

## Judicial Review of Private Mass Tort Settlements

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### I. INTRODUCTION

As the late Richard Nagareda so elegantly explained, settlement is the “endgame” of mass tort litigation.<sup>1</sup> And with the general demise of class actions in this field, mass tort litigation is increasingly resolved through non-class aggregate settlements.<sup>2</sup> Although it has been argued that “procedural aggregation in the law of torts” is “inevitab[le],”<sup>3</sup> the legal profession has struggled for many years to find an effective aggregate settlement mechanism for mass tort litigation that does not run afoul of the “historic tradition that everyone should have his own day in court,” if he should want it.<sup>4</sup> Over the last dec-

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<sup>1</sup> RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT, at ix (2007) (“As in traditional tort litigation, the endgame for a mass tort dispute is not trial but settlement.”).

<sup>2</sup> See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 cmt. (b)(1)(B), at 25 (2010) (“As a doctrinal matter, the class action has fallen into disfavor as a means of resolving mass-tort claims arising from personal injuries. This development reflects many factors, including concerns about the quality of the representation received by members of settlement classes, difficulties presented by choice-of-law problems, and the need for individual evidence of exposure, injury, and damages.”).

<sup>3</sup> Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1579 (2004). Professors Issacharoff and Witt chronicle the “early development of repeat-play interests around the personal injury problem” to reveal that the “pattern of settlement rather than trial finds its roots in the early decades of the law of torts.” *Id.* at 1582.

<sup>4</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (noting the “due process principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a

ade, however, as a result of the evolution of non-class aggregate settlements, a new opt-in paradigm for mass tort settlements has emerged that is true to that historic tradition. This Article discusses the emerging opt-in paradigm and the appropriate contours of judicial authority vis-à-vis aggregate settlements that conform to this paradigm and will refer to such settlements as “private mass tort settlements.”<sup>5</sup>

A private mass tort settlement begins as a contractual agreement between plaintiffs’ liaison counsel and the defendant(s) involved in a particular mass tort litigation that sets forth a negotiated settlement offer for each individual plaintiff to consider. The substance of the settlement offer consists of a commitment by the defendant(s) to pay a fixed amount to the current aggregate plaintiff population, with individual awards varying based on the strength of each plaintiff’s claim as determined by the allocation of “points” among the plaintiffs by a neutral administrator pursuant to negotiated—and often very complex—formulas and grids. Those settlement formulas and grids tend to be based on real-world information and experience gained through discovery, pretrial rulings, and bellwether jury trials, all of which increasingly occur in the context of a multidistrict litigation proceeding created pursuant to 28 U.S.C. § 1407. In other words, private mass tort settlements often await and account for the maturation of the litigation.<sup>6</sup>

Once negotiated by liaison counsel, the master settlement offer is then presented to individual plaintiffs for consideration and often made available for inspection by the general public as well. Each individual plaintiff may either affirmatively opt in to the claims process (i.e., accept the settlement offer) and voluntarily dismiss his or her

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party or to which he has not been made a party by service of process” and that it is “our deep-rooted historic tradition that everyone should have his own day in court”) (internal quotations and citations omitted).

<sup>5</sup> The emerging opt-in paradigm for mass tort settlements described in this Article is but one aspect of a larger “mass tort litigation paradigm” that seems to be taking hold. See, e.g., Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 414–15 (1999) (arguing that Professor Chayes’s famous public law model “fails to capture the dynamics of modern mass tort litigation” and identifying the “need for a new descriptive model to capture the contemporary mass tort litigation paradigm”). I intend to address other aspects of this larger mass tort litigation paradigm in future articles and hope to eventually craft a comprehensive descriptive model for mass tort litigation based on the realities of modern practice. But for a very high-level overview of the predominant characteristics of modern mass tort litigation, see *infra* notes 72–80 and accompanying text.

<sup>6</sup> See generally Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1993) (introducing the concept of “maturity” to the field of mass torts).

lawsuit, or reject the settlement offer and continue litigating. Notably, private mass tort settlements do not attempt to solve the difficult issues surrounding latent disease and the present resolution of unknown future claims. Rather, the master settlement offer is made only to “eligible” plaintiffs who have come forward with claims. Moreover, private mass tort settlements are contingent upon a certain percentage of plaintiffs agreeing to opt in to the claims process—though even if the requisite percentage of plaintiffs accept the offer and the deal becomes effective, private mass tort settlements only bind those plaintiffs who voluntarily agree to settle. The settlement of the *Vioxx* pharmaceutical litigation in 2007 is the most prominent real-world example of a private mass tort settlement, although the *Vioxx* deal was built upon a novel approach utilized in the earlier *Baycol* pharmaceutical litigation and also upon other more common features of prior aggregate settlements. The structure of the 2010 settlement of the *World Trade Center Disaster Site* litigation largely mirrors the *Vioxx* deal and confirms the parameters of the emerging opt-in paradigm for mass tort settlements.<sup>7</sup>

Although the trend away from class action settlements and toward non-class aggregate settlements in mass tort litigation has inspired debate and scholarship concerning the ethical implications for plaintiffs’ lawyers—the *Principles of the Law of Aggregate Litigation* recently published by the American Law Institute (ALI) is the leading example—very little attention has been focused on the proper role for judges to play when they are presented with private mass tort settlements.<sup>8</sup> Private mass tort settlements present a difficult conun-

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<sup>7</sup> The *Baycol*, *Vioxx*, and *World Trade Center Disaster Site* litigations are discussed in detail *infra* Part III.A.

<sup>8</sup> See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.01 cmt. d, at 190 (“Few commentators have addressed non-class aggregate settlements.”). A recent student note addresses the issue head-on, however, and concludes that “non-class mass settlement should not be subject to judicial approval and rejection.” Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial “Approval” and “Rejection” Out of Non-class Mass Settlement*, 80 FORDHAM L. REV. 319, 323 (2011). The few additional commentators who have addressed the issue did so before the emergence of the opt-in paradigm described in this Article and suggest that courts should have the authority to review non-class aggregate settlements. See L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 234–39 (2004) (proposing legislation to amend 28 U.S.C. § 1407 to authorize judicial review by the transferee court of post-consolidation, pre-class certification, and “collective” settlements); Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 432 (2007) (“Such judicial approval [of class action settlements] should also be required in aggregative settlements under the auspices of MDL judges, which is not currently the case.”); Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 858 (1997) (“Judges should be obliged to struc-

drum for presiding judges. On the one hand, mass tort litigation requires active judicial involvement and oversight due to the sheer size and complexity of such matters. Thus, having been intimately involved in the litigation from its inception, it understandably seems natural for courts to want to exercise some degree of control over private mass tort settlements. But, on the other hand, like traditional one-on-one settlements and unlike class action settlements and other specific settlements, private mass tort settlements do not impact the rights of absent or unrepresented parties. Perhaps not surprisingly then, courts have struggled in applying established principles concerning the scope of judicial authority to evaluate and oversee the implementation of traditional settlements in the unfamiliar context of private mass tort settlements.

This Article seeks to provide a clear path forward by describing the emerging opt-in paradigm and discussing the appropriate contours of judicial authority vis-à-vis private mass tort settlements. In Part II, the Article first examines several limited contexts in which courts have the authority to evaluate and oversee the implementation of traditional settlements: class action and shareholder derivative suit settlements; compromises of claims in bankruptcy; antitrust consent decrees in cases brought by the United States; environmental cleanup consent decrees under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); settlements of Fair Labor Standards Act (FLSA) claims; settlements of actions in which receivers have been appointed; and settlements in cases involving minors and incompetent persons. In each instance, the Article highlights the nature of the absent or unrepresented interests that judicial review is designed to protect in those traditional contexts in order to contrast those examples with private mass tort settlements.

Part III then discusses the emerging opt-in paradigm for mass tort settlements and traces the paradigm's lineage to three recent cases: *In re Baycol Products Liability Litigation*, *In re Vioxx Products Liability Litigation*, and *In re World Trade Center Disaster Site Litigation*.<sup>9</sup> Part IV argues that the well-established maxim that courts lack authority over private one-on-one settlements should apply with equal force to private mass tort settlements because non-class aggregate settlements allow each individual plaintiff to decide whether to settle on the

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ture settlement negotiations (ex ante) and to evaluate settlements (ex post) in all aggregates, be they called class actions, MDLs, consolidations or whatever.”). This Article critiques the express and implied reasoning underlying such suggestions insofar as private mass tort settlements are concerned. See *infra* Part IV.B.

<sup>9</sup> See *infra* Part III.A.

terms offered and do not impact the rights of absent or unrepresented parties. In short, courts do not have—and do not need—the authority to review private mass tort settlements. Rather than performing post hoc evaluations of private mass tort settlements that have already been negotiated, courts should instead focus on ensuring that such settlements occur in an adversarial context and are based on the factual and legal realities of the litigation. The Article concludes by addressing the arguments that have been advanced to support judicial review of non-class aggregate settlements, debunking the “quasi-class action” theory that some courts have relied upon to regulate attorneys’ fees in connection with mass tort settlements, and discussing the various ways in which courts may nevertheless be able to influence private mass tort settlements (which include leveraging the parties’ desire for case-management orders and a favorable—if informal—public judicial response to the announcement of such settlements and retaining enforcement jurisdiction).

## II. JUDICIAL REVIEW OF TRADITIONAL SETTLEMENTS

To appreciate fully why courts do not—and need not—have the authority to evaluate or oversee the implementation of private mass tort settlements, it is important to understand the role of the judiciary vis-à-vis traditional settlements. Notwithstanding the fact that private mass tort settlements have been described as having “quasi-class action” and “quasi-public” qualities,<sup>10</sup> non-class aggregate settlements are fundamentally different than class action settlements and other unique settlements that require judicial review. Indeed, private mass tort settlements, though much more complex, are essentially analogous to settlements in private one-on-one litigation because, in both instances, each affected litigant must affirmatively agree to be bound by any settlement.

A judge’s informal approval of a run-of-the-mill private settlement between two litigants is a common occurrence. Indeed, the Federal Rules of Civil Procedure are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding,”<sup>11</sup> and, more often than not, these dictates are achieved through settlement.<sup>12</sup> Although the Federal Rules

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<sup>10</sup> See *infra* Part IV.B–C.

<sup>11</sup> FED. R. CIV. P. 1.

<sup>12</sup> See generally Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994) (“While settlement is the most frequent disposition of civil cases in the United States, its predominance should not be exaggerated. Oft-cited figures estimating settlement rates of

do not always require it,<sup>13</sup> courts often enter pro forma orders dismissing cases that have settled.<sup>14</sup> And, in certain circumstances, courts may even agree to vacate prior orders when the parties request such relief in connection with a settlement.<sup>15</sup> Most judges, litigants, and scholars agree that it is perfectly appropriate for the judiciary to express informal gratification and tacit approval when litigants amicably agree to resolve their disputes.<sup>16</sup> Of course, not everyone shares this view.<sup>17</sup>

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between 85 and 95 percent are misleading; those figures represent all civil cases that do not go to trial.”).

<sup>13</sup> See FED. R. CIV. P. 41(a)(1)(A) (“[T]he plaintiff may dismiss an action without a court order by filing (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared.”).

<sup>14</sup> For example, upon receiving notification (via a letter or phone call from the parties) that a settlement has been reached, the trial court may enter an order dismissing the case without prejudice to clear the case and any associated deadlines from its docket. If a notice or stipulation of dismissal is subsequently filed by the parties and provides that the dismissal is to be with prejudice, the court may then issue an order converting its prior administrative dismissal into a dismissal with prejudice.

<sup>15</sup> See generally Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

<sup>16</sup> See, e.g., *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986) (“We acknowledge the strong public interest in encouraging settlement of private litigation. Settlements save the parties the substantial cost of litigation and conserve the limited resources of the judiciary.”); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980) (“It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement.”); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976) (“Settlement agreements should . . . be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before over-burdened courts, and to the citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute.”).

<sup>17</sup> See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (“[Settlement] should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.”); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648 (1995) (“The sticking point with settlements is not truth but openness. Parties consummate settlements out of public view. The facts on which they are based remain unknown, their responsiveness to third parties who they may affect is at best dubious, and the goods they create are privatized and not public. Settlements are opaque.”). Whether or not the debate “for or against” settlement has run its course in light of the fact that “settlement has become the ‘norm’ for our sys-

That said, “an active role for the trial court in approving the adequacy of a settlement is the exceptional situation, not the general rule.”<sup>18</sup> Indeed, courts generally lack the authority to evaluate and/or oversee the implementation of settlements unless such authority is either (i) voluntarily conferred by the consent of the settling parties or (ii) conferred by law for specific types of settlements. Judicial review of settlements at the joint request of the parties does not raise any particularly novel issues and nothing prevents this practice in the context of private mass tort settlements.<sup>19</sup> However, a discussion of the situations in which the law gives courts the authority to evaluate and/or oversee the implementation of particular settlements is instructive because in each instance—unlike the private mass tort settlement context—there are absent or unrepresented interests to be protected by judicial review.

A. *Authority Conferred by Settling Parties*

Parties are, of course, free to seek judicial approval of their own private settlements, whether in traditional one-on-one litigation or in mass tort litigation.<sup>20</sup> When they do so in either context, however, parties can no longer insist on keeping their settlements confiden-

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tem,” Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2664–65 (1995) (identifying the arguments on each side of this “polarized debate” and suggesting that the more relevant questions are “when, how, and under what circumstances should cases be settled”) (emphasis omitted), that debate is largely beyond the scope of this Article. For an engaging critique of Fiss’s arguments as applied to the modern mass tort context, however, see Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009).

<sup>18</sup> *United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980), *modified on reh’g en banc*, 664 F.2d 435 (5th Cir. 1981).

<sup>19</sup> See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006).

<sup>20</sup> For example, in the *Zyprexa* multidistrict pharmaceutical litigation, Judge Jack Weinstein and his special masters were intimately involved in crafting a settlement protocol:

After discovery and negotiations overseen by the court-appointed special discovery master and four special settlement masters, in November 2005 the defendant entered into a partial settlement covering some 8,000 individual plaintiffs. Under court supervision, a complex claims administration process was developed [and] [i]t will be administered by the special settlement masters.

*Id.* (citation omitted). Accordingly, it is not surprising that the parties sought and obtained Judge Weinstein’s formal approval of the final settlement protocol. See *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-01596, 2005 WL 3117302, at \*1 (E.D.N.Y. Nov. 22, 2005).

tial.<sup>21</sup> Judicial review of settlements at the request of the settling parties is not designed to protect absent or unrepresented interests, but rather is likely driven in most cases by the parties' desire for a judicial imprimatur.<sup>22</sup> But whatever the parties' motivation, a "district judge's 'approval' of a settlement—unless that approval is embodied in a judicial order retaining jurisdiction of the case in order to be able to enforce the settlement without a new lawsuit—has no legal significance."<sup>23</sup>

*B. Authority Conferred by Law*

In certain types of cases that present "special considerations not present in ordinary litigation," the law requires that judges formally approve proposed settlements.<sup>24</sup> The most well-known examples of settlements that require court approval are class action and shareholder derivative suit settlements,<sup>25</sup> claims in bankruptcy,<sup>26</sup> and consent decrees in civil antitrust suits brought by the United States.<sup>27</sup> Other less prominent examples include: environmental clean-up consent decrees under CERCLA,<sup>28</sup> settlements of employment claims

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<sup>21</sup> See *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344–45 (3d Cir. 1986) ("[T]he court's approval of a settlement or action on a motion are matters [sic] which the public has a right to know about and evaluate. . . . Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records."); see also *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) ("The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to. All this would be of no moment, however, if the agreement were not in the files of the court . . .").

<sup>22</sup> See *Jessup*, 277 F.3d at 927 ("The parties reached an agreement and embodied it in a signed document that they gave the judge. He 'approved' the agreement, we are told, but the significance of this approval is unclear."). In some cases, however, the parties may have more specific reasons to seek court approval of their settlement. For example, in California, parties may seek judicial approval of settlements to prevent contribution claims by non-settling joint tortfeasors. See CAL. CIV. PROC. CODE § 877.6(c) (West 2011).

<sup>23</sup> *Jessup*, 277 F.3d at 929. The concept of "enforcement jurisdiction" and its applicability to private mass tort settlements is discussed below. See *infra* Part IV.D.

<sup>24</sup> *United States v. City of Miami*, 614 F.2d 1322, 1330 & n.6 (5th Cir. 1980), *modified on reh'g en banc*, 664 F.2d 435 (5th Cir. 1981); see also *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995) ("Our federal courts have neither the authority nor the resources to review and approve the settlement of every case brought in the federal court system. There are only certain designated types of suits . . . where settlement of the suit requires court approval.").

<sup>25</sup> See *infra* Part II.B.1.

<sup>26</sup> See *infra* Part II.B.2.

<sup>27</sup> See *infra* Part II.B.3.

<sup>28</sup> See *infra* Part II.B.4.

under the FLSA,<sup>29</sup> settlements of actions in which receivers have been appointed,<sup>30</sup> and settlements in cases involving minors or incompetent persons.<sup>31</sup>

In these discrete types of cases, courts are generally charged by either statute or rule to review proposed settlements to ensure that the settlement is “fair to the persons whose interests the court is to protect.”<sup>32</sup> Indeed, judicial authority in those contexts flows from a legislatively recognized duty to ensure that certain interests—either specific interests of parties not personally before the court or broader public interests—are protected and not unduly prejudiced by the settlement at issue.<sup>33</sup> Importantly, however, the power to approve or reject proposed settlements does not encompass the authority to force a judicially amended agreement upon the parties.<sup>34</sup> Although a comprehensive treatment of judicial review of settlements in each of the following special contexts is beyond the scope of this Article, the brief discussions that follow in this Part will focus on the nature of the interests sought to be protected by judicial review in order to contrast those situations with the lack of any such interests in the context of private mass tort settlements.

#### 1. Class Action and Shareholder Derivative Suit Settlements

Rule 23 of the Federal Rules of Civil Procedure provides that “[t]he claims, issues, or defenses of a certified class may be settled, vo-

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<sup>29</sup> See *infra* Part II.B.5.

<sup>30</sup> See *infra* Part II.B.6.

<sup>31</sup> See *infra* Part II.B.7.

<sup>32</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.14 (2004); see also *United States v. City of Miami*, 614 F.2d 1322, 1330 (5th Cir. 1980), *modified on reh'g en banc*, 664 F.2d 435 (5th Cir. 1981) (“In these . . . situations, the standard for approval has been stated [by statute or rule] both positively that the trial court must find that the settlement is fair, adequate, and reasonable, and negatively that the trial court may only approve a settlement after determining that its terms are not unlawful, unreasonable, or inequitable.” (citations omitted)).

<sup>33</sup> Of course, courts must remain impartial and neutral in considering a proposed settlement: “The judge must guard against the temptation to become an advocate—either in favor of the settlement because of a desire to conclude the litigation, or against the settlement because of the responsibility to protect the rights of those not party to it.” MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.14 (2004).

<sup>34</sup> See *id.* (“The trial court may not rewrite a settlement agreement; if it is unacceptable the court must disapprove it, but it may suggest changes.”); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05, cmt. d, at 212 (“Numerous courts have recognized that a court may accept or reject a settlement but may not impose terms on unwilling parties.”).

luntarily dismissed, or compromised only with the court's approval."<sup>35</sup> The same principle applies to proposed settlements of shareholder derivative lawsuits.<sup>36</sup> In both contexts, "the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties."<sup>37</sup>

The law requires judicial approval of class action and shareholder derivative suit settlements because both are representative actions that adjudicate the rights of unnamed class members "even though such individuals are not present in court and may not even be monitoring the proceedings."<sup>38</sup> Moreover, "in the vast majority of situations, the unnamed class members will have played no role in selecting either the class representative or class counsel."<sup>39</sup> Accordingly, because class action settlements and shareholder derivative settlements can bind unwitting individuals who have no opportunity to monitor counsel appointed to act on their behalf—and the associated opportunities for mischief that result—the law subjects such settlements to judicial oversight.<sup>40</sup>

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<sup>35</sup> FED. R. CIV. P. 23(e). The same principle applies for proposed class action settlements involving "unincorporated associations." See FED. R. CIV. P. 23.2 (providing that "the procedure for settlement, voluntary dismissal, or compromise" of cases "by or against the members of an unincorporated association as a class . . . must correspond with the procedure in Rule 23(e)"). Some courts also hold that a representative of a putative class action can only settle his or her own individual claim with court approval because otherwise "the putative class members [are] likely lulled into believing that their claims continue[] to be preserved." *Doe v. Lexington-Fayette Urban Cnty. Gov't*, 407 F.3d 755, 761–64 (6th Cir. 2005); see also PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.02 cmt. b, at 194–95 (collecting authorities).

<sup>36</sup> See FED. R. CIV. P. 23.1(c) ("A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval.").

<sup>37</sup> *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); see also FED. R. CIV. P. 23(e)(2) (providing that a class action settlement that "would bind class members" may only be approved by the court "after a hearing and on finding that it is fair, reasonable, and adequate"). However, "[t]he current case law on the criteria for evaluating settlements is in disarray. Courts articulate a wide range of factors to consider, but rarely discuss the significance to be given to each factor, let alone why a particular factor is probative." PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05 cmt. a, at 205.

<sup>38</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.02 cmt. a, at 190–91; see also Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 739 (1997) ("A single named plaintiff can conscript any number of absent plaintiffs by filing a complaint alleging classwide harm and by having the class certified. The absent plaintiffs may never have heard of the named plaintiff, need not have filed lawsuits of their own, and may have no opportunity to exclude themselves from the class.").

<sup>39</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.02 cmt. a, at 191.

<sup>40</sup> See, e.g., *Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1125 (9th Cir. 2002) (recognizing the potential for class counsel to "collude with defendants, tacitly reducing the overall settlement in return for a higher attorney's fee"); *John C. Coffee*,

## 2. Compromises of Claims in Bankruptcy

In the bankruptcy context, courts are charged with reviewing proposed settlements of adversary proceedings and contested matters.<sup>41</sup> Rule 9019(a) of the Federal Rules of Bankruptcy Procedure governs such review<sup>42</sup> and has been interpreted to require courts to ensure that proposed settlements are “fair and equitable.”<sup>43</sup> The “fair and equitable” standard means that proposed settlements must be “in the best interests of the estate.”<sup>44</sup> As the United States Supreme Court has recognized: “The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and reasonable.”<sup>45</sup>

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Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1367–84 (1995).

<sup>41</sup> See WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW & PRACTICE, § 167:1 (3d ed., 2011).

<sup>42</sup> FED. R. BANK. P. 9019(a) (“On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”). Although the plain language of Rule 9019(a) suggests that court approval of bankruptcy settlements is discretionary, most courts hold that court approval is mandatory. Compare *Travelers Ins. Co. v. Am. AgCredit Corp.* (*In re Blehm Land & Cattle Co.*), 859 F.2d 137, 141 (10th Cir. 1988) (“Under Bankruptcy Rule 9019, a settlement or compromise agreement between the trustee and a party must be approved by the court, after notice and hearing, to be enforceable.”), with *In re Levine*, 287 B.R. 683, 690 (Bankr. E.D. Mich. 2002) (“Rule 9019(a) does not state that the court ‘shall’ approve all compromises and settlements reached by the trustee. It provides only that the court ‘may’ approve a settlement or compromise, and then only if the trustee has filed a motion seeking such approval.”).

<sup>43</sup> *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968); see also *Cosoff v. Rodman* (*In re W.T. Grant Co.*), 699 F.2d 599, 608 (2d Cir. 1983) (“In undertaking an examination of the settlement, we emphasize that this responsibility of the bankruptcy judge . . . is not to decide the numerous questions of law and fact [that might be raised by the parties] but rather to canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness.” (internal quotation marks and citations omitted)). Courts often consider a variety of factors in evaluating whether proposed bankruptcy settlements are “fair and equitable,” including: the probability of success on the merits in the litigation; the difficulties, if any, to be encountered in collection of any judgment that might be obtained; the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; the paramount interests of creditors and the proper deference to their reasonable views in the premises; and whether the conclusion of the litigation promotes the integrity of the judicial system. See *In re Bates*, 211 B.R. 338, 343 (Bankr. D. Minn. 1997) (citing *TMT Trailer Ferry*, 390 U.S. at 424–25).

<sup>44</sup> See, e.g., *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc.* (*In re Cajun Elec. Power Coop., Inc.*), 119 F.3d 349, 355 (5th Cir. 1997).

<sup>45</sup> *TMT Trailer Ferry*, 390 U.S. at 424. For additional details concerning the review of proposed settlements in bankruptcy, see NORTON, *supra* note 41, § 167:2.

Judicial oversight of bankruptcy settlements is necessary because, much like proposed class action and shareholder derivative suit settlements affect unnamed class members that are not present before the court, settlements in bankruptcy have a direct impact on the bankruptcy estate that is administered by the court on behalf of all creditors.<sup>46</sup> By impacting the estate, bankruptcy settlements directly affect the rights of creditors and other interested entities that are not parties to the proposed settlements. In addition, the need for judicial approval of settlements in the bankruptcy context can also flow from the representative nature of the trustee's duties:

The purpose of Rule 9019(a) is simply to give the trustee the opportunity to secure from the court a declaration that her decision to enter into a settlement was consistent with her duties as a fiduciary so as to avoid at some later date a possible objection to her fees or a possible claim . . . that she had breached those duties by entering into the settlement.<sup>47</sup>

### 3. Antitrust Consent Decrees in Suits Brought by the United States

“Most civil antitrust actions initiated by the United States terminate in a settlement that is filed with the court and incorporated into a judicial order known as a ‘consent decree.’”<sup>48</sup> But before entering a consent decree in a civil antitrust suit brought by the United States, courts must determine whether the proposed consent decree is “in the public interest.”<sup>49</sup> This determination, in turn, depends upon “the competitive impact of such judgment” and “the impact of entry of such judgment upon competition in the relevant market or mar-

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<sup>46</sup> See *In re Bates*, 211 B.R. at 343 (“Rule 9019 of the Federal Rules of Bankruptcy Procedure vests the bankruptcy court with broad authority to approve or disapprove all compromises and settlements affecting the bankruptcy estate.”).

<sup>47</sup> *In re Levine*, 287 B.R. at 690. It is conceivable that plaintiffs' liaison counsel who negotiate private mass tort settlements might desire judicial approval of such settlements for similar reasons.

<sup>48</sup> IIA PHILLIP E. AREEDA ET AL., ANTITRUST LAW § 327a (3d ed. 2007). “A consent decree is a settlement, in the form of a court order, containing injunctive relief in which the trial court agrees to maintain jurisdiction over the case.” Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 292 (1988). As a practical matter, consent decrees in all cases—not just antitrust suits brought by the United States—are effectively subject to court approval because courts must decide whether to “enter the proposed consent decree.” *Id.* at 294. Of course, a court's authority to approve consent decrees outside the specific antitrust context identified above is voluntarily conferred by parties who would seek such consent decrees—it is not mandated by statute or rule.

<sup>49</sup> 15 U.S.C. § 16(e)(1) (2006); see also AREEDA, *supra* note 48, § 327e.

kets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint.”<sup>50</sup>

As Judge Greene explained in approving the consent decree in the government’s famous antitrust case against AT&T, this statutory requirement is designed “to ensure that the Justice Department’s use of consent decrees in antitrust cases would fully promote the goals of the antitrust laws and foster public confidence in their fair enforcement.”<sup>51</sup> Even in this context, however, settlement is largely a matter for the parties:

It is not the court’s duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest.<sup>52</sup>

Thus, whereas judicial oversight of settlements in the class action, shareholder derivative, and bankruptcy contexts is largely driven by the need to protect specific unrepresented interests, judicial oversight of antitrust settlements involving the United States is designed to ensure that such settlements are consistent with federal antitrust statutes.

#### 4. Environmental Clean-Up Consent Decrees Under CERCLA

CERCLA<sup>53</sup> sets forth various mechanisms that enable “the federal government to facilitate the clean-up of toxic waste sites.”<sup>54</sup> For example, CERCLA provides that “monies spent by federal and state governments to clean up hazardous substances will, whenever possible, be recovered from responsible parties.”<sup>55</sup> Of particular relevance here, CERCLA also authorizes the executive branch of the federal government to enter into clean-up agreements with responsible par-

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<sup>50</sup> 15 U.S.C. §§ 16(e)(1)(A)–(B) (2006); *see, e.g.*, *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995) (reversing the district court’s rejection of the consent decree in the Microsoft antitrust litigation, but noting that the statute speaks “in rather broad terms” and “does not give specific guidance” as to the precise factors district courts should consider in evaluating whether proposed consent decrees are in the public interest).

<sup>51</sup> *United States v. AT&T*, 552 F. Supp. 131, 148 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>52</sup> *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975).

<sup>53</sup> 42 U.S.C. §§ 9601–9628 (2006).

<sup>54</sup> *City of Bangor v. Citizens Commc’ns Co.*, 532 F.3d 70, 89 (1st Cir. 2008).

<sup>55</sup> *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 931 (8th Cir. 2006).

ties and now provides that certain of those agreements must be approved by a federal district court and entered as consent decrees.<sup>56</sup>

In reviewing CERCLA settlements, courts are charged with ensuring that the settlement is “reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.”<sup>57</sup> In other words, the terms of a CERCLA settlement “must be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each [potentially responsible party] has done.”<sup>58</sup> Moreover, when CERCLA settlements address future clean-up activities, “the decree’s likely efficaciousness as a vehicle for cleansing the environment is of cardinal importance.”<sup>59</sup> Thus, the justification for judicial review of CERCLA settlements is largely analogous to that in the antitrust context discussed above—namely that, in both situations, Congress has determined that a neutral judge should review such settlements to guarantee that they are consistent with the public interest as expressed in comprehensive legislation.

#### 5. Settlements of FLSA Claims

As a general matter, the provisions of the FLSA<sup>60</sup> that protect workers from substandard wages and oppressive working hours are mandatory and “are not subject to negotiation or bargaining between employers and employees.”<sup>61</sup> An employee’s FLSA claim against his or her employer may be settled, however, “as the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise and settlement.”<sup>62</sup> In short, the law requires FLSA settlements to occur in the “adversarial context” of litigation to ensure that

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<sup>56</sup> See 42 U.S.C. § 9622(d)(1)(A) (2006). This provision was added to CERCLA by the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)).

<sup>57</sup> *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (quoting H.R. REP. NO. 253, pt. 3, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042).

<sup>58</sup> *Id.* at 87.

<sup>59</sup> *Id.* at 89.

<sup>60</sup> 29 U.S.C. §§ 201–219 (2006).

<sup>61</sup> *Lynn’s Food Stores, Inc. v. United States ex rel. U.S. Dep’t of Labor*, 679 F.2d 1350, 1352 (11th Cir. 1982) (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697 (1945)).

<sup>62</sup> *Id.* at 1353 n.8 (quoting *Brooklyn Sav. Bank*, 324 U.S. at 905) (internal quotations omitted).

the settlements are not the result of “an employer’s overreaching.”<sup>63</sup> Accordingly, “[w]hen employees bring a private action for back wages under the FLSA,” such actions may only be settled upon a determination by the court that the settlement “is a fair and reasonable resolution of a bona fide dispute over FLSA provisions.”<sup>64</sup>

The FLSA was intended “to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce.”<sup>65</sup> Thus, the rationale for judicial review of FLSA settlements is similar to that justifying judicial review of the antitrust and environmental consent decrees discussed above, namely, a legislative desire to ensure that the public policies furthered by the federal statutes at issue are not thwarted by private settlements.<sup>66</sup>

#### 6. Settlements of Actions in Which Receivers Have Been Appointed

Rule 66 of the Federal Rules of Civil Procedure provides that “[a]n action in which a receiver has been appointed may be dismissed only by court order.”<sup>67</sup> “A receiver is an individual appointed by the Court to preserve and administer disputed assets during the course of litigation.”<sup>68</sup> The need for court approval of settlements in

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<sup>63</sup> *Id.* at 1354. Employees’ claims under the FLSA may also be settled out of court if the settlement provides that the Secretary of Labor will supervise the payment of unpaid wages to the employees. See 29 U.S.C. § 216(c) (2006).

<sup>64</sup> *Lynn’s Food Stores*, 679 F.2d at 1353. Similarly, drawing an analogy to FLSA cases, some courts have also held that court approval is required for settlements of claims under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601–2654 (2006). See, e.g., *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 456 (4th Cir. 2007) (discussing 29 C.F.R. § 825.220(d), which provides that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA”).

<sup>65</sup> *Brooklyn Sav. Bank*, 324 U.S. at 706.

<sup>66</sup> See *id.* at 704 (“Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.”).

<sup>67</sup> FED. R. CIV. P. 66; see also FED. R. CIV. P. 41(a)(1)(A) (noting that Rule 66 curtails a plaintiff’s right to voluntarily dismiss an action without a court order); *United States v. Mansion House Ctr. N.*, 95 F.R.D. 515, 517 (E.D. Mo. 1982) (“[T]he policy behind Rule 66 requires court approval of any settlement agreement that might be presented by the parties.”), *rev’d sub nom.* *United States v. Altman*, 750 F.2d 684, 695–96 (8th Cir. 1984) (“Without an effective appointment of a Receiver to the foreclosure action itself, or to the consolidated action, Rule 66 provides no support for the district court’s entry of the order enjoining the settlement of the foreclosure litigation.”).

<sup>68</sup> *Gordon v. Dadante*, No. 1:05-CV-2726, 2009 WL 1850309, at \*4 n.9 (N.D. Ohio June 26, 2009).

this context is analogous to the bankruptcy situation discussed above, as revealed by the historical origins of receivers:

Receivership practice apparently grew out of the need of the English Court of Chancery for an additional means of protecting real property for the benefit of remaindermen when the court doubted that the party in possession would obey the court's injunction to stay waste and preserve the property, rents, and profits for those ultimately entitled to receive them.<sup>69</sup>

#### 7. Settlements in Cases Involving Minors and Incompetent Persons

The claims of minors and incompetent persons generally cannot be settled absent court approval.<sup>70</sup> The need for judicial approval of settlements arises in this context because guardians and parents act in a representative capacity for minors and incompetent persons, much like class representatives in class actions. Accordingly, judicial review is necessary to ensure that proposed settlements are in the best interests of the minors and incompetent persons that will be bound by such settlements.<sup>71</sup>

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<sup>69</sup> 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 2981 (2d ed. 1997).

<sup>70</sup> See, e.g., CAL. CIV. PROC. CODE § 372(a) (West 2009) ("The guardian or conservator of the estate or guardian ad litem so appearing for any minor, incompetent person, or person for whom a conservator has been appointed shall have power, with the approval of the court in which the action or proceeding is pending, to compromise the same . . . ."); FLA. STAT. ANN. § 744.387(3)(a) (West 2002) ("No settlement after an action has been commenced by or on behalf of a ward or other incompetent shall be effective unless approved by the court having jurisdiction of the action."); LA. CODE CIV. PROC. ANN. art. 4265 (1998) ("With the approval of the court . . . a tutor may compromise an action or right of action by or against the minor . . . ."); TEX. R. CIV. PROC. 44 (noting that "next friends" may "compromise suits and agree to judgments" on behalf of "[m]inors, lunatics, idiots, or persons non compos mentis . . . with the approval of the court."); see also, e.g., *Large v. Hayes*, 534 So. 2d 1101, 1105 (Ala. 1988) ("This Court has recognized the special nature of an attempted settlement of a minor's claim. Before such a settlement can be approved, there must be a hearing, with an extensive examination of the facts, to determine whether the settlement is in the best interest of the minor.").

<sup>71</sup> The same principle applies for wrongful death actions in some states. See, e.g., MICH. COMP. LAWS ANN. § 600.2922(5) (West 2011) ("If, for the purpose of settling a claim for damages for wrongful death where an action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.").

### III. THE NEW PARADIGM FOR MASS TORT SETTLEMENTS IN THE POST-CLASS ACTION ERA

Modern mass tort litigation frequently consists of hundreds or thousands of similar claims for personal injury, wrongful death, and/or economic harm arising from a discrete accident or event, prolonged exposure to an allegedly harmful substance or condition, or the use of an allegedly defective product.<sup>72</sup> In the post-class action era, these tort claims typically must proceed as individual lawsuits.<sup>73</sup> But while such individual lawsuits may be filed in courts across the country, the Judicial Panel on Multidistrict Litigation often transfers related mass tort lawsuits filed in, or removed to, federal courts to one judge for centralized multidistrict litigation (MDL) proceedings pursuant to 28 U.S.C. § 1407.<sup>74</sup> Consolidation of mass tort litigation may also be achieved through the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA),<sup>75</sup> disaster-specific jurisdictional statutes,<sup>76</sup> or state-court analogs to the federal MDL statute.<sup>77</sup>

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<sup>72</sup> See Jeremy T. Grabill, *Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts*, 80 TUL. L. REV. 299, 304–05 (2005) (“[Mass torts] can arise in two situations: so-called ‘single situs’ torts where a single temporal and geographic event causes injury to numerous plaintiffs and ‘wide-spread’ or ‘dispersed’ torts where a single defendant causes injury to numerous plaintiffs across the country over the course of time.”).

<sup>73</sup> See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 cmt. b(1)(B), at 25 (noting that mass tort class actions have “fallen into disfavor” for several reasons, “including concerns about the quality of the representation received by members of settlement classes, difficulties presented by choice-of-law problems, and the need for individual evidence of exposure, injury, and damages”).

<sup>74</sup> See generally DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL (2011); see also Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2326–30 (2008) (discussing the modern multidistrict litigation process); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2209–13 (2008) (same).

<sup>75</sup> 28 U.S.C. § 1369 (2006). The MMTJA confers original federal jurisdiction over “any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location.” § 1369(a). The MMTJA was “[e]nacted in 2002 shortly after the terrorist attacks of September 11, 2001” and was “rarely” invoked “prior to Hurricane Katrina.” *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc.*, 463 F. Supp. 2d 583, 591 (E.D. La. 2006) (holding that federal jurisdiction did not exist under the MMTJA for personal injury and wrongful death claims by patients in a New Orleans hospital because the requisite number of deaths did not occur at the hospital in the aftermath of the storm and refusing to treat the New Orleans metro area as a discrete location). *But see* *Passa v. Derderian*, 308 F. Supp. 2d 43, 65 (D.R.I. 2004) (finding that wrongful death and negligence claims arising from a nightclub fire were properly removed under the MMTJA).

<sup>76</sup> See, e.g., Air Transportation Safety and System Stabilization Act (ATSSSA), Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 note (2006)); see also 42 U.S.C. § 2210(n)(2) (2006) (providing for centralization of litiga-

Following the consolidation of mass tort litigation in one court, it is common for the presiding judge to appoint “liaison” counsel for plaintiffs and defendants and task such counsel with coordinating and overseeing all aspects of the litigation.<sup>78</sup> In addition to reporting to the judge and coordinating discovery and motion practice, liaison counsel typically lead any global settlement negotiations.<sup>79</sup> Such negotiations, however, increasingly occur only after bellwether jury trials and are likely to be informed by the results of such trials.<sup>80</sup> Accordingly, this is the context in which private mass tort settlements tend to arise.

A. *The Evolution of Non-Class Aggregate Settlements*

Several of the features of the new opt-in paradigm for mass tort settlements have been common aspects of aggregate settlements for many years. Others can be traced, at the very least, back to the unique settlement approach used in the *Baycol* pharmaceutical litigation. The more recent settlements of the *Vioxx* pharmaceutical litigation and the *World Trade Center Disaster Site* litigation build upon the *Baycol* approach and exhibit the most novel aspects of the emerging opt-in model. Accordingly, all three of those litigations and the set-

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tion arising out of a nuclear attack on the United States in “the United States district court in the district where the nuclear incident takes place”). The ATSSSA is discussed in more detail below in connection with the *World Trade Center Disaster Site* litigation. See *infra* Part III.A.3.

<sup>77</sup> See, e.g., Grabill, *supra* note 72, at 322–23 (collecting authorities and discussing several specific state-court consolidation procedures); see also Fallon, Grabill & Wynne, *supra* note 74, at 2326 n.6 (noting that it is common for a federal MDL proceeding to coordinate with multiple state-wide consolidated proceedings involving similar claims).

<sup>78</sup> See, e.g., *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2010 WL 724084, at \*1 (E.D. La. Feb. 18, 2010) (“[T]he Court appointed committees of counsel to represent the parties and to meet with the Court once every month to review the status of the litigation.”); see also Fallon, Grabill & Wynne, *supra* note 74, at 2338–39 n.74 (discussing the role of liaison counsel and noting that such counsel “essentially serve as the communication conduit between the transferee court and the thousands of lawyers that can often be involved in any given MDL”).

<sup>79</sup> See, e.g., *In re Vioxx*, 2010 WL 724084, at \*1; see also Fallon, Grabill & Wynne, *supra* note 74, at 2338 n.74.

<sup>80</sup> See generally Fallon, Grabill & Wynne, *supra* note 74 (discussing the rise of informational bellwether trials). As Judge Fallon noted:

A typical bellwether case often begins as no more than an individual lawsuit that proceeds through pretrial discovery and on to trial in the usual binary fashion: one plaintiff versus one defendant. Such a case may take on “bellwether” qualities, however, when it is selected for trial because it involves facts, claims, or defenses that are similar to the facts, claims, and defenses presented in a wider group of related cases.

*Id.* at 2325.

tlements that emerged from each will be discussed in this Part to reveal the real-world underpinnings of the new opt-in paradigm for mass tort settlements.

1. *In re Baycol Products Liability Litigation*

In 2001, Bayer pulled its cholesterol-lowering statin Baycol (Cervastatin) off the market in the United States after the drug was linked to an increased risk of rhabdomyolysis.<sup>81</sup> Approximately 12,000 individual products liability claims followed, which were centralized in a federal MDL proceeding before Judge Michael J. Davis in Minnesota.<sup>82</sup> The plaintiffs generally alleged that Bayer withheld information about the risks of Baycol and continued to market the drug despite known dangers.<sup>83</sup> Plaintiffs' attempts to obtain certification of various class actions were denied.<sup>84</sup>

After winning several individual jury trials, Bayer unilaterally created a schedule of payments for which it was willing to settle particular rhabdomyolysis claims.<sup>85</sup> "For non-rhabdomyolysis claims of injury or for plaintiffs who rejected the schedule, Bayer announced that [it] would litigate."<sup>86</sup> A recent paper based on interviews with the lawyers involved in the *Baycol* litigation explains the unique nature of this settlement approach as follows:

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<sup>81</sup> See James M. Anderson, *Understanding Mass Tort Defendant Incentives for Confidential Settlements: Lessons from Bayer's Cervastatin Litigation Strategy* 5 (RAND Inst. for Civil Justice, Working Paper No. WR-617-ICJ, 2008), available at [http://www.rand.org/pubs/working\\_papers/WR617](http://www.rand.org/pubs/working_papers/WR617) ("Rhabdomyolysis is a breakdown of muscle fibers which results in the muscle protein myoglobin being released into the bloodstream. The myoglobin is toxic and can substantially damage the kidney. . . . In rare cases, the renal failure caused by the myoglobin can be fatal.")

<sup>82</sup> See *In re Baycol Prods. Liab. Litig.*, 180 F. Supp. 2d 1378, 1380 (J.P.M.L. 2001) (creating MDL 1431). The United States District Court for the District of Minnesota maintains a helpful website for the *Baycol* MDL. See *Baycol Product Liability Litigation*, U.S. DIST. CT. DIST. MINN., <http://www.mnd.uscourts.gov/MDL-Baycol/index.shtml> (last updated Apr. 16, 2010).

<sup>83</sup> See *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 201–02 (D. Minn. 2003); *In re Baycol*, 180 F. Supp. 2d at 1379–80.

<sup>84</sup> See *In re Baycol*, 218 F.R.D. at 216 (denying plaintiffs' motion for certification of nationwide personal injury, medical monitoring, and economic loss class actions). An attempt by certain plaintiffs to make an end-run around this ruling by seeking class certification in state court was initially enjoined by Judge Davis and the injunction upheld by the Eighth Circuit, but the U.S. Supreme Court recently allowed the plaintiffs to proceed. See *In re Baycol Prods. Litig.*, 593 F.3d 716 (8th Cir. 2010), *rev'd sub nom.* *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011) (concluding that the Anti-Injunction Act prohibited the injunction because the class certification standards in state court differed from the federal standards).

<sup>85</sup> Anderson, *supra* note 81, at 15.

<sup>86</sup> *Id.* at 2–3.

While Bayer did not actively publicize the settlements, it only sought confidentiality agreements in a handful of unusual cases. According to George Lykos, Bayer Corporation's Chief Legal Officer in the U.S., part of the appeal of this strategy was its transparency: every claimant would know that he or she was being treated the same as other claimants.<sup>87</sup>

Thus although Bayer eventually entered into thousands of individual settlement agreements with plaintiffs based on its fixed schedule of payments, the novel concept of utilizing a transparent global grid to provide uniform settlement offers for similarly situated plaintiffs would evolve in the later *Vioxx* and *World Trade Center Disaster Site* litigations and has become the central feature of private mass tort settlements.

## 2. *In re Vioxx Products Liability Litigation*

The products liability litigation concerning Merck's prescription painkiller Vioxx (Rofecoxib) was centralized in a federal MDL proceeding before Judge Eldon E. Fallon in New Orleans,<sup>88</sup> and in several parallel coordinated state-court proceedings in New Jersey (before Judge Carol Higbee), California (before Judge Victoria Chaney), and Texas (before Judge Randy Wilson).<sup>89</sup> The plaintiffs generally alleged that Vioxx increased the risk of heart attacks and strokes, and that Merck had failed to warn of that increased risk.<sup>90</sup> Plaintiffs' bids for certification of personal injury class actions,<sup>91</sup> medical monitoring class actions,<sup>92</sup> and economic loss class actions<sup>93</sup> were denied. Accord-

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<sup>87</sup> *Id.* at 3.

<sup>88</sup> See *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1355 (J.P.M.L. 2005) (creating MDL 1657). The United States District Court for the Eastern District of Louisiana maintains a helpful website for the *Vioxx* MDL. See *Current Developments, MDL-1657 Vioxx Products Liability Litigation*, VIOXX PROD. LIABILITY, <http://vioxx.laed.uscourts.gov> (last visited, Jan. 31, 2012) [hereinafter *Current Developments Vioxx*].

<sup>89</sup> See *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2011 WL 3563004, at \*5 (E.D. La. Aug. 9, 2011).

<sup>90</sup> *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 452 (E.D. La. 2006); *In re Vioxx*, 360 F. Supp. 2d at 1354; *Sinclair v. Merck & Co., Inc.*, 948 A.2d 587, 589 (N.J. 2008).

<sup>91</sup> See *In re Vioxx*, 239 F.R.D. at 463 (denying plaintiffs' motion for certification of a nationwide personal injury class action).

<sup>92</sup> See *Sinclair*, 948 A.2d at 596 (affirming Judge Higbee's dismissal of a putative nationwide medical monitoring class action).

<sup>93</sup> See *In re Vioxx Consol. Class Action*, No. JCCP4247, 2009 WL 1283129 (Cal. Super. Ct. Apr. 30, 2009), *aff'd sub. nom. In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 87 (Cal. Ct. App. 2009) (affirming Judge Chaney's denial of motion for certification of a state-wide class action seeking recovery of the "difference in price between what [plaintiffs] paid for Vioxx and what they would have paid for a safer, equally effective, pain reliever"); *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v.*

dingly, the *Vioxx* litigation proceeded as thousands of individual actions, the bulk of which were coordinated among the four judges identified above.

After approximately nineteen bellwether jury trials over the course of several years, the parties announced a global settlement of the *Vioxx* litigation on November 9, 2007.<sup>94</sup> The *Vioxx* Settlement Agreement was a sixty-five-page document with fifteen exhibits entered into by the six-member committee of “Negotiating Plaintiffs’ Counsel” and Merck, and provided that Merck would pay a total of \$4.85 billion to claimants who had already given notice of their claims (either by filing suit in state or federal court, or by entering into a tolling agreement with the company) as of the date the settlement was announced.<sup>95</sup> Utilizing information gathered in preparation for, and as a result of, the various jury trials concerning the relative strengths and weaknesses of plaintiffs’ claims, plaintiffs’ counsel and Merck negotiated detailed compensation formulas to be used by a neutral administrator to determine individual settlement awards.<sup>96</sup> Merck’s agreement to settle was contingent, however, upon at least eighty-five percent of eligible claimants choosing to accept the offer and opt in to the claims process.<sup>97</sup> Thus, the settlement agreement was in no way binding on individual plaintiffs unless such plain-

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Merck & Co., 929 A.2d 1076, 1089 (N.J. 2007) (reversing Judge Higbee’s certification of a nationwide third-party payor class action).

<sup>94</sup> See Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto 1 (Nov. 9, 2007) [hereinafter *Vioxx* Settlement Agreement], available at [http://www.merck.com/newsroom/vioxx/pdf/Settlement\\_Agreement.pdf](http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf). Six of the bellwether trials occurred in federal court before Judge Fallon, and the rest took place in various state courts. See *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2010 WL 724084, at \*1 (E.D. La. Feb. 18, 2010) (“During the same period that this Court conducted six bellwether trials, approximately thirteen additional *Vioxx*-related cases were tried before juries in the state courts of Texas, New Jersey, California, Alabama, Illinois, and Florida.”). Reports on the total number of trials vary because several state-court cases involved multiple plaintiffs and also because several cases had to be re-tried. For a more detailed discussion of the six federal bellwether jury trials, see Fallon, Grabill & Wynne, *supra* note 74, at 2335–36. The bellwether jury trials in the *Vioxx* litigation were only binding on the individual parties to the specific cases that were tried. *Id.* at 2337.

<sup>95</sup> See *Vioxx* Settlement Agreement, *supra* note 94, § 1.1. Both plaintiffs’ counsel and the defendant maintain websites where the *Vioxx* Settlement Agreement and the exhibits and amendments thereto are available. See *Vioxx Settlement Documents*, OFFICIAL VIOXX SETTLEMENT, <http://www.officialvioxxsettlement.com/documents> (last visited Nov. 20, 2011); *Merck Agreement to Resolve U.S. VIOXX® Product Liability Lawsuits*, MERCK (Nov. 9, 2007), [http://www.merck.com/newsroom/news-release-archive/corporate/2007\\_1109.html](http://www.merck.com/newsroom/news-release-archive/corporate/2007_1109.html).

<sup>96</sup> *Vioxx* Settlement Agreement, *supra* note 94, § 3.2.

<sup>97</sup> *Id.* § 11.1.

tiffs affirmatively chose to be bound by it and only then if a sufficient number of eligible plaintiffs chose to participate.<sup>98</sup>

The settlement of the *Vioxx* litigation was publicly announced during a regularly scheduled status conference in the federal MDL in New Orleans on November 9, 2007.<sup>99</sup> During that proceeding, it was revealed that the four coordinating judges had called the parties together eleven months earlier in December 2006 and asked them to begin discussing ways in which the litigation might be resolved:

The Court convened a conference in New Orleans on December 8, 2006. In addition to the undersigned Transferee Judge, state judges from Texas, New Jersey, and California attended. Also in attendance was an official of the Defendant, lead and liaison counsel for the Defendant, and lead and liaison counsel for the Plaintiffs' Steering Committee. The Judges expressed the view that it was timely for the parties to begin serious settlement discussions. With the benefit of experience from the bellwether tri-

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<sup>98</sup> The *Vioxx* Settlement Agreement also contained controversial provisions that required any counsel enrolling one client in the settlement to recommend the settlement to one hundred percent of his or her clients and to withdraw from representing any client who rejected the deal. *See id.* § 1.2.8. The intent of these provisions was to ensure that plaintiffs with strong claims were not selectively kept out of the settlement by counsel and, more generally, to deter plaintiffs from rejecting the deal and maximize closure. The provisions initially drew various ethical criticisms and were later amended to make clear that “[e]ach Enrolling Counsel is expected to exercise his or her independent judgment in the best interest of each client individually before determining whether to recommend enrollment in the Program.” *See* Amendment to Settlement Agreement Between Merck & Co., Inc., and the Counsel Listed in the Signature Pages Hereto Under the Heading “Negotiating Plaintiffs’ Counsel” § 1.2.2 (Jan. 17, 2008), *available at* [http://www.merck.com/newsroom/vioxx/pdf/Amendment\\_to\\_Settlement\\_Agreement.pdf](http://www.merck.com/newsroom/vioxx/pdf/Amendment_to_Settlement_Agreement.pdf); *see also* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 301 (2011) (arguing that the consent of claimants that opted in to the *Vioxx* Settlement was “inauthentic” in light of the above provisions “because they could not rely on independent advice from counsel and because the prospect of losing their lawyer left them with no real choice”); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 1000–04 (2010) (discussing the provisions, collecting criticisms, and noting that the Connecticut Bar Association Committee on Professional Ethics considered the provisions unethical); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 218–19 & n.104 (2009) (collecting similar criticisms). Ultimately, whether or not the provisions complied with applicable ethics rules, I do not consider them a necessary feature of the opt-in model described herein. Indeed, the private mass tort settlement in the *World Trade Center Disaster Site* litigation discussed below did not include such provisions, yet still provided significant closure. Thus, as I argue in this Article, and contrary to a recent suggestion, “consent and closure” need not be “antipodes in the world of mass torts settlements.” Erichson & Zipursky, *supra*, at 320.

<sup>99</sup> *See* Transcript of Status Conference, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007) [hereinafter Transcript of Status Conference], *available at* <http://vioxx.laed.uscourts.gov/Transcripts/11-9-07.pdf>.

als, as well as this encouragement from the several coordinated courts, the parties soon began settlement discussions in earnest.<sup>100</sup>

Over the course of approximately eleven months, “the parties met and negotiated independently,” but kept the coordinating judges “informed of their progress in settlement discussions.”<sup>101</sup>

Judge Fallon never issued an order “approving” the private settlement agreement, but his remarks from the bench on November 9, 2007, left no doubt that he was very pleased with the settlement.<sup>102</sup> Adding to the uniqueness of the proceeding, Judge Higbee and Judge Chaney traveled to New Orleans to sit on the bench alongside Judge Fallon and expressed similar remarks.<sup>103</sup> Ultimately, approximately 33,000 claimants received settlement awards out of a pool of approximately 50,000 eligible and enrolled claimants.<sup>104</sup>

Although the Vioxx Settlement Agreement was a non-class aggregate settlement, the settlement agreement did assign certain functions to Judge Fallon:

The Settlement Agreement is a voluntary opt in agreement and expressly contemplates that this Court shall oversee various aspects of the administration of settlement proceedings, including appointing a Fee Allocation Committee, allocating a percentage of the settlement proceeds to a Common Benefit Fund, approving a cost assessment, and modifying any provisions of the Settlement

<sup>100</sup> See *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2010 WL 724084, at \*2 (E.D. La. Feb. 18, 2010); see also Transcript of Status Conference, *supra* note 99, at 5:12–18 (remarks by Merck’s counsel Douglas R. Marvin); *id.* at 10:8–16 (remarks by Plaintiffs’ Liaison Counsel Russ M. Herman).

<sup>101</sup> *In re Vioxx*, 2010 WL 724084, at \*2 n.4; see also Sherman, *supra* note 74, at 2214 (reporting remarks made by Judge Fallon at a *Tulane Law Review* symposium that the parties conducted settlement negotiations “independent of[,] but reporting periodically to[, the four coordinating judges]”).

<sup>102</sup> See Transcript of Status Conference, *supra* note 99, at 39:13–42:23. Judge Fallon remarked:

[T]his successful conclusion was due to the work of the lawyers. I practiced law for 33 years as an active litigator before taking the bench 13 years ago. I know what it is to be in the foxhole during the trial of a lawsuit. I lived in those foxholes, and I know that it is harder work to be a lawyer than it is to be a judge. I also know that a large portion of the credit for resolving litigation belongs to the lawyer and not the judge. . . . It’s important for judges to recognize that it is the workhorse[s], the lawyer[s], who get us through litigation, and all of us personally appreciate that in this case.

*Id.*

<sup>103</sup> See *id.* at 30:11–35:24 (remarks by Judge Higbee); *id.* at 36:2–39:12 (remarks by Judge Chaney).

<sup>104</sup> See *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 646 (E.D. La. 2010) (noting that the settlement was administered in “only 31 months” and that “[t]his efficiency is unprecedented in mass tort settlements of this size”).

Agreement that are otherwise unenforceable. Accordingly, this Court has consistently exercised its inherent authority over the MDL proceedings in coordination with its express authority under the terms of the Settlement Agreement to ensure that the settlement proceedings move forward in a uniform and efficient manner.<sup>105</sup>

Thus, unlike the aggregate settlement agreement in the *World Trade Center Disaster Site* litigation discussed below, the Vioxx Settlement Agreement expressly provided that the presiding federal judge would exercise some limited authority over the implementation of the settlement agreement. In other words, although the global settlement of the *Vioxx* litigation was “crafted cooperatively by counsel,” it was designed by the parties to be “blessed and overseen in its execution by the MDL court.”<sup>106</sup>

### 3. *In re World Trade Center Disaster Site Litigation*

Within two weeks of the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon, Congress enacted the Air Transportation Safety and System Stabilization Act (ATSSSA), which conferred exclusive jurisdiction to the United States District Court for the Southern District of New York over all actions regarding any claim “resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.”<sup>107</sup> Thereafter, Judge Alvin K. Hellers-

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<sup>105</sup> *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 552–53 & n.7 (E.D. La. 2009) (discussing § 9.2.4, § 9.2.5, and § 16.4.2 of the Vioxx Settlement Agreement, *supra* note 94).

<sup>106</sup> Sherman, *supra* note 74, at 2205 (abstract). In this regard, a recent suggestion that Judge Fallon “crafted the settlement” in the *Vioxx* litigation is simply mistaken. See Rothman, *supra* note 8, at 342. Moreover, as noted in Part II.A, *supra*, parties are free to seek judicial involvement in their settlements, and, therefore, the parties’ joint request for Judge Fallon to perform limited oversight functions in connection with the Vioxx Settlement Agreement supplies the necessary authority for such formal judicial involvement in this private mass tort settlement. For further discussions of the *Vioxx* litigation, see Issacharoff, *supra* note 98, at 215–19, and Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 DEPAUL L. REV. 509 (2008).

<sup>107</sup> Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230, 241 (2001) (codified as amended at 49 U.S.C. § 40101 note (2006)). ATSSSA also created the September 11th Victim Compensation Fund (VCF), that, before it closed, distributed more than \$7 billion to over 5000 people who either were injured or lost family members in the attacks. See KENNETH R. FEINBERG, ESQ., ET AL., U.S. DEP’T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 I (2004), available at [http://www.usdoj.gov/final\\_report.pdf](http://www.usdoj.gov/final_report.pdf). See generally KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005) (discussing the procedures employed to distribute VCF funds and relating various individual scenarios that arose during the process). On January 2, 2011, President Obama signed into law the James Zadroga 9/11 Health and Com-

tein was assigned to manage the *World Trade Center Disaster Site* litigation and he eventually segregated the litigation into five separate dockets, assigning each group its own “master calendar” (MC) number:

- 21 MC 97: wrongful death and personal injury lawsuits related to the terrorist attacks
- 21 MC 100: respiratory injury lawsuits filed by workers engaged in the search, rescue, and clean-up effort at the World Trade Center site in the weeks and months following September 11, 2001
- 21 MC 101: property damage lawsuits arising from the destruction of Towers One and Two of the World Trade Center
- 21 MC 102: respiratory injury lawsuits filed by workers engaged in clean-up efforts in areas outside the World Trade Center site in the weeks and months following September 11, 2001
- 21 MC 103: respiratory injury lawsuits filed by search, rescue, and clean-up workers who worked both within the World Trade Center site and in surrounding areas<sup>108</sup>

Though it is a creature of ATSSSA, the *World Trade Center Disaster Site* litigation can be thought of as an MDL proceeding, or perhaps five related mini-MDLs all before the same judge.<sup>109</sup> And just as in the *Baycol* and *Vioxx* litigations, the plaintiffs’ claims in the *World Trade Center Disaster Site* litigation were not certified as class actions, leaving thousands of related cases to proceed individually.<sup>110</sup>

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pensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623 (2011), which amends ATSSSA to reopen the VCF and establishes a medical monitoring program for responders and other people who may have been exposed to airborne toxins in the aftermath of the attacks.

<sup>108</sup> See *In re Sept. 11 Litig.*, 567 F. Supp. 2d 611, 614 n.3 (S.D.N.Y. 2008). For an extended discussion of the history, organization, and evolution of the *World Trade Center* litigation, see Robin J. Efron, *Event Jurisdiction and Protective Coordination: Lessons from the September 11th Litigation*, 81 S. CAL. L. REV. 199, 203–21 (2008).

<sup>109</sup> In this way, the jurisdictional provision of ATSSSA is a unique subject-matter specific analogue of the general MDL statute. Compare 49 U.S.C. § 40101 note (2006), with 28 U.S.C. § 1407 (2006). For a discussion of “ad hoc district-wide consolidation” of mass tort litigation, including the consolidation of the *World Trade Center* litigation pursuant to ATSSSA, see generally Robin J. Efron, *Disaster-Specific Mechanisms for Consolidation*, 82 TUL. L. REV. 2423 (2008).

<sup>110</sup> See *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 499 (S.D.N.Y. 2009) (“I denied class status because of the variety of illnesses alleged by the plaintiffs, the varying severity of their illnesses, the transient nature of the work-sites, the varying levels of supervision governing plaintiffs’ work, the variety of defen-

Faced with these various categories of cases, Judge Hellerstein essentially triaged and focused his attention first on the 21 MC 97 cases involving wrongful death and personal injury claims related to the crashes.<sup>111</sup> There were ninety-five such cases involving victims from all three crash sites (the World Trade Center, the Pentagon, and Shanksville, Pennsylvania).<sup>112</sup> In light of reports that the claims against the airlines and other aviation defendants might exceed available insurance assets, “[a] special [settlement] protocol was developed to resolve the dilemmas that were presented,” namely “the fear that payments of earlier settlers [might] leave inadequate funds for later verdicts and settlements.”<sup>113</sup> Pursuant to the agreed upon protocol, the twenty-one property-damage plaintiffs in 21 MC 101 agreed to an informal stay of their claims “in order to allow wrongful death and personal injury settlers to settle and be paid, provided that such settlements would be approved by the Court as fair and reasonable.”<sup>114</sup>

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dants, and the complexity of determining and evaluating pre-existing medical conditions.”).

<sup>111</sup> Judge Hellerstein stated that “the families of those who were murdered by the terrorists of 9/11 have suffered greatly. . . . [and] this court has made every effort to provide prompt, responsive, economical and efficient proceedings for their cases.” *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 621.

<sup>112</sup> *Id.* at 614.

<sup>113</sup> *Id.* In addition to centralizing the cases in the Southern District of New York, ATSSSA also limited the liability of the airlines and aviation defendants to their insurance coverage. See 49 U.S.C. § 40101 note, § 408(a)(1) (2006). Similar “caps” on the liability of the City of New York and its contractors were subsequently enacted. See *id.* §§ 408(a)(3)–(4).

<sup>114</sup> *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 614–15. Judge Hellerstein approved the bulk of these individual settlements, but he rejected settlements in four of the last remaining wrongful death cases to settle that were “substantially higher than those of similarly situated plaintiffs in previous settlements.” *Id.* at 613. In doing so, he interpreted ATSSSA to require his review and oversight of all 9/11-related settlements. *Id.* at 620 (“Whatever the ability of parties under the particular laws of a State to settle cases as they wish, and to pay their attorneys contingent fees as they agree, such laws and such practices are inconsistent with Federal law expressed in the ATSSSA . . . . Under the ATSSSA, this district court, discharging its task to administer all the cases before it, must consider these settlements in the context of all other settlements and all remaining outstanding claims.”). Judge Hellerstein’s supervision of the 21 MC 97 wrongful death and personal injury settlements is best justified, however, by reference to the authority voluntarily conferred upon him by the parties to those cases. Indeed, more recently, in reviewing settlements in eighteen of the twenty-one property damage cases in the 21 MC 101 docket at the request of the parties, Judge Hellerstein turned aside challenges to those settlements and held that ATSSSA does not create a “limited fund” and, thus, did not require judicial supervision of the settlements to ensure an equitable division of funds. See *In re Sept. 11 Litig.*, 723 F. Supp. 2d 534, 542–43 (S.D.N.Y. 2010), *aff’d sub nom. In re Sept. 11 Property Damage Litig.*, 650 F.3d 145 (2d Cir. 2011).

Thereafter, Judge Hellerstein turned his attention to the 21 MC 100, 21 MC 102, and 21 MC 103 dockets, which consisted of approximately 10,000 personal injury lawsuits filed by search, rescue, and clean-up workers who worked in and around the World Trade Center site.<sup>115</sup> For the most part, these suits were filed against the City of New York and the various contractors engaged by the City, and plaintiffs generally alleged respiratory injuries and/or fear of cancer as a result of the defendants' allegedly inadequate provision of respiratory protective equipment.<sup>116</sup> Following several years of legal briefing and appeals concerning jurisdictional issues<sup>117</sup> and the defendants' immunity arguments,<sup>118</sup> Judge Hellerstein adopted a case-management protocol "for selecting appropriate cases for intensive pretrial discovery, motions, and trials."<sup>119</sup> The court's protocol was essentially a bellwether-trial plan for the respiratory injury cases whereby thirty cases would be selected for trial from a larger pool of the most "severe" cases, along with an additional thirty discovery-only cases.<sup>120</sup>

On March 11, 2010, only two months before the first bellwether trials were set to begin, the parties announced a global settlement of the personal injury lawsuits filed by search, rescue, and clean-up workers who worked in and around the World Trade Center site.<sup>121</sup> The ninety-five-page World Trade Center Litigation Settlement Process Agreement ("Original WTC Settlement Agreement") was entered into by plaintiffs' liaison counsel, the defendants, and the WTC Captive Insurance Company (the "Captive"),<sup>122</sup> and, much like the

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<sup>115</sup> *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 614 n.3 ("[Judge Hellerstein stated that t]he vast majority of the September 11-related lawsuits [ ] number[ing] in the tens of thousands, have been consolidated before me . . . encompassing wrongful death, personal injury and property damage . . . filed by workers engaged in the search, rescue and clean-up effort at [and in the areas surrounding] the World Trade Center site . . .").

<sup>116</sup> *See, e.g.*, Effron, *supra* note 108, at 208.

<sup>117</sup> *See In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005).

<sup>118</sup> *See In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169 (2d Cir. 2008).

<sup>119</sup> *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 501 (S.D.N.Y. 2009).

<sup>120</sup> *Id.* at 503–04.

<sup>121</sup> *See* Mireya Navarro, *Deal is Reached on Health Costs of 9/11 Workers*, N.Y. TIMES, Mar. 12, 2010, at A1.

<sup>122</sup> The City of New York formed the WTC Captive Insurance Company in July 2004 with approximately \$1 billion in funding from the Federal Emergency Management Agency to insure the City of New York and approximately 140 contractors and subcontractors that the City engaged against claims arising out of the debris-removal process that began after the collapse of the World Trade Center towers on September 11, 2001. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., A REVIEW OF THE WORLD TRADE CENTER CAPTIVE INSURANCE COMPANY (2008), *available at*

Vioxx Settlement Agreement, provided that the Captive would pay between \$575 million and \$657.5 million to eligible plaintiffs who chose to opt in to the claims process set forth in the settlement agreement, provided that at least ninety-five percent of all eligible plaintiffs opted in.<sup>123</sup> The settlement agreement broke plaintiffs into four “tiers” based on the severity of their alleged injuries, and individual settlement awards were to be determined by an “allocation neutral” based on the various payment mechanisms set forth in the agreement.<sup>124</sup> In addition to base payments in each payment tier, plaintiffs could also receive separate payments for disabilities, orthopedic injuries, and qualifying surgeries that satisfied agreed-upon proof criteria.<sup>125</sup> Finally, all eligible plaintiffs could enroll in a cancer insurance policy that would pay a one-time benefit of \$100,000 to each plaintiff who subsequently developed certain types of cancers alleged to be related to work at the World Trade Center site.<sup>126</sup>

Unlike the Vioxx Settlement Agreement, however, the private mass tort settlement in the *World Trade Center Disaster Site* litigation did not contemplate that the presiding judge would play any role in overseeing its implementation. On March 15, 2010, four days after the settlement was announced, Judge Hellerstein issued an order that recognized that the settlement agreement “does not provide for judicial supervision or appointment of the Allocation Neutral and the Firm and panel of physicians that will assist it,” but nonetheless instructed the parties “not to engage, or commit to engage, or continue to engage, any individuals or entities to fill such positions without advice to, and approval by, the Court.”<sup>127</sup> Then on March 19, 2010, Judge Hellerstein held a public hearing during which he spoke “from

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[http://www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_08-21\\_Jun08.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_08-21_Jun08.pdf). Given the Captive’s unique role and the fact that the settlement would be funded with its money, the Captive and its counsel were intimately involved in the settlement negotiations along with liaison counsel for the plaintiffs and the defendants.

<sup>123</sup> See World Trade Center Litigation Settlement Process Agreement, *In re* World Trade Ctr. Disaster Site Litig., No. No. 21 MC 100, § II, at \*10–15, § VI, at \*26–30 (S.D.N.Y. Mar. 11, 2010), 2010 WL 1063445 [hereinafter Original WTC Settlement Agreement]. The Original WTC Settlement Agreement is also available via PACER and is on file with the author. See World Trade Center Litigation Settlement Process Agreement, *In re* World Trade Ctr. Disaster Site Litig., No. 1:21-mc-00100 (S.D.N.Y. Mar. 12, 2010), ECF No. 2003-2.

<sup>124</sup> Original WTC Settlement Agreement, *supra* note 123, § VIII.

<sup>125</sup> See *id.* §§ XVI; XVIII.

<sup>126</sup> See *id.* § XVII.

<sup>127</sup> Order, *In re* World Trade Ctr. Disaster Site Litig., No. 1:21-mc-00100 (S.D.N.Y. Mar. 15, 2010), ECF No. 2006. The March 15, 2010, order is also on file with the author.

the heart,” announcing that, in his judgment, the amount of the settlement was “not enough” and that he would require certain modifications before “approving” the deal. A former reporter for *The New York Times* was present at the March 19 hearing and his account is consistent with my own recollection:

Then Hellerstein did something that surprised even the most experienced attorneys who thought they’d seen everything. Reversing the normal decorum of a federal court, he rose slowly from his chair on the bench and addressed the lawyers and plaintiffs who remained seated before him.

“I have no formal notes,” Hellerstein said in an even voice that reached to the back of the courtroom. Standing erect at the bench, he struck a pose of both humility and strength. “I speak, as it were, from the heart.”

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“From the beginning I’ve felt that these [cases] are special, that the people who responded on 9/11 were our heroes,” he told those in the courtroom who sat in rapt attention to his words. . . . He raised his right hand and admitted that his efforts at reaching a fair settlement of the cases had, in essence, failed. “In my judgment,” he said, “this settlement is not enough.”

While he had been sitting down, Hellerstein was a respected federal judge presiding over an enormously complex legal matter. But standing, he seemed to take on a far more public role, leaving behind the neutrality of the bench and taking up the cloak of advocacy.<sup>128</sup>

On June 10, 2010, almost three months after Judge Hellerstein publicly expressed his various concerns about the original settlement,

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<sup>128</sup> ANTHONY DEPALMA, CITY OF DUST: ILLNESS, ARROGANCE, AND 9/11, at 320–24 (2010). Judge Hellerstein remarked:

Most settlements are private; a plaintiff and defendant come together, shake hands, and it’s done with. Although the judge may look and see if there’s some infant or some compromise or something else, basically it’s the parties that decide. It’s the parties that grant the fee. The judge has no part in it.

This is different. This is 9/11. This is a special law of commons. This is a case that’s dominated my docket, and because of that, I have the power of review. If I don’t think it is fair, I’m going to tell you that, and you will make the judgment how to deal with it.

Transcript of Status Conference at 54:14–:24, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Mar. 19, 2010) (on file with author). Underlying most, if not all, of Judge Hellerstein’s demanded modifications was his desire to oversee the implementation of the Original WTC Settlement Agreement. *See id.* at 63:9–:21 (“I want judicial control over this process, because that’s what’s fair. If I’m the judge, I can be reversed. If the parties appoint someone, he’s the dictator. We don’t have dictators. So there will be judicial approval of the allocation neutral and of the experts that the allocation neutral picks, all under judicial supervision.”).

and after the resulting re-negotiations, the parties announced a revised settlement agreement in the approximately 10,000 personal injury lawsuits filed by search, rescue, and clean-up workers who worked in and around the World Trade Center site.<sup>129</sup> The 104-page World Trade Center Litigation Settlement Process Agreement, As Amended (“Amended WTC Settlement Agreement”), addressed many of Judge Hellerstein’s concerns regarding the original settlement and provided that the Captive would pay up to \$712.5 million to eligible plaintiffs that chose to opt in to the revised claims process.<sup>130</sup> The increase in value to individual plaintiffs over the original settlement was reported to be approximately \$125 million—larger than the raw increase in the overall settlement amount—and consisted of additional cash from the Captive, a concession by certain defendants to waive workers’ compensation liens, and an agreement by plaintiffs’ counsel to reduce their attorneys’ fees from 33.3% to 25%.<sup>131</sup> In addition, the amended settlement added an internal reconsideration procedure within the claims process to be overseen by Kenneth Feinberg, who had agreed to serve as the “claims appeal neutral.”<sup>132</sup>

During a so-called fairness hearing on June 23, 2010, Judge Hellerstein purported to approve the amended settlement agreement and issued an order later the same day finding that the amended deal was “fair, reasonable, adequate, just and in the best interests of the parties in light of the complexity, expense, and duration of litigation and risks involved in establishing liability, damages, and in maintaining the actions through trial and appeal.”<sup>133</sup> On November 19, 2010, it was announced that over ninety-five percent of plaintiffs had opted in to the amended settlement program, thereby satisfying the overall participation requirement.<sup>134</sup> Since then, all remaining prerequisites have been satisfied and the amended settlement program is being

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<sup>129</sup> See A.G. Sulzberger & Mireya Navarro, *Accord on Bigger Settlement for Ill 9/11 Workers*, N.Y. TIMES, June 11, 2010, at A1.

<sup>130</sup> See World Trade Center Litigation Settlement Process Agreement, As Amended § II, *In re Trade Center Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. June 10, 2010) [hereinafter Amended WTC Settlement Agreement], available at <http://www.nysd.uscourts.gov/cases/show.php?db=911&id=540>. The Amended WTC Settlement Agreement is also on file with the author.

<sup>131</sup> *Id.* § XXII.A.iv.

<sup>132</sup> *Id.* § XI.

<sup>133</sup> Order Approving Modified and Improved Agreement of Settlement, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-00100-AKH (S.D.N.Y. June 23, 2010), ECF No. 2091. The June 23, 2010, order is also on file with the author.

<sup>134</sup> See Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. TIMES, Nov. 12, 2010, at A1.

administered. To date, approximately \$225 million has been paid to eligible plaintiffs.<sup>135</sup>

In contrast to the protocol agreed upon by the parties to the individual 21 MC 97 personal injury and death cases—and unlike the Vioxx Settlement Agreement—the original and amended aggregate settlements in the *World Trade Center Disaster Site* litigation did not confer any authority upon Judge Hellerstein to review the terms or oversee the implementation of those aggregate settlements. As a result, the parties have filed various appeals concerning several of the court’s orders that purported to exercise authority over the aggregate settlements and those appeals have now been consolidated for briefing in the United States Court of Appeals for the Second Circuit.<sup>136</sup> Regardless of the outcome of those appeals, the *World Trade Center Disaster Site* litigation is a stark example of the influence courts can have over private mass tort settlements—especially when courts exceed their authority—and demonstrates why the contours of judicial authority vis-à-vis private mass tort settlements need to be clarified and authoritatively resolved.

#### B. *The Emerging Opt-In Paradigm*

The non-class aggregate settlements in the *Baycol*, *Vioxx*, and *World Trade Center Disaster Site* litigations reveal an emerging opt-in paradigm for the settlement of mass tort litigation in the post-class action era. In describing the characteristics of this emerging paradigm, I will rely in part on the terminology set forth by Professor Howard Erichson in his article *A Typology of Aggregate Settlements*.<sup>137</sup> As Professor Erichson explained: “Group settlements take various forms, and their essential features can be understood in terms of different levels of collectiveness in allocation and conditionality.”<sup>138</sup> “Allocation” means “that aspect of the deal that governs settlement amounts, the method for determining who gets how much,” and “[c]onditionality”

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<sup>135</sup> See Payment Status Update From the Allocation Neutral at 1, Nos. 21 MC 100, 21 MC 102 & 21 MC 103, *In re World Trade Ctr. Litig.* (S.D.N.Y. Nov. 7, 2011), available at <http://www.nysd.uscourts.gov/cases/show.php?db=911&id=664>.

<sup>136</sup> The lead docket for the consolidated appeals is *In re World Trade Center Disaster Site Litigation*, No. 11-4021 (2d Cir.). At this point, given the successful implementation of the Amended WTC Settlement Agreement, the primary issue on appeal concerns Judge Hellerstein’s directive to the Captive to make certain “bonus payments” to plaintiffs pursuant to the terms of the Amended WTC Settlement Agreement. See *In re World Trade Ctr. Litig.*, Nos. 21 MC 100, 21 MC 102 & 21 MC 103, 2011 WL 6425111 (S.D.N.Y. Dec. 20, 2011).

<sup>137</sup> Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1786 (2005).

<sup>138</sup> *Id.* at 1784.

refers to the “conditions [that] must be met for the settlement to stick, particularly the extent to which settlements are voidable by defendants for failure to obtain releases from all the plaintiffs.”<sup>139</sup> Although the concepts of allocation and conditionality are useful in understanding the emerging opt-in paradigm for mass tort settlements, several aspects of the paradigm are not accounted for in Professor Erichson’s typology.

Ultimately, there are five distinctive features of private mass tort settlements: (1) private mass tort settlements begin as a global settlement offer set forth in a contract between plaintiffs’ liaison counsel and the defendant(s); (2) the settlement offer is made to “eligible” plaintiffs only; (3) a requisite percentage of eligible plaintiffs must individually opt in for the deal to become effective, but plaintiffs who refuse to opt in are not bound by such settlements; (4) settlement awards are based on detailed “points” matrices administered by claims resolution facilities; (5) the entire settlement structure is transparent and available for each plaintiff, and the public at large, to review. Each of these features will be discussed in turn and fleshed out with examples from the *Baycol*, *Vioxx*, and *World Trade Center Disaster Site* settlements.

1. Settlement Initiated by Contract Between Plaintiffs’ Liaison Counsel and the Defendant(s)

First, private mass tort settlements begin as a contract between plaintiffs’ liaison counsel and the defendant(s) that essentially memorializes a global settlement offer for individual plaintiffs to consider.<sup>140</sup> Until such time as the requisite percentage of plaintiffs accept the settlement offer, the initial “settlement” contract only binds plaintiffs’ liaison counsel and the defendant(s) to various miscellaneous obligations.

For example, the initial contract may require plaintiffs’ liaison counsel and the defendant(s) to seek certain orders to facilitate the opt-in process. In that regard, the *Vioxx* Settlement Agreement provided that plaintiffs’ liaison counsel and Merck would jointly seek a “registration” order from each of the coordinating judges requiring all lawyers involved in the litigation to identify each individual plaintiff asserting a claim in the litigation.<sup>141</sup> Similarly, the Amended WTC Settlement Agreement required plaintiffs’ liaison counsel to submit a

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<sup>139</sup> *Id.*

<sup>140</sup> See Issacharoff, *supra* note 98, at 218 (noting that the *Vioxx* Settlement Agreement “was structured as an offer from Merck”).

<sup>141</sup> *Vioxx* Settlement Agreement, *supra* note 94, § 1.1.

list to the defendants of plaintiffs who were eligible for the settlement program, along with the nature of each eligible plaintiff's alleged injury.<sup>142</sup> Provisions such as these allow the parties to determine the denominator for any calculations that may be necessary down the road concerning the percentage of plaintiffs who choose to opt in.

Similarly, the initial contract may also require plaintiffs' liaison counsel and the defendant(s) to seek case management orders—known as *Lone Pine* orders—to regulate any cases that may remain after the successful implementation of the settlement.<sup>143</sup> By imposing added requirements—typically the need to obtain an expert report on causation—on plaintiffs who choose not to opt in and copycat plaintiffs who file claims after the settlement is announced in hopes of a quick payday, such orders are thought to deter additional litigation and maximize the degree of closure that defendants obtain through settlement.<sup>144</sup> For example, the Amended WTC Settlement Agreement noted that the defendants would file a motion seeking *Lone Pine* orders from the court and provided that plaintiffs “expressly agree[d] to join this motion.”<sup>145</sup> And although the Vioxx Settlement Agreement did not reference *Lone Pine* orders, the parties nevertheless jointly moved for the entry of such orders in conjunction with the announcement of the settlement.<sup>146</sup>

Finally, other common obligations imposed upon plaintiffs' liaison counsel and the defendant(s) in the initial contract include du-

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<sup>142</sup> Amended WTC Settlement Agreement, *supra* note 130, § VI.A.

<sup>143</sup> “*Lone Pine*” orders can be traced back to *Lore v. Lone Pine Corp.*, in which the Superior Court of New Jersey approved a pretrial order requiring plaintiffs to provide some basic facts in the form of expert reports or run the risk of having their cases dismissed. No. L-33606-85, 1986 WL 637507, at \*2 (N.J. Super. Ct. Law. Div. Nov. 18, 1986). Such orders are commonly issued in modern mass tort litigation and have been affirmed on appeal because they essentially only require “information that plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3).” *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000); *see also In re Vioxx Prods. Liab. Litig.*, 388 F. App'x 391, 398 (5th Cir. 2010) (reaffirming “the clear holding in *Acuna* that it is within a court's discretion to take steps to manage the complex and potentially very burdensome discovery” that mass tort cases often entail).

<sup>144</sup> *See, e.g., In re Rezulin Prods. Liab. Litig.*, No. 00 Civ. 2843(LAK), 2005 WL 1105067, at \*2 (S.D.N.Y. May 9, 2005) (“The failure to timely serve an Expert Report with all required information . . . prescribed by this order may result in the imposition of sanctions, which may include dismissal of the delinquent plaintiff's action with prejudice.”).

<sup>145</sup> Amended WTC Settlement Agreement, *supra* note 130, § XXI.A.

<sup>146</sup> *See generally In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741 (E.D. La. 2008) (discussing the *Lone Pine* orders that were entered in conjunction with the Vioxx Settlement Agreement).

ties to cooperate in publicizing the settlement and to refrain from disparaging the settlement offer in the media.<sup>147</sup>

## 2. Settlement Offer Only Made to Eligible Plaintiffs

Second, private mass tort settlements are only open to “eligible” plaintiffs—that is, plaintiffs with pending claims as of a date certain, often the date on which the initial contract between plaintiffs’ liaison counsel and the defendant(s) is announced.<sup>148</sup> The concept of a pending claim does not necessarily include only individuals who have filed lawsuits, but may also include individuals who have provided notice to the defendant of potential claims in some fashion. For example, in the *Vioxx* litigation, thousands of individuals had entered into “tolling agreements” with Merck that tolled the statutes of limitations and allowed individual claims to be “on file” with the defendant without requiring plaintiffs to file actual lawsuits.<sup>149</sup> And those individuals were eligible to participate in the *Vioxx* Settlement Agreement.<sup>150</sup> Similarly, the Amended WTC Settlement Agreement was open to individuals who had filed state-law “notices of claim” with the City of New York, even if they had yet to file lawsuits as of the eligibility cut-off date.<sup>151</sup>

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<sup>147</sup> See Amended WTC Settlement Agreement, *supra* note 130, § XXII.L (“[A]ny Party may issue press release(s) announcing this Agreement and may without limitation make public statements or comments to any member of the media regarding this Agreement; provided, however, that in making such public statements or comments no Party shall disparage another with respect to this Agreement, any aspect of the negotiation of this Agreement, or [the plaintiffs’] Claims generally.”); *Vioxx* Settlement Agreement, *supra* note 94, § 15.2 (“The parties shall cooperate in the public description of this Agreement and the Program established herein and shall agree upon the timing of distribution.”).

<sup>148</sup> See *Vioxx* Settlement Agreement, *supra* note 94, Recital H (“No claims brought against Merck after the date of this Agreement will be eligible to participate in the Program or receive any payment under the Program.”); see also Sherman, *supra* note 74, at 2215 (noting that the success of *Vioxx* Settlement Agreement was due in part to “its limited scope . . . [which] only applied to pending cases filed by persons who claimed to have suffered injuries from taking the drug”). The Amended WTC Settlement Agreement was only open to plaintiffs with claims pending as of April 12, 2010. See Amended WTC Settlement Agreement, *supra* note 130, § I.O. This cut-off date was approximately one month after the announcement of the Original WTC Settlement, but two months prior to the announcement of the amended agreement.

<sup>149</sup> See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 118 (2010) (“[A]n additional 14,100 claimants had entered into Tolling Agreements with Merck.”).

<sup>150</sup> See *Vioxx* Settlement Agreement, *supra* note 94, § 17.1.22.2.

<sup>151</sup> See Amended WTC Settlement Agreement, *supra* note 130, § I.O.

Limiting the settlement offer to known plaintiffs allows the parties to make accurate estimates concerning how many claims may be covered by the settlement—which, in turn, prevents the dilution of negotiated claim values—and avoids the “if-you-build-it-they-will-come” phenomenon that can undermine aggregate settlements, such as occurred in the Fen-Phen diet drugs litigation.<sup>152</sup> Notably, private mass tort settlements do not attempt to solve the difficult issues surrounding latent disease and the present resolution of future claims. Rather, private mass tort settlements contemplate some future litigation and do not attempt to achieve absolute closure. But the broader context in which these settlements arise (i.e., after several years of litigation, during which important legal issues will have been resolved and applicable statutes of limitations will have been running) ensures that future litigation risks are minimized and predictable.

3. Requisite Percentage of Eligible Plaintiffs Must Individually Opt In, but Plaintiffs who Refuse to Opt In Are Not Bound

Third, private mass tort settlements are “opt-in” settlements. That is, individual plaintiffs must affirmatively accept the settlement offer in order to be bound by the master settlement agreement. The opt-in nature of private mass tort settlements stands in stark contrast to Rule 23(b)(3) class actions, in which class members are bound by the proceeding unless they affirmatively opt out, not to mention Rule 23(b)(1) and (b)(2) class actions that do not even provide class members an opportunity to opt out.<sup>153</sup>

Moreover, private mass tort settlements are not effective unless a large percentage of eligible plaintiffs agree to participate in the settlement process. For example, the Vioxx Settlement Agreement was contingent upon at least eighty-five percent of eligible claimants opting in,<sup>154</sup> and the Amended WTC Settlement Agreement contained an

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<sup>152</sup> See *In re* Diet Drugs Prods. Liab. Litig., 385 F.3d 386, 391 (3d Cir. 2004) (noting that the trust fund established by the class action settlement was “inundated” with claims “in a volume not anticipated by the experts who testified at the fairness hearing” and that “a significant proportion” of these unexpected claims “came from a few law firms that represented large numbers of claimants”).

<sup>153</sup> FED. R. CIV. P. 23(b). Of course, this opt-in requirement is not entirely novel. For example, FLSA suits “only [bind] those [plaintiffs] who affirmatively ‘opt in’ by filing written consents-to-join with the court.” Elizabeth J. Cabraser, *The Class Action Counterreformulation*, 57 STAN. L. REV. 1475, 1518 (2005). Similarly, Judge Shira Scheindlin utilized an “innovative opt-in procedure” in connection with a Rule 23 class action in litigation arising from a “fatal fire aboard a ski train near Kaprun, Austria.” *Id.* (discussing *In re* Ski Train Fire in Kaprun, 220 F.R.D. 195 (S.D.N.Y. 2003)).

<sup>154</sup> Vioxx Settlement Agreement, *supra* note 94, § 11.1.

overall opt-in requirement of ninety-five percent.<sup>155</sup> In addition to an overall opt-in threshold, private mass tort settlements may also contain multiple opt-in conditions for various subclasses of claims.<sup>156</sup> “[A] settlement with a walk-away provision gives the defendant the right to abandon the settlement if more than a certain percentage of plaintiffs decline the offers.”<sup>157</sup> Conditioning the entire settlement on obtaining a certain opt-in percentage is designed to maximize the closure provided by the settlement and ensure that the relative valuations informing the settlement formulas and matrices are not skewed on the back end by a low participation rate.<sup>158</sup>

#### 4. Claims Resolution Facilities Assign Points to Each Claim

Fourth, private mass tort settlements utilize “claims resolution facilities” to afford varying degrees of individualized treatment for each claimant by assigning “point” values to individual claims based on relevant factual and legal circumstances as set forth in a negotiated formula or matrix.<sup>159</sup> This aspect of private mass tort settlements “combine[s] features of multiple allocation categories” on Professor Erichson’s allocation axis, but the important point here is that

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<sup>155</sup> Amended WTC Settlement Agreement, *supra* note 130, § VI.D.i.

<sup>156</sup> In addition to its overall opt-in requirement of ninety-five percent, the Amended WTC Settlement Agreement also imposed a ninety-five percent opt-in requirement on plaintiffs falling into the most severe injury categories and a ninety percent opt-in requirement on plaintiffs in less severe injury categories. *See id.* § VI.D.iii-iv; *see also* Silver & Baker, *supra* note 38, at 765 (discussing an unidentified “asbestos settlement” in which “the defendants reserved the right to kill the deal unless one-hundred percent of the mesothelioma victims and claimants representing eighty-five percent of the total settlement fund accepted the deal”).

<sup>157</sup> Erichson, *supra* note 137, at 1793–94. This aspect of the emerging opt-in paradigm corresponds to “walk-away conditionality” on Erichson’s conditionality axis. *Id.* Prior class action and non-class settlements have contained such “walk-away” or “blowout” rights. *See* Silver & Baker, *supra* note 38, at 737 (“Some defendants make settlement offers that all plaintiffs or a specified number of plaintiffs must accept before any plaintiff is paid.”).

<sup>158</sup> *See* Silver & Baker, *supra* note 38, at 760 (“The desire for finality accounts for a variety of common settlement features, including . . . ceilings on the number of plaintiffs who can reject an offer in a mass action without causing a settlement to explode.”).

<sup>159</sup> *See generally* Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1362 (2005) (“The variety of options available for creating a claims resolution facility are daunting.”); *see also* Lahav, *supra* note 8, at 396 (“A trust or other entity created for the purpose of administering claims decides individual compensation based on a matrix or some other routinized form of decision-making.”).

private mass tort settlements are not simply “inventory” settlements.<sup>160</sup> Rather, private mass tort settlements are based on complex formulas and matrices that ensure that plaintiffs with stronger claims receive larger settlement awards—vertical equity—and that plaintiffs with similar claims receive similar awards—horizontal equity.<sup>161</sup>

Ideally, the formulas and matrices utilized in private mass tort settlements should be informed by real-world information and experience gained as a result of discovery, pretrial legal rulings, and bellwether jury trials. For example, the nineteen bellwether jury trials held across multiple jurisdictions in the *Vioxx* litigation revealed that although all plaintiffs faced hurdles in proving specific causation (i.e., not simply that Vioxx could cause a heart attack or stroke, but that the drug had in fact been a proximate cause of the plaintiff’s injury) older plaintiffs in poor health had the most difficulty establishing this element. This is but one example; the Vioxx Settlement Agreement accounted for a variety of individual circumstances:

The final claims valuation process involves an objective, numerical determination that takes into consideration such individual factors as: age, injury, duration of usage, consistency of use, whether the claimant used Vioxx pre- or post-label adjustment, and the

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<sup>160</sup> Paul Rheingold’s definition of an “inventory” settlement describes the practice from the plaintiffs’ lawyer’s perspective:

You are handling a large number of cases arising out of the same event, let us say clients all injured by the same drug product. Defendant’s counsel comes to you and says that they want to dispose of your entire inventory of cases. Either they ask how much it will take, or, if they are more aggressive, they offer you a very large sum of money to settle all your cases. They could care less how you apportion it among your cases. Their client just does not want to spend the time and money arguing over the value of the cases individually, let alone cutting individual checks.

Erichson, *supra* note 137, at 1787–88 (quoting Paul D. Rheingold, *How to Settle Your Inventory of Mass Tort Cases Ethically*, in TORTS, INS. & COMP. LAW SECTION, N.Y. STATE BAR ASS’N, FALL MEETING 165, 167 (2004)).

<sup>161</sup> *See id.* at 1792 (“[A] lump sum fund may be divided based on a matrix, and the process of placing claimants into the matrix may be handled by a claims facility.”); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04 cmt. f, at 48 (“Ideally, the amount of compensation a claimant receives should reflect the merits of the claim itself, including the likelihood that the claimant would prevail at trial and the amount the claimant would win. Meeting this standard in an aggregate proceeding would ensure horizontal equity (similarly situated claimants receive similar amounts) and vertical equity (more deserving claimants receive larger payments than less deserving ones.”); Anderson, *supra* note 81, at 28 (“This is in marked contrast to the conventional settlement paradigm where factors such as the skill and reputation of the plaintiffs’ and defendant’s trial attorneys, the jurisdiction in which the plaintiff filed suit, and the judge to which the case is assigned can greatly affect the settlement amount.”).

claimant's general health and medical history. Factors in the claimant's medical history that might affect the points award include smoking, cholesterol levels, and whether the claimant or the claimant's family has a history of heart attacks or ischemic strokes.<sup>162</sup>

The important point here is that discovery, pretrial legal rulings, and bellwether trials do not necessarily establish specific monetary "values" for different categories of claims—indeed, juries awarded some plaintiffs in the *Vioxx* litigation hundreds of millions of dollars and zeroed others out—but instead allow the parties to identify relevant circumstances that impact the strength or weakness of individual claims and ensure that settlement awards roughly reflect such differences.

Applying negotiated formulas and matrices to individual plaintiffs' claims requires the claims administrator to review various documentation submitted by each plaintiff, often including a plaintiff's medical records.<sup>163</sup> The Amended WTC Settlement Agreement even required the claims administrator to retain a "medical panel" of at least three licensed physicians to assist the claims administrator "when physician expertise is required" to apply the various medical criteria set forth in the settlement agreement.<sup>164</sup> Once the claims administrator has reviewed and assigned final point values to all claims, the cash value of one point can be determined by dividing the lump-sum settlement amount by the total number of points awarded to the plaintiff population as a whole. Individual awards are then calculated by multiplying the per-point cash value by the total number of points assigned to each plaintiff. Because this approach requires all claims to be reviewed before final payments can be made, private mass tort settlements often provide for partial "interim" or "preliminary" payments to ensure that at least some settlement funds begin to flow expeditiously to claimants.<sup>165</sup> An associated consequence of this

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<sup>162</sup> *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2010 WL 724084, at \*3 (E.D. La. Feb. 18, 2010) (internal citations omitted).

<sup>163</sup> See *Vioxx Settlement Agreement*, *supra* note 94, Ex. 1.3.1 (requiring the submission of relevant medical records and pharmacy records); Amended WTC Settlement Agreement, *supra* note 130, § XI.I (requiring that claim forms be accompanied by relevant medical records).

<sup>164</sup> Amended WTC Settlement Agreement, *supra* note 130, § XI.A.

<sup>165</sup> See *Vioxx Settlement Agreement*, *supra* note 94, § 4.1. As noted above, the Amended WTC Settlement Agreement broke plaintiffs into four "tiers" based on the severity of their alleged injuries and only utilized a "points" system for Tier 4 plaintiffs (i.e., the most severely injured plaintiffs). See Amended WTC Settlement Agreement, *supra* note 130, § XIII. Thus, interim payments were only necessary for

approach is that individual plaintiffs must decide whether to opt in before knowing the *exact* amount of their settlement award.

#### 5. Settlement Formulas and Matrices Are Transparent

Finally, and perhaps most importantly, defendants have not sought to keep confidential the master settlement contract initially entered into with plaintiffs' liaison counsel containing the settlement formulas and matrices,<sup>166</sup> although the precise amounts of subsequent individual awards may remain confidential.<sup>167</sup> This feature of private mass tort settlements can be traced to the *Baycol* litigation, and it is at least a partial departure from defendants' historical insistence on confidential settlements.<sup>168</sup> As a result, private mass tort settlements are much more transparent than traditional private settlements—each individual plaintiff, and the public at large, has the opportunity to review and examine the structure of private mass tort settlements. This not only ensures compliance with the “aggregate settlement rule,”<sup>169</sup> but, as argued below, it also addresses some of the strongest traditional criticisms of settlements in general.<sup>170</sup> Of course, the new transparency is largely dictated by the form of private mass tort settlements (e.g., contracts between plaintiffs' liaison counsel and the defendant(s) setting forth an offer) and the sheer size of mass tort plaintiff populations. The settlement offer essentially has to be “sold” to each individual plaintiff by plaintiffs' liaison counsel, the defendant(s), and, perhaps, the court—and it is hard to sell a secret.

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Tier 4 plaintiffs, *id.* § IX.C, as plaintiffs in the other tiers received final payments in fixed amounts, *id.* §§ IX.A–B.

<sup>166</sup> See Amended WTC Settlement Agreement, *supra* note 130, § XXI.K (“Once executed, this Agreement shall not be confidential and may be disclosed without limitation by any Party . . .”).

<sup>167</sup> See Vioxx Settlement Agreement, *supra* note 94, § 15.1 (“[T]he amount of any payments and/or awards made to Enrolled Program Claimants under this Agreement . . . shall be kept confidential by the Parties.”).

<sup>168</sup> See, e.g., *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (“Parties who settle a legal dispute rather than pressing it to resolution by the court often do so, in part anyway, because they do not want the terms of the resolution to be made public. Defendants in particular are reluctant to disclose the terms of settlement, lest those terms encourage others to sue.”); *Erichson & Zipursky*, *supra* note 98, at 279 (“Unlike many mass tort settlement agreements, the Vioxx agreement was made public, so the full details of its terms are available.”).

<sup>169</sup> See *infra* note 173 and accompanying text.

<sup>170</sup> See *infra* Part IV.B.

## IV. JUDICIAL REVIEW OF PRIVATE MASS TORT SETTLEMENTS

To date, very little attention has been focused on the proper role for judges to play when mass tort litigation is settled pursuant to the emerging opt-in paradigm defined in this Article.<sup>171</sup> Perhaps not surprisingly then, courts have struggled in applying the established principles discussed above concerning the scope of judicial authority to evaluate and oversee the implementation of traditional settlements in the unfamiliar context of private mass tort settlements.

Notwithstanding the *Principles of the Law of Aggregate Litigation's* recognition that “[s]ignificant differences between class and non-class cases require that these two types of cases be treated differently for purposes of settlement,”<sup>172</sup> its formal treatment of judicial authority in the non-class context is limited to a hypothetical future in which the aggregate settlement rule has been relaxed.<sup>173</sup> In short, the *Principles of the Law of Aggregate Litigation* proposes a regime in which the attorney-client relationship is established by modernized contingency

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<sup>171</sup> *But see supra* note 8 and accompanying text; PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.01 cmt. a, at 188 (“Non-class aggregate settlements, by contrast, involve attorneys who have been hired by the individual claimants and whose relation to claimants is subject to contract. Non-class settlements do not normally require court approval, and the approval mechanism is governed by the retainer agreement, subject to the rules of professional responsibility.”).

<sup>172</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.15, at 257.

<sup>173</sup> “Rule 1.8(g) of the Model Rules of Professional Conduct is known as the aggregate settlement rule,” Silver & Baker, *supra* note 38, at 734, and it provides as follows:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.

MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2010); *see also* Erichson, *supra* note 137, at 1805 (noting that the aggregate settlement rule “mandates that no party be bound by a settlement unless that party agrees to it after full disclosure”); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 584 (“The purpose of the [aggregate settlement] rule appears to be to prevent attorneys from trading off the interests of clients without their informed consent.”). Notably, private mass tort settlements do not run afoul of the aggregate-settlement rule because individual plaintiffs have the opportunity to review the structure of these settlements before deciding whether or not to opt in, and because such settlements do not bind those plaintiffs who choose not to opt in. *See* Erichson, *supra* note 137, at 1801 (“Because such settlements use collective methods of allocating funds, rather than plaintiff-by-plaintiff settlement negotiation, clients must understand the deal as a whole in order to make an informed decision on whether to accept it.”); Silver & Baker, *supra* note 38, at 755 (noting that the aggregate settlement rule “appears to allow any client to settle his or her own claim while authorizing no client to determine whether another’s claim will be settled or not”).

fee contracts whereby individual plaintiffs agree “to be bound by a substantial-majority vote of all claimants concerning an aggregate settlement proposal.”<sup>174</sup> The *Principles of the Law of Aggregate Litigation*, however, does not attempt to set forth guidelines for the exercise of judicial authority over non-class aggregate settlements that only bind those plaintiffs who affirmatively opt in to them (i.e., private mass tort settlements).<sup>175</sup> This is a significant open question that deserves attention because it is of immediate concern for litigants, lawyers, and judges involved in mass tort litigation today.<sup>176</sup>

The new regime presented in the *Principles of the Law of Aggregate Litigation* would, however, expand the circumstances in which aggregate settlements could bind individual plaintiffs who may not affirmatively support such settlements.<sup>177</sup> In a somewhat similar vein, Professor Elizabeth Chamblee Burch has proposed a “litigating-together approach” whereby the courts would facilitate communication between mass tort plaintiffs in the hopes that the plaintiffs themselves

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<sup>174</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b), at 262. The new regime presented in the *Principles of Aggregate Litigation* has been subjected to various criticisms. See Erichson & Zipursky, *supra* note 98, at 309–11 (“[ALI’s] advance consent proposal presents a client-client conflict of interest that is nonconsentable.”); Nancy J. Moore, *The Absence of Legal Ethics in the ALI’s Principles of Aggregate Litigation: A Missed Opportunity—And More*, 79 GEO. WASH. L. REV. 717, 719 (2011) (“With respect to non-class aggregations, I argue that the Principles’ failure to address ethical rules governing communications and conflicts of interest outside the context of aggregate settlements makes it likely that mass tort lawyers will continue to treat their clients as if they were absent members of a class, without the protections afforded a class.”).

<sup>175</sup> Cf. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 3.17(d)–(e), at 263–64 (contemplating judicial review of aggregate settlements reached pursuant to the ALI’s new advance consent regime). These observations should not be interpreted as a criticism of the *Principles of Aggregate Litigation*. Rather, I simply mean to highlight the fact that the formal treatment of non-class aggregate settlements in the *Principles of Aggregate Litigation* merely sets forth a new regime for judges, legislators, state bar associations, and other rule-makers to consider enacting. And unless the ALI’s silence on this issue can be interpreted as an endorsement of the application of the traditional view that courts lack authority over private settlements to the non-class aggregate settlement context, the *Principles of Aggregate Litigation* leave open for debate the question of whether courts should have the authority to evaluate or oversee the implementation of private mass tort settlements that conform to the emerging opt-in paradigm discussed in this Article.

<sup>176</sup> In a 2003 article, Professor Erichson suggested that one might “evaluate whether the same concerns that necessitate judicial approval of class settlements and fees also suggest the need for judicial approval of certain non-class settlements and fees in collective representation.” Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 527. This Article performs that analysis with respect to private mass tort settlements.

<sup>177</sup> See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17, at 262.

would agree to a majority voting rule.<sup>178</sup> Moreover, Professor Alexandra Lahav recently proposed a “model bellwether trial procedure” whereby the results of bellwether trials would be “extrapolated” to bind non-trial plaintiffs with similar claims.<sup>179</sup> I continue to be troubled by the ongoing search for novel ways to bind individual mass tort plaintiffs to outcomes by which they do not affirmatively agree to be bound (in the case of Professor Lahav’s bellwether trial procedure) or do not affirmatively support (in the case of the ALI’s majority voting rule for non-class settlements and Professor Burch’s litigating-together approach). Indeed, in my view, the one overarching lesson to be learned from the demise of the mass tort class action is that individual plaintiffs’ rights cannot be sacrificed in the pursuit of an “efficient” resolution of complex litigation. Moreover, during the last decade, innovative approaches have proven that individual plaintiffs’ rights need not be so sacrificed. For example, Judge Fallon has argued that bellwether trials need not be binding on non-trial plaintiffs to contribute to the fair and efficient resolution of mass tort litigation.<sup>180</sup> And, as I argue in this Article, private mass tort settlements can effectively resolve mass tort litigation by providing significant closure while preserving individual plaintiffs’ rights to choose whether they wish to be bound by such settlements.

Although the structure of private mass tort settlements may be novel, the general question concerning the proper scope of judicial authority over particular types of settlements is not new. Over fifteen years ago, Professor Carrie Menkel-Meadow sought to re-frame the debate “for or against” settlement as follows:

At the core of this assessment is a prior question about “possession” of the dispute. If the parties “own” their dispute, then party consent must be our democratic justification for settlement. If someone other than the parties (affected third parties, the public) have [sic] an interest in the dispute, we must consider ways to assess how our party-initiated and party-controlled legal system can be adapted to take account of such interests and how those interests can be raised. . . . [A] “jurisprudence of settlement” is waiting to be invented . . . .<sup>181</sup>

This framework provides a convenient lens through which to consider the present question concerning the appropriate role for courts to

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<sup>178</sup> Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87 (2011).

<sup>179</sup> Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 634–37 (2008).

<sup>180</sup> See Fallon, Grabill & Wynne, *supra* note 74, at 2337–38.

<sup>181</sup> Menkel-Meadow, *supra* note 17, at 2696.

play vis-à-vis private mass tort settlements. A uniform understanding of judicial authority in this context—and its consistent application—would benefit litigants, lawyers, and courts by clarifying one of the most significant areas of uncertainty in the post-class action world of mass torts.<sup>182</sup>

Thus, I propose that any jurisprudence of private mass tort settlements must be founded upon the well-established principle that the settlement of private litigation is solely a matter for the parties. Indeed, unlike the specific situations discussed above in Part II, no statute or rule mandates or authorizes judicial review of private mass tort settlements. Nor can the common law “quasi-class action” theory support judicial review of private mass tort settlements. Rather, like settlements in traditional one-on-one litigation, each affected litigant must affirmatively agree to be bound by a private mass tort settlement. Accordingly, unless the parties jointly seek court approval or oversight of private mass tort settlements that conform to the opt-in paradigm described above, courts have no authority to evaluate, approve, oversee the implementation of, or reject such settlements. That said, courts continue to have significant control over mass tort litigation in general and can have very meaningful influence over the context in which private mass tort settlements emerge.<sup>183</sup>

A. *Courts Do Not Have the Authority to Review Private Mass Tort Settlements*

Unlike the specific settlements discussed in Part II of this Article, no statute or rule authorizes or requires judicial review of private mass tort settlements.<sup>184</sup> This should not be surprising, however, be-

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<sup>182</sup> See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 cmt. b, at 56–57.

Historically, judges have had extensive power to manage class actions, but less power to manage other aggregations. In recent years, judges have expanded their authority to manage non-class aggregations, however, and differences between types of proceedings have been blurred. For example, judges have recently begun to import class-action management procedures into multidistrict litigations, including procedures relating to appointment of counsel and regulation of lawyers’ fees. In so doing, they have drawn upon some of the parallels between multidistrict litigations and class actions. In this way, class-action-style procedures have come to be employed in mass-tort lawsuits where class actions could not ordinarily be certified.

*Id.*

<sup>183</sup> See *infra* Part IV.D.

<sup>184</sup> In several settlement-related orders in the *Vioxx* litigation, Judge Fallon grounded his authority not only upon the specific authority conferred upon him by the *Vioxx* Settlement Agreement but also upon his “inherent authority” as a transferee judge. See, e.g., *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2010 WL 724084, at

cause private mass tort settlements that conform to the emerging opt-in paradigm do not adjudicate the rights of absent or unrepresented parties, or the public at large. Rather, this new approach to settling mass tort litigation preserves each individual plaintiff's right to decide whether to opt in to the settlement or instead continue litigating, and this is of paramount importance.<sup>185</sup>

As noted above, the traditional view is that "an active role for the trial court in approving the adequacy of a settlement is the exceptional situation, not the general rule."<sup>186</sup> The United States Court of Appeals for the Fifth Circuit stated this private-settlement maxim as follows:

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\*3 n.9 (E.D. La. Feb. 18, 2010) (referencing Pretrial Order No. 32, in which the court relied upon both its express authority under the Vioxx Settlement Agreement and its "inherent authority over this multidistrict litigation" to appoint a committee of plaintiffs' lawyers to make a recommendation concerning the allocation of any common benefit fee award). Pretrial Order No. 32 is available online in its entirety. Pretrial Order No. 32, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 20, 2007), ECF No. 13007, available at <http://vioxx.laed.uscourts.gov/Orders/vioxx.pto32.pdf>. Although a full discussion of the continuum of a transferee court's authority (express and implied) over all aspects of multidistrict litigation is beyond the scope of this Article, it will suffice for present purposes to note that 28 U.S.C. § 1407 has never been interpreted to confer authority upon a transferee court to approve or reject non-class aggregate settlements.

<sup>185</sup> See Erichson & Zipursky, *supra* note 98, at 269 ("[T]he preservation of certain basic aspects of client consent is essential to settlement in non-class aggregate litigation. Consent, not closure, determines legitimacy."); Richard Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 768 (2002) ("For present purposes, the point is simply that this underlying notion of consent, rooted in client autonomy, is what gives aggregate settlements their legitimacy."). The *Principles of the Law of Aggregate Litigation's* discussion of class action notice procedures highlights the continued insistence on preserving the opportunity for individual participation in complex litigation. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION intro., at 1 ("It must be clear to everyone that notice has little chance of converting class members with small interests into active participants in class actions. Sending these claimants notices wastes money and time. Even so, the practice continues, reflecting a well-intentioned belief that the apparent potential for individual participation lends greater legitimacy to the aggregate proceeding.").

<sup>186</sup> *United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980), modified on *reh'g en banc*, 664 F.2d 435 (5th Cir. 1981); see also *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1025 (2d Cir. 1992) ("Typically, settlement rests solely in the discretion of the parties, and the judicial system plays no role."); *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1189 (8th Cir. 1984) ("In ordinary litigation, that is, lawsuits between private parties, courts recognize that settlement of the dispute is solely in the hands of the parties."). The U.S. Supreme Court recently referenced this reality in dicta in a case concerning fee-shifting and "prevailing party" status. See *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Res.*, 532 U.S. 598, 604 n.7 (2001) ("Private settlements do not entail the judicial approval and oversight involved in consent decrees.").

In what can be termed “ordinary litigation,” that is, lawsuits brought by one private party against another private party that will not affect the rights of any other persons, settlement of the dispute is solely in the hands of the parties. If the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved. . . . “[T]he traditional view is that the judge merely resolves issues submitted to him by the parties . . . and stands indifferent when the parties, for whatever reason commends itself to them, choose to settle a litigation.”<sup>187</sup>

The Fifth Circuit also recognized that that this well-settled concept is now essentially codified in the Federal Rules of Civil Procedure: “[P]rocedurally it would seem to be impossible for the judge to become involved in overseeing a settlement, because the parties are free at any time to agree to a resolution of the dispute by private contractual agreement, and to dismiss the lawsuit by stipulation.”<sup>188</sup> This private-settlement maxim applies with equal force to non-class aggregate settlements.<sup>189</sup>

The most relevant reported example of this principle occurred in several consolidated cases in Minnesota federal court concerning the Dalkon Shield intrauterine contraceptive device.<sup>190</sup> In 1983, Judge Miles W. Lord was assigned to preside over multiple individual tort suits brought against A.H. Robins Company alleging personal injuries as a result of use of the Dalkon Shield.<sup>191</sup> Shortly after the defendant’s attempt to disqualify Judge Lord failed, the parties reached a settlement in several individual cases, two of which were pending

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<sup>187</sup> *City of Miami*, 614 F.2d at 1330 (quoting *Heddendorf v. Goldfine*, 167 F. Supp. 915, 926 (D. Mass. 1958)); see also *Georgevich v. Strauss*, 96 F.R.D. 192, 197 (M.D. Pa. 1982); *United States v. Louisiana*, 527 F. Supp. 509, 512 (E.D. La. 1981); MANUAL FOR COMPLEX LITIGATION § 13.14 (4th ed. 2004) (“Ordinarily, settlement does not require judicial review and approval.”); Resnik, *supra* note 8, at 854 (“Absent facially invalid agreements, courts routinely enter proposed consent judgments as presented; they have neither obligation nor permission in individual civil litigation to scrutinize the adequacy of settlements.”).

<sup>188</sup> *City of Miami*, 614 F.2d at 1330. The limited exception to this statement concerning the retention of enforcement jurisdiction is discussed below. See *infra* Part IV.D.

<sup>189</sup> See, e.g., Chamblee, *supra* note 8, at 177 (“In non-class aggregated settlements, judges have no authority to reject the settlement or inquire into its fairness.”); Lahav, *supra* note 8, at 432 (recognizing that “aggregative settlements under the auspices of MDL judges” are not subject to “judicial approval”).

<sup>190</sup> See *Gardiner*, 747 F.2d 1180. These cases were initially filed in Minnesota state court and subsequently removed by the defendant, *id.* at 1183–84, and never made it to the Dalkon Shield MDL in Kansas federal court.

<sup>191</sup> *Id.* at 1184.

before Judge Lord.<sup>192</sup> The settlement “provided for stipulated dismissals of the cases” pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and Judge Lord initially recognized that “he had no authority to interfere with the settlement and that reaching such an agreement was a private matter to be entrusted to the parties.”<sup>193</sup>

But the very next day, during a hearing at which the parties executed the settlement agreement and presented their stipulations of dismissal to the court, Judge Lord asked if there was a signature line for him on the settlement agreement.<sup>194</sup> The parties responded that there was not because they had not anticipated that Judge Lord would have to approve the settlement.<sup>195</sup> Nevertheless, after forcing several of the defendant’s corporate officers to sit in the courtroom and read a copy of a religious speech that Judge Lord had given several years earlier criticizing American corporations, and then verbally reprimanding those officers himself, Judge Lord affixed a “so ordered” notation and his signature to the bottom of the settlement agreement.<sup>196</sup> Although the parties did not object to Judge Lord’s dismissal of the settled cases, the defendant appealed the “so ordering” of the parties’ private settlement agreement.<sup>197</sup> The United States Court of Appeals for the Eighth Circuit struck Judge Lord’s notation as improper because the parties had not “mutually agreed to court approval” of the settlement, and, therefore, “the effect of Judge Lord’s notation was an attempt to convert the document into some-

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<sup>192</sup> See *id.* Robins argued that Judge Lord was biased and prejudiced against the company, *id.*, and, although Judge Lord denied Robins’ motion for disqualification, he eventually admitted that he had indeed been biased. See *id.* at 1192 n.17 (“I have concluded that the plaintiffs are right and that the things I say are based—they are my judgment based on the record. You don’t have to argue that I am prejudiced at this point. I am.”).

<sup>195</sup> *Id.* at 1184–85. The phrase quoted in the text above is the Eighth Circuit’s paraphrasing, but the court also reproduced Judge Lord’s own words on this point:

Here is my view of the matter. If this were a class action case or a case that had within it equity and, you know, injunctions and things of that kind, I would be very concerned about it. But even though I personally view all of these litigations as one, coming from one nexus of facts and one nexus of causation, I don’t think that technically I have authority to interfere with the settlement that you have made.

*Id.* at 1185 n.6.

<sup>194</sup> *Id.* at 1185.

<sup>195</sup> *Gardiner*, 747 F.2d at 1185.

<sup>196</sup> *Id.* at 1186.

<sup>197</sup> *Id.*

thing the parties neither anticipated nor negotiated” (i.e., a court order “enforceable by contempt”).<sup>198</sup>

*B. Courts Do Not Need the Authority to Review Private Mass Tort Settlements*

As a normative matter, it is impossible to ignore the fact that the emerging opt-in paradigm for mass tort settlements addresses many of the traditional criticisms of both the trend toward settlement in general<sup>199</sup> and aggregate settlements in particular.<sup>200</sup> In those respects, the most notable features of private mass tort settlements are their transparency and respect for individual rights—the latter being reflected by both the individualized treatment of claims informed by discovery, pretrial rulings, and bellwether trials, as well as the individual opt-in requirement.<sup>201</sup> As a result, there is simply no justification for courts to assume the formal responsibility of reviewing private mass tort settlements to ensure that they are “fair” and “adequate.” Whether private mass tort settlements are “fair” and “adequate” are matters for each individual plaintiff to consider before deciding whether or not to opt in to the claims processes created by such settlements.

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<sup>198</sup> *Id.* at 1189–90. On appeal, the Eighth Circuit also found that Judge Lord’s treatment of the defendant’s officers “exhibit[ed] a pervasive bias and prejudice” and “deprive[d] Robins of its due process right to a hearing before an impartial judge.” *Id.* at 1192. Thus, although the Eighth Circuit’s analysis of the impropriety of Judge Lord’s approval of the private settlement agreement stands of its own force in my view, it must nevertheless be understood in the unusual context in which it occurred.

<sup>199</sup> See sources cited *supra* note 17.

<sup>200</sup> See, e.g., Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 36 (2009) (noting that “[m]ore often than not,” aggregate settlements “include confidentiality provisions”); Lahav, *supra* note 8, at 390–91 (lamenting that “claims administration systems” are “an administrative structure providing non-individualized resolution for mass claims”).

<sup>201</sup> See Burch, *supra* note 200, at 36–37 (recognizing several benefits that would be achieved with “greater transparency and less confidentiality in aggregate settlements,” including providing “interested non-party public observers” access to information that could “enhance social welfare”); Lahav, *supra* note 8, at 431 (“Transparency is critical to a humanized bureaucracy because it makes claimant responses to the claims administration facility possible. Control over information is power, and by allowing all the players to have access to information and to the decision-making process of the bureaucracy, that power is dispersed.”); see also John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1446 (2003) (“[W]e therefore propose to limit a [class action] settlement’s binding effect to those members of the class who affirmatively agree to the settlement—that is, those who opt in.”).

Much of the traditional criticism of settlement (whether in individual or aggregate litigation) has been based on the assumption that “early settlement focus circumnavigates conventional litigation between adversaries,” and, thus, “[f]acts and evidence usually unearthed during the discovery process remain buried.”<sup>202</sup> Although that may be true in some instances, the recent settlements in the *Baycol*, *Vioxx*, and *World Trade Center Disaster Site* mass tort litigations occurred after significant discovery and litigation activity, and, in the cases of *Baycol* and *Vioxx*, after multiple bellwether jury trials.<sup>203</sup> Indeed, by deciding controlling legal issues expeditiously and adopting bellwether trial plans, courts can ensure that the complex settlement formulas and matrices used in private mass tort settlements are informed by, and account for, the legal and factual issues impacting individual plaintiffs’ claims.<sup>204</sup> Not only do these approaches reflect an engaged and responsive judiciary, but they can also remove much of the uncertainty that would otherwise surround an individual plaintiff’s evaluation of his or her own case and allow for a public airing of mass tort disputes.<sup>205</sup>

For example, the full-fledged discovery necessary to prepare for bellwether trials will often reveal many of the factual circumstances relevant to the ultimate success or failure of individual plaintiffs’ claims. Judge Fallon explained the institutional benefits of his use of bellwether jury trials in the *Vioxx* litigation as follows:

[B]y injecting juries and fact-finding into multidistrict litigation, bellwether trials assist in the maturation of disputes by providing an opportunity for coordinating counsel to *organize* the products of pretrial common discovery, *evaluate* the strengths and weaknesses of their arguments and evidence, and *understand* the risks and costs associated with the litigation. . . . [T]he knowledge and experience gained during the bellwether process can precipitate global settlement negotiations and ensure that such negotiations

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<sup>202</sup> Burch, *supra* note 200, at 32; *see also* sources cited *supra* note 17.

<sup>203</sup> *See supra* Part III.A.1–3.

<sup>204</sup> Before the emergence of private mass tort settlements, Professors Issacharoff and Witt made a similar observation when discussing the “inevitability” of aggregate settlements. *See* Issacharoff & Witt, *supra* note 3, at 1636 (“[C]ourts may be best advised to decide individual cases by reference to long-standing, traditional tort standards, without regard to the private settlement institutions that will emerge in their shadow.”).

<sup>205</sup> *See, e.g.*, Burch, *supra* note 200, at 26–28 (“Perhaps oddly, people are often more concerned with just procedures than fair outcomes.”). *But see* Issacharoff & Klonoff, *supra* note 17, at 1196 (“The notion that claimants in suits seeking exclusively or primarily damages are disserved by not obtaining a formal court finding of wrongdoing does not comport with reality in many circumstances.”).

do not occur in a vacuum, but rather in light of real-world evaluations of the litigation by multiple juries.<sup>206</sup>

But even if the parties settle before bellwether jury trials are held, such as occurred in the *World Trade Center Disaster Site* litigation, the knowledge gained during discovery in preparation for such trials can nevertheless inform the relative valuations reflected in the structure of the settlement formulas and matrices. Moreover, authoritative pretrial rulings on significant legal issues can also assist in the maturation of mass tort disputes and supply useful information to be factored into settlement negotiations.

For example, in the *Vioxx* litigation, the question of whether or not the plaintiffs' claims were preempted by virtue of the activities and regulations of the Food and Drug Administration was a central legal issue that was vigorously disputed.<sup>207</sup> Notwithstanding Judge Fallon's holding that the plaintiffs' claims were not preempted, the anticipation that the U.S. Supreme Court might soon resolve the same preemption issue differently in an upcoming case—and thereby render the plaintiffs' claims in the *Vioxx* litigation essentially worthless—created strong motivations for both sides to consider settlement.<sup>208</sup> Notably, after the *Vioxx* Settlement Agreement was announced, the Supreme Court issued its opinion in *Wyeth v. Levine*, which held, consistent with Judge Fallon's reasoning, that state law failure-to-warn claims are generally not preempted in the pharmaceutical context.<sup>209</sup> Nevertheless, this is a stark example of the uncertainties of mass tort litigation and a reminder that each private mass tort settlement must be evaluated by reference to the real-world context in which it arose.

Beyond the general criticism that settlement circumnavigates conventional litigation activities, it has also been argued that judicial review of non-class aggregate settlements is necessary because the opt-in process may exhibit elements of "collusion" or "coercion." For example, Professor Burch has argued that "[i]n aggregated mass tort litigation, clients with an attenuated attorney-client relationship must choose between settlement and independent expensive litigation, which offers the client little meaningful choice."<sup>210</sup> This argument is

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<sup>206</sup> Fallon, Grabill & Wynne, *supra* note 74, at 2325.

<sup>207</sup> See *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 776, 780 (E.D. La. 2007).

<sup>208</sup> See *id.* at 788 (denying Merck's motion for summary judgment on federal preemption grounds).

<sup>209</sup> 555 U.S. 555, 581 (2009).

<sup>210</sup> Chamblee, *supra* note 8, at 248. It is unclear to me how continued litigation can be considered an inadequate option for mass tort plaintiffs. By filing lawsuits in

founded upon the belief that “collective representation . . . permits collusion and inequitable settlement allocations that lead to second-class justice for mass tort claimants.”<sup>211</sup> Professors Erichson and Zipursky have similarly argued that “[t]he mandatory recommendation and mandatory withdrawal provisions of the Vioxx [S]ettlement run afoul of several legal ethics rules”<sup>212</sup> and “made it practically impossible for a claimant to decline the offer.”<sup>213</sup>

As noted above, however, I do not consider the provisions of the Vioxx Settlement Agreement that Professors Erichson and Zipursky attack to be necessary aspects of the emerging opt-in model for private mass tort settlements.<sup>214</sup> The Amended WTC Settlement Agreement did not contain such provisions yet it still garnered over ninety-five percent participation, and I believe that the Vioxx Settlement Agreement would have been successful even without the mandatory recommendation and mandatory withdrawal provisions in light of the preemption issue that was swirling around the litigation.<sup>215</sup> But even assuming that collusion is afoot in mass tort litigation, private mass tort settlements preserve the ability of each individual plaintiff to decide whether or not he or she wishes to settle on the terms offered or instead continue with litigation. In that regard, it might be surprising to learn that the plaintiffs’ lawyers that negotiated the Vioxx Settlement Agreement only represented approximately twenty-five percent of the plaintiffs that ultimately opted in to the deal.<sup>216</sup> Thus, not only

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the first place, plaintiffs must be presumed to understand that litigation is the default method for resolving civil disputes in the American justice system.

<sup>211</sup> *Id.* at 161.

<sup>212</sup> Erichson & Zipursky, *supra* note 98, at 281.

<sup>213</sup> *Id.* at 266.

<sup>214</sup> *See supra* note 98.

<sup>215</sup> It should be noted that the Fifth Circuit recently affirmed Judge Fallon’s rejection of a challenge by a plaintiff who invoked these very provisions to argue that he had been coerced by his attorney into opting in to the Vioxx Settlement Agreement. *See In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2010 WL 724084, at \*6 (E.D. La. Feb. 18, 2010) (“Plaintiff cannot now back out of the Settlement Agreement which he voluntarily entered.”), *aff’d*, *In re Vioxx Prods. Liab. Litig.*, 412 F. App’x 653, 654 (5th Cir. 2010) (noting that “[a] settlement agreement is a contract, which is interpreted by reference to state law,” and that under Louisiana law, “consent may be vitiated by error, fraud, or duress”). The Fifth Circuit found no indication of fraud—and, indeed, held that the plaintiff’s consent was voluntary—because the settlement agreement “contained the provisions about which [plaintiff] complains, and he received a full copy of the agreement to review before he signed the consent.” *In re Vioxx*, 412 F. App’x at 654.

<sup>216</sup> This was revealed in a recent filing in the *Vioxx* litigation. Following the announcement of the settlement, Judge Fallon appointed a “fee allocation committee” to make recommendations concerning the allocation of any common-benefit fee award. *See* Pretrial Order No. 32, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D.

did each and every plaintiff retain the right to evaluate the Vioxx Settlement Agreement before deciding whether to opt in, but also seventy-five percent of the plaintiffs who did opt in were represented by counsel who had no role in negotiating the master settlement offer. Ultimately, if a private mass tort settlement sets forth inequitable settlement allocations—whether as a result of collusion or otherwise—individual plaintiffs can simply refuse to opt in to the settlement. Indeed, “[c]lients’ retention of power to reject settlements individually provides the best assurance of arms-length negotiations that go not only to the aggregate amount, but also to individual allocations.”<sup>217</sup>

Moreover, some have suggested that the “power of governance” wielded by plaintiffs’ counsel who negotiate mass tort settlements needs to be “constrained.”<sup>218</sup> But the unique structure of private mass tort settlements would seem to quell most governance-based concerns. For example, Professor Nagareda’s conception of “governance” includes “the power to alter preexisting legal rights” and “the power to make those alterations binding upon individuals in order to advance the greater good.”<sup>219</sup> As described in Part III of this Article,

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La. Nov. 20, 2007), ECF No. 13007, *available at* <http://vioxx.laed.uscourts.gov/Orders/vioxx.pto32.pdf> (appointing plaintiffs’ lawyers to the fee allocation committee). The fee allocation committee consisted of nine plaintiffs’ lawyers (including each of the six plaintiffs’ lawyers who negotiated the Vioxx Settlement Agreement). *Id.* at 1–2. The fee allocation committee’s recommendation was provided to the court on January 19, 2011, and in the recommendation, the committee noted that its members “[r]epresented 25% of the total participants enrolled in the Settlement Program.” *See Order, In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Jan. 20, 2011), ECF No. 60391, *available at* <http://vioxx.laed.uscourts.gov/Orders/012011.or.pdf>.

<sup>217</sup> Erichson, *supra* note 176, at 573; *see also id.* at 578–79 (“The right to decline an aggregate settlement should give clients comfort that their lawyer, while generally pursuing group interests to maximize the collective recovery, retains an incentive to negotiate an adequate and fair settlement for each plaintiff.”). Judge Weinstein noted over fifteen years ago that “[o]ur current general code of ethics assumes a Lincolnesque lawyer strongly bonded to an individual client,” but “[i]n mass torts the facts do not fit this picture.” Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 481 (1994). Although I do not disagree with Judge Weinstein, this Article focuses on the role of the judiciary vis-à-vis private mass tort settlements, and, therefore, issues concerning possible revisions to ethical rules to account for the realities of modern mass tort litigation are beyond its scope.

<sup>218</sup> NAGAREDA, *supra* note 1, at ix–x; *see also* Burch, *supra* note 200, at 48 (“There has long been discord between overly traditional individual process and mass tort litigation. Central to this debate is whether to treat nonclass aggregation in the same manner as individual lawsuits, or to create alternative governance theories to handle the increasing differences and complications that flow from adjudicating large numbers of claims.”).

<sup>219</sup> NAGAREDA, *supra* note 1, at x. In my view, Professor Nagareda’s governance-based concerns are best understood in relation to mass tort litigation involving latent diseases and associated settlements that attempt to resolve future claims.

in the context of private mass tort settlements, plaintiffs' liaison counsel merely negotiate the structure of the settlement offer; individual plaintiffs must affirmatively opt in (i.e., accept the offer) before their preexisting legal rights are permanently altered.<sup>220</sup> Thus, concerns about governance do not supply a justification for judicial review of private mass tort settlements.

Finally, mass tort litigation has been said to exhibit "quasi-public components" because it "impacts more than just parties to the lawsuit."<sup>221</sup> This view seems to be based on the fact that mass tort litigation often "ignite[s] heated public policy debates" and "[b]ecause aggregate litigation frequently involves 'social policy torts,' the litigation's ripple effect on regulatory policies and product availability are [sic] of primary concern."<sup>222</sup> Some commentators have suggested that these "quasi-public components" of mass tort litigation justify judicial review of mass tort settlements.<sup>223</sup> But whether or not mass tort litigation in the post-class action era can be generically described as exhibiting "quasi-public components," private mass tort settlements only bind those individual plaintiffs who affirmatively choose to be bound. Thus, in light of this reality, and because no statute or rule authorizes judicial review of private mass tort settlements, the traditional maxim that settlement is a matter solely for the parties applies with equal force when mass tort litigation is settled in accordance with the emerging opt-in paradigm described in this Article.

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<sup>220</sup> That said, because private mass tort settlements continue the trend toward the private administration of mass tort claims, they will likely be subject to revised criticisms of that trend. See, e.g., Lahav, *supra* note 8, at 428 ("Claims administration may be seen as a trust that the legislature has placed in the courts. Privatization has a greater potential to erode legitimacy and fairness in the court system than any administrative structure set up to resolve mass claims within the court system.").

<sup>221</sup> Burch, *supra* note 200, at 12; see also Weinstein, *supra* note 217, at 474 ("Mass tort cases and public litigations both implicate serious political and sociological issues. Both are restrained by economic imperatives. Both have strong psychological underpinnings. And both affect larger communities than those encompassed by the litigants before the court.").

<sup>222</sup> Burch, *supra* note 200, at 24.

<sup>223</sup> See Menkel-Meadow, *supra* note 17, at 2686 ("In situations in which mass numbers of cases affect the functioning of the public litigation system or the public interest is obviously involved or implicated in court action . . . appropriate scrutiny of the settlement is in order."); *id.* at 2695 ("I am persuaded that certain settlements so implicate the interests of those beyond the dispute that some 'public' exposure of such cases may be a necessary part of our democratic process. . . . [M]ass torts actions, by their very nature, fall into this class of 'public' cases not only because they affect many potential victims, but because the sheer numbers of these cases have had a significant impact on our justice system.").

C. *Misplaced Reliance on the Quasi-Class Action Theory*

A few words are also necessary about the newly minted “quasi-class action” theory invoked by district courts to regulate contingency fees for plaintiffs’ counsel in several recent mass tort cases because the theory has the potential to be used as a justification for judicial review of private mass tort settlements. The *Principles of Aggregate Litigation* succinctly summarizes this recent trend:

[C]ourts in consolidated multidistrict litigation in the federal system have begun to articulate—with some ambiguity—the concept of a “quasi-class action,” and, on that basis, have issued orders concerning the allocation of fees as between the two types of lawyers—orders that, in practical effect, tax the fees for lawyers who represent claimants on the remaining issues in the litigation to account for the benefit provided by the lawyers in the aggregate proceeding.<sup>224</sup>

Although the quasi-class action theory has primarily been utilized to regulate attorneys’ fees, a brief critique of this theory is necessary to explain why it cannot justify judicial review of private mass tort settlements and why it is superfluous when invoked to support the regulation of attorneys’ fees in connection with such settlements.<sup>225</sup>

The reliance on a quasi-class action theory to cap or fix plaintiffs’ counsel’s contingency fees in connection with private mass tort settlements can be traced to Judge Jack B. Weinstein’s approach in the *Zyprexa* products liability multidistrict litigation.<sup>226</sup> Recognizing

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<sup>224</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.09 cmt. c, at 172.

<sup>225</sup> In a recent article, Professors Charles Silver and Geoffrey Miller argue that “judicial appointment of lead attorneys, judicial control of lead attorneys’ compensation, forced fee transfers, and fee cuts . . . jointly constitute the emerging ‘quasi-class action’ approach to MDL management.” Silver & Miller, *supra* note 149, at 110. Silver and Miller trace the “roots of the quasi-class action doctrine” back to 1977. *See id.* at 110 n.7 (discussing *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1012 (5th Cir. 1977)) (“[T]he number and cumulative size of the massed cases created a penumbra of class-type interest on the part of all the litigants and of public interest on the part of the court and the world at large.”). But by criticizing what they label the “quasi-class action approach to MDL management,” *id.* at 110 (internal quotation marks omitted), Silver and Miller are making a much broader argument that I do not join, though they do identify several additional aspects (e.g., judicial appointment of lead counsel and regulation of attorneys’ fees) of the larger mass tort litigation paradigm that seems to be taking hold. *See supra* note 5.

<sup>226</sup> *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006). Professors Silver and Miller note that Judge Weinstein first expressed his conception of the quasi-class action theory in his 1994 article discussing ethical dilemmas in mass tort litigation. Silver & Miller, *supra* note 149, at 110 n.7; *see* Weinstein, *supra* note 217, at 480–81 (“What is clear from the huge consolidations required in mass torts is that they have many of the characteristics of class actions. . . . It is my conclusion . . . that mass consolidations are in effect quasi-class actions.”). Professor Issacharoff suggests

that the *Zyprexa* settlement was “in the nature of a private agreement between individual plaintiffs and the defendant,” Judge Weinstein nevertheless held that it had “many of the characteristics of a class action and may be properly characterized as a quasi-class action subject to general equitable powers of the court.”<sup>227</sup> The court then explained why judicial regulation of attorneys’ fees was appropriate under these circumstances:

The large number of plaintiffs subject to the same settlement matrix approved by the court; the utilization of special masters appointed by the court to control discovery and to assist in reaching and administering a settlement; the court’s order for a huge escrow fund; and other interventions by the court, reflect a degree of court control supporting its imposition of fiduciary standards to ensure fair treatment to all parties and counsel regarding fees and expenses.<sup>228</sup>

Judge Weinstein, however, did not justify his regulation of fees solely upon the quasi-class action theory.<sup>229</sup> Indeed, after noting the “analogy” to class actions, the court proceeded to explain its general responsibility to review contingency fee contracts for fairness.<sup>230</sup> Several courts have followed Judge Weinstein’s approach, including Judge Fallon in the *Vioxx* litigation, invoking both the quasi-class action theory and the inherent authority of the courts over attorneys’ fees to justify capping plaintiffs’ counsel’s fees in connection with non-class mass tort settlements.<sup>231</sup>

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that the “quasi-class action” concept has been inherited from FLSA opt-in class actions. Issacharoff, *supra* note 98, at 214–15 (“The term ‘quasi-class’ refers to the uncertain period during which an FLSA class has been asserted, but the structure has not yet been approved by the court and the putative class members have not yet decided to join in.”).

<sup>227</sup> *In re Zyprexa*, 424 F. Supp. 2d at 491.

<sup>228</sup> *Id.* at 490–91 (capping contingency fees at 20% for certain low-value settlements and 35% for all other settlements but allowing special masters to vary the latter cap “upwards to a maximum of 37.5% and downward to 30% in individual cases on the basis of special circumstances”).

<sup>229</sup> *Id.* at 492.

<sup>230</sup> *Id.* (“Supervision includes the power to determine that the fee contract was not obtained through undue influence or fraud and that the amount of the fee is not unfair or excessive under the circumstances of the case.”).

<sup>231</sup> See *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549 (E.D. La. 2009); see also *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*19 (D. Minn. Mar. 7, 2008) (capping contingency fees at twenty percent, but allowing attorneys to petition special masters for increases); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008) (modifying cap on contingency fees to provide that plaintiffs shall pay the lesser of the fee set forth in their contingency fee contract, 37.18%, or the state-imposed limit on contingency fees). Judge Hellerstein also

It is unfortunate that several courts have based their regulation of attorneys' fees, at least in part, on the quasi-class action theory when the inherent judicial authority to ensure that contingency fees are not excessive is well established.<sup>232</sup> Unlike some commentators, I believe that there is a compelling logic in ensuring that plaintiffs from around the country brought together in mass tort litigation pay the same percentage contingency fee to their attorneys when all of their claims are resolved in a centralized forum.<sup>233</sup> And although some may object to the judicial modification of individual contingency fee contracts, cuts need not be draconian; rather, fee regulation seems particularly appropriate when non-liaison counsel do little more than file suit and assist plaintiffs with enrolling in a subsequent settlement.<sup>234</sup> For example, in the *Vioxx* litigation, Judge Fallon har-

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invoked the quasi-class action theory in the *World Trade Center* litigation to regulate plaintiffs' counsel's fees in connection with the individual wrongful death settlements that were reached several years before the Amended WTC Settlement Agreement discussed above. See *In re* Sept. 11 Litig., 567 F. Supp. 2d 611, 621 (S.D.N.Y. 2008) ("I administered the cases to produce the same sorts of efficiencies and economies as in class actions, using liaison counsel, coordinated discovery, and responsive judicial proceedings, giving priority to the special needs of the 9/11 lawsuits. Like a class action, I have jurisdiction to limit and award allowances for attorneys' fees to protect the interests of the plaintiffs as well as the public, and for the very same reasons."). Several years after his *Zyprexa* opinion, Judge Weinstein again relied on the quasi-class action theory in a case involving a ferryboat crash in New York City. See *McMillan v. City of New York*, Nos. 03-CV-6049 & 08-CV-2887, 2008 WL 4287573, at \*5 (E.D.N.Y. Sept. 17, 2008) ("There was reduced risk to the claimants' attorney in this case. Scores [of] passenger claimants were involved. The issue of liability had already been decided under the leadership of other counsel. In a sense this was a quasi aggregate or quasi class action with increased power to control fees.").

<sup>232</sup> See, e.g., *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1111 (7th Cir. 1982) ("The district court's appraisal of the amount of the fee is . . . justified by the court's inherent right to supervise members of its bar."); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1277 (8th Cir. 1980) ("The court has the power and responsibility to monitor contingency fee arrangements for reasonableness."); see also *Taylor v. Bemiss*, 110 U.S. 42, 45-46 (1884) ("This . . . does not remove the suspicion which naturally attaches to such [contingency] contracts, and where it can be shown . . . that the compensation is clearly excessive, . . . the court will in a proper case protect the party aggrieved.").

<sup>233</sup> See *In re Zyprexa*, 424 F. Supp. 2d at 490 ("Limiting fees is particularly appropriate in the instant litigation since much of the discovery work the attorneys would normally have done on a retail basis in individual cases has been done at a reduced cost on a wholesale basis by the plaintiffs' steering committee."). But see *Silver & Miller*, *supra* note 149, at 110 ("Although judges justify forced rebates by arguing that MDLs reduce non-lead lawyers' costs, they make no serious effort to connect the amount rebated to the amount saved. A rigorous econometric analysis of scale economies in MDLs would require an expert armed with data and a model. Judges never consult such experts. They invent numbers instead.").

<sup>234</sup> Of course, counsel who perform more substantial work may be entitled to a share of a common-benefit fee award.

monized contingency fees at thirty percent for all plaintiffs, trimming only a few percentage points off of most lawyers' expected recoveries.<sup>235</sup> That said, some up-front predictability may be desirable in this regard. But by invoking a quasi-class action theory to regulate contingency fees, courts have muddied the waters and added to the confusion that now exists concerning the proper role for courts to play more generally when confronted with private mass tort settlements. In short, courts can continue to regulate attorneys' fees by relying on their inherent authority and need not risk the confusion that the quasi-class action theory connotes.<sup>236</sup>

*D. Avenues for Judicial Influence*

As described in Part III, the emerging opt-in paradigm for mass tort settlements allows each individual plaintiff to decide whether or not to accept the settlement offer, but the offer to each plaintiff is contingent upon acceptance by a certain percentage of the total plaintiff population. Therefore, in most instances, the parties will want to ensure that the judge overseeing the litigation is "on board" with the contemplated settlement, such that the judge would be willing to either encourage individual plaintiffs to opt in—or at least not discourage them from opting in—or educate plaintiffs about the settlement after it is announced. For example, following the announcement of the Vioxx Settlement Agreement, Judge Fallon spoke to audiences in New Orleans, Chicago (via videoconference), and New York (via videoconference) to share information about the settlement and answer questions from individual plaintiffs. During those sessions, Judge Fallon made it clear that he "neither encourage[d] nor discourage[d] participation" in the settlement, but simply

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<sup>235</sup> As Professors Silver and Miller point out, Judge Fallon also ordered that a common benefit fee of \$315,250,000 (which represented 6.5% of the total \$4.85 billion settlement amount) be paid to attorneys who performed common-benefit work out of the contingency fees collected by other attorneys who did not perform such work, thereby reducing the latter group's recovery even further. *See* Silver and Miller, *supra* note 149, at 136; *see also In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740 (E.D. La. 2011) (allocating the common-benefit fee among lawyers that performed common-benefit work). Although the various alternatives for compensating liaison counsel and attorneys who perform common-benefit work in non-class mass tort litigation are beyond the scope of this Article, I tend to agree with Professors Silver and Miller that "claimants should not have to pay extra for [common benefit work]." Silver and Miller, *supra* note 149, at 140.

<sup>236</sup> For example, is all Rule 23 authority imported into the non-class aggregate settlement context, some subset of that authority, or only the authority to regulate attorneys' fees?

“endeavor[ed] to insure that all eligible plaintiffs have the information necessary to make informed choices.”<sup>237</sup>

Savvy lawyers will often try to secure this judicial imprimatur by privately consulting with the court as the settlement nears completion to ensure that any judicial concerns are addressed. Indeed, because mass tort litigation requires active judicial involvement and oversight from inception due to the sheer size and complexity of such matters, judges are likely to have valuable insights that counsel ought to consider. But to the extent that such consultations do not occur, or in the event that a judge nevertheless has serious concerns about a private mass tort settlement, it is not difficult for judges to derail such settlements as a practical matter by making their concerns publicly known, as Judge Hellerstein did when the original aggregate settlement was announced in the *World Trade Center Disaster Site* litigation.<sup>238</sup> Thus, the issuance of an order “rejecting” a private mass tort settlement would likely be gratuitous in most cases.

In a similar vein, as noted above, private mass tort settlements tend to be accompanied by requests to the court for *Lone Pine* orders to govern plaintiffs who choose not to opt in and any copycat plaintiffs who may file claims after the settlement is announced in hopes of a quick payday.<sup>239</sup> The parties’ desire for these types of orders in conjunction with private mass tort settlements can provide another leverage point for a judge who may have concerns about a contemplated settlement. Indeed, a court’s preliminary refusal to issue such orders could cause the parties to address any broader concerns the court may have regarding the contemplated private mass tort settlement,

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<sup>237</sup> *Current Developments Vioxx*, *supra* note 88 (“The Court does not take a position on the settlement and neither encourages nor discourages participation; rather, the Court merely endeavors to insure that all eligible plaintiffs have the information necessary to make informed choices.”). The Fifth Circuit recently turned aside a challenge to Judge Fallon’s impartiality that relied upon the informational sessions, and the Supreme Court subsequently denied certiorari. See *In re Vioxx Prods. Liab. Litig.*, 388 F. App’x 391, 396–97 (5th Cir. 2010) (“[The district court] ‘has consistently stated that it neither encourages nor discourages participation in the settlement’ . . . Nothing about the settlement conferences would give a reasonable observer any doubt about Judge Fallon’s impartiality.”), *cert. denied*, 131 S. Ct. 1477 (2011). Judge Hellerstein also held informational sessions in Queens and Staten Island to discuss the Amended WTC Settlement Agreement, though he did not attempt to remain impartial. See Mireya Navarro, *Judge Counsels 9/11 Workers to Settle*, N.Y. TIMES GREEN BLOG (July 27, 2010, 12:40 PM), <http://green.blogs.nytimes.com/2010/07/27/settle-a-judge-counsels-911-workers> (“[Judge Hellerstein] urged the plaintiffs to accept the settlement as the best possible alternative.”).

<sup>238</sup> See *supra* notes 127–28 and accompanying text.

<sup>239</sup> See *supra* Part III.B.1.

assuming that the parties were otherwise unwilling to address such concerns.

Finally, as also noted above, it has been suggested that the opt-in process in non-class aggregate settlements may exhibit elements of “collusion” or “coercion.”<sup>240</sup> Although the individual opt-in requirement and the associated transparency of private mass tort settlements render such charges unconvincing, critics and skeptics alike can take comfort in the fact that courts presiding over mass tort litigation may be able to retain “enforcement jurisdiction” to hear and decide any disputes that arise concerning the enforceability of private mass tort settlements. Historically, courts retained “the inherent power to enforce private settlement agreements entered into in settlement of litigation” pending before them.<sup>241</sup> In *Kokkonen v. Guardian Life Insurance Co. of America*, however, the United States Supreme Court clarified that the enforcement of a settlement agreement, “whether through award of damages or decree of specific performance, is more than just a continuation or renewal of a dismissed suit, and hence requires its own basis for *jurisdiction*.”<sup>242</sup> Therefore, a federal district court’s *formal* oversight of a private mass tort settlement that does not expressly confer such authority can only be justified by—and must be consistent with—the retention of enforcement jurisdiction pursuant to Rule 41 of the Federal Rules of Civil Procedure.

When a private case settles, the plaintiff will typically voluntarily dismiss the case pursuant to Rule 41. Indeed, in private mass tort settlements, individual plaintiffs often express their desire to opt in to the settlement by signing a release and a Rule 41 stipulation of dismissal.<sup>243</sup> Rule 41 provides two types of voluntary dismissals: dismissal without a court order, Rule 41(a)(1), and dismissal by court order, Rule 41(a)(2).<sup>244</sup> A case may only be dismissed without a court order in one of two situations: if a notice of dismissal is filed before the defendant(s) serve an answer or a motion for summary judgment, or if a stipulation of dismissal is signed by all parties who have appeared.<sup>245</sup>

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<sup>240</sup> See *supra* notes 210–13 and accompanying text.

<sup>241</sup> *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1190 n.13 (8th Cir. 1984).

<sup>242</sup> 511 U.S. 375, 378 (1994) (emphasis added). For a thorough examination of *Kokkonen* and enforcement jurisdiction, see generally Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33 (2003).

<sup>243</sup> For example, to opt in to the Vioxx Settlement Agreement, claimants were required to complete the “enrollment form” and “all exhibits and attachments thereto.” Vioxx Settlement Agreement, *supra* note 94, § 1.2.2. Attachment B to the enrollment form was a form stipulation of dismissal with prejudice. *Id.* Ex. 17.1.28.

<sup>244</sup> FED. R. CIV. P. 41(a)(1)–(2).

<sup>245</sup> FED. R. CIV. P. 41(a)(1)(A)(i)–(ii).

In all other situations, cases “may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.”<sup>246</sup>

In *Kokkonen*, the Supreme Court held that “[w]hen the dismissal is pursuant to Federal Rule of Civil Procedure 41(a)(2) . . . the parties’ compliance with the terms of the settlement contract (or the court’s ‘retention of jurisdiction’ over the settlement contract) may, in the court’s discretion, be one of the terms set forth in the order.”<sup>247</sup> The Supreme Court contrasted this unilateral ability of a court to retain enforcement jurisdiction under Rule 41(a)(2) with a court’s ability to do so under Rule 41(a)(1) only “if the parties agree.”<sup>248</sup> Accordingly, in situations governed by Rule 41(a)(2), courts could conceivably retain jurisdiction to enforce private mass tort settlements, provided that “the terms of the [settlement] agreement are incorporated into the order of dismissal.”<sup>249</sup> Of course, the parties could agree as part of a private mass tort settlement that a special master or arbitrator will decide enforcement issues, but courts likely could still retain jurisdiction to decide whether such a provision is itself enforceable.

Importantly, however, the retention of enforcement jurisdiction does not include the authority to approve or reject private mass tort settlements. Indeed, the purpose of Rule 41(a)(2) is simply to “prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.”<sup>250</sup> In the context of private mass tort settlements, voluntary dismissals will have been negotiated and agreed upon by all settling parties and, thus, cannot be said to affect either party unfairly. Moreover, when plaintiffs seek dismissal with prejudice—as they will in connection with private mass tort settlements—courts “cannot force an unwilling plaintiff to go to

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<sup>246</sup> FED. R. CIV. P. 41(a)(2).

<sup>247</sup> *Kokkonen*, 511 U.S. at 381.

<sup>248</sup> *Id.* at 382.

<sup>249</sup> *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 n.7 (2001). However, “[q]uestions have arisen on how settlement terms are properly incorporated” and “[t]he lower courts seem unsure.” Parness & Walker, *supra* note 242, at 38. Although determining the precise process for district courts to utilize to retain enforcement jurisdiction over private mass tort settlements is beyond the scope of this Article, it would seem that the complexity and sheer length of such agreements would further complicate this already murky area of the law.

<sup>250</sup> *Alamace Indus., Inc. v. Filene’s*, 291 F.2d 142, 146 (1st Cir. 1961); *see also* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2364, at 474–76 n.19 (3d ed. 2008) (collecting authorities echoing the purpose of Rule 41(a)(2)).

trial” by refusing such a voluntary dismissal,<sup>251</sup> but rather “must grant that request.”<sup>252</sup> Therefore, although courts may desire to retain jurisdiction to resolve any disputes that could arise concerning the enforceability of the contractual provisions of private mass tort settlements, the retention of enforcement jurisdiction does not authorize courts to approve, reject, or otherwise oversee the implementation of such settlements.

#### V. CONCLUSION

This Article defines an emerging opt-in paradigm for mass tort settlements in the post-class action era and clarifies the role for the judiciary to play as mass tort litigation is increasingly settled in this new, unfamiliar, and private way. After examining the justifications for judicial review of class action and other specific settlements that affect the legal rights of absent or unrepresented parties and/or concern activity governed by federal statutory schemes, the Article discusses the private-settlement maxim and argues that, notwithstanding charges of collusion and coercion, there is no need or justification for judicial review of private mass tort settlements because such settlements only bind those plaintiffs who affirmatively opt in to them. This is true whether or not mass tort litigation in the post-class action era can be generically described as exhibiting “quasi-class action” or “quasi-public” components.

Instead of seeking to perform post hoc evaluations of private mass tort settlements that have already been negotiated, courts should instead focus on ensuring that such settlements occur in an adversarial context and are based on the factual and legal realities of the litigation, principally by deciding disputed legal issues and presiding over bellwether trials. Courts, however, ultimately have the ability to influence private mass tort settlements in various ways, which include leveraging the parties’ desire for case-management orders and a favorable—if informal—public judicial response to the announcement of such settlements and retaining enforcement jurisdiction.

A prominent mass tort scholar recently suggested that there is value in “recogniz[ing] the limitations of what formal procedural law may offer and [looking] favorably upon market mechanisms that may provide alternative means of organizing and resolving common claims.”<sup>253</sup> This Article highlights the fact that, except in several spe-

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<sup>251</sup> 9 WRIGHT & MILLER, *supra* note 250, § 2364, at 470.

<sup>252</sup> *Id.* § 2367, at 551 & n.3 (collecting authorities).

<sup>253</sup> Issacharoff, *supra* note 98, at 221.

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cific circumstances, individual litigants have long enjoyed the freedom to resolve their individual claims without judicial interference, and it contends that individuals should retain such freedom even when hundreds or thousands of similarly situated mass tort plaintiffs simultaneously decide that settlement is preferable to the uncertainty, expense, and stress of continued litigation.