.[85] State trial and appellate courts, as it turned out, provided considerably more lax class certification standards than their sister federal courts.[86] In states with elected judiciaries, the class

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[81] PSLRA § 27(a)(3)(B)(iii), 109 Stat. at 737–38 (codified as amended at 15 U.S.C. 77z-1(b) (2006)).

[82] Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

[83] I do not have an authoritative source for this quote, but I was there then and remember it very well, especially for its entirely correct prophetic value.

[84] This is not to suggest that there were virtually no federal class actions during the late 1990s, but throughout the period following 1995, there was a marked upswing in state court class action filings.

[85] During this period, various groups of defense attorneys kept lists of the ten most notorious class litigation hellholes, which lists were routinely trotted out at defense bar conferences. Repeatedly, four Texas county courts made the top-ten list. Perhaps the most famous of hellhole jurisdictions was Madison County, Illinois, then famed for its close to 100% class certification and settlement record. *Cf., e.g.*, AM. TORT REFORM FOUND., *supra* note 73, at 4 ("[Madison County] ha[s] come a long way since hitting rock bottom."); *see also* Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL'Y 235, 240 (2004) (describing Madison County as an attractive forum for plaintiffs' lawyers due to particular judicial amenability to class certification).

[86] During this period, the most infamous procedure was the drive-by certification where, in some venues, it was entirely possible for a courier to run a class complaint into the clerk's office, where it was routinely certified on the pleadings and without further ado. The practice of drive-by certification has largely abated in state court, and it is difficult to imagine a drive-by certification occurring in federal court today. *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1507–09 & n.270 (2008) (discussing drive-by class certifications and other perceived problems that led to the enactment of CAFA); Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 93–95 (2009) (discussing same); David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism*

action problem was often exacerbated by judges pandering to popular sentiment in favor of penalizing corporate defendants.[87] Moreover, existing federal jurisdiction and removal provisions made it exceedingly difficult for the corporate defendants to remove the cases to federal court.[88]

By the late 1990s, corporate defendants had had enough of state courts. Thus, in 1997–1998, congressional sympathizers introduced legislation to change the jurisdictional rules relating to class actions. After eight years and multiple revised bills, Congress finally enacted the Class Action Fairness Act (CAFA) in 2005.[89] The legislative history to CAFA,[90] published several months later, contained a scathing description of the problems with state courts that had induced Congress to act.

CAFA did two major things: (1) it created a new federal jurisdiction[91] and (2) it created a new removal provision, both especially tailored for class actions.[92] CAFA's enactment had largely been driven by corporate and Republican political interests, and the core purpose of CAFA

Implications of Diversity Jurisdiction, 48 WM. & MARY L. REV 1247, 1294 (2007) (describing the phenomenon of drive-by certifications, noting that the Alabama Supreme Court put an end to this practice in 1997).

[87] *See* Schwartz et al., *supra* note 85. This is not in any way intended to impugn, disparage, or even call into question the honesty, integrity, expertise, judgment, or ethical standards of elected judges. However, as the political science literature on elected judiciaries educates us, there are some regrettable lapses in judicial judgment and temperament among elected state judges. Decisionmaking with regard to class action litigation, with its potential extensive reach among the populace, has not proven immune from these sorts of problems.

[88] Among other problems, the *Zahn* nonaggregation rule repeatedly frustrated removal attempts in diversity cases where individual class members could not satisfy the $75,000 amount-in-controversy requirement. *See supra* notes 38–41 and accompanying text. Because diversity class actions were largely based on state law tort and other claims, state class actions were difficult to remove. In addition, plaintiffs' attorneys carefully pleaded around citizenship requirements to ensure there were nondiverse parties to defeat removal attempts. All these maneuvers were largely successful in keeping state-filed class actions in state court.

[89] *See* Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). Significantly, the Class Action Fairness Act was enacted and signed into law on February 18, 2005, less than a month after the second inauguration of President George W. Bush. It was the very first piece of legislation signed into law by President Bush, thereby completing a tactical promise to Bush's Republican and corporate supporters to do something about the dire class action situation burdening corporate America. *Cf., e.g.*, *Transcripts: President Bush's Remarks on Class Action Reform*, MADISON-ST. CLAIR REC. (Feb. 10, 2005, 7:00 AM), http://madisonrecord.com/news/143826-transcripts-president-bushs-remarks-on-class-action-reform.

[90] *See* S. Rep. No. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3.

[91] *See* CAFA § 4, 119 Stat. at 9 (codified at 28 U.S.C. § 1332(d) (2006)). Generally, in order to establish federal jurisdiction for a class action, the proponents must establish three things: (1) diversity of citizenship among the parties, (2) at least one hundred members in the proposed class, and (3) an amount in controversy equal to or exceeding $5 million. As in prior jurisprudence, the diversity requirement among parties continues to require only minimal diversity. CAFA did, however, overrule *Zahn* and permit the aggregation of damages among class members to reach the $5 million threshold for jurisdiction. *See* discussion *supra* note 40 and accompanying text.

[92] *See* 28 U.S.C. § 1453 (providing the rule for the removal of class actions).

(notwithstanding its high-minded legislative title) was to create a procedural means for getting vexatious class actions out of state court and back into federal court, where corporate defendants believed they were more likely to win.

It is perhaps worth noting that, with a nice degree of historical symmetry—not to mention pendulum effects, the laws of procedural physics, and other such metaphors—CAFA was finally enacted exactly a decade after the Seventh Circuit's decision in *Rhone-Poulenc* and after nearly a decade of defendant exposure to state court class action jurisprudence. Thus, after they were drummed by state courts, CAFA finally restored corporate interests' access to the more hospitable federal courts, which a decade prior had rendered the corporate-favoring class jurisprudence of the 1995–1996 revolt.

Among savvy class action observers and semiastute political analysts, CAFA therefore represented another victory for the corporate and defense bar. CAFA, then, supplied yet another opportunity for the class action Cassandras to proclaim the death of the class action rule.[93]

4. Wal-Mart v. Dukes, AT&T v. Concepcion, *and Access to Justice (Death #6).*—If things were not bad enough for class litigation following CAFA, then the Supreme Court presumably issued it the ultimate *coup de main* in its twin 2011 decisions in *AT&T Mobility LLC v. Concepcion*[94] and *Wal-Mart Stores, Inc. v. Dukes*.[95] To suggest that these decisions embodied some Supreme unfriendliness to class litigation might be an understatement. Certainly the plaintiffs' bar and liberal sympathizers read these decisions as constituting outright hostility[96] and used them as a platform to once again decry the death of class actions (ahem, death #6). In addition, class advocates and scholars disappointed in the Court's holdings characterized these decisions as denying access to justice for injured and aggrieved plaintiffs.[97]

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[93] It is perhaps rather late in this Article to note that the class action Cassandras repeatedly announcing (and lamenting) its demise substantially overlap with the plaintiffs' bar and liberal interest groups. This should come as no surprise because it is somewhat difficult to imagine defendants lamenting the death of class actions (as in: "I truly regret that I can no longer effectively be sued on a massive, corporate-bankrupting basis.").

[94] 131 S. Ct. 1740 (2011).

[95] 131 S. Ct. 2541 (2011).

[96] *See, e.g.*, George Rutherglen, Wal-Mart, AT&T Mobility, *and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 31 (2012), http://www.virginialawreview.org/inbrief/2012/04/14/Rutherglen.pdf.

[97] *See, e.g.*, Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 148–54 (2011).

a. Wal-Mart Stores, Inc. v. Dukes.—In one of the most closely watched and highly publicized class action cases in its history,[98] the Supreme Court decided in *Wal-Mart Stores, Inc. v. Dukes*, in a 5–4 decision, that the certification of the largest female employment discrimination case ever, against the country's largest employer, was an abuse of discretion. After *Dukes*, American corporations facing employment discrimination classes no doubt issued a collective sigh of relief. More importantly for all class action defendants, though, the Court articulated a more stringent standard for class certification generally.

Specifically, the majority ruling on Rule 23(a)(2) commonality was the crux of the Court's decision and the most significant discussion for certification of all future class actions. Rule 23(a)(2) requires that the proponents of a class action demonstrate that there are "questions of law or fact common to the class."[99] Under prevailing class action jurisprudence, most courts in the past have agreed that this standard was easily satisfied, requiring the identification of only one common question.

Justice Scalia confronted this notion of what I refer to as "easy commonality" head on. He indicated that the Rule 23(a)(2) requirement was easy to misread as permitting plaintiffs to state common questions at the highest, most generalized level of abstraction.[100] But Justice Scalia also indicated that such generalized questions could not pass muster for stating a common question under Rule 23(a)(2); "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[101]

Applying a more stringent interpretation of Rule 23(a)(2) commonality, Justice Scalia concluded that the mere claim by some Wal-Mart female employees that they had suffered discrimination gave no cause to believe that all the women's claims could be litigated together. The Court concluded that the plaintiffs were attempting to sue about literally millions of employment decisions at once, noting that "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."[102]

Perhaps the most important (and controversial) part of the Court's Rule 23(a)(2) commonality analysis focused on the *dissimilarities* among class members in order to ascertain whether even a single common question existed to satisfy the commonality requirement. The majority's

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[98] This portion of the Article has been adapted from Linda S. Mullenix, *Class Action Roundup: A Little Something for Everyone*, 38 PREVIEW U.S. SUP. CT. CAS. 330 (2011).

[99] *Dukes*, 131 S. Ct. at 2548 (quoting FED R. CIV. P. 23(a)(2)).

[100] *See id.* at 2551.

[101] *Id.* (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)).

[102] *Id.* at 2552.

focus on dissimilarities among class members drew a sharp rebuke from the four dissenting Justices.[103] Regarding dissimilarities among the *Wal-Mart* class members, the Court, agreeing with Ninth Circuit Judge Kozinski's dissent from the class certification, held that the class embraced too many diverse jobs, workplace categories, supervisors, store locations, and regional policies. Some women employees "thrived while others did poorly. They have little in common but their sex and the lawsuit."[104]

The four liberal Justices (in an opinion authored by Justice Ginsburg) concurred that the *Wal-Mart* class had been improperly certified under Rule 23(b)(2) but strongly dissented from the majority's decision that the plaintiffs failed to satisfy Rule 23(a)(2) commonality.[105] In essence, the dissenters objected to the majority's ratcheting up of the commonality requirement, noting that the Court's decision "disqualifies the class at the starting gate."[106] The dissenters noted, accurately, that the Court's "dissimilarities" standard was far reaching. In addition, the dissenters pointed out that the majority's interpretation of Rule 23(a)(2) commonality, with its focus on dissimilarities among class members, essentially mimicked the more stringent predominance standard of Rule 23(b)(3). Thus, the dissenters stated: "The Court errs in importing a 'dissimilarities' notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry."[107]

b. AT&T Mobility LLC v. Concepcion.—In *AT&T Mobility LLC v. Concepcion*,[108] another 5–4 decision authored by Justice Scalia, the majority disallowed class-wide arbitration where state contract law would otherwise negate a contractual class action waiver. To reach this conclusion, the Supreme Court held that California precedent,[109] which invalidated class action waivers in arbitration agreements, was preempted by the Federal Arbitration Act. This led the pundits to declare that contractual waivers, now bulletproof thanks to *Concepcion*, would kill the class action (yet again).

F. Countersigns of Life: Class Actions Resuscitated (Again)

While it might be tempting to suggest, in light of the 1995–1996 federal appellate decisions, the PSLRA, CAFA, and the Supreme Court

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[103] *See id.* at 2562 (Ginsburg, J., concurring in part and dissenting in part).

[104] *Id.* at 2557 (majority opinion) (quoting Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, C.J., dissenting), *rev'd*, 131 S. Ct. 2541).

[105] *Dukes*, 131 S. Ct. at 2561–62 (Ginsburg, J., concurring in part and dissenting in part).

[106] *Id.* at 2562.

[107] *Id.* at 2567.

[108] 131 S. Ct. 1740 (2011). For further background on the case, see Frank Blechschmidt, Comment, *All Alone in Arbitration:* AT&T Mobility v. Concepcion *and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541 (2012).

[109] *See* Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), *abrogated by AT&T Mobility*, 131 S. Ct. 1740.

decisions in *Amchem*, *Ortiz*, *Wal-Mart*, and *Concepcion* that class actions are definitively dead six times over, this would not be precisely accurate. Indeed, several indicia suggest that class actions are alive, well, and thriving as usual, if, in some quarters, in somewhat modified forms.[110]

1. Empirical Indicators.—Whether class actions are dead is capable of empirical proof. Any number of scholars and institutions keep track of this sort of thing, so it would come as a great surprise to (among others) federal judges, the Federal Judicial Center, the Rand Institute for Civil Justice,[111] Stanford Law School, and various class action scholars to hear that class actions are dead.

The Federal Judicial Center (FJC) has for years conducted several empirical studies of the incidence and consequences of class action litigation in federal district courts.[112] What these studies reveal, not surprisingly, is the cyclical waxing and waning of class action filings that fairly track historical trends of enthusiasm for, or retrenchment from, class litigation. These bean-counting exercises also illustrate keenness for or apathy towards certain substantive class actions.[113] What the FJC studies do not document, however, is the death of class actions, which, despite everything, continue to be filed and adjudicated on a fairly constant basis.[114]

2. Robust PSLRA Litigation and CAFA Class Action Forum Shifting.—Advocates of class action litigation greeted both the PSLRA and CAFA as not-so-veiled efforts by corporate America and the defense bar to stifle class litigation. The view was that the defense bar, which had been largely unable to impede class litigation in federal and state judicial forums, had turned to legislation to gain some relief from class litigation.

As indicated above, the post-PSLRA and CAFA eras, however, have proved otherwise; plaintiffs have continued to file both securities derivative

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[110] *See infra* Part II.

[111] *See, e.g.*, DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS (2000).

[112] *See, e.g.*, BOB NIEMIC & TOM WILLGING, FED. JUDICIAL CTR., EFFECTS OF *AMCHEM*/*ORTIZ* ON THE FILING OF FEDERAL CLASS ACTIONS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (2002), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/amchem.pdf/$file/amchem.pdf; 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 (2008); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996).

[113] Perhaps the most studied subcategory of class actions relates to plaintiffs' civil rights and employment discrimination cases, which scholars for decades have been arguing constitute a universe of class actions that are more frequently dismissed on summary judgment motions, denied class certification, or otherwise dismissed. *See, e.g.*, Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813 (2004).

[114] *Cf.* Lee & Willging, *supra* note 112, at 1750.

actions and all other types of class litigation. Instead, what the post-PSLRA and CAFA eras demonstrate is the continued resiliency of the plaintiffs' class action bar and its ability to regroup and adapt.

Commentators have also noted that one of the many ironies of the PSLRA was that it led to more securities class litigation rather than less.[115] Thus, in spite of heightened pleading requirements, more stringent substantive standards, and a change in the designated class representative, securities class attorneys have nonetheless discovered ways to satisfy these new requirements. Thus, securities class litigation flourished even after the PSLRA.[116]

And similar to the post-PSLRA record, CAFA has failed to "kill off" class litigation. Instead, class action defendants have utilized CAFA to remove as many state class actions to federal court as possible under the new CAFA removal provision.[117] The Federal Judicial Center has documented—not surprisingly—a spiked increase in removal practice after CAFA.[118] Thus, CAFA has not reduced class litigation; it has merely redistributed the forums where class litigation is adjudicated and resolved.[119] Nor is there substantial evidence that the removal of class litigation to federal court has resulted in increased denials of class certification or dismissals of class actions.

3. The Supreme Court Saves the Class Action!: Shady Grove Orthopedics.—If ever the Supreme Court had an opportunity to kill off federal class actions, it came in the 2010 case *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[120] Notwithstanding

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[115] *See* Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 913 ("The picture that emerges from studying these data is that the PSLRA did not work as intended. This article demonstrates that as many, if not more, class actions are filed after the Act as before.").

[116] *See* John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002–2007*, 8 Class Action Litig. Rep. (BNA), at S-787 to S-789 (Oct. 26, 2007).

[117] And, as indicated above, the plaintiffs' bar also has learned how to plead around the CAFA jurisdictional and removal provisions in order to keep some class actions in the state forums where they are originally filed. *Cf.* Lee & Willging, *supra* note 112, at 1756.

[118] *See id.* at 1750–54 & fig.1. It also is difficult to estimate whether some plaintiffs' attorneys, confronted with the inevitable possibility of a CAFA removal, have now simply opted to originally file their class actions in federal court. If this is true, CAFA will have had the unintended consequence of *increasing* class litigation in federal courts. *See id.* at 1751–53; *cf.* Coffee & Paulovic, *supra* note 116, at S-789 to S-790 ("Recognizing that their class actions could be removed from state courts under CAFA, plaintiff's attorneys may instead file class actions initially in 'friendly' jurisdictions, such as the Second and Ninth, rather than see them removed to 'unfriendly' federal courts in the Fourth and Fifth Circuits.").

[119] There is little empirical proof for the proposition that class action litigation has decreased or increased comparative to other eras. The CAFA analogy here is to the pig working its way through the python's digestive track. Thus, class litigation has just moved along to another place.

[120] 130 S. Ct. 1431 (2010).

dire prognostications to the contrary,[121] the Supreme Court confounded Court watchers by rescuing the federal class action rule in a semicomprehensible array of opinions with Justices joining and concurring in various parts.[122] No matter. Rule 23 was saved.

The collision between federal and state class action practice in *Shady Grove* arose from a New York state civil code provision that prohibits plaintiffs from pursuing a class action to recover statutory penalties or minimal recoveries.[123] In the underlying litigation, the plaintiff filed a class action in a New York federal court to recover a 2% monthly late-payment fee, on behalf of all class members, from the defendant.[124] The lower courts invoked the code provision, dismissing the class action.[125] The Supreme Court was asked to decide whether Rule 23, which contains no such prohibition on penalty fee cases, applied or whether the lower federal courts were correct in dismissing the lawsuit based on New York state law.

The Court's resolution of this *Erie* dispute was significant for litigants potentially involved in class action litigation. If the Court affirmed the lower courts' dismissals, other states potentially would have followed New York's example and sought to impose similar statutory limitations on the class action mechanism. At the extreme, states might have chosen to ban class actions altogether, as Virginia and Mississippi currently do in their state courts.[126] And similar state statutes limiting the remedies or claims for certain types of class actions would have become enforceable in federal

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[121] I readily admit to being among the dire (and subsequently very surprised) prognosticators, especially after hearing the arguments before the Court.

[122] For a description and attempted analysis through this messy swamp of jurisprudence, see Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a* Shady Grove, 79 GEO. WASH. L. REV. 448 (2011), shamelessly exploiting the prevailing class action "death" metaphor.

[123] N.Y. C.P.L.R. 901(b) (McKinney 2006) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.").

[124] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 469 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1431 (2010).

[125] *See, e.g.*, *Shady Grove*, 549 F.3d at 146.

[126] Currently, Mississippi and Virginia do not have state class action rules, although this is not a matter of statutory enactment banning class actions. *See* Wade v. Danek Med., Inc., 182 F.3d 281, 287 n.7 (4th Cir. 1999) (stating that Virginia does not use a class action mechanism); Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092, 1102 (Miss. 2004) (Graves, J., specially concurring) (stating that Mississippi does not use a class action mechanism and in fact has no statutory or common law provision allowing class actions); *see also* Linda S. Mullenix, *Should Mississippi Adopt a Class-Action Rule—Balancing the Equities: Ten Considerations that Mississippi Rulemakers Ought to Take into Account in Evaluating Whether to Adopt a State Class-Action Rule*, 24 MISS. C. L. REV. 217, 217 & n.2 (2005) (noting that Mississippi is the only state in the Union that allows no class actions, whereas Virginia, lacking a class action rule, nonetheless allows class relief in some situations). *See generally* Deborah J. Challener, *Foreword: Love It or Leave It; An Examination of the Need for and Structure of a Class Action Rule in Mississippi*, 24 MISS. C. L. REV. 145 (2005) (discussing how Mississippi does not have a class action rule and advocating for one).

court, resulting in dismissals of class actions based on state law limitations.[127] Under such a precedent, these state limitations effectively would have curbed or eliminated class action practice in both state and federal courts.

But instead the Court decided that Federal Rule of Civil Procedure 23 takes precedence in federal diversity class actions and preempted state statutory provisions that limit class litigation. There was no majority opinion. A slim plurality saved the federal class action from death by a thousand cuts through state-limiting provisions on class litigation, although the Justices recognized that their decision will encourage class action federal forum shopping to evade states with existing statutory limits on class litigation.[128] Justice Ginsburg noted the irony inherent in the Court's decision, which undermined congressional intent in enacting CAFA[129] while saving the federal class action.[130] As a matter of *Erie* jurisprudence, the Court splintered and muddied the already murky swamp of the *Erie* doctrine.

4. The Supreme Court Saves the Class Action Again!: Those Other Overlooked 2011 Decisions.—If the Supreme Court had wanted to kill off class action litigation, it actually had four opportunities to do so during its 2010 to 2011 term. Instead, it did not. Often lost in the public outcry over the Court's decisions in *Wal-Mart* and *Concepcion*, the Court decided two other important class action cases that term, and both these decisions favored plaintiffs and disadvantaged class action defendants.

a. Erica P. John Fund, Inc. v. Halliburton Co.—Unlike the *Wal-Mart* and *Concepcion* cases, the *Erica P. John Fund, Inc.*[131] decision clearly represented a victory for class action plaintiffs involved in securities litigation. A unanimous Court rejected Halliburton's invitation to tighten a securities class action plaintiff's burden of proof at class certification.[132] Just as corporate America must have breathed a sigh of relief in the Court's *Wal-Mart* and *Concepcion* decisions, so too must the plaintiffs' securities class action bar have been relieved at the Court's decision in *EPJ Fund*.

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[127] *See* Brief for Respondent at apps. A–B, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008), 2009 WL 2777648, at *1a–14aa (listing representative federal and state statutes limiting the remedy available in a class action as well as representative state statutes prohibiting class actions for particular claims).

[128] *Shady Grove*, 130 S. Ct. at 1435, 1448.

[129] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

[130] *Shady Grove*, 130 S. Ct. at 1473 (Ginsburg, J., dissenting). Similarly ironic is the fact that many such class actions would not be allowed in the courts of the states under whose laws the causes of action arise. *See id.*

[131] Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011).

[132] *See id.* at 2183, 2187.

b. Smith v. Bayer Corp.—In perhaps the most obscure of the four cases dealing with class action litigation, the Court in *Smith v. Bayer Corp.*[133] essentially permitted a duplicative class action to proceed to class certification in a West Virginia state court after a Minnesota federal court had denied class certification in an identical class action. To make a long story short, first, a federal district court denied class certification; then, a different plaintiff brought an identical class action in West Virginia state court. Next, the defendant asked the federal court to enjoin the class certification hearing in the state court under the relitigation exception to the Anti-Injunction Act (which, generally speaking, prohibits federal courts from enjoining state ones);[134] the federal court entered the injunction but was ultimately reversed when the Supreme Court decided that the Anti-Injunction Act exception didn't allow the injunction and, perhaps more significantly, that a decision denying class certification cannot, consistently with the due process protection against nonparty preclusion, bind and thus prevent other members of that alleged class from trying class certification themselves.[135] In other words, each member of the class can take a crack at filing a case and seeking class status.

II. FROM RULE 23 AND CLASS ACTIONS TO AGGREGATE LITIGATION: THE DEATH OF CLASS ACTIONS (II)

It is fair to contend, then, that Feinberg's pronouncement is an inaccurate assessment of judicial and legislative trends. As described above, there is plentiful evidence that class actions are alive, well, and flourishing. Thus, current pronouncements of the death of class action are misguided, even though historically predictable.

However, although class litigation continues unabated in federal and state courts, it is fair to suggest that the quality and nature of class litigation has changed over time. There has been a sea change in the ways in which litigants, their attorneys, courts, and extrajudicial dispute resolution mechanisms approach class action litigation. Perhaps the most telling signifier of this trend is the drift away from the clearly defined concept of the "class action" to the more vague and amorphous concept of "aggregate litigation."[136]

The change in nomenclature is important. The idea of class action litigation carried with it a defined Federal Rule of Civil Procedure (Rule 23), important constitutional underpinnings, seventy-plus years of litigation experience, and an enormous corpus of jurisprudence. However conflicted and ambiguous this class action jurisprudence, class litigation was and still

[133] 131 S. Ct. 2368 (2011).

[134] 28 U.S.C. § 2283 (2006).

[135] *See Smith*, 131 S. Ct. at 2373.

[136] *See, e.g.*, AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010).

is governed by a set of constitutional, statutory, and rules-based principles. The embrace by various actors in the judicial and political arenas of aggregate litigation, in contrast, represents the triumph of a more amorphous form of dispute resolution. As will be argued, the advent of the era of aggregate litigation has signaled a move away from the rule of law into more dangerous territory of arbitrary justice.

A number of theories suggest reasons for this drift from class action litigation to the more pliable concept of aggregate litigation. One reason is enhanced freedom of action. Once untethered from the class action rule and class action jurisprudence, litigants are afforded enhanced flexibility to do whatever they want in resolving massive disputes. The desirability of free-form aggregate dispute resolution has always had great appeal for the plaintiffs' side of the docket, but over time the defense bar similarly came to understand the attractiveness of the ability to resolve its major litigation free from the constraints of the class action rule. Furthermore, federal courts likewise embraced the notion that they could clear their dockets of major litigation by acceding to new forms of dispute resolution, unmoored from the jurisprudential constraints of the class action rule.

This tectonic shift away from conventional class action litigation, it will be argued, has been manifested in four different ways, each noteworthy because it signals a trend towards more undemocratic dispute resolution. These include (1) the increasing use of the settlement class, (2) the nonclass contractual aggregate settlement, (3) the quasi-class action, and (4) fund approaches to aggregate claims resolution.

If the primary justice concern should focus on the fair and equitable resolution of individual claims, then the new means for aggregate dispute resolution, accomplished outside the protection of established class litigation, is a disquieting development. Moreover, as stated at the outset of this Article, much of Professor Redish's work has been devoted to arguing about the undemocratic features of class litigation. If Redish is correct, then his arguments, rather than being irrelevant, apply with even greater force to aggregate dispute resolution mechanisms that fail to supply even the protections of the class action rule.

A. The Triumph of MDL Procedure and Settlement Classes

Through the end of the twentieth century, class litigation followed a fairly well-defined procedural course: attorneys filed a class action complaint, certification proceedings ensued, the court granted or denied class certification, and class litigation or a settlement resulted. Throughout this process, however, class litigation was largely supervised and managed by a judicial officer protecting the interests of absent class members.

In the early 1990s, during the heyday of mass tort litigation, plaintiffs' attorneys introduced the largely then-unknown technique of the "settlement

class."[137] This involved parties to a class action first negotiating a settlement and *then* filing a complaint with a request for certification of the class and approval of the settlement. Throughout the 1990s, the major class action debate focused on the legitimacy of the settlement class,[138] and a chief concern focused on the adequacy of representation of absent class members as well as other ethical considerations related to crafting and approving a class settlement in this manner. The Supreme Court definitively decided this debate—in favor of the settlement class—in its *Amchem* and *Ortiz* decisions.

The Supreme Court in *Amchem* and *Ortiz* validated the concept of the settlement class, indicating, though, that settlement classes had to satisfy all the requirements for class certification as litigation classes, except for the manageability requirement for Rule 23(b)(3) classes.[139] The Court's twin settlement class decisions inspired litigators in the ensuing decade to embrace the concept of the settlement class with enthusiasm.

In the twenty-first century, newfound enthusiasm for the settlement class was coupled with a newfound enthusiasm for multidistrict proceedings.[140] Until the early 1990s, federal courts had consistently resisted and repudiated attempts to use Multidistrict Litigation (MDL) auspices to create mass tort and other class action multidistrict litigation.[141] In 1991, however, an MDL panel reversed this trend when the panel approved and created an asbestos MDL.[142] In the ensuing two decades,

[137] The most famous (or infamous) settlement class in this period was *Georgine v. Amchem Products, Inc.*, in which a settlement class was certified by Judge Reed in the Federal District Court for the Eastern District of Pennsylvania. *See* 157 F.R.D. 246, 315 (E.D. Pa. 1994) (approving a settlement class). This nationwide settlement class of current and future asbestos claimants was intended to resolve all outstanding asbestos claims. The Third Circuit overturned the approval of this settlement class in 1995, *see* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 618 (3d Cir. 1996), and eventually the U.S. Supreme Court upheld the Third Circuit's decision in its 1997 *Amchem* decision. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997).

[138] The best appellate discussion of the problems relating to the legitimacy of settlement classes in this period may be found in Judge Becker's decisions in the *GMC Pick-Up Truck Fuel Tank Products Liability Litigation* and his reprise of this debate one year later in *Georgine*. *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 786–94 (3d Cir. 1995); *Georgine*, 83 F.3d at 634–35.

[139] *See, e.g.*, *Amchem*, 521 U.S. at 619–20.

[140] *See* 28 U.S.C. § 1407 (2006). The multidistrict litigation statute is essentially a transfer provision that permits the transfer of all pending cases that share a common question of law or fact to one designated federal court for coordinated pretrial proceedings. For the paradigm shift to increased use of MDL proceedings after *Amchem* and *Ortiz*, see generally Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775 (2010).

[141] *See* MULLENIX, *supra* note 42, at 2.

[142] *In re* Asbestos Prods. Liab. Litig., 771 F. Supp. 415, 417 (J.P.M.L. 1991).

MDL panels created dozens of new multidistrict mass tort,[143] consumer, and other aggregate litigations.[144] Moreover, no longer does the MDL panel wait for litigants to request creation of an MDL for particular aggregate cases; instead, the MDL panel frequently sua sponte, or at the request of a federal judge or judges, creates an MDL.[145] Indeed, almost all new pharmaceutical, medical device, and consumer actions almost immediately become subject to MDL jurisdiction.

This proliferation of MDL proceedings has been married to the settlement class device. The marriage of MDL proceedings to the settlement class has modified usual class litigation by providing a judicial platform that is largely free from initial or ongoing class action constraints. In this setting, attorneys representing thousands or hundreds of thousands of claimants are at liberty to bargain and negotiate aggregate claims and then to cobble together a class settlement with defendants to be presented to the MDL judge. At this juncture, MDL judges, motivated by the inertial pressures to clear dockets of massive litigation, routinely bless the settlements. Nonetheless, the harnessing of the settlement class device to MDL jurisdiction resonates in back-room deal making, blanketed with an aura of judicial legitimacy and largely liberated from the due process concerns and protections associated with the class action itself.

B. The Contractual Nonclass Aggregate Settlement Movement

At the beginning of the twenty-first century, the drift towards resolving aggregate litigation through MDL settlement classes went largely unnoticed, most likely because such complex litigation was being resolved through existing and familiar procedural means. What had changed by then was a marked shift in judicial attitudes and receptivity to employing the MDL mechanism combined with the settlement class to dispose of complex litigation.

The combined MDL and settlement class model, however, proved to be a somewhat imperfect vessel for resolving massive cases, at least for the attorneys involved. Although MDL forums and agreeable MDL judges provided a more hospitable environment for free-wheeling dispute resolution, in the end, any class settlement the parties negotiated and agreed to was still subject to Rule 23(e)'s scrutiny when the parties presented their

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[143] *See* Willging & Lee, *supra* note 140, at 793–98 (addressing the rising number of mass tort, product liability, and medical device MDL proceedings).

[144] *See Pending MDLs*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., http://www.jpml.uscourts.gov/pending-mdls-0 (last visited Mar. 21, 2013); *see also Multidistrict Litigation Terminated Through September 30, 2012*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-2012.pdf (last visited Mar. 21, 2013) (listing all MDL proceedings resolved through September 30, 2012).

[145] *See* 28 U.S.C. § 1407(c)(i) (providing the panel the authority to create MDLs on its own initiative).

deal to the MDL court.[146] Even in an MDL, a class settlement still needs judicial approval at a "fairness hearing" at which interested parties can raise objections based on dozens of years' worth of class action jurisprudence.

Against this backdrop, the interests of plaintiffs' counsel and defense counsel converged. Both sought to exploit the favorable MDL environment to forge favorable deals, resolving massive liabilities. The aim, thus, was to create some deal-making mechanism that could simultaneously take advantage of the MDL forum but liberate ultimate deal approval from the threat of irksome objectors seeking to derail accomplished arrangements, as well as liberate parties from the constraints of the irksome requirements of the class action rule.[147]

Enter the contractual nonclass aggregate settlement. Plaintiffs' and defense attorneys initially deployed the concept of the contractual aggregate nonclass settlement in pharmaceutical mass tort litigation, most famously in resolution of the massive *Vioxx* litigation.[148] The mechanism of the contractual aggregate nonclass settlement has since been used repeatedly in other pharmaceutical and mass tort litigation, including the *Zyprexa* litigation[149] and other cases.[150]

The concept behind the contractual aggregate nonclass settlement is simple. Individual cases that are scattered throughout the federal system are collected and transferred to a single MDL forum. In current practice, parties often need not wait through months of extensive MDL petitions and hearings because contemporary MDL panels obligingly and instantaneously create MDLs for emerging massive cases.[151]

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[146] *See* FED R. CIV. P. 23(e); FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION §§ 21.61–.612, at 308–15 (4th ed. 2004) (describing standards for judicial approval of settlement classes and the role of the judge in approving settlements).

[147] The emergence of nonclass settlement arrangements has generated significant commentary, much of it focusing on problems relating to the implementation and legitimacy of nonclass settlements. *See, e.g.*, Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517 (2008); Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506 (2011); Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1 (2009); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011); Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628 (2011).

[148] *See Vioxx Settlement Update*, OFFICIAL VIOXX SETTLEMENT, http://www.officialvioxx settlement.com (last visited Mar. 21, 2013) (providing links to documents with information about the litigation). Note that this website is sponsored by the Vioxx MDL Plaintiffs' Steering Committee.

[149] *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006).

[150] *See* Willging & Lee, *supra* note 140, at 793–802.

[151] *See id.* at 793–94. It should also be noted that savvy and knowledgeable complex litigation practitioners lobby assiduously before MDL panels to have their cases assigned to known accommodating MDL judges who will both sign off on accomplished deals and agree to the award of sizeable attorney fees.

Once under the umbrella of an MDL court, the parties involved in the litigation forge an agreeable deal, which more often than not embraces a highly favorable, discounted arrangement for the defendant in exchange for sizeable fees for the plaintiffs' attorneys. However, rather than creating a class action settlement, the parties instead create a contractual arrangement that applies to all individual claims. This contractual settlement of massive claims thus concludes all outstanding litigation but nonetheless evades class action approval or scrutiny. The parties then present their contractual deal to the MDL judge who, upon concluding that the parties have amicably arranged a contract, dismisses the litigation.

The attorneys on both sides of the docket who have crafted the concept of the contractual aggregate nonclass settlement are to be commended for their inventiveness. In essence, complex litigation attorneys—as interested actors—have crafted a dispute resolution mechanism that favors their own interests often at the expense of unknowing claimants whom the attorneys purportedly represent. Once attorneys on both sides of the docket became comfortable with the shift of complex litigation into MDL forums, the parties involved created a much better mousetrap. Without much notice, fanfare, or objection, the attorneys involved in aggregate litigation devised a means for disposing of large-scale litigation unburdened by exacting judicial scrutiny or jurisprudential constraints conferred by the class action rule. The shift to contractual aggregate nonclass settlement has been gradual, evolutionary, and subtle, building on existing procedural mechanisms and cleverly mimicking known procedural memes (such as the class action).

As indicated above, nomenclature is important. The "nonclass aggregate contractual settlement" is a concept that deliberately resonates in the familiar language of the class action while simultaneously rejecting the class concept in favor of a unit of "aggregate claims" resolved instead by contract. It should come as no surprise, also, that the attorneys on both sides of the dockets who were engaged in creating the nonclass aggregate contractual settlement device lobbied to institutionalize these practices through the auspices of the American Law Institute.[152]

C. The Invention of the Quasi-Class Action

Although the attorney-driven creation of the contractual nonclass aggregate settlement mechanism marks a new benchmark in dispute resolution, it does not represent the end point of evolutionary drift in complex dispute resolution. Once MDL judges embarked into the new conceptual world of contractual nonclass aggregate settlements, it was only

[152] *See, e.g.*, AM. LAW INST., *supra* note 136, § 3.01, at 187–88.

a matter of time before judicial invention of the "quasi-class action."[153] Indeed, the quasi-class action may almost be viewed as the logical extension of, and corollary to, the contractual nonclass aggregate settlement.[154]

Judge Jack Weinstein invented the quasi-class action in his judicial management of the *Zyprexa* litigation.[155] The core issue that prompted Judge Weinstein to invoke the concept of the quasi-class action focused on an attorney fee dispute. In class action litigation, attorney fees are subject to judicial scrutiny and approval.[156] Although there are different methodologies for determining attorney fees in class action litigation,[157] the most common method calculates fees based on a percentage of the common-benefit fund that the attorneys negotiate on behalf of the class claimants.[158]

The *Zyprexa* litigation, however, was not resolved as a class action settlement and therefore theoretically was not subject to any class action constraints, such as judicial review of the attorney fee requests. Consequently, some plaintiffs' attorneys sought to enforce privately negotiated contingent fee contracts, which would have provided attorney fees in excess of those typically awarded in common-benefit class litigation.

Judge Weinstein apparently believed these privately negotiated fee contracts would reward excessive fees to the attorneys and were unfair to claimants. In order to block enforcement of the contingent fee contracts, Judge Weinstein requested that the special masters assisting him in the *Zyprexa* litigation adjust the requested attorney fee schedules.[159] In issuing

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[153] *See* Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389 (2011). Portions of this section of the Article are adapted from this piece, which examines the origins of the quasi-class action.

[154] See Fla. Power Corp. v. Granlund, 82 F.R.D. 690, 692 (M.D. Fla. 1979), noting, about the invocation of a quasi-class action: "The Court is faced here with a procedural invention of unknown origin which bears a remarkable resemblance to the class action . . . and which has itself engendered considerable controversy in the context of this case."

[155] *See In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. 122, 122 (E.D.N.Y. 2006) (the first of a series of *Zyprexa* orders invoking the concept of the quasi-class action). The *Zyprexa* litigation was not the first case in which Judge Weinstein used the term quasi-class action, nor was it the last. However, the *Zyprexa* litigation is significant in that it spawned no fewer than thirty-two separate orders in which Judge Weinstein repeated that he conducted the *Zyprexa* litigation as a quasi-class action.

[156] FED. R. CIV. P. 23(h).

[157] *See* FED. JUDICIAL CTR., *supra* note 146, § 21.7, at 334–35.

[158] *See id.* § 14.121, at 186–93. The other common method for determining attorney fees in class litigation is the lodestar method, which requires plaintiffs' attorneys to keep detailed billing records of time expended in the representation as well as detailed records of other fees and expenses. The court then adjusts actual billing fees by a lodestar, which effectively is a multiplier to account for assumption of risk, lost opportunity costs, and similar factors in pursuing class litigation on behalf of claimants. *Id.* § 14.122, at 193–96.

[159] *In re Zyprexa*, 233 F.R.D. at 122 (instructing special masters to "consider a fee that shall be the lesser of the maximum reasonable general fee schedule they recommend, the fee agreed upon between

this order, Judge Weinstein declared that the *Zyprexa* litigation had been administered as a quasi-class action, which theoretically provided Judge Weinstein with the authority to adjust attorney fees.[160]

Judge Weinstein, in one of his earliest *Zyprexa* decisions, described the central features of a quasi-class action. Quasi-class actions, then, occur under the umbrella of MDL proceedings. Within the MDL auspice, a quasi-class action is characterized by:

> The large number of plaintiffs subject to the same settlement matrix approved by the court, the utilization of special masters approved by the court to control discovery and assist in and administer settlement, and the order of the court for a huge escrow arrangement and other interventions by the court reflect a degree of control requiring exercise by the court of fiduciary standards to ensure fair treatment to all parties and counsel regarding fees.[161]

Even though the quasi-class action had its origins in the *Zyprexa* attorney fee dispute, the concept gained traction in no small part because Judge Weinstein repeatedly used the label in numerous subsequent published opinions and orders. Thus, in the aftermath of Weinstein's original announcement that the *Zyprexa* litigation was administered as a quasi-class action, Judge Weinstein issued no fewer than thirty-one additional orders reasserting that the *Zyprexa* litigation was a quasi-class action.

However, few of these opinions discuss what a quasi-class action is, the consequences of characterizing litigation as a quasi-class action, or authority in support of this concept. Instead, Judge Weinstein's orders dramatically illustrate the problem of computer-generated boilerplate opinions that repeat formulaic, conclusory set pieces. Hence, in at least twenty-five of his thirty-one *Zyprexa* decisions, Judge Weinstein copied and pasted the identical paragraph referring to the quasi-class action.[162]

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the client and the attorney in an individual case, and the maximum amount permitted under the applicable local state rules or statutes"); *see also In re* Zyprexa Prods. Liab. Litig., No. 04-MD-1596, 2008 WL 2511791, at *2 (E.D.N.Y. June 19, 2008) (describing fee adjustments).

[160] *In re Zyprexa*, 233 F.R.D. at 122.

[161] *Id.* at 122–23; *see also In re* Zyprexa Prods. Liab. Litig., 238 F.R.D. 539, 540 (E.D.N.Y. 2006) (reiterating the judge's conclusion that an obligation existed to exercise control over the proceedings and adjust fees); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006) (describing the same).

[162] *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., Nos. 04-MD-1596, 06-CV-2592, 2009 WL 5062109, at *1 (E.D.N.Y. Dec. 10, 2009) (order concerning Arizona's two-year statute of limitations on consumer products liability claims). The order states:

> The individual Zyprexa user litigation has been administered as a quasi-class action. *See In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 262 (E.D.N.Y. 2006) ("The court, magistrate judge and special masters will continue to administer this litigation as a quasi-class action."); *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 477 (E.D.N.Y. 2006) ("Recognizing its obligation to exercise careful oversight of this national 'quasi-class action,' the court has already utilized its equitable power to limit attorneys' fees and costs.") (citation omitted); *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (finding that individual Zyprexa user litigation "may be characterized properly as a quasi-class action subject to the general

Only a very small subset of Judge Weinstein's *Zyprexa* orders attempted to amplify a theory of the quasi-class action as it related to the attorney fee issue.[163] And to further demonstrate the doctrinal drift away from conventional class litigation under Rule 23 to some other construct, Judge Weinstein referred to the *Zyprexa* litigation variously as a "non-class action conglomerate settlement,"[164] something *analogous* to the class action,[165] and a "*structural* class action."[166] Yet Judge Weinstein acknowledged that the resolution of the *Zyprexa* litigation was "in the nature of a private agreement between individual plaintiffs and defendants."[167]

In a half-dozen orders, Judge Weinstein cited various authoritative sources in support of his ability to supervise the award of attorney fees in the context of a private-party settlement based on his theory that he was supervising a quasi-class action. Judge Weinstein briefly cited four types of authority: (1) the "general equitable powers of the court," (2) the Federal

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equitable power of the court"); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (same); *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122, 122 (E.D.N.Y. 2006) (same).

In re Zyprexa, 2009 WL 5062109, at *1.

Clearly, this repeated reference to the quasi-class action is self-referential and provides no doctrinal support for the concept. Moreover, in the numerous orders in which Judge Weinstein recites that *Zyprexa* was administered as a quasi-class action, that status had absolutely no implication at all for the issue adjudicated in the order. *See id.* at *16 (granting a motion to dismiss on statute of limitations grounds); *see also In re* Zyprexa Prods. Liab. Litig., 260 F.R.D. 13, 17–18, 25 app. B (E.D.N.Y. 2009) (holding, along with a boilerplate recitation of quasi-class action status, that the magistrate's discovery order in the state attorneys' general litigation was not clearly erroneous and that the MDL settlement was warranted); *In re* Zyprexa Prods. Liab. Litig., No. 04-MD-1596, 2009 WL 1173069, at *1, app. B at *6–7 (E.D.N.Y. May 1, 2009) (ordering the expanded authority of the special master to include the attorneys general of Idaho and Minnesota, along with a boilerplate recitation of quasi-class action status); *In re* Zyprexa Prods. Liab. Litig., 253 F.R.D. 69, 78–79, 82 (E.D.N.Y. 2008) (granting class certification to institutions and patients against a pharmaceuticals manufacturer alleging overpayment on purchases of Zyprexa, and again providing a boilerplate recitation of quasi-class action status); *In re* Zyprexa Prods. Liab. Litig., Nos. 04-MD-1596, 05-CV-4115, 2008 WL 2696916, at *5 (E.D.N.Y. July 2, 2008) (providing a boilerplate recitation of a quasi-class action status order in preparation for a conference on a motion for class action status in third-party payor litigation); *In re* Zyprexa Prods. Liab. Litig., 451 F. Supp. 2d 458, 477–79 (E.D.N.Y. 2006) (referring to quasi-class action status as the basis for limiting attorney fees and ordering that state Medicaid agencies pay their share of attorney fees and costs in procuring settlement).

[163] *See, e.g.*, *In re Zyprexa*, 238 F.R.D. at 540–41; *In re Zyprexa*, 467 F. Supp. 2d at 269–73; *In re Zyprexa*, 433 F. Supp. 2d at 271–72; *In re Zyprexa*, 424 F. Supp. 2d at 491–93; *In re Zyprexa*, 233 F.R.D. at 122–23; *see also In re* Zyprexa Prods. Liab. Litig., 671 F. Supp. 2d 397, 403–04 (E.D.N.Y. 2009) (discussing the court's equitable power to adjust attorney's fees).

[164] *In re Zyprexa*, 467 F. Supp. 2d at 262; *see also id.* at 269 (referring to the *Zyprexa* settlement as a "conglomerate mass quasi-class action . . . in the offing").

[165] *In re Zyprexa*, 424 F. Supp. 2d at 491–92.

[166] *In re Zyprexa*, 671 F. Supp. 2d at 433 (emphasis added) ("Mississippi's suit is in the nature of a structural class action. The extensive case law regarding the uses and limitations of aggregate evidence in Rule 23 class actions is applicable."). The suit was not pursued formally under Rule 23.

[167] *In re Zyprexa*, 233 F.R.D. at 122.

Rules of Civil Procedure, (3) precedential cases, and (4) the Class Action Fairness Act. However, none of these briefly referenced authorities in Judge Weinstein's various *Zyprexa* orders remotely authorized or legitimized the concept of the quasi-class action. In addition, Judge Weinstein also appealed to various broad policy rationales to justify his endorsement of the quasi-class action mechanism.[168]

Judge Weinstein's broadest invocation of authority for the quasi-class action was the "general equitable power of the court."[169] Under the rubric of the "general equitable powers of the court," Weinstein located a mandate to federal judges to creatively innovate in the supervision and administration of aggregate litigation. Relying on no less an authoritative body than the FJC, in a daisy chain of logic, Weinstein suggested:

> Recognizing the special difficulties presented by mass tort quasi-class actions, the Federal Judicial Center has advised that "[a]lthough the 'just, speedy, and inexpensive determination of every action' requirement applies to all cases, the difficult and sometimes contradictory demands posed by mass torts make case management both challenging and critical. The absence of precedent or of legislative or rule-making solutions *should not foreclose innovation and creativity*."[170]

Relying, then, on the FJC's *Manual for Complex Litigation* to supply content to the court's inherent power, Judge Weinstein concluded that "when confronting the novel challenges of aggregate litigation," individual courts and judges are obligated to rely on the innovation and creativity allowed by their inherent equitable power.[171] However, his references to the *Manual for Complex Litigation* as directly or indirectly supporting the quasi-class action seems dubious at best; the *Manual* does not articulate, propose, endorse, or recognize the quasi-class action anywhere in its hundreds of pages.

Judge Weinstein's second cluster of support for the quasi-class action is derived from the Federal Rules of Civil Procedure. Ironically, many of the authorities he cites rely on the class action rule itself: Rule 23(g), (h), and (e).[172] But Rule 23 and the Advisory Committee note nowhere speak of the concept of a quasi-class action, and Rule 23 does not by its terms

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[168] *See* discussion *infra* note 182 and accompanying text.

[169] *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006).

[170] *Id.* (quoting FED. JUDICIAL CTR., *supra* note 146, § 22.1 (alteration in original)).

[171] *Id.* Judge Weinstein also cited to the AM. LAW INST., COMPLEX LITIGATION PROJECT app. B, § 6 cmt. c, at 818 (Council Draft No. 4, Oct. 23, 1992).

[172] *See, e.g.*, *In re Zyprexa*, 233 F.R.D. at 122. Judge Weinstein cited Rule 23(g)(1)(C)(iii) (judicial authority in appointing counsel to consider alternative possible fee proposals by competing applicants for appointment as class counsel), Rule 23(h) (judicial authority to approve fee petitions in class actions), and Rule 23(e)(1)–(2) (dealing with judicial approval of proposed class action settlements). *See also In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (citing Rule 23 provisions in support of a quasi-class action).

provide support for broad assertions of judicial power in aggregate settlements outside the context of a certified class action. Again, something either is a class action under Rule 23 or it is not; a "conglomeration" is not a class action or even something analogous to a class action, except, perhaps, in its size.

In addition to citing Rule 23 as authority in support of the quasi-class action, Judge Weinstein also cited Rule 1, which mandates that federal courts should administer the rules to accomplish the "just . . . determination of every action."[173] However, the global asbestos class settlements in *Amchem* and *Ortiz*—both accomplished under the formal requirements of Rule 23 and subsequently repudiated by the Supreme Court—were not therefore legitimized by Rule 1 simply because the settlements accomplished an efficient resolution of all asbestos claims.

The third type of authority that Judge Weinstein broadly cited was precedent, including two class actions that he presided over: the New York asbestos litigation[174] and the *Agent Orange* settlement.[175] Yet both of these cases are dubious support for the theory that a quasi-class action is a legitimate construct because both were pursued under the formal class action rule, and the New York asbestos litigation was ultimately resolved under bankruptcy auspices. These cases represent the proposition that judges in properly certified class actions may approve or disapprove attorney fee requests, but neither has anything to do with the quasi-class action.

Finally, Judge Weinstein cited CAFA[176] as providing additional support for the quasi-class action.[177] He referred specifically to a CAFA subsection authorizing the removal of "mass" actions to federal court.[178] However, this CAFA provision has nothing to do with quasi-class actions. Of the fifty states, two do not have state class action rules.[179] Consequently, actions instituted in those states that join large numbers of plaintiffs would

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[173] *See In re* Zyprexa, 424 F. Supp. 2d at 491 (alteration in original) (quoting FED. R. CIV. P. 1).

[174] *Id.* (citing *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 784 (E. & S.D.N.Y. 1991)).

[175] *Id.* (citing *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1304–05 (E.D.N.Y. 1985)).

[176] *See* 28 U.S.C. § 1332(d) (2006), as amended by the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 9.

[177] *In re Zyprexa*, 424 F. Supp. 2d at 491.

[178] *Id*. (citing § 1332(d)(11)(A)).

[179] These states are Mississippi and Virginia. *See* discussion *supra* note 126. Mississippi, at least, permits simple joinder of large numbers of plaintiffs in a single action but does not recognize the class action mechanism. *Cf. In re* Zyprexa Prods. Liab. Litig., 671 F. Supp. 2d 397, 402 (E.D.N.Y. 2009) (characterizing Mississippi's individual lawsuit in the *Zyprexa* litigation, seeking approval for use of class-wide statistical aggregate evidence, as constituting "a 'structural' class action . . . congruent with other forms of aggregate litigation insofar as the State [sought] to use generalized evidence to prove its claims").

not be subject to removal under CAFA.[180] To remedy this problem, Congress enacted a provision to provide defendants sued in these states the ability to remove cases involving the mass joinder of claimants and called these types of cases "mass actions."[181] In so doing, Congress did not contemplate, create, or endorse the concept of a quasi-class action.

In addition to the weak rule-based and precedential authority that Judge Weinstein conjured for his assertion of judicial power outside the confines of an appropriately constituted class action, he relied on dicta and policy rationales. For example, he cited with disapproval the history of mass tort litigation as a narrative of judicial ineffectiveness in resolving mass torts.[182] Thus, after citing Rule 23 as authority for his power to adjust attorney fees, he attacked Rule 23 jurisprudence as an obstacle to accomplishing resolution of mass litigation. Judge Weinstein would have it both ways: he cited to Rule 23 both in support of his judicial powers[183] and as an impediment to those powers.

In particular, Judge Weinstein criticized the Supreme Court's decisions in *Amchem* and *Ortiz*, and the Second Circuit's decisions in *Stephenson v. Dow Chemical Co.*,[184] as decisions that "made total closure of possible future claims by class action more difficult."[185] Considering these obstructionist Supreme Court and Second Circuit decisions, Judge Weinstein discerned a trend and support for his new quasi-class action concept:

> As a result of the dubious benefits available from class actions in resolving mass disputes, particularly in pharmaceutical cases, more defendants have now begun to embrace a form of quasi-class action to aggregate and settle cases, using masters, matrices and other administrative techniques.[186]

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[180] CAFA's operative removal provision for the most part relies on state law to define litigation as a class action. *See* § 1332(d)(1)(B).

[181] *See id.* § 1332(d)(11)(A).

[182] *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., 467 F. Supp. 2d 256, 269 (E.D.N.Y. 2006) ("[I]t is well to reflect for a moment on the recent history of mass litigation generally."); *see also In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (manifesting concern for the effect of constraints on judicial power to resolve mass torts on the fate of the pharmaceutical industry and public health).

[183] "Mississippi's suit is in the nature of a structural class action. The extensive case law regarding the uses and limitations of aggregate evidence in Rule 23 class actions is applicable." *In re Zyprexa*, 671 F. Supp. 2d at 433 (characterizing an individual lawsuit by the State of Mississippi as a "structural class action," even though not pursued formally under Rule 23, resulting in an expansion of the court's ability to consider certain types of evidence).

[184] 273 F.3d 249 (2d Cir. 2001), *aff'd in part by an equally divided Court, vacated in part*, 539 U.S. 111 (2003) (per curiam).

[185] *In re Zyprexa*, 467 F. Supp. 2d at 269 (citing also to AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION: DISCUSSION DRAFT (2006) (for discussion purposes, not yet referred to the ALI for adoption)).

[186] *Id.* at 269–70.

In a subsequent *Zyprexa* order—invoking the same theme that criticizes the *Amchem*, *Ortiz*, and *Stephenson* decisions—Judge Weinstein similarly suggested:

> This development [the *Amchem*, *Ortiz*, and *Stephenson* decisions] has led a number of judges and attorneys, particularly in pharmaceutical cases, to attempt mass settlements on consolidated and cooperative basis without the formalities of a class action. The substitute quasi-class action aggregate technique has advantages and is being closely studied.[187]

Judge Weinstein's observation concerning the practicing bar and the judiciary's embrace of private settlements as a preferred means for resolving aggregate liabilities, however, certainly does not provide authoritative legal support for the quasi-class action.[188] The resolution of the subsequent *Vioxx* litigation illustrates how judicial deployment of the quasi-class action has expanded, beyond mere judicial authority to adjust attorney fees, to adversely affect the rights of unrepresented or underrepresented persons with an interest in the litigation. Moreover, the *Vioxx* litigation has inspired the first wholesale attack against the quasi-class action through an appeal to the United States Supreme Court.[189]

Similar to the *Zyprexa* litigation, the *Vioxx* MDL court's decision to cap the contingent fee arrangements caused a consortium of plaintiffs' lawyers, the Vioxx Litigation Consortium (VCL), to challenge that decision.[190] The VCL challenged the court's authority to adjust legal fees "by arguing that classifying an MDL as a quasi-class action [was] inappropriate."[191] The VCL pointed out that the underlying actions in an MDL are individual in nature whereas a class action is a representative proceeding.[192] For this reason, the VCL contended, fee capping is appropriate in a class action but not in an MDL proceeding.[193]

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[187] *In re* Zyprexa Prods. Liab. Litig., 238 F.R.D. 539, 541 (E.D.N.Y. 2006) (similarly citing AM. LAW INST., *supra* note 185).

[188] In addition, apart from Judge Weinstein, there is scant evidence that "a number" of judges have supervised private mass settlement deals outside the purview of the class action rule. *See* discussion of the *Vioxx* settlement, *infra* notes 190–198 and accompanying text. *But see In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *6 (D. Minn. Mar. 7, 2008) (asserting the court's authority to supervise the attorney fee award in the private settlement of a medical device mass action and noting that "[b]efore this Court is a coordinated litigation of many individual yet related cases that effectively is, and proceeded as, a quasi-class action").

[189] *See* Petition for Writ of Certiorari, Dier v. Merck & Co. (*In re* Vioxx Prods. Liab. Litig.), No. 10-666 (U.S. Nov. 17, 2000); Brief in Opposition to Petition for Writ of Certiorari, *In re Vioxx*, No. 10-666 (U.S. Jan. 21, 2011). The Court denied the petition for certiorari on February 22, 2011. *See In re Vioxx*, 131 S. Ct. 1477 (2011).

[190] *See In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 551 (E.D. La. 2009).

[191] *Id.* at 558.

[192] *See id.*

[193] *See id.*

The court responded by indicating that it was true that "the Federal Rules of Civil Procedure expressly provide that district courts may require reasonable fees in class actions while the MDL statute lacks an analogous provision."[194] But, relying on both the *Zyprexa* and *Guidant* cases, the Louisiana court held that the *Vioxx* settlement could be considered and analyzed as a quasi-class action and that therefore the court had the power to evaluate contingent fee contracts for reasonableness.[195] The court noted that the global settlement in the *Vioxx* litigation bore a significant resemblance to the *Zyprexa* global settlement.[196] Comparing the two litigations, the court concluded that "[g]iven these similarities, and § 1407's mandate of just and efficient treatment, it is correct to consider [the] MDL as a quasi-class action."[197] Furthermore, in assessing the boundaries of its authority under the private settlement agreement, the court noted that the parties had given the court express authority to modify any provision under certain circumstances.[198]

D. Fund Approaches to Aggregate Claims Resolution

The fourth notable shift in aggregate dispute resolution in the past decade relates to the American embrace in the twenty-first century "fund" approaches to resolving mass claims. Civil law countries, such as Germany, and other mixed-law jurisdictions, such as Japan, have used fund approaches to resolving mass injury in the past.[199] But the United States, with its robust individual tort system, has long ignored this means for resolving large-scale injuries.

Fund approaches to resolving mass liabilities are chiefly extrajudicial, private means for resolving aggregate claims. The United States has now experienced two such massive fund efforts: the World Trade Center Victim Compensation Fund, created in the aftermath of the World Trade Center terrorist attacks in September 2001, and the Gulf Coast Claims Facility (GCCF), created in the aftermath of the Deepwater Horizon oil platform explosion in April 2010 and the ensuing oil spill.[200] Ken Feinberg's involvement as the administrator of these funds, and his advocacy for this means of aggregate claims resolution, has inspired him to declare that class actions are dead.

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[194] *Id.* (comparing FED. R. CIV. P. 23(g)(1)(C)(iii), (h) with 28 U.S.C. § 1407 (2006)).

[195] *See id.* at 558–59. Taking a page from Judge Weinstein's playbook, the Louisiana federal court located its authority to oversee attorney fee arrangements in the quasi-class action context in various provisions of Rule 23, basic equity, and the FJC's *Manual for Complex Litigation*.

[196] *See id.* at 559.

[197] *Id.*

[198] *See id.* at 554.

[199] *See* Mullenix, *supra* note 19, at 908 (discussing other countries' historical use of fund approaches to resolving mass tort liabilities).

[200] *See generally id.* at 827–37 (detailing the history of the creation of these two funds).

The two American fund experiences share common and uncommon characteristics.[201] The WTC Fund was created through congressional enactment; the Gulf Coast Claims Facility was created with a handshake deal between BP and President Obama. The WTC Fund was implemented through a federal notice-and-comment rulemaking; the Gulf Coast Claims Facility was not. Instead, the GCCF was set up largely under the supervision of its administrator, Ken Feinberg, who is the administrator for both funds.[202]

Numerous scholars and commentators have written extensively about the use of fund approaches to resolving aggregate claims.[203] While the WTC Fund experience initially inspired admiring enthusiasts for this extrajudicial approach to resolving mass tort claims, a more critical commentary subsequently ensued as scholars carefully examined the implementation and results of the WTC Fund.[204]

In the American context, fund approaches to resolving massive liabilities derived from their American antecedent, the class action settlement. Indeed, Feinberg began his career as Judge Jack Weinstein's special master in the *Agent Orange* class action fund. Thus, one can draw a linear progression from the 1984 *Agent Orange* settlement class experience to the WTC and GCCF funds in 2001 and 2010.

Similar to the evolution of MDL procedures and contractual nonclass aggregative settlements, the twenty-first-century embrace of fund approaches represents an incremental shift away from judicial auspices to an entirely different type of claims resolution mechanism that is largely free from the constraints of judicial oversight and the class action rule. Indeed, fund resolutions of mass claims occur independently of the judicial arena. Although the advocates of fund approaches applaud these new approaches as fair, inexpensive, and expeditious, independent commentators have paid insufficient attention to the negative consequences for claimants of poorly designed and implemented fund approaches.

Finally, it is hardly surprising that the primary advocates for nonclass remedies include Judge Weinstein[205] and Ken Feinberg, who want to be able to resolve complex litigation liberated from the class action rule, class action jurisprudence, and the rule of law generally. And, similar to the

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[201] *See id.*

[202] Ken Feinberg was appointed the special master of the WTC Fund pursuant to congressional authorization under the enabling legislation. Because there was no congressional authorization for the GCCF, Ken Feinberg was appointed its administrator in a deal between BP and the White House. *See id.* at 863–67 (discussing the appointment and responsibilities of the administrators for the WTC and GCCF).

[203] *See id.* at 822–26 & n.20 (cataloguing sources of commentary on the WTC Fund).

[204] *See id.* (documenting the positive and critical commentary relating to the WTC Fund).

[205] As is well-known, the Second Circuit has reversed many of Judge Weinstein's class action decisions expanding the law beyond existing class action jurisprudence. *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008); *In re* Simon II Litig., 407 F.3d 125 (2d Cir. 2005).

embrace of contractual nonclass settlement mechanisms, the experience of the GCCF demonstrates that corporate misfeasors who find themselves enmeshed in massive liabilities have recognized the attractiveness of resolving these claims outside the judicial arena. As I have argued elsewhere, the advent of fund approaches in the United States ought to be greeted with some degree of caution and alarm.[206]

III. THE END OF DEMOCRATIC PROCESS: THE DEATH OF CLASS ACTIONS (III)

A. Aggregate Litigation Claims Resolution in a Nonclass Universe—Documenting the Paradigm Shift

Since the advent of the twenty-first century, there has been a marked paradigm shift in the landscape of complex, aggregate litigation. The evolutionary drift towards the resolution of aggregate claims, unmoored from the class action rule, ought to be viewed with increasing concern. But to date, these novel means for complex dispute resolution have largely evaded public attention. Of even greater concern, advocates for these novel means of complex dispute resolution have aggressively sought to institutionalize and codify these mechanisms through such august bodies as the American Law Institute and various scholarly forums.

Although it is easy to document that class actions are alive and well and flourishing, there has been a parallel paradigm shift in how complex cases are now resolved in the judicial and extrajudicial arenas. For those actors for whom the class action presents frustrating barriers to resolving massive litigation on favorable terms, there has been a decided shift away from the class action towards the creative invention of class-avoidance mechanisms. In other words, the class action went from being too novel, too flexible, and too extreme, to being too rigid and not novel enough.

As discussed below, the drift to MDL forums, contractual aggregate nonclass settlements, the quasi-class action, and fund approaches to aggregate claims ought to be viewed with alarm because in evading the requirements of the class action rule, these mechanisms shift power over claims resolution entirely into the hands of self-interested parties and largely evade judicial scrutiny and oversight. The carefully articulated due process protections embedded in decades of class action jurisprudence consequently have been jettisoned, to the detriment of the claimants these very requirements were intended to protect.[207]

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[206] *See* Mullenix, *supra* note 19, at 825 (arguing that fund approaches ought to be the object of concern).

[207] And this is to say nothing of Professor Redish's critique of these techniques' inherently undemocratic processes.

As discussed above, MDL forums, once a little-utilized and disfavored judicial backwater for managing complex cases, have instead become a preferred staging ground for disposing of massive liabilities. In addition, compliant MDL forums have now become the staging ground for creation of contractual aggregate nonclass settlements, which successfully evade the strictures of the class action rule.

As part of this paradigm shift, the judicial invocation of the quasi-class action has been appearing with increasing, uncriticized frequency.[208] While it may be premature to characterize these sporadic references as a trend,[209] it is perhaps soon enough to call attention to the misuse of loose labels that carries significant consequences.

Judicial invocation of the concept of the quasi-class action ought to inspire concern for three reasons. First, there is no such thing as a quasi-class action. As I have written elsewhere, there is no constitutional, statutory, doctrinal, or other basis for the quasi-class action.[210] The label "quasi-class action" is a convenient, lazy fabrication to justify the lawless administration of aggregate claims.

Second, whatever historical antecedents or analogues may exist for the concept of a quasi-class action, the 1966 amendments to Rule 23, the Supreme Court's decisions in *Amchem* and *Ortiz*, and multiple class actions decisions lay to rest any notions of a quasi-class action. The entire point of the class action rule is not only to supply an aggregate mechanism for efficiently resolving multiple claims, but also to balance efficiency values with the due process protection of absent class members in representative litigation. The quasi-class action is the antithesis of due process. It is a jurisprudential oxymoron that its proponents deploy to justify the expeditious resolution of aggregate claims, and it fails to adequately protect the interests of claimants.

Third, the quasi-class action (along with contractual aggregate nonclass settlements) ought to be repudiated as an unfortunate drift into further lawlessness in administering aggregate claims.[211] Over the past thirty years, actors involved in resolving aggregate claims—especially

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[208] A Westlaw search in the "allfeds" database of the term "quasi-class action," in February 2011, located sixty-eight federal cases citing the term.

[209] *But see* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal* 7 (N.Y. Univ. Law & Econ. Working Papers, Paper No. 174, 2009), *available at* http://lsr.nellco.org/nyu_lewp/174 (describing the "emerging doctrine that MDLs are 'quasi-class actions'" and endorsing expanded judicial powers for MDL judges managing such quasi-class actions). *Cf. In re* Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 643 n.4 (E.D. La. 2010) (rejecting the suggestion by Professors Silver and Miller that "the attorneys themselves should select the Plaintiffs' Steering Committee with the attorney with the largest number of plaintiff cases having the laboring oar. But the experience of the MDL courts suggest otherwise." (citation omitted)).

[210] *See* Mullenix, *supra* note 153, at 389.

[211] For a discussion of aggregate settlements, including nonclass aggregate settlements, see AM. LAW INST., *supra* note 136, §§ 3.01–.18, at 187–282.

aggregate tort claims—have embraced claims-resolution models that allow malefactors to control, manage, and settle their liabilities on highly preferential terms; permit plaintiffs' attorneys to reap bountiful and often excessive fees; and enable judges (and their surrogates) to clear their dockets of large numbers of cases.

The interests of powerful, well-funded, and self-interested actors thus have tacitly converged to support a de facto collusive model of aggregate claims resolution. In the past three decades, federal courts, including the Supreme Court, have rejected collusive backroom aggregate settlement deals that do not adequately protect the interests of class members. In response, and in order to be free of formal class action constraints, self-interested actors on both sides of the docket have co-opted the federal multidistrict litigation procedure to provide a compliant arena for the private resolution of aggregate claims. The most extreme variant of private aggregate claims resolution, completely outside the scrutiny of judicial management and review, is exemplified by fund approaches to mass claims resolution—most recently the Gulf Coast Claims Facility.[212]

In the judicial arena, there are good reasons why complex litigation lawyers now embrace MDL procedure, whereas they eschewed this mechanism in the past. Because the formal class action rule became an inconvenient impediment to resolving aggregate claims favorably to both plaintiff and defense interests, actors involved in mass litigation now promote MDL procedure, contractual aggregate nonclass settlements, and the quasi-class action concept as entirely useful, creative mechanisms to accomplish self-interested goals.

It is not at all surprising that self-interested negotiators and some MDL judges have embraced the concepts of the contractual aggregate nonclass settlement and the quasi-class action as the most effective means to resolve massive liabilities. Thus, in the early twenty-first century, private actors have evolved the nearly perfect model for accomplishing self-dealing agreements by manipulating MDL procedure to accomplish ends the mechanism was never intended to perform. Hence, contractually resolving mass claims under MDL auspices and the penumbra of the quasi-class action effectively does an end run around the class action rule and liberates deal makers from having to adequately protect the interests of injured claimants.

The deployment of MDL jurisdiction—with the quasi-class action fiction engrafted onto it—has stripped away protections afforded by class action requirements. Mass litigation actors now may settle complex cases largely unconstrained by law. What the class action bar could not achieve through decades of judicial decisions—such as elimination of the need for an adequate class representative—has effectively been achieved through

[212] *See* discussion *infra* Part III.C.

adroit manipulation of MDL procedure and the ministrations of selected judges and their special masters.

Before the inspired fabrication of the contractual aggregate nonclass settlement mechanism and the quasi-class action, global agreements accomplished under MDL auspices had to be settled pursuant to formal class requirements and due process protections.[213] By engrafting the contractual nonclass settlement and quasi-class action concept onto MDL procedure, self-interested actors have created a perfect means for negotiating back-room deals that carry an aura of judicial legitimacy, liberated from the constraints of the formal class action rule.

In turn, MDL judges, in endorsing contractual settlements and embracing the concept of the quasi-class action, have greatly expanded the scope of their authority and have become complicit in allowing private parties to accomplish the very backdoor settlements that the Supreme Court and federal courts have disallowed for decades. The combined means, then, represents an ultimate, cynical expression of an aggregate claims resolution model that enables self-interested actors to resolve claims in the actors' best interests rather than the interests of injured claimants.

B. The End of Structural Assurances of Due Process

Judge Weinstein's creation and repeated endorsement of the concept of the quasi-class action as an adjunct to private, contractual nonclass settlements illustrates how the paradigm shift in complex dispute resolution reflects a telling reaction to the constraints of conventional class action litigation. Thus, Judge Weinstein's extensive policy justifications, documented above, embody a repudiation of decades of carefully crafted judicial class action jurisprudence, including Supreme Court decisions.

Yet Judge Weinstein's repudiation of the *Amchem*, *Ortiz*, and *Stephenson* decisions (among other class-action-constraining decisions) manifests a tone-deaf dismissal of the fundamental importance of those cases.[214] Judge Weinstein rejected the Court's *Amchem*, *Ortiz*, and

[213] Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, LITIGATION, Summer 1998, at 43, 47 (listing examples of class settlements under MDL auspices); *cf.* L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 227–28, 235–37 (2004) (arguing that MDL judges should review post-aggregation settlements using mechanisms similar to Rule 23); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123 (2012) (describing new regime of contractual nonclass settlements and lack of judicial review under Rule 23).

[214] It is hardly surprising that Judge Weinstein would eschew the Second Circuit's *Stephenson* decision which, in essence, held that Judge Weinstein had failed to provide future claimants with adequate representation at the time of his approval of the *Agent Orange* settlement. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 261 (2d Cir. 2001), *aff'd in part by an equally divided Court, vacated in part*, 539 U.S. 111 (2003) (per curiam) (affirming that future claimants were not bound by class settlement of future claims due to a lack of adequate representation at the time of the settlement, and that future claimants were permitted to pursue collateral attack against the settlement).

Stephenson decisions because he perceived those decisions as limiting the usefulness of the class action rule to resolve mass litigation.

Collectively, these decisions, Judge Weinstein believed, bound his hands as a judge and frustrated his ability to achieve efficiency in resolving big cases. These federal appellate class action decisions—with their heightened class certification and settlement requirements—were ill conceived in Weinstein's view because they imposed impediments to judicial efforts to resolve mass cases. In addition, these decisions were harmful to industry and, in the instance of pharmaceutical litigation, adverse to public health considerations.[215]

In this same vein, Judge Weinstein drew further support for private settlements under the umbrella of the quasi-class action because he viewed the quasi-class action as an antidote to the perceived failure of past mass tort litigation: "Most would agree that a reprise of the asbestos litigation with an almost uncontrolled search by plaintiffs' attorneys for new cases and new parties, ultimately exhausting the courts and bankrupting industries, ought not be encouraged."[216]

However, the fundamental purpose of the Court's reasoning in *Amchem*, *Ortiz*, and *Stephenson* was to strengthen the due process protections of absent class members by requiring heightened scrutiny of the Rule 23 adequacy-of-representation requirement, especially in the settlement context. Judge Weinstein, then, would jettison the requirements of Rule 23 and the due process protections of absent class members in favor of efficiency rationales.

Therefore, if *Amchem, Ortiz, and Stephenson* have set the due process bar too high, Judge Weinstein would approve circumventing these decisions by allowing litigants to privately cut deals without the necessity of satisfying formal Rule 23 requirements and their concomitant due process protections. If Rule 23 were a barrier to accomplishing aggregate settlements, Judge Weinstein would simply dispense with the rule, except when needed to buttress support for his ability to exercise some judicial authority in a limited sphere of operation.[217]

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[215] *In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) ("In addition, the viability of an effective pharmaceutical industry and public health considerations necessitate efficient and fair control by the courts of cases of this kind.").

[216] *In re* Zyprexa Prods. Liab. Litig., 238 F.R.D. 539, 541 (E.D.N.Y. 2006).

[217] *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., 671 F. Supp. 2d 397, 433 (E.D.N.Y. 2009) (characterizing an individual lawsuit by the State of Mississippi as a "structural class action" even though not pursued formally under Rule 23, allowing application of class action jurisprudence regarding aggregate evidence, and effectively expanding the quantum of evidence the court could consider).

In fairness to Judge Weinstein, he does at least concede, in one of his *Zyprexa* orders, that "[a]voiding formal Rule 23 class actions presents serious pitfalls." *In re Zyprexa*, 238 F.R.D. at 541. Judge Weinstein notes: "One is the possibility that new cases, and attorneys, will be attracted to the

C. Aggregate Litigation Claims Resolution as a Matter of Private Arrangements: The Death of Democratic Dispute Resolution

The tectonic shift towards use of combined MDL procedures and contractual settlements, along with the embrace of the quasi-class action, should be cause enough for concern. But newfound enthusiasm for fund approaches to resolving massive liabilities ought to be viewed with equal alarm. These fund mechanisms, which have roots vaguely lodged in the class action settlement, have evolved into private arrangements that self-promote their efficiency, pragmatism, and fairness.

However, fund approaches to resolving massive liabilities bear little in common with their class action antecedents, apart from the common nomenclature "fund." Indeed, fund approaches are almost the antithesis of the class action settlement because the driving rationale is to free these private arrangements from the very constraints of the class action rule. Adopting Professor Redish's paradigm, fund approaches are the antithesis of democratic dispute resolution.

Hence, as I have argued elsewhere, the GCCF represents a fund too far in the evolution of group remedies.[218] Moreover, apart from its superficial designation as a compensation fund, the GCCF bears little resemblance to the WTC Victim Compensation Fund, which arguably was the more commendable (though controversial) effort at a fund approach to resolving mass claims. Although these two fund mechanisms shared the same all-powerful administrator, the two were entirely unlike one another.

First, the WTC Victim Compensation Fund was widely acknowledged as a sui generis, one-time endeavor to compensate victims of a national terrorist disaster.[219] Indeed, Special Master Feinberg repeatedly stressed

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honey pot of the litigation after all, or almost all, of the well-founded cases have been disposed of. Only the Rule 23 class action can provide full closure in many litigations." *Id.*

However, after acknowledging that Rule 23 has its virtues, Judge Weinstein nonetheless defaulted to his preferred position, which favors private settlement of mass litigation under the auspices of MDL proceedings. Again, in one of his earliest decisions discussing the quasi-class action, Judge Weinstein acknowledged that many of the concerns about the protection of class members should apply with equal force to aggregate settlements achieved in a nonclass format. Thus, Judge Weinstein wrote:

> Many of the same considerations that necessitate close judicial supervision of plaintiffs' counsel and proposed settlements in the class action context—such as protecting absent or disinterested litigants, and dealing with plaintiffs' practical inability to monitor their attorneys, some of whom represent hundreds of clients within the same litigation—apply to quasi-class actions such as the instant one. Some of the conventions *required* when a class is certified are *appropriate* in quasi-class actions involving large aggregations of claims. In both contexts, the primary goal of the court is to "ensure that similarly situated individuals receive equal fairness protections regardless of how the courts aggregated the litigation."

In re Zyprexa, 433 F. Supp. 2d at 272 (quoting Chamblee, *supra* note 213). However, Judge Weinstein's initial recognition of the need for Rule 23 constraints in the context of quasi-class action settlements does not reappear in his numerous subsequent citations to the quasi-class action "rule."

[218] Mullenix, *supra* note 19, at 825–26, 913–16.

[219] *See, e.g.*, 1 KENNETH R. FEINBERG ET AL., DEP'T. OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 83–84 (2004), *available*

that the Victim Compensation Fund was neither a model for tort reform nor a model for any future terrorist or other disaster.[220] Feinberg consistently insisted that the WTC Fund was not a model *for anything*.[221] And many, if not most, academic commentators agreed with that assessment.[222] Yet Feinberg nonetheless touted the WTC Victim Compensation Fund[223] as the

at http://www.usdoj.gov/final_report.pdf; Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 205 (2005) ("Because the Fund is *sui generis*, it is unlikely to have a profound impact on developments in the law of torts." (footnote omitted)); Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51, 53 (2003) ("Perhaps the most repeated observation made about the September 11th Victim Compensation Fund, like the horrible events which brought it into being, is that it is unique and has no close parallel in the history of United States injury and compensation law."); Robert S. Peck, *The Victim Compensation Fund: Born from a Unique Confluence of Events Not Likely to Be Duplicated*, 53 DEPAUL L. REV. 209 (2003) (comparing the World Trade Center events to the attack on Pearl Harbor on December 7, 1941); Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 771 (2003); Robert L. Rabin & Stephen D. Sugarman, *The Case for Specially Compensating the Victims of Terrorist Acts: An Assessment*, 35 HOFSTRA L. REV. 901, 907 (2007) ("[The] 9/11 [attack] was the quintessential once-in-a-lifetime disaster."); Erin G. Holt, Note, *The September 11 Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513, 535, 539–40 (2004). *But see* Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289 (2003) (arguing that the WTC Victim Compensation Fund was not unprecedented and that the federal government historically has been involved in compensating victims of various types of calamities, including other victims of terror).

[220] 1 FEINBERG ET AL., *supra* note 219, at 83; KENNETH R. FEINBERG, WHAT IS LIFE WORTH? 178 (2005) ("[I]t would be a mistake for Congress or the public to take the 9/11 fund as . . . a model in the event of future attacks."); Kenneth Feinberg, *The Building Blocks of Successful Victim Compensation Programs*, 20 OHIO ST. J. ON DISP. RESOL. 273, 276–77 (2005); Kenneth R. Feinberg, Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation, Address Before the Washington University School of Law (Sept. 14, 2004), *in* 19 WASH. U. J.L. & POL'Y 21, 29 (2005) ("9/11 was unique and gave rise to a unique response. That is the only way, I think, to explain it."); *Q & A with Kenneth Feinberg*, C-SPAN VIDEO LIBRARY (July 1, 2005), http://www.c-spanvideo.org/program/187524-1 (stating that the 9/11 Fund was an aberration and unique); *see also* Peter T. Elikann, Book Review, 90 MASS. L. REV. 48, 50–51 (2006) (noting that Feinberg does not believe the WTC Victim Fund should be a model for tort reform); Robert L. Rabin, *September 11th Through the Prism of Victim Compensation*, 106 COLUM. L. REV. 464, 479 (2006) (book review) (noting the same); James E. Rooks, Jr., Book Review, TRIAL, Mar. 2006, at 74, 75 (noting the same).

[221] 1 FEINBERG ET AL., *supra* note 219; FEINBERG, *supra* note 220; *see also* Rabin, *supra* note 220, (contending that the thrust of Feinberg's argument, that the September 11th Victim Compensation Fund would be a mistake as a precedent for future programs, is puzzling).

[222] *See, e.g.*, Rabin & Sugarman, *supra* note 219, at 913 ("[A]n ad hoc fund by its very nature runs a substantial risk of being myopic in design—fixated with excessive particularity on the event at hand. In this regard, the 9/11 Fund provides a cautionary note."); *see also* Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 588 (2001); Larry S. Stewart et al., *The September 11th Compensation Fund: Past or Prologue?*, 9 CONN. INS. L.J. 153, 171 (2002) (stating that the fund will "not likely serve as a model for future 'reform' of the American civil justice system").

[223] *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401–409, 115 Stat. 230, 237–41 (2001) (codified at 49 U.S.C. § 40101 (2006)).

model for the GCCF.[224] It should give some pause that the special master who repeatedly disavowed his own work then relied on it in a different and anomalous context.

Second, almost every aspect of the GCCF was unlike the WTC Victim Compensation Fund. Among numerous features, the funds differed in the nature of the events giving rise to creation of the fund, authorization, rulemaking, review mechanisms, transparency, election of remedies, applicable law, assistance of counsel, and litigation alternatives, as well as the role of the prospective defendants.[225] In addition, the GCCF raised challenging ethical and professional responsibility issues as well as questions relating to the fund's transparency.

Third, the GCCF represented an unnoticed, incremental trend towards the lawless, private resolution of mass claims, which resolution was created by a culpable defendant, unbounded by legal norms, and administered by a heroic special master with limitless, unreviewable discretion who also was in the employ of the malefactor. Whatever else may be argued on behalf of the GCCF, this cannot be a good development.

Feinberg's initial experience with the use of a fund to resolve mass claims involved his participation as a special master in the *Agent Orange* litigation in the late 1970s and early 1980s.[226] Feinberg himself frequently refers to this formative experience as the basis for techniques he engrafted onto his management of the WTC and GCCF funds, such as the use of town hall meetings to address the victims' concerns and to make the claims process more personal for its participants.[227]

The *Agent Orange* fund model, however, was jurisprudentially light-years removed from the GCCF. First, the *Agent Orange* fund was created to implement a negotiated class action settlement.[228] Second, the *Agent Orange* litigation began with hundreds of lawsuits filed in state and federal courts.[229] Finally, many years of contested litigation preceded the adversaries' ultimate agreement to settle a class action and create the *Agent Orange* fund.[230]

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[224] *See, e.g.*, Meet the Press Interview with Ken Feinberg, Independent Administrator of the BP Oil Spill Victim Compensation Fund, NBCNEWS.COM (June 20, 2010) *available at* http://video.msnbc.msn.com/meet-the-press-netcast/37809679#37809679 (in which Feinberg describes, beginning soon after minute 19, how he drew on the lessons of the WTC Fund to guide his implementation of the GCCF).

[225] *See* Mullenix, *supra* note 19, at 821, 823.

[226] *See* SCHUCK, *supra* note 30, at 144–45.

[227] *See Full Committee Hearing on Recovery in the Gulf: What the $20 Billion BP Claims Fund Means for Small Businesses: Hearing Before the H. Comm. on Small Business*, 111th Cong. 7 (2010) (statement of Kenneth Feinberg, Administrator, Gulf Coast Claims Facility) [hereinafter Feinberg Statement].

[228] *See* SCHUCK, *supra* note 30, at 143–67.

[229] *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 151 (2d Cir. 1987).

[230] *See id.* at 157–58.

The *Agent Orange* litigation and settlement was managed under the close supervision of Judge Weinstein,[231] and the *Agent Orange* fund was a creature of a Rule 23 class action settlement.[232] Whatever role Feinberg may have played in the resolution of the *Agent Orange* litigation, he was appointed as a special master in that litigation under the authority of Rule 53.[233] Feinberg's authority and powers in the *Agent Orange* fund were limited and circumscribed by law, and he was answerable to the federal court.[234]

It is important to emphasize that the *Agent Orange* fund was the creature of a class action settlement.[235] As such, before this fund mechanism could begin to provide compensation to veterans, Judge Weinstein had to review and approve the *Agent Orange* settlement pursuant to Rule 23(e).[236] The *Agent Orange* fund, then, was subject to an array of substantive and procedural due process constraints, not the least of which was the requirement that Weinstein find that class claimants had been accorded adequate representation.

Hence, the *Agent Orange* fund was created subject to an array of legal constraints, and Feinberg, in his role as special master, did not function as a free-wheeling, unbounded law giver. Moreover, in the largely uncritical commentary lauding the *Agent Orange* fund,[237] it is frequently overlooked that litigants successfully challenged the *Agent Orange* settlement nearly twenty-five years after Weinstein's approval of the fund on due process grounds for the failure to provide future claimants with adequate representation.[238]

Feinberg's second experience with a fund approach to resolving mass claims was his administration of the WTC Fund. The WTC Fund represented an innovative approach to resolving mass tort claims against the backdrop of national tragedy. In terms of both substance and procedure, the WTC Fund drew loosely from its class action cousin. But the WTC Fund was not the result of class litigation or the close judicial supervision entailed in settling class litigation.

Thus, the WTC Fund represented a fund archetype once removed from the class action model, although not without legal constraints. The Fund

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[231] Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 341–43 (1986).

[232] *See In re Agent Orange*, 818 F.2d at 155–58, 174 (upholding a class action settlement).

[233] *See* SCHUCK, *supra* note 30, at 144–45.

[234] *See id.*

[235] *See In re Agent Orange*, 818 F.2d at 155–58, 174 (upholding a class action settlement).

[236] *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 758 (E.D.N.Y. 1984).

[237] *See, e.g.*, Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2011 (1997).

[238] *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 261 (2d Cir. 2001), *aff'd in part by an equally divided Court, vacated in part*, 539 U.S. 111 (2003) (per curiam).

was a creature of federal statute subject to congressional oversight with a special master appointed by the Executive Branch who was accountable to Congress and the Department of Justice.[239] In addition, the WTC Fund incorporated several features of the rule of law, including public notice-and-comment rulemaking and significant transparency.[240]

Although legal authorization undergirded the WTC Fund, it signaled an expansive progression from the class action model. The WTC Fund was not created within the scope of federal judicial authority, nor was it subjected to judicial oversight and management. Unlike in the class action context, decisions relating to the WTC Fund were not subject to judicial review for substantive or procedural due process. Moreover, the WTC special master had liberal rulemaking and other authority,[241] which he increasingly exercised in an ad hoc fashion, and his award determinations were subjected to limited appellate review.

The GCCF illustrated a third and seemingly lawless expansion of the fund approach to resolving mass claims. It was difficult to discern the legal authorization for the fund, other than vague references to the Oil Pollution Act.[242] The GCCF was not created to implement a class action settlement, nor did Congress authorize creation of this fund. Thus, the GCCF was not subjected to the scrutiny that would have accompanied a class action settlement or congressional oversight.

Moreover, it is difficult to characterize exactly what the GCCF was and what legal status this entity had, if any. Feinberg described the GCCF as a "compact;"[243] federal Judge Barbier described the GCCF as a "hybrid."[244] The GCCF was largely a private claims-adjusting facility acting in ad hoc fashion and run by a culpable party's retained autocrat. It did not function as a mediation or arbitration center, and claims administrators were not designated or selected through adversarial processes. The GCCF thus functioned outside judicial scrutiny and was seemingly not subject to any professional rules of conduct.

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[239] *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401–409, 115 Stat. 230, 237–41 (2001) (codified at 49 U.S.C. § 40101 (2006)).

[240] *Id.* § 404(a)(2); *see also* 5 U.S.C. § 553 (2006) (notice-and-comment procedures under the federal Administrative Procedure Act); September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 55,901 (proposed Nov. 5, 2001). The Interim Final Rule was published on December 21, 2001. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 21, 2001). The Final Rule was published on March 13, 2002. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104). *But see* Mullenix, *supra* note 19, at 838–39 (describing how, despite the formal notice-and-comment requirements, the regulations promulgated thereunder were more flexible than one might have assumed).

[241] *See* Air Transportation Safety and System Stabilization Act § 405(b)(4)(C).

[242] Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762 (2006).

[243] Feinberg Statement, *supra* note 227, at 4.

[244] *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2179, 2011 WL 323866, at *5 (E.D. La. Feb. 2, 2011) (granting plaintiffs' motion to supervise ex parte communications with the putative class).

Instead, the GCCF was the result of private, behind-closed-door negotiations with unidentified participants.[245] The fund was created and funded by the primary malefactor who picked the fund's administrator.[246] The relationship between BP and its administrator raised numerous significant ethical issues, centrally relating to the administrator's independence.[247] The administrator and his law firm financially profited from administration of the fund.[248] There were numerous indicia that BP did not operate independent of the fund but rather intervened in crucial decisions relating to the fund's implementation, which decisions favored BP's interests.[249]

The GCCF engaged in no public rulemaking and virtually all its decisions were cloaked in secrecy, including its criteria and personnel.[250] The fund operated largely in a nontransparent fashion, with limited avenues for independent appellate review.[251] There was a significant lack of information upon which Gulf Coast victims might determine the possible valuation of their claims and whether it made sense to seek remediation through the GCCF.[252] In spite of promises to provide legal assistance to Gulf Coast claimants, such provision of counsel was virtually nonexistent or slow in being provided.[253] Claims administration was protracted and

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[245] *See* Mullenix, *supra* note 19, at 833–34 (discussing the legally uncertain genesis of the fund and noting that "[t]he OPA does not, by its terms, require creation of a claims facility or a fund or any other mechanism for victim compensation").

[246] *See In re Oil Rig Deepwater Horizon*, MDL No. 2179, 2011 WL 323866 at *1, *5; Mullenix, *supra* note 19, at 865–66.

[247] *See In re Oil Rig Deepwater Horizon*, MDL No. 2179, 2011 WL 323866 at *1 ("[T]he nature of the relationship between BP and the GCCF and Mr. Feinberg remains a disputed issue.").

[248] *See id.* at *5 (noting that Feinberg and his law firm received a monthly fee from BP).

[249] *See* Ian Urbina, *BP Settlements Likely to Shield Top Defendants*, N.Y. TIMES, Aug. 20, 2010, at A1 (describing BP influence on the scope of the waiver and release that required GCCF fund claimants to waive their right to sue not only BP but also all other major defendants involved with the spill).

[250] Feinberg, as claims administrator, made little effort to publicize proposed protocols in advance of their implementation. *See id.* (describing the proposed protocol for emergency payments as per internal documents from lawyers at the fund, which provided the "first definitive picture" of how claims would be paid and to whom).

[251] Feinberg himself would not have disagreed with this characterization, as in his words, "I think one task I have got to do quickly is develop a much more transparent sunlight so that Congress, as part of its oversight function[, can monitor the claims process]." Feinberg Statement, supra note 227, at 6; *see also* Mullenix, *supra* note 19, at 878–81 (discussing the limited reviewability of GCCF administrator decisions).

[252] Even members of Congress, let alone small business owners in the Gulf states, were unsure about the process and how much they could take from the fund before waiving their right to sue. Feinberg Statement, *supra* note 227, at 12–13; *see also* Mullenix, *supra* note 19, at 854–59 (describing transparency and consistency problems in claims valuation under the GCCF).

[253] *See* Mullenix, *supra* note 19 at 899–901; *see also* Dionne Searcey, *BP Oil-Spill Claims Get Fast Track*, WALL ST. J., Dec. 13, 2010, http://online.wsj.com/article/SB10001424052748704058704576015591156318386.html (Feinberg to announce that "anyone who wants a lawyer to help them sort through new options can have one for free" and that "Feinberg plans to hire a firm to offer . . . free legal services").

multiple claims were delayed or denied. Claimants complained about inconsistent awards. The waiver required as a condition for the final settlement released a large array of potential claims, including dozens of potential defendants in addition to BP. Against this chaotic background, the GCCF's administrator repeatedly urged Gulf Coast residents and businesses to seek compensation in the GCCF as the best means for receiving compensation, for which the federal court in Louisiana finally enjoined him.[254]

Hence, almost every hallmark supporting the legitimacy of an alternative dispute resolution facility, including important due process protections for claimants, was lacking in implementation of the GCCF.[255]

Not all fund approaches to resolving mass claims are the same, and not all funds are fungible. Nonetheless, funds are now invoked with almost talismanic approval as a preferred means for providing compensation to disaster victims outside the litigation system.[256] Moreover, the GCCF provides a stellar example of the unseemly pressure exerted on disaster victims to quickly seek relief through a fund mechanism rather than retaining counsel and filing a lawsuit.

The greatest justifications for fund resolution of mass claims are grounded in values of efficiency and economy.[257] The theory underlying fund resolution of claims is that by avoiding the litigation system, claimants receive quick, easy payment of claims and eliminate the risks, transaction costs, and delays inherent in litigation. With the advent of the GCCF, however, commentators ought to ask probing questions concerning who benefits from these mechanisms and whether the GCCF model in particular serves the interests of justice, and for whom.[258]

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[254] *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 323866 (E.D. La. Feb. 2, 2011).

[255] Ironically, Feinberg himself has stated that an excellent alternative dispute resolution facility must satisfy three design variables: substantive criteria, due process protections, and mechanics. *See* Feinberg, *supra* note 220, at 275.

[256] One critic perceives the trend towards fund solutions to mass tort claims as eroding fundamental justice: "Yet, tort law will continue to be eroded by attrition, by lopping off remedies—especially by limiting damages and expanding immunities—unless we are able to grab hold of the public's conscience and consciousness to bring home the point that liability in tort is not some form of punishment, erratically inflicted." George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 PENN. ST. L. REV. 175, 177 (2007).

[257] *See* Ackerman, *supra* note 219, at 220 ("Efficiency was a major reason for the Fund, and because of both the manner in which it was tailored and the laudable, professional efforts of the Special Master and his staff, the efficiency goal was met.").

[258] *See generally* Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627 (2003) (enumerating factors to consider in the future design of compensation funds for victims of disaster and terrorist attacks).

CONCLUSION: IS THE ARC OF HISTORY BENDING TOWARDS GREATER INJUSTICE?

This Article began with reflections on Professor Redish's important contribution to elevating the debate over class action litigation, culminating in his influential book *Wholesale Justice*. However, Redish's critique is anchored in the great class action debates of the 1990s. By the time of its publication, a significant paradigm shift had occurred in complex dispute resolution away from employing class action auspices to resolve complex litigation. And while class action litigation is not dead, new forms of nonclass aggregate dispute resolution now dominate the landscape.

If the litigation paradigm has shifted to nonclass resolution of aggregate claims, then what is the continued value and relevance of Professor Redish's appraisal of class litigation? The answer simply is that Redish's democratic critique now has even greater resonance for the new nonclass means of aggregate dispute resolution. The same concerns over lack of participation, due process, voluntariness, and consent that animated Redish's criticisms of the class action mechanism have even greater import for the new forms of nonclass aggregate dispute resolution.

As I have noted elsewhere,[259] the arc of Ken Feinberg's career neatly demonstrates the evolution of different models of aggregate dispute resolution, progressing from arguably the most legitimate to arguably the least legitimate (and most lawless).[260] However, scant attention has focused on how these aggregate dispute resolution mechanisms have evolved from older procedural means governed by the rule of law to various new models essentially unconstrained by law.

The parties involved in these new models for aggregate dispute resolution—the contractual settlement, the quasi-class action, and fund approaches—praise these mechanisms for their efficiency in claims resolution. However, one may legitimately question whether pragmatism and efficiency ought to be the bellwether metrics or the animating values for a successful compensation program.

In contrast, other commentators have suggested (similar to Professor Redish's critique of the class action rule) that compensation programs ought to be evaluated by the core substantive values of democratic governance, which include the values of participation, accountability, transparency, rationality, personal autonomy, consent, equality, due process, and other social capital values necessary to promote civil society.[261]

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[259] Mullenix, *supra* note 19, at 825, 909–13.

[260] *Id.* at 909–10. In Feinberg's case, this represents a seamless progression from (1) a judicially approved and managed class action settlement to (2) a congressionally mandated and supervised fund to (3) a defendant-created and directed fund.

[261] *See* Ackerman, *supra* note 219, at 202–06 (quoting George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527, 545 (2003) ("The

Scholars thus have suggested that elements of procedural justice include: (1) whether procedures allow people an opportunity to state their case; (2) whether authorities are viewed as neutral, unbiased, honest, and principled in their decisionmaking; (3) whether the authorities are seen as benevolent, caring, and trustworthy; and (4) whether the people involved are treated with dignity and respect.[262] Undoubtedly, Professor Redish would add other core values identified in *Wholesale Justice*.

The twenty-first-century paradigm shift to the concept of aggregate litigation and nonclass solutions to mass claims ought to be a cause for concern. If Professor Redish's life's work embodies a significant critical evaluation of the undemocratic nature of class litigation, then the argument may be made that the new models of nonclass aggregate dispute resolution represent an even more compelling illustration of the death of democratic dispute resolution. Against this backdrop, the appropriate focus ought to be justice for claimants and what democratic theory requires to this end.

September 11th Fund will remain controversial because the source of the definition of its awards—however able and committed—is not in any sense democratic. Coupled with the lack of an internal rational[e] or constraint, the awards granted by the Fund will continue to remain problematic."); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 285–86 (2004)). Other commentators have suggested that the WTC Fund signaled the beginning of a "broad regressive trend." *See* Conk, *supra* note 256, at 253.

[262] Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 384 (2003) (noting that the September 11th Victim Compensation Fund failed to create either distributive justice or procedural fairness amongst recipients of the Fund, and concluding that "none of the aforementioned ways of creating perceptions of procedural fairness were utilized when the Fund was initially established").